

these competing demands require capable political and legal institutions. But the prognosis for meaningful political reform remains dim.

II. WHY THE STATE AND LIBERAL INSTITUTIONS MATTER

The state remains important in the global age.⁵⁵ The debate in East Asia, especially China, over a strong state or not begs the question what kind of strong state is needed as development progresses. Investor confidence seems to be at its maximum at an intermediate institutional stage between extreme authoritarianism and free wheeling democracy, where there are democratic institutional checks and yet the formal power to veto or override policy decisions is confined to a limited number of reliable institutional actors.⁵⁶ Such conditions seem likewise favourable to reducing corruption.⁵⁷ This section argues that constitutionalism best provides the conditions for this intermediate level of openness and constraint. Stephen Haggard notes that in the aftermath of the economic crisis, East Asian governments faced the need to generate a new social contract.⁵⁸ For the most developed Asian economies, this new contract has taken a constitutional form as institutions of multi-party democracy, a free and vigorous press and constitutional judicial review are beginning to flourish.

In the discussion that follows, this paper considers how constitutionalism, in a liberalising developmental context, may contribute to transparency, order, reliability, and participation, thus affording the required opportunities for various interests to achieve their goals through accepted channels. Specifically, this section will consider the following issues: (1) the empowering role of constitutionalism in the developmental context; (2) the processes of constitution making and execution; and (3) the avenues for securing constitutionalism in the local condition.

(A) The Empowering Role of Constitutionalism and Its Importance to Development

Constitutionalism has a significant, but insufficiently studied, role in contemporary consideration of the political economy of development. Constitutionalism empowers diverse forces in society by affording the institutions of transparency, representation and accountability. This may engender the public confidence needed to secure robust economic activity. This

55 See Theda Skocpol, "Bringing the State Back in: Strategies of Analysis in Current Research", in Peter B. Evans et al (eds.) *Bringing the State Back In* (1985), at p 3; Stiglitz, *supra* note 7; Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (1994) (asserting that the economic importance of law and the state in the development of trade has long been recognised).

56 See MacIntyre, *supra* note 24. MacIntyre stresses "the importance of credible commitments and policy stability, on the one hand, and adaptability and policy flexibility, on the other". *Ibid.*, at p 86.

57 See Kang, *supra* note 21.

58 Stephan Haggard, *supra* note 33. Haggard notes the elements of the old social contract to include: healthy per-capita GDP growth rates; high levels of public and private investment in education and basic health care; balanced growth strategies that emphasise labour intensive manufacturing and address rural poverty through land reform; strong traditions of family support; and a tradition of firms providing social insurance. See *ibid.*, at p 142.

is especially of concern in societies facing economic restructuring. There is a need to appreciate the role of constitutionalism in generating public policy and the political confidence to carry it out. Constitutionalists have too often focused only on the constraining aspects of constitutionalism. Stephen Holmes worries that the metaphors of checking, blocking, and restraining have distracted us too much.⁵⁹ By ensuring transparency and accountability constitutionalism insures consent, affording both a framework for orderly decision and reliable boundaries of constraint.⁶⁰ This goes a long way towards explaining why scholars have noticed a positive correlation between democracy and development.

Constitutionalism must be distinguished from mere majoritarianism, both in its "commitment to 'self-binding' procedures of governance" and its requirement of "a clear hierarchy of laws, interpreted by an independent judicial system and supported by a strong legal culture in civil society".⁶¹ The populist alternative to constitutional democracy is a plebiscitarian democracy, where the leader may feel empowered to get the job done without regard to the constitutional niceties.⁶² Both newly elected post-authoritarian leaders and leaders facing a crisis often succumb to this temptation. To do so is not just to ignore constraint, but to disable popular democratic will. Authoritarian leaders who routinely ignore constitutional requirements may court volatility in public policy making; leaders who are required to bargain too much may encourage rigidity and indecisiveness.⁶³ Constitutionalism may provide the happy medium.

(B) The Dynamics of the Constitutive Process

Among the more substantial challenges facing a new democracy are the constitutional founding and its consolidation. We may divide the constitutional process into three stages or types of activity: (1) *constitution-making*: the founding or constitution drafting process; (2) *constitutional implementation*: those periods of ordinary politics when constitutional changes are evolutionary in nature and largely guided by formal institutions; and (3) *constitutional politics*: moments of extraordinary change under the existing constitutional regime. The chief concern of constitutional process at all stages is to ensure transparency and effectively engage a range of social, political and economic interests and ideas.

Constitution-making is the primary task of the founding period, when a high level of social engagement is apparent. It often involves a constitutional assembly (a legislative or conventional meeting), as a venue for initiating choices

59 See Stephen Holmes, "Precommitment and the Paradox of Democracy", in Jon Elster and Rune Slagstad (eds) *Constitutionalism and Democracy* (1988) at pp 195, 226, 231.

60 Jon Elster, "Forces and Mechanisms in the Constitution-Making Process", (1995) 45 *Duke Law Journal* 364.

61 See Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies", (1996) 7 *Journal of Democracy* 14, at p 19.

62 Guillermo O'Donnell, worries that when the fit with democratic institutions is not good, there may emerge a "caesaristic, plebiscitarian executive" that feels it is empowered to govern the country as it deems fit; then, normal political institutions, including the legislature, the judiciary, and various regulatory and administrative agencies, are viewed as hindrances placed in the way of proper discharge of duties the voters have delegated. Guillermo O'Donnell, "Illusions About Consolidation", (1996) 7 *Journal of Democracy* 34, at pp 39-40.

63 See MacIntyre, *supra* note 24.

Scott and Alston agree with the conclusion in this case but criticise its reasoning.⁶ They argue that the "rationality" test was dangerously deferential to the state on the allocation of resources. They contend that one of the consequences of the Court's reasoning in this case is to read the right to emergency as a "negative" right only, as it only prohibits state action and does not mandate state conduct. This results in an interpretation that does not place any obligation on the state to develop emergency medical services that are sufficient to meet need.⁷

(B) *B and Others v Minister of Correctional Services*

Are prisoners entitled to a higher level of medical care, at state expense, than that provided by the state to non-prisoners? This was the question the High Court had to consider in *B and Others v Minister of Correctional Services*.⁸ According to the South African constitution everyone who is detained, including sentenced prisoners, are guaranteed:

"... conditions of detention that are consistent with human dignity, including at least exercise and the provision at state expense of adequate accommodation, nutrition, reading material and medical treatment".⁹

Four HIV positive prisoners contended in this case that the South African constitution entitled them to anti-viral medication at state expense. Two of the prisoners had progressed to a stage where internationally accepted medical practice considered anti-viral therapy to be necessary. The most effective therapy at that time was a combination of AZT and 3TC. The first respondent, the Minister of Correctional Services, adhered to the policy that prisoners should have access to health care services and treatment equal to that provided to non-prisoners who attended provincial hospitals. HIV patients at provincial hospitals in the same condition as the four applicants in the case were not provided with the medication sought by the prisoners.

The Minister contended that the standard of medical treatment provided at provincial hospitals was determined by the available resources. The Minister's defence was that what was constitutionally guaranteed to prisoners was "adequate" medical treatment and not "optimal" medical care or the best available medical care. If prisoners received the same treatment they would have received at a provincial hospital, it could not be said that their rights were being violated.

According to the argument made by the prisoners, any standard of treatment that fell below what was considered as "adequate" was a violation of the constitutional standard. The government could not avoid its obligations by pleading a lack of funds since the constitution was clear in the standard required. What provincial hospitals could afford to provide was not relevant since the state

- 6 Craig Scott and Philip Alston, "Adjudicating Constitutional priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise", (2000) 16 *South African Journal of Human Rights* 206 at p 238.
- 7 *Ibid.*, at p 245.
- 8 See judgment of Brand J in *B and Others v Minister of Correctional Services* 1997 (6) BCLR 789 (c) High Court, Cape of Good Hope Provincial Division, 17 April 1997.
- 9 Constitution of South Africa (1996), Article 35(2).

owed a higher duty of care to HIV patients who were prisoners than to HIV patients who were not prisoners.

The High Court upheld this argument noting that:

"... lack of funds cannot be an answer to a prisoner's constitutional claim to adequate medical treatment. Therefore once it is established that anything less than a particular form of medical treatment would be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment".¹⁰

The court tempered this by stating that if the authorities could establish that they could not afford a particular form of treatment or that the provision of such treatment would place an unwarranted burden on the state, the court may decide that the less effective treatment that is affordable must be accepted as "adequate medical treatment".¹¹ According to this reasoning, the burden would lie on the state to show that a particular form of treatment is not being provided because the state cannot afford that treatment.

The court held that unlike non-prisoners, prisoners did not have access to resources that would enable them to purchase the necessary medical treatment. Some prisoners would, upon their release, be able to earn an income that would enable them to claim the requisite anti-viral treatment. As such, a failure to provide the anti-viral treatment to prisoners was an infringement of their rights.

The court referred to another factor that governed its decision. HIV prisoners were more vulnerable to opportunistic viruses such as tuberculosis and pneumonia than non-prisoners because of their incarceration. In this context, the state was obliged to provide them with a treatment that was better able to improve their immune systems than what the state provided to HIV patients outside prison.

The state was directed to provide two of the applicants, whose infection had progressed to a stage where internationally accepted medical opinion accepted that anti-viral treatment was required, with the treatment they sought. The Department of Correctional Services had failed to show that they were unable to afford the anti-viral treatment for prisoners who were eligible for such treatment.

The decision of the High Court raises a number of questions. The effect of the decision is to make available a higher standard of health care to those within prison than to those outside. The reason the government failed, in the court's view, was because it was unable to justify its decision in strong and rational terms. The government's defence was that those who attended provincial hospitals were not being provided anti-viral therapy free of charge and that this was the benchmark that was applied to prisoners. But as the court noted, if the state had been able to prove that it would have been beyond the state's capacity to provide this treatment, then perhaps the court would have held with the government. This is key to judicial review of any kind. What justification can the state provide of its decisions? This is the main advantage of constitutionalising economic and social rights. It allows independent bodies in the form of courts to scrutinise key areas of government policy. Not so much by substituting their view, but by asking government to rationalise and justify its policies, the courts perform an important function. The likelihood of independent scrutiny is more likely to force a bureaucracy to adopt policies that that have considered all possible alternatives and are rational.

- 10 *B and Others v Minister of Correctional Services* 1997 (6) BCLR 789 at p 802.
- 11 *Ibid.*

personal experience and from different angles of view. In my opinion, in the evaluation of the situation of human rights protection, we must connect it with the actual conditions of China and judge in an objective and active way. This will contribute a lot to the development of domestic human rights protection in China.

Firstly, the situation of human rights protection must be connected with the conditions and practical demands of the development of the Chinese economy.

China is a developing country with the largest population in the world. At present, the most important aim of China is to develop its economy so as to satisfy the basic requirements of its people and ensure the development and progress of society.

Fundamentally, the development of the economy and human rights protection are consistent with each other. The development of the economy is the foundation for realisation of the material requirements of human rights and also the basis of the realisation of the spiritual requirements of human rights. But in practice, the contradiction between the development of the economy and human rights protection still exists. In certain circumstances, the development of the economy will cause environmental pollution, a decrease of the level of employment due to progress in science and technology, poor labour conditions, inequality between the sexes, insufficient protection of the rights and interests of farm workers due to a surplus of labour, insufficient social security measures, and so on. To a certain extent, these new human rights problems are by-products of economic development but can be solved by further developing the economy. The existence of such problems cannot deny the fact that human rights protection in China is improving.

We also notice that the deficiency of development of the economy brings unfavourable effects on the improvement of human rights protection in China. Many human rights problems, such as the outdated concept of what constitutes human rights protection, incomplete measures and system of human rights protection and the great gap between China and western countries, etc. are the results of economic as well as political reasons. In my opinion, with economic development, democracy, human rights and the legal concept of the society will be improved gradually and progress in the areas of democracy will finally resolve many human rights problems.

However, the effect of economic development on human rights protection is only part of the reason. Economic development is not the only factor in deciding upon human rights protection, although economic development is greatly important in the evaluation of human rights protection in China.

Secondly, the improvement of the human rights situation must be connected with the social and political stability of China. This is the basis of the sustainable development of human rights protection.

Many of the human rights problems in China are due to the unreasonable factors in the design and operation of Chinese political system, such as the highly centralised power, lack of scientific restraint systems, the "rule by men" factor in the exercise of power, the abuse of power and corruption without effective punishment, the inefficient judicial remedies for the human rights protection and so on. In this regard, human rights protection is not only a legal problem in China but also a political and social problem. The improvement of human rights protection depends on the democratic reform of the political system.

We should also realise that political reform in China is made gradually also that political and social stability is the basis for the political reform. China is a vast country with a large population and the developments in different regions

vary greatly. The national and religious factors are very complicated. At the same time, China is relatively poor in natural resources, development and has a long history of autocracy. The history of Chinese political development suggests that it is rather hard to maintain political and social stability, which is the basis of the development of social economy and democracy. The 27 years since the reform and opening-up policy have been the most prosperous period in Chinese history and the standard of living of its people has increased very quickly. It is also in this period that China has made its greatest progress in human rights protection. So the political reform in China must be based on the present situation and made step by step in order to seek a democratically political mode, which is effective and accepted by all the political entities. Only in this way can we push the democracy forward and solve human rights problems. Excessive political reform cannot accelerate this development and resolve human rights problems. On the contrary, it will only lead to instability and set back the cause of human rights and social development in China.

The evaluation of the situation of human rights in China and the improvement of human rights protection must go deep into the practical situation of China. The evaluation must be made on an objective and fair point of view. We should notice the positive side of human rights protection and the political progress and encourage, support and help its democratic progress. If we separate human rights problems from the entire social development and situation of China, the conclusion would be non-objective and the solution would be infeasible. Ideal human rights may not be an urgent need of the Chinese people or it may be impractical at present. The best attitude to the human rights problem is to find practical and feasible solutions under the current conditions. Even the slightest improvement is needed.

At last, we must be active and confident in the improvement of the situation of human rights in China; otherwise we will lose any opportunity to improve it.

IV. WHY IS CONSTITUTIONAL REVIEW THE KEY TO HUMAN RIGHTS PROTECTION IN CHINA?

The practical measure of the promotion of human rights protection in China is the system's construction. Although in the realisation of certain rights, the overall improvement of the situation of human rights is dependent on the progress in political reform, the construction and optimisation of a large scale system is still the most difficult point in the realisation of human rights protection. In my opinion, the key to this problem is building, respecting and implementing constitutional review.⁶

⁶ Constitutional review is used under the context of the Chinese constitution. It reviews not only whether the activities of administrative bodies, other governmental organs, political parties and individuals when they exercise public power are constitutional, but also whether the laws are constitutional. In accordance with the Constitution of China, which was promulgated in 1982, the Standing Committee of the National People's Congress exercises the power of constitutional review. But this system has not taken any effect for a long time, which is a main reason for the disappointing implementation of Chinese constitution. This essay is written under this background.

effectively reduce poverty", together with the need for broad-based participation in such action,³⁴ that has facilitated the growth of systemic programs centring on good governance and the rule of law. On the face of it, this provides one road by which human rights have found a place in Bank programs – though it has to be said this is apparent less in name than by inference.³⁵ Such appropriation of the way of policy formulation of project implementation.³⁶ Such appropriation of rights-based language in the rhetoric overlaying these initiatives may be driven by opportunistic concerns to deflect external criticism of the Bank's insensitivity towards human rights.³⁶ In the alternative, it may simply be the result of the Bank's ignorance of, or indifference to, the human rights connotations of the notions of good governance and the rule of law.³⁷

In any event, the rights at the centre of good governance and rule of law initiatives are nearly always civil and political – primarily, fair trial and equality, and secondarily privacy, freedom of speech, thought and religion. Another road into the Bank's operational activities for human rights has been through the addressing of specific sectorial interests – such as programs focusing on criminal justice, children, women, indigenous peoples and HIV/AIDS. Each of these has added some coverage of economic and social rights to the Bank's portfolio (especially, the rights to health, environmental protection, access to food and water, and rights to housing and education).³⁸ The Bank's core commitment to aiding countries in meeting the Millennium Development Goals (MDGs) has also advanced this process to some degree,³⁹ although there is an erroneous tendency within the development agencies to view the MDGs and human rights as existing in largely separate worlds.⁴⁰

(D) The Private Sector Development Perspective – IFC and MIGA

During the late 1980s and early 1990s, the Bank began pushing the role that the private sector (autochthonous and foreign) could play in development, through both a sharp increase in the "business" of its private sector arm – the International Finance Corporation (IFC) – and the establishment of the Multinational Investments Guarantee Agency (MIGA) in 1988.⁴¹ As such, a new set of problems, as well as opportunities, have presented themselves in terms of human rights protection.⁴² In part, this has been due to the fact that these two private sector development arms of the World Bank Group have not only been exposed to the usual pressures put on the Bank as a whole to address human rights issues,

34 World Bank, *Poverty Reduction Strategies: Overview: What are the core principles underlying the PRSP approach?* Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,menuPK:384209~pagePK:162100~piPK:159310~theSitePK:384201,00.html>.

35 Davis (2005), at pp 5–6.

36 Uvin (2004), at chapter 3.

37 See Alston (2005) at p 780, and his critique of the impoverished nature of the WBG and IMF Development Committee's understanding of the notions of good governance and the rule of law in its *Global Monitoring Report* (2004).

38 See for example the Bank's OP 4.10 (2002) and Darrow (2003) at p 158.

39 See the World Bank MDG webpage, at www.developmentgoals.org.

40 Alston (2005), at pp 759–762.

41 On which see "History of the IFC" at <http://www.ifc.org>, and <http://www.miga.org> respectively.

42 See generally UNCTAD (2004).

but also to the separate human rights and corporate social responsibility (CSR) pressures being brought to bear on their corporate partners/clients.

The IFC especially has been active in seeking to raise the profile of human rights in its work – it was the chief broker of the *Equator Principles* (2004) on social and environmental standards for private sector banks financing development projects. It has itself re-configured its Safeguard Policies as "Performance Standards". These new Standards were originally intended to expressly address human rights issues (in contrast to the prevailing focus on environmental matters), but have not turned out to do so.⁴³ Criticism of the IFC's involvement in projects that allegedly violate multiple human rights continues unabated.⁴⁴ MIGA, on the other hand, has not yet addressed the question of the relevance of human rights to its core business of providing political risk insurance, being instead preoccupied, in the eyes of some, with deflecting criticism of the competitive advantage it appears to have over insurers' clients of offering the opportunity not only to buy insurance, but also to pay protection money.⁴⁵

(E) The Overall Picture

What this amounts to in terms of the aggregate of the Bank's awareness of, and commitment to, human rights is patchy at best. Essentially, it comprises some rhetorical statements from the top; some specific, targeted programs at the operational level, and very little in the middle. It is fair to say that there is some limited evidence of acceptance of the Bank's human rights footprint – maybe even at times, an acknowledgment that it is significant in terms of HIV/AIDS, gender-related, criminal justice, child-focused and indigenous projects, (and possibly others focusing on enhancing access to basic health, housing and education services, for example, where some familiarity with, and acceptance of, economic and social rights is evident).⁴⁶ What is more, this stance has even been interpreted as evidence that the Bank accepts some role in ensuring that its activities at least do no harm to the protection of human rights in the areas that it

43 See McBeth (2005), at p 21; Wachenfeld (2003) and various NGO criticism of draft Performance Standards – Bretton Woods Project, "From Bad to Worse: IFC Safeguards", 13 June 2005, [http://www.brettonwoodsproject.org/article.shtml?cmd\[126\]=x-126-235769](http://www.brettonwoodsproject.org/article.shtml?cmd[126]=x-126-235769), and Bankwatch, "Comments to the IFC draft Safeguard Policy Review", 10 November 2005, http://aa.ecn.cz/img_upload/2a47e698cb07569dfd0ebe077b6aad99/comments_ifcspr_11_05.pdf.

44 Kinley & Davis (2004), at pp 41–66. On the potentially malign effect on human rights protection of host government agreements (HGAs), see Amnesty International (2005).

45 Friends of the Earth, *Risky Business* (2001), at p 5. Though consider the report by the Compliance Advisor Ombudsman on MIGA's underwriting of Anvil Mining's operations in the Democratic Republic of Congo, <http://www.cao-ombudsman.org/html-english/DemocraticRepublicofCongo.htm>. While the CAO's final audit was submitted to the World Bank Group on 14 October 2005, it was not officially made public. NGOs such as RAID-UK have expressed concern about this failure to make the report public, see letter to Paul Wolfowitz from RAID-UK, dated 6 December 2005, <http://www.ifwatchnet.org/LettertoWolfowitzDikulushiCAO.pdf>. The audit was posted in February 2006.

46 See Darrow (2003), at pp 64–66 and Clapham (2006), pp 153–154 for pertinent remarks of the World Bank Inspection Panel's report.

As an example of such a linkage, Citigroup is building networks with numerous local micro-credit providers to streamline resources, such as information resources regarding credit checks and the administration of loans, and to provide greater capital for micro-credit opportunities.⁴¹ Deutsche Bank too has established the Global Commercial Microfinance Consortium, in conjunction with USAID and the UK's Department of International Development (DFID), to attract commercial investors to lend to microfinance institutions to facilitate the latter's growth and viability.⁴²

But why would MNCs agree to foster the opportunities of others, that is, local SMEs? Put bluntly, what is in it for MNCs? There are two reasons why MNCs would benefit from the adoption of such a strategy.

First, businesses are being forced to acknowledge the existence of social obligations due to increased scrutiny of their social performance by a variety of actors, including governments, intergovernmental bodies, the media, NGOs, and the investment community. Poor social performance can severely harm a company's reputation and can on occasion attract legal liability, delivering competitive advantages to its more socially responsible business rivals. There is increasing acceptance of the idea that businesses have responsibilities to all stakeholders, including workers, consumers, suppliers and people in local communities where they operate, rather than only to their own shareholders.⁴³ Therefore, some MNCs are driven to adopt such pro-poor strategies due to internal corporate social responsibility agendas, including commitments to assisting the poor in areas where they conduct operations.⁴⁴

Second, such pro-poor strategies make sense from a more traditional business perspective. They can deliver significant profits to an MNC, as they permit the MNC to access the largely untapped market potential of the so-called "Bottom of the Pyramid". According to economists C.K. Pralahad and Stuart Hart, businesses generally ignore the market at the "Bottom of the Pyramid", which

41 Pralahad and Hart, *supra* note 35, at p 8. Also see generally www.citigroup.com/citigroup/citisen/microfinance/index.htm.

42 International Business Leaