

Human Rights and Development

Human Rights and Development

Towards Mutual Reinforcement

Edited by

PHILIP ALSTON
and
MARY ROBINSON

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Preface

This book results from a conference held at New York University Law School in 2004, at which drafts of most of the chapters were first presented. The conference was the result of a joint initiative by two co-sponsors. The first was Realizing Rights: The Ethical Globalization Initiative (EGI), founded by Mary Robinson, and devoted to promoting a more ethical and equitable globalization process through dialogue, research, and concerted action. The second co-sponsor was the Center for Human Rights and Global Justice at New York University Law School, one of the principal aims of which is to generate high quality research into the relationship between human rights and the global economic system.

In preparation for the conference Mary Robinson consulted with James Wolfensohn, President of the World Bank group, who was extremely supportive and agreed that it would be helpful if a significant number of senior Bank officials could contribute papers, and participate in the discussions. One of the Bank's Managing Directors, Mamphela Ramphele, and her adviser, Alfredo Sfeir-Younis, then joined Mary Robinson and Philip Alston in identifying the topics and the speakers who were invited to present papers to the conference. Speakers included a range of leading scholars, as well as representatives from key international organizations including UNICEF, the International Monetary Fund, the Office of the High Commissioner for Human Rights, and the Inter-American Development Bank. NGO participants included speakers from Human Rights Watch, Amnesty International, and World Vision International. Participants from the World Bank, in addition to James Wolfensohn and Mamphela Ramphele, included Peter Woicke, Executive Vice-President of the International Finance Corporation, Jean-Luis Sarbib and Roberto Dañino, both senior Vice-Presidents, and Gobind Nankani, Ian Goldin, and Meg Taylor, all of whom are Vice-Presidents of the Bank. The Chairperson of the Bank's independent Inspection Panel, Edith Brown Weiss, and the Compliance Advisor/Ombudsman from the International Finance Corporation, Meg Taylor, also participated.

We are grateful to NYU Law School, and especially its Dean, Richard Revesz, for financial and other support for the conference. In addition the World Bank facilitated the participation of a number of participants from developing countries. In the design of the conference, Scott Jerbi and Françoise Torchiana, both from EGI, and Tish Armstrong from NYU all provided very helpful advice, as did Alan Whaites of World Vision International.

The organization of the conference was undertaken almost entirely by Tish Armstrong, of the Center for Human Rights and Global Justice, who did a superb job. Smrita Narula, Executive Director of the Center, and

Meg Satterthwaite, its Research Director, also contributed a great deal to the successful outcome of the conference.

Finally, we owe a debt of gratitude to Nehal Bhuta for his first-rate work in preparing the papers for publication.

Philip Alston and Mary Robinson
New York, January 2005

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Abbreviations

ACIT	Academic Consortium on International Trade
ADB	Asian Development Bank
ADR	alternative dispute resolution
ALGs	Alternative Law Groups
APL	above poverty line
BITs	bilateral investment treaties
BMI	body mass index
BP	British Petroleum
BPL	below poverty line
BTC	Baku-Tbilisi-Ceyhan
CAO	Compliance Advisor/Ombudsman
CBO	community-based organization
CDC	Center for Disease Control and Prevention
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEE	Central and Eastern Europe
CEO	Chief Executive Officer
CESCR	Committee on Economic, Social and Cultural Rights
CFOs	Chief Finance Officers
CLE	clinical legal education
CRC	Convention on the Rights of the Child
CRS	Catholic Relief Services
CRWHUM	Cingranelli, Richards, and Webster Human Rights Codification
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
DFID	Department for International Development
DFIDB	DFID Bangladesh
DG	democracy and governance
DHS	Demographic and Health Surveys
EBRD	European Bank for Reconstruction and Development
EFA	Education For All
EGI	Ethical Globalization Initiative
EMP	environmental management plan
EOS	Executive Opinion Survey
EPZs	export processing zones
EU	European Union
FDI	foreign direct investment
FGM	female genital mutilation

FSU	former Soviet Union
FTI	Fast Track Initiative
GAC	governance and anti-corruption diagnostics
GDP	gross domestic product
GER	gross enrollment rates
GPI	gender parity index
GRESEA	Groupe de recherche sur les stratégies économiques alternatives
HAART	highly active anti-retroviral therapy
HGAs	Host Government Agreements
HIPC	Heavily Indebted Poor Countries
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICDS	Integrated Child Development Services
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTV	International Confederation of Free Trade Unions
ICSID	International Center for the Settlement of Investment Disputes
IDA	International Development Association
IDB	Inter-American Development Bank
IELRC	International Environmental Law Research Centre
IFC	International Finance Corporation
IFES	International Foundation for Election Systems
IFIs	international financial institutions
IGA	Inter-Governmental Agreement
ILO	International Labour Organization
IMF	International Monetary Fund
INGOs	international NGOs
IPEC	International Program on the Elimination of Child Labor
I-PRSP	Interim Poverty Reduction Strategy Paper
LDCs	least developed countries
LRC	Legal Resources Centre
LTCs	Land Tenure Certificates
MAI	multilateral agreement on investment
MDGs	Millennium Development Goals
MICS	Multiple Indicator Cluster Survey (UNICEF)
MIGA	Multilateral Investment Guarantee Agency
MLIs	multilateral lending organizations
NACC	National AIDS Control Council (Kenya)
NAFRE	National Alliance for the Fundamental Right to Education
NAFTA	North American Free Trade Agreement
NAR	net attendance ratio

NGO	non-governmental organization
NNMB	National Nutrition Monitoring Bureau
NYU	New York University
OAS	Organization of American States
ODI	Overseas Development Institute
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PCR	primary completion rates
PDS	public distribution system
PIL	Public Interest Litigation
PISA	Program for International Student Assessment
PPAs	Participatory Poverty Assessments
PREM	Poverty Reduction and Economic Management
PRGF	Poverty Reduction Growth Facility
PROBE	Public Report on Basic Education in India
PRs	Poverty Reduction Strategies
PRSPs	Poverty Reduction Strategy Papers
PSIA	Poverty and Social Impact Analysis
RAPs	Resettlement Action Plans
RBA	rights-based approach
RDI	Rural Development Institute
ROL	rule of law
SDC	Swiss Agency for Development and Cooperation
SIDA	Swedish International Development Cooperation Agency
SSA	sub-Saharan Africa
SSAJ	Safety, Security, and Access to Justice
SUBIR	Sustainable Use of Biological Resources Project
TB	tuberculosis
TBP	Time-bound Programme
TNCs	transnational corporations
TRC	Truth and Reconciliation Commission (South African)
TRIMs	Trade-Related Investment Measures
UDHR	Universal Declaration of Human Rights
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNDP	United Nations Development Program(me)
UNESCO	United Nations Educational Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
USAID	United States Agency for International Development

WBES	World Business Environment Survey
WBI	World Bank Institute
WDR	World Development Report
WEF	World Economic Forum
WHO	World Health Organization
WTO	World Trade Organization
1GHR	first generation human rights
2GHR	second generation human rights

1

The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours

PHILIP ALSTON AND MARY ROBINSON

The focus of this volume is on ways in which the strengths, resources, and support of the international human rights and development communities can be mobilized in order to reinforce one another in their efforts to achieve shared goals. Endeavours to promote meaningful and productive linkages between the agendas of these two communities are hardly new. Indeed, one of the main achievements of the first World Conference on Human Rights, held in Teheran in 1968, was precisely its assertion that ‘the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development’.¹ Almost a decade later, in 1977, the UN Commission on Human Rights gave a new impetus to these efforts by proclaiming the existence of a human right to development.² That in turn led to the launching of a major push by developing countries to broaden the focus of international human rights debates to include a range of economic and other issues which had previously been considered to lie squarely and exclusively within the domain of the national and international development agencies.³

But debates in the United Nations and in other international fora do not necessarily translate into change on the ground, let alone within the different disciplines which need to adjust their working assumptions and methods in order to embrace, or at least accommodate, change. While the human rights

¹ The Proclamation of Teheran, para. 13, in *Final Act of the International Conference on Human Rights*, UN doc. A/CONF.32/41 (1968).

² Commission on Human Rights res. 4 (XXXIII)(1977).

³ For the next few years a debate raged around the pros and cons of the resolution—General Assembly res. 32/120 (1977). For some contemporary competing perspectives see various contributions in B. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration* (Martinus Nijhoff, 1979).

community had recognized the need to engage with their development counterparts, they were not necessarily prepared to change their *modus operandi*. And, perhaps unsurprisingly, the latter group proved generally reluctant to engage in debates about international legal obligations and how to reflect the relevant norms in policies at the domestic and international levels. In the latter setting, the initial efforts to achieve some sort of practical integration of the issues came, in different ways and in response to different pressures, in the institutional arrangements dealing first with women and then with children. One of the most important of the policy initiatives during this period focused on gender mainstreaming, although it is important to note that this was not always pursued in terms of women's rights *per se*. Similarly, the impetus behind the Convention on the Rights of the Child, adopted in 1989, and the involvement of the UN children's agency UNICEF in the promotion of that Convention, led to measures designed to insinuate at least a part of the overall human right agenda into development activities as they related to children. Several of the chapters in this volume address the current state of the art in relation to these efforts.

In the mid-1990s the human rights community began to engage more directly and constructively with their counterparts working on development issues and a movement began to promote rights-based approaches to development.⁴ But it was not until Kofi Annan directed all UN agencies, in 1997, to contribute to the mainstreaming of human rights that a comprehensive effort began in that regard. Mary Robinson's appointment as High Commissioner for Human Rights later in the same year ensured that this important policy initiative would be given a major practical impetus and one of the results was the initiation of in-depth discussions with many of the principal UN agencies.⁵ Some of the results achieved in that context are noted below in Chapter 3.

But despite the very considerable progress made in recent years in terms of formal commitments to the mainstreaming of human rights there remains a great deal to be done. In his recent book, Peter Uvin presents a detailed and challenging evaluation of the role of rights-based approaches to development. One of the principal conclusions that he draws relates to the extent to which the embrace of a human rights approach by a development agency requires far-reaching change. In his view, the adoption of such an approach is:

a radical affair . . . demanding profound changes in choices of partners, the range of activities undertaken and the rationale for them, internal management systems and

⁴ P. Alston, 'The Rights Framework and Development Assistance', 34 *Development Bulletin* (Australia), August 1995, p. 9.

⁵ See e.g. M. Robinson, *Bridging the Gap between Human Rights and Development: From normative principles to operational relevance*, World Bank Presidential Lecture, Washington, 3 December 2001.

funding procedures, and the type of relationships established with partners in the public and non-governmental sectors.⁶

And the challenge is rendered all the more difficult by the continuing compartmentalization of responsibilities in the development domain. This point was emphasized in the 2004 report submitted to the UN Secretary-General by a 'High-level Panel on Threats, Challenges and Change' which explored the major challenges to the UN system in the years ahead. They noted that '[i]nternational institutions and States have not organized themselves to address the problems of development in a coherent, integrated way . . .'. The approaches of the former were said to 'mirror the fragmented sectoral approaches of Governments'.⁷

The challenge of mainstreaming or of ensuring a human rights-based approach to development is thus clearly on the international agenda, but it has to be acknowledged that there is a very long way to go before such approaches become the norm. And as Christina Biebesheimer observes in this volume, there is a great deal more that the human rights community can do in terms of developing more practical and applied approaches to demonstrate how human rights dimensions can best be integrated into work being done on many of the key challenges that confront those seeking to promote human development.

The aim of this volume is precisely to facilitate a dialogue between development and human rights practitioners and to contribute, both in conceptual and practical terms, to moving the debate forward. Rather than engaging in the type of abstract or polemical approaches which have so often been adopted in the literature dealing with these issues, the focus is on six very practical and quite specific sets of issues. They are (a) the economics of social rights; (b) land rights and women's empowerment; (c) child labour and access to education; (d) reform of legal and judicial systems; (e) the role of the private sector in promoting human rights; and (f) building human rights into development planning processes.

We turn now to a brief review of the different contributions to the book.

1.1 PROMOTING MUTUAL REINFORCEMENT: INTRODUCTORY ESSAYS

The nature of some of the challenges confronting efforts to ensure that the human rights and development agendas really can be mutually reinforcing are elucidated in the first part of the volume by two of the key players in the

⁶ P. Uvin, *Human Rights and Development* (Kumarian Press, 2004).

⁷ United Nations, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change (New York, United Nations, 2004), para. 55.

international debate, James Wolfensohn, as former World Bank President, and Mary Robinson, as former UN High Commissioner for Human Rights. Wolfensohn begins by acknowledging that the debate is one ‘that I’ve never fully understood’. Nevertheless, by undertaking a systematic review of some of the key provisions of the Universal Declaration of Human Rights and the two International Covenants on Human Rights he concludes that this normative base could easily have provided ‘the framework which led [the World Bank] to the poverty reduction strategy approach, or the comprehensive development framework’.⁸ And he observes that a good many of the World Bank’s other initiatives in relation to issues such as addressing the plight of the Roma Peoples of central and eastern Europe, or the role of culture in development, could equally well have been approached through a human rights lens.

Wolfensohn notes, however, that to some of the governments who constitute the Bank’s shareholders ‘the very mention of the words human rights is inflammatory language’. And so in order to avoid controversy the Bank has opted in the past to ‘talk the language of economics and social development’.⁹ He notes, encouragingly, that the Bank had been unable or unwilling to talk about the issue of corruption when he first became President and that this has since changed dramatically. In the same spirit, he suggests that ‘maybe we now need to mention the “R” word which is “rights”. And, maybe . . . we will talk much more about rights as we move forward.’ At the end of his remarks he states that the Bank is ‘deeply committed to trying to clarify the role of rights in development’. Finally he concludes by emphasizing that both the human rights and development communities share a common enemy of indifference to the plight of poverty in the world, to the neglect of the Millennium Development Goals, and to the spiralling levels of military expenditure in the world. The two communities need to join together to tackle those issues.

Mary Robinson begins her chapter by surveying the situation of global poverty and some of the factors that have exacerbated it. She then considers some of the positive developments in recent years which have seen greater attention paid to human rights issues in development discussions. They include efforts by various UN agencies to consider how they might incorporate a stronger human rights dimension in their work, leading to the adoption of a Common Understanding on the application of a rights-based approach. In addition, various bilateral development assistance programmes have adopted a human rights approach, human rights NGOs are now more engaged with these issues, and the World Bank has made a major effort to engage with human rights on a variety of fronts. Taken together, these add

⁸ J. D. Wolfensohn, ‘Some Reflections on Human Rights and Development’, Chapter 2 below, p. 19.

⁹ *Ibid.*, p. 21.

up to a sea change in the relationship between the two communities, although while mutual curiosity has increased ‘confidence is far from being safely established’.¹⁰

Robinson’s chapter then turns to examine some of the major criticisms directed at human rights by development specialists. They include the claim that human rights are political, that they are unrealistic, that they are abstract and incapable of practical application, that they cannot cope with notions of change over time, and that an emphasis on law does little to help the poor. She concedes that there are elements of truth in some of these criticisms but contends that the human rights community is well able to respond to each of them. She concludes by outlining the ways in which a human rights framework can add value to development challenges and, like Wolfensohn, emphasizes the importance of promoting an effective and empowering approach to realizing the Millennium Development Goals.

(a) The Economics of Social Rights

Human rights proponents are often accused of ignoring the economic implications of the normative positions which they advocate. While this shortcoming tends to be overlooked when it affects civil and political rights, such as freedom of speech, the right to vote, or the rights to be free from torture and slavery, it is considered to be especially problematic when it arises in relation to economic and social rights. This first section of the book thus sees two economists casting a critical eye over the rights to food, health, and education, and evaluating the extent to which sound economic policy is compatible with commitments to promote respect for these rights.

In Chapter 4, Jean Drèze argues that the persistence of a serious nutrition crisis in India reflects the fact that Indian democracy is trapped in a ‘vicious circle of exclusion and elitism’.¹¹ Despite constitutional protections of certain economic and social rights, including the right to food, and relatively stable democratic institutions, the underprivileged are excluded from actively participating in democratic politics, with the result that their aspirations and priorities are not reflected in public policy. The elitism of public policy further disempowers the poor by perpetuating their deprivations. Drèze notes that the renowned Indian political leader Dr. Ambedkar predicted an intensification of the contradiction between political equality and economic and social inequality, in speeches given a few years after India achieved independence. Ambedkar had insisted on the inclusion of social and economic rights in the Directive Principles of the Indian Constitution in order

¹⁰ M. Robinson, ‘What Rights Can Add to Good Development Practice’, Chapter 3 below, p. 31.

¹¹ J. Drèze, ‘Democracy and the Right to Food’, Chapter 4 below, p. 45.

to try to ensure that a concern with economic and social democracy would not be allowed to disappear from the political agenda in India. Relying on these Directive Principles, Drèze calls for a revival of concern with Constitution-based economic and social rights, in order to fully realize the democratic vision of Ambedkar and of the Indian Constitution itself. He notes that greater consciousness of elementary education as a *constitutional right* (brought about by two decades of social activism and a landmark Supreme Court decision) has helped expand the reach of the school system, and protect it—to some extent—from the fiscal cutbacks arising from structural adjustment.

In the case of the right to food, Drèze accepts that it may be harder to define and operationalize than the right to education. Defined as ‘freedom from hunger’, the right to food may be seen as a right to ‘nutrition’. But nutrition is achieved not just through food but through clean water, basic health care, and good hygiene, among other inputs. Similarly, although the state can be regarded as bearing primary responsibility for the right to food, there is also a responsibility on local communities and families to ensure basic nutrition is equally available to all their members. Drèze accepts that this complicates the question of how the right to food can be enforced. The courts are not powerless, but may not be the best venue through which to realize the right to food. Instead of relying on an unwieldy and ad hoc judicial enforcement process, he insists that the right to food must be the basis for mobilization in the democratic public sphere, and made the object of political demands for protective legislation. Drèze sees asserting the right to food *as a fundamental right* as one way of creating a focus for public action in response to India’s nutrition emergency, and for increasing the poor and underprivileged’s sense of entitlement to state action on nutrition. Moreover, the more politicized the deprived are about their right to food, the more vigilant they will be in policing the various state nutrition schemes that already exist, and in combating the endemic corruption that diminishes the effectiveness of existing measures. That campaigning, combined with selective litigation over the right to food, can achieve concrete successes, is illustrated by the introduction of cooked mid-day meals in primary schools in many states, after a public campaign and a Supreme Court case in 2001.

Drèze concludes that the right to food cannot be realized in isolation from other social and economic rights, such as the right to health. The rights to health care and education are taken up by another economist, Varun Gauri, in the second contribution to this section of the volume. Gauri’s carefully argued essay is a nuanced analysis of the philosophical foundations of social and economic rights, which demonstrates that disagreements between a ‘rights-based’ and a development economics approach to social welfare are not as significant as they might appear. He first reviews the different normative bases upon which social and economic rights are claimed to be

'rights', and the major philosophical and practical objections. He suggests that economic and social rights, such as the right to health care and education, are best understood not as legal instruments for individuals, but as 'duties for governments, international agencies, and other actors to take concrete measures on behalf of individuals, or to restructure institutions so that the rights can be fulfilled more effectively. . . . Calling health care and education rights means, on this understanding, that everyone bears some responsibility for their fulfillment.'¹²

Gauri then reviews some of the economic literature on education and health care, observing that economists seem to accept that the realization of high standards of health and education are conducive to economic growth. Moreover, economists' concerns about how health care is best provided are not incompatible with a human rights orientation. From a human rights perspective, participation, empowerment, transparency, and accountability in relation to service delivery are important for ensuring health care and education quality and for fostering a social basis for self-esteem. From an economic perspective, the same goals are important because they help solve problems related to collective action and asymmetric information. Nevertheless, the tensions do not dissolve completely. The human rights approach regards transparency and empowerment as ends in themselves, while an economic approach sees them as instrumental to a welfare outcome. Similarly, a human rights approach typically evaluates health and education programmes in terms of distribution of outcomes, not just averages. Conversely, a human rights approach gives little or no guidance in terms of prioritizing allocative decisions or making trade-offs, and cannot easily analyse the sometimes perverse consequences of a redistributive policy, such as forms of moral hazard or free riding. Gauri concludes that there are no simple answers to some of these tensions between the human rights approach and an economic perspective, but that both approaches can learn from the limitations of the other, and should recognize their complementarities.

(b) Land Rights and Women's Empowerment

The second section of the volume explores the complementarities and possible conflicts in the relationship between human rights principles and development programmes intended to increase women's legal right to land in developing countries.

Kerry Rittich notes that programmes which promote the formal real property rights of women—in place of customary laws or other informal mechanisms—have the potential to both improve and retard women's access

¹² V. Gauri, 'Social Rights and Economics: Claims to Health Care and Education in Developing Countries', Chapter 5 below, p. 72.

to real property, depending on how such measures are implemented.¹³ She argues that the programmes promoting property rights tend to go together with measures to formalize, commodify, and individualize landholdings, and that these three processes have often intensified the dispossession of women who may have had access to land under informal or customary law arrangements. Thus, the promotion of property rights from an economic perspective may well undermine the social rights and human development of women in developing countries, if specific attention is not paid to the gender-specific impact of changing property regimes. In this field, economic analysis may learn something from legal conceptions of property, which treat property not just as a resource but as a set of relations between individuals and groups. Such an approach might highlight the otherwise unforeseen distributive consequences for women of moving from an informal property regime to a formalized and individualized one. No single conception of property or set of institutional reforms in respect of land can be associated with greater gender empowerment.

Based on their extensive experience with the World Bank, Karen Mason and Helene Carlsson draw on a large amount of empirical material in their consideration of the development impact of gender equality on land rights. Their review of the literature and their own empirical investigations suggest that secure rights to land enhance human development, but that a range of factors lead to gender disparities in women's ability to benefit from reforms aimed at securing land tenure.¹⁴ They argue that secure land rights enhance incentives to invest in the land and thus raise agricultural productivity and household incomes, and may also improve the sustainability of agricultural practices. However, despite the fact that women do the majority of agricultural labour in many developing countries, they own very little of the land they work. Mason and Carlsson note that, unless gender inequality in land holding is taken into account when implementing land tenure reforms, improved land tenure security may diminish women's land holdings. A variety of factors can lead to this result, including discriminatory inheritance laws, the application of an androcentric definition of 'head of household', and inequalities in women's capacity to participate in the market for land. However, the authors cite some examples, such as Costa Rica and Colombia, in which land reforms were undertaken in a way that improved women's ownership of land.

They argue that improving women's access to secure land holding will greatly enhance their human development, and that of the country in which they live: women who own the land they work have greater incentives to raise

¹³ K. Rittich, 'The Properties of Gender Equality', Chapter 6 below, p. 92–3.

¹⁴ K. O. Mason and H. M. Carlsson, 'The Development Impact of Gender Equality in Land Rights', Chapter 7 below, p. 114.

their labour productivity, and women who earn more income are more likely than men to invest in the household and in their children's education and nutrition. Overall food production may also increase. The empowerment of women that flows from having a productive economic asset may also help ameliorate the impact of the HIV/AIDS pandemic on agricultural production, and strengthen the bargaining power of women in household decisions. The reforms suggested by Mason and Carlsson at the conclusion of the chapter illustrate the importance of applying a human rights lens—specifically, the norms of non-discrimination and equal property rights—when implementing economic reforms, and suggest the indivisibility of economic and social rights from women's capacity to exercise civil and political rights.

Janet Walsh, basing herself on a lengthy report on Kenya prepared by Human Rights Watch,¹⁵ documents the serious violations of women's human rights that arise from a discriminatory property rights regime and a lack of will on the part of courts and the government. Although the right to property can be regarded as an 'economic and social right', discriminatory laws and practices in relation to women's right to own property after the death of a husband, after a divorce, or as part of an inheritance, have immediate consequences for the civil and political rights of women in Kenya.¹⁶ Women who lose their property due to discriminatory laws and practices face impoverishment, sexual violence, and are at increased risk of HIV/AIDS due to both homelessness and the rituals associated with the loss of their property. The inequality in gender relations that is encoded in discriminatory laws, and the indifference of state organs, jeopardizes Kenya's efforts to stem the spread of HIV/AIDS, and threatens agricultural production, indicating the concrete negative impact that human rights violations can have on the achievement of development goals.

(c) Child Labour and Access to Education

From both a development economics perspective and a human rights perspective, there are strong reasons to seek an end to child labour. Human rights advocates have long regarded child labour as implicated in the violation of many of the rights of the child. It should be eradicated in order to ensure children's human rights as ends in themselves. From the perspective of development economics, child labour amounts to an inter-generational loss of potential income, as children suffer diminished human capital (such as reductions in health and opportunities for education) that will reduce their productivity in the future. The contribution to this volume by Gordon Betcherman, Jean Fares, Amy Luinstra, and Robert Prouty notes the

¹⁵ Human Rights Watch, *Women's Property Rights Violations in Kenya* (New York, 2003).

¹⁶ J. Walsh, 'Women's Property Rights Violations in Kenya', Chapter 8 below, p. 133.

International Labour Organization's (ILO's) estimate that current levels of child labour will result in an income foregone of \$5 trillion between 2000 and 2020. They review recent statistics on the extent of child labour, and estimate that a staggering 23 per cent of the world's children aged between 5 and 17 years are engaged in some form of work. They also note that there is considerable evidence to suggest that child labour adversely affects children's educational attainment.¹⁷

While economists and human rights activists are united in their desire to see an end to child labour, Betcherman et al. demonstrate the important insights that economic analysis can provide in understanding how best to reduce child labour. Factors contributing to child labour can be seen in terms of incentives that encourage child work, constraints that compel children to work, and decisions that may not be made in the best interests of the children. Human rights advocates often focus on the latter (whether by parents or governments), but also need to consider how the direct (books, transport) and indirect (poor quality, loss of household labour) costs of education may lead parents to regard the returns of education as not providing sufficient immediate returns to the household or the child. Understanding these factors could improve strategies for changing household decision making. Betcherman et al. consider some creative examples of government policies aimed at altering the structure of incentives and constraints affecting child labour, such as Mexico's *Progresa* programme, that indicate the important concrete contribution that a development economics perspective can bring to the question of how best to alter social and economic practices. Similarly, echoing Gauri's argument, the authors point out that standard setting legislation is of itself insufficient to alter an interacting set of incentives and constraints, and may well have the perverse effect of reducing child welfare.

Drawing on their extensive experience of working with these issues in UNICEF, Elizabeth Gibbons, Friedrich Huebler, and Edilberto Loaiza consider how, at the level of *statistical analysis*, the application of the human rights principle of non-discrimination can affect our understanding of the dimensions of child labour.¹⁸ They note that existing methods of calculating the extent of child labour under-report the degree of child work done by girls, because the measures exclude household chores. By failing to consider 'female work' within the definition of child labour, the impact of child work on the educational and health attainment of girls is made invisible.

The authors undertake an analysis of child labour data in an attempt to make female child labour visible, revealing a one-quarter increase in the estimate of child labour among girls, and a fall in the gap between boys' and

¹⁷ G. Betcherman, J. Fares, A. Luinstra, and R. Prouty, 'Child Labor, Education, and Children's Rights', Chapter 9 below, p. 175.

¹⁸ E. D. Gibbons, F. Huebler, and E. Loaiza, 'Child Labour, Education, and the Principle of Non-Discrimination', Chapter 10 below, p. 205.

girls' child labour. Gibbons, Huebler, and Loaiza also investigate some of the factors affecting school attendance and find that, while labour and household poverty are generally constraints on attendance, a mother's educational attainment is also an important determinant that correlates positively with school attendance. This, they argue, 'shows, in dramatic and incontrovertible terms, the inter-generational payoff from an investment in girls' education'.¹⁹ An examination of the impact of child labour on *performance* in schools (as opposed to simply attendance) leads to the conclusion that child labour does not result in a higher likelihood of grade repetition in most countries, but that household wealth and the level of education of the primary caretaker can also have a significant effect on educational attainment.²⁰ However, child labour does clearly increase the probability that a child will drop out of school.

On the basis of a case study of India, the chapter by Philip Alston and Nehal Bhuta considers the evidence of the qualitative impact that human rights discourse, and the constitutional entrenchment of economic and social rights, can have on the attainment of social goods such as education. They review the history of the constitutional amendment that was adopted in 2002 to make education part of the category of 'fundamental rights' in the Indian Constitution.²¹ The amendment led to the inclusion of a justiciable right to education in relation to children between the ages of 6 and 14. The authors ask whether this has made any difference in terms of progress towards achieving the goal of free, universal, elementary education. The evidence is mixed, but does suggest that the public debate surrounding the constitutional amendment, and public interest litigation in state and federal courts, have provided some impetus for government authorities to address critical problems in the provision of education. Perhaps more enduringly, and in line with the analysis of the right to food undertaken by Jean Drèze in Chapter 4, the idea of education as a 'fundamental right' is becoming a focus for local political action and agitation among under-resourced and oppressed communities, who rely on the new constitutional provision as a way of pressing their demands on local and regional government decision makers.

(d) Reform of Legal and Judicial Systems

The extent to which multilateral lending agencies should use human rights criteria in assessing development projects has been subject to considerable debate over the last fifteen years. Agencies such as the World Bank and International Monetary Fund have been criticized for failing to consider

¹⁹ Ibid., p. 214. ²⁰ Ibid., p. 230.

²¹ P. Alston and N. Bhuta, 'Human Rights and Public Goods: Education as a Fundamental Right in India', Chapter 11 below, p. 244.

adequately the human rights impact of their lending.²² At the same time, international financial institutions (IFIs) are increasingly funding ‘institution-building’ projects that, explicitly or implicitly, have human rights-related objectives, particularly in the form of rule of law initiatives. Christina Biebesheimer reflects on the experience of the Inter-American Development Bank (IDB), which has explicitly embraced the promotion of human rights as conducive to creating the conditions for economic development. The IDB, perhaps more than any other international financial institution, has expanded its loans to projects concerned with improving public sector institutions such as courts. It has, as a matter of policy, come to regard democratic institution-building as part of a state modernization strategy and has taken the justice sector as a particular focus. Biebesheimer reviews the kinds of projects that the IDB has supported through its ‘modernization of the state’ strategy, and observes that human rights principles are being used in ‘interpreting the areas of justice [the IDB] can work in, in defining project content, in establishing methodologies for pre-project diagnostics, and in defining indicators for project success and impact’.²³

In her concluding sections, Biebesheimer asks how a comprehensive human rights approach would change the way that the IDB works. Her answer is that it may lead to a greater emphasis on citizen participation in the design and implementation of justice projects, and may lead to placing greater emphasis on justice sector initiatives that combat discrimination and exclusion. She laments, however, that little practical guidance in project design and implementation can be derived presently from the materials produced by the human rights community. There is a need for human rights advocates to address their concerns to the development community in a way that demonstrates how a human rights approach will improve project effectiveness, and how improvements could be implemented in a way that is consistent with existing time and resource constraints.

In his chapter, Stephen Golub takes aim at the ‘rule of law’ promotion practices of the international financial institutions. He argues that these lending practices are underpinned by a ‘rule of law orthodoxy’ that does not adequately conceptualize the relationship between justice sector reform and human rights protection.²⁴ The ‘rule of law orthodoxy’s’ focus on narrowly defined justice sector projects does not pay sufficient attention to the reality that improvements in the courts or in legal training will by no means necessarily result in the enforcement of rights or the alleviation of poverty for

²² See generally M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, Hart, 2003).

²³ C. Biebesheimer, ‘The Impact of Human Rights Principles on Justice Reform in the Inter-American Development Bank’, Chapter 12 below, p. 279–80.

²⁴ S. Golub, ‘Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development’, Chapter 13 below, p. 299.

structurally disadvantaged groups. Golub notes that project reviews of justice sector reform projects have generally found that the projects have not had a discernible impact on the poor and disadvantaged, and have not necessarily resulted in durable and sustainable changes in the functioning of legal institutions.

He argues that, instead of the 'rule of law', development agencies should promote 'legal empowerment', which he defines as 'the use of legal services and other development activities to increase disadvantaged populations' control over their lives'. He suggests that such a strategy would emphasize strengthening the capacity of NGOs and community-based organizations that defend and promote the rights of the poor, and the selection of issues flowing from the needs of the poor. It would also pay greater attention to a variety of state institutions (administrative agencies, local governments, and so forth) that can be used to advance the rights of the poor, rather than focusing on a narrowly defined justice sector. Golub marshals considerable evidence that such an approach is more sustainable and more likely to have long-term benefits for the realization of human rights and human development, than justice sector programmes. His contention is not that justice sector programmes should be abandoned, but that a better balance should be struck in 'rule of law' development funding, between legal empowerment and legal reform.

(e) The Role of the Private Sector in Promoting Human Rights

Peter Woicke reflects on the International Finance Corporation's (IFC's) efforts to incorporate human rights standards into its criteria for evaluating prospective loans to private companies. The IFC is the private sector development lending arm of the World Bank Group. In recent years it has emerged as a leader within the group in developing modalities for using human rights criteria in lending decisions. Woicke argues that this effort by the IFC should be seen as part of a broader worldwide movement for corporate social responsibility.²⁵ It is thus consistent with efforts by large corporations to respond to criticism of corporate behaviour and to present adherence to international human rights standards as part of their corporate and brand identity. As a financier of private companies active in developing countries, the IFC has accepted that corporate responsibility principles can and should be applied to those who fund private sector activity, as well as to those who implement them. In an informative and illuminating case study, Woicke describes in detail a project that was financed by the IFC, and how

²⁵ P. Woicke, 'Putting Human Rights Principles into Development Practice through Finance: The Experience of the International Finance Corporation', Chapter 14 below, p. 328.

the process of project assessment could have incorporated a human rights analytical framework.

Does human rights promotion and enforcement actually lead to better governance and greater human development? Are civil and political rights and economic and social rights really indivisible? While these propositions have become something of a policy and philosophical commonplace since Amartya Sen's powerfully persuasive work,²⁶ Daniel Kaufmann observes that the empirical basis for (or against) the claims is not easy to establish. Employing an innovative method for measuring and assessing human rights outcomes and their impact on governance, he seeks to rise to this challenge in his chapter.²⁷ He first reviews indicators for political and civil rights and asks whether there has been an improvement in the realization of these rights. He then explores the relationship between civil and political rights and economic and social rights, and asks how improvements in the former affect the realization of the latter. He finds that progress in the realization of civil and political rights is uneven and varies according to region, but that there is a strong correlation between income levels and respect for civil and political rights. Of course, this tells us little about the causality of the relationship between civil and political rights and economic development.

In a further series of analyses, Kaufmann makes a persuasive case for the proposition that good governance is not a 'luxury good' which every country comes to enjoy when it becomes wealthier, implying that policy makers and civil society must work hard and continuously at improving civil rights and governance. He also finds that where political and civil rights are less respected, the risks of corruption and state capture by special interests are higher, which in turn impairs socio-economic development. Conversely, better governance seems to be causally related to improved development outcomes. Kaufmann examines the case of Bolivia to contend that measures that promote participation and citizens' input into the operations of an institution were likely to reduce corruption and improve service delivery. Voice and participation are thus instrumentally related to containing corruption and realizing social and economic rights, and it may not be reasonable to expect that a purely technocratic approach to macroeconomic management will deliver such objectives.

Olivier de Schutter proposes a new way of conceiving the human rights responsibilities of transnational corporations (TNCs). He argues that the conventional approach, which focuses on the project-specific human rights consequences of a particular company in a particular locale, is inadequate to address concerns about whether the activities of TNCs promote the human

²⁶ See e.g. A. Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999).

²⁷ D. Kaufmann, 'Human Rights and Governance: The Empirical Challenge', Chapter 15 below, p. 352.

development of the society as a whole.²⁸ De Schutter distinguishes between a 'micro' and a 'macro' approach to the human rights impact of TNC activity. Most current analyses take the 'micro' approach, but do not consider ways in which TNCs and foreign direct investment can be instruments in a form of growth that realizes the right to development. De Schutter contends that the 'macro' analysis must supplement the 'micro' to discern measures that can link TNC activity to national economic development. De Schutter reviews a wide range of evidence indicating that the mere presence of foreign investment will not necessarily result in balanced human development, and should be subject to a multilateral framework of development friendly rules. By contrast, the current framework for investment aims to limit as much as possible the capacity of a state to impose conditions on foreign investment and TNC activity. De Schutter argues that developed states and multilateral lending institutions should bear primary responsibility for developing a multilateral framework for 'development friendly' investment, and suggests that such a set of rules has the potential to alleviate the problem of 'regulatory competition' between national jurisdictions.

**(f) Building Human Rights into Development Planning Processes:
The PRSP Exercise**

By far the most important single tool for development planning and for seeking to stimulate a greater and better focused flow of development assistance today is the Poverty Reduction Strategy Paper (PRSP) process. It was introduced in 1999 as a condition of eligibility for debt relief among Heavily Indebted Poor Countries (HIPC), but has since become ubiquitous in the development context. The rationale for the PRSP process was that it would promote national and local 'ownership' of macroeconomic policies and help ensure that these policies were sufficiently adapted to relieving poverty in the world's poorest countries. In principle, the process represents an embrace of the values of participation and transparency in the formulation of macroeconomic policy, and thus has the potential to shape the content of these policies in order to meet the needs of the poor. As of April 2004, thirty-nine countries had completed PRSPs on a full or interim basis.

The chapter by Frances Stewart and Michael Wang reviews the experience of participation in the preparation of these strategies over a number of countries, and assesses whether this participation has empowered the poor to alter the content of macroeconomic policy and poverty reduction strategies. They find significant variation across countries, in terms of *who* participates, *how* they participate, and *issues* in respect of which they have

²⁸ O. de Schutter, 'Transnational Corporations as Instruments of Human Development', Chapter 16 below, p. 404.

participated.²⁹ Troublingly, they find that a number of important actors have been consistently excluded from participation, including parliamentarians, and the representatives of trade unions, women, and marginalized groups. The amount of time allowed for consultations and participation was often inadequate, and in a number of cases civil society groups were presented with pre-prepared drafts on which to ‘comment’ rather than having an opportunity to participate in the design of the framework. Nevertheless, Stewart and Wang find that the PRSP process seems to have led national development plans to become more ‘pro-poor’ and include more ambitious social targets. At the same time, participation rarely resulted in changes to the macroeconomic policies prescribed by IFIs and there were no departures ‘from the kind of advice provided under structural adjustment programmes’.³⁰

Stewart and Wang conclude by asking how a more explicitly ‘human rights-based’ approach might alter the process and content of PRSPs. They note that even if PRSPs did use the language of rights, the change might end up being confined to language and have little consequence in reality. They recommend, instead, that PRSPs be reformed so that there is greater participation by the marginalized and the poor, and that the representation of private sector groups and external agencies be limited. Wang and Stewart note, however, that even if steps are taken to improve the PRSP process, they will not have a positive impact on the content of PRSPs unless donor countries and IFIs cede greater control to the countries concerned in defining their economic priorities.

Drawing on the experience of the World Bank, as the principal driving force behind the PRSPs, Gobind Nankani, John Page, and Lindsay Judge argue that these strategies should be seen as an important means for bringing about a convergence of human rights principles and poverty reduction policies. The PRSP process, they recall, was introduced as a way of ensuring that the voice of the poor was heard in the formulation of development strategies, and as a way of trying to avoid the failures of ‘top-down’ development policies.³¹ The participatory process mandated by PRSPs represents a ‘pact between states, their citizens, and the international community’ to achieve poverty reduction. Nankani, Page, and Judge contend that the outcomes sought by a poverty reduction focused development strategy overlap considerably with the norms and values embodied in human rights instruments, although the overlap is not total. They note that, on the *supply* side, human rights advocates and development economists may be at odds over what governments need to do to ensure various possible outcomes for

²⁹ F. Stewart and M. Wang, ‘Poverty Reduction Strategy Papers within the Human Rights Perspective’, Chapter 17 below, p. 454.

³⁰ *Ibid.*, p. 466.

³¹ G. Nankani, J. Page, and L. Judge, ‘Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?’, Chapter 18 below, p. 477.

citizens (with economists focused on the question of how to ensure optimal use of finite resources), while on the *demand* side there is convergence in the emphasis on empowering marginalized people to take control of their lives and claim their entitlements.

Nankani, Page, and Judge defend the PRSP process as likely to lead to a better alignment between poverty reduction strategies and human rights principles. They argue that the process has enhanced country ownership of, and commitment to, poverty reduction policies, and has also changed donor behaviour by encouraging donors to co-ordinate more carefully their inputs with national governments. They also contend that the PRSP process has led to a more comprehensive approach to poverty reduction in countries that have undertaken it. They argue that further steps can be taken to heighten the complementarity between a human rights approach and the PRSP process, but sound a note of caution: resource and capacity constraints in developing economies mean that hard choices and some trade-offs must always be made. But there is room for thinking through these hard choices in terms of a human rights framework.

Finally, in the last chapter, the theme of hard choices and trade-offs is taken up by Mark Plant, a senior official of the International Monetary Fund. Plant revolves his comments around a set of *Draft Guidelines* for a human rights approach to Poverty Reduction Strategies which was prepared at the request of the Office of the High Commissioner for Human Rights (OHCHR).³² He raises some challenging questions about the practical utility of incorporating human rights language into PRSPs. He notes that there is a danger that the strategy documents will become overburdened with 'wish-lists' of desired outcomes and principles, while at the same time losing their role in providing concrete guidance to the implementation of poverty reduction policies in a given national context. He asks whether the human rights community has given enough consideration to achieving the right balance between ambition and realism. He suggests that there is a real danger that the human rights approach advocated by the OHCHR will be seen by low-income countries as being unnecessarily 'grafted on to the PRS process and thus more of a burden than a help'.³³ Plant also raises an important empirical question about whether broader participation will actually result in *better* economic policy. While local level actors are well placed to identify the needs and priorities that concern them the most, these must be balanced with the maintenance of national economic stability in an international economy.

³² United Nations High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, 10 September 2002 (Geneva: United Nations). It should be noted that a revised version of this document was due to be made available early in 2005.

³³ M. W. Plant, 'Human Rights, the Poverty Reduction Strategies, and the Role of the International Monetary Fund', Chapter 19 below, p. 501.

Plant contends that ‘difficult macroeconomic choices cannot be avoided by adopting empty or internally contradictory policies; if this is done, the choices will be made by markets . . . or postponed until later generations through indebtedness’.³⁴ Plant’s pointed questions lead to a challenge to members of the human rights community to ask themselves whether, while demanding that development economists internalize the human rights perspective, they have failed to adequately internalize the economists’ concerns. He concludes by suggesting that OHCHR should consider ways in which it can operationalize its expertise, so as to provide concrete assistance to developing countries that face difficult trade-offs in terms of how best to implement economic policies in a manner consistent with human rights principles.

(g) The World Bank and Human Rights

In the concluding chapter of the volume Roberto Dañino, who has been Senior Vice-President and General Counsel of the World Bank since 2003, offers some personal reflections on the appropriate role of human rights within the work of the Bank. His views are of particular significance in light of the influence that his predecessors, and especially Ibrahim Shihata, exerted in relation to such matters within the Bank. Dañino makes clear that while there are both legal and institutional limits that must be respected, the World Bank should in the future ‘embrace the centrality of human rights to [its] work instead of being divided by the issue of whether or not to adopt a “rights-based approach” to development’. While some would suggest that such an approach would represent a significant change in Bank policy, others would argue that the Bank already has a very extensive *de facto* policy in relation to a wide range of human rights issues and that Dañino’s approach would serve mainly to bring the theory into line with the practice and thus encourage a more systematic approach to human rights within the work of the most influential of the international community’s development agencies.

³⁴ M. W. Plant, ‘Human Rights, the Poverty Reduction Strategies, and the Role of the International Monetary Fund’, Chapter 19 below, p. 503.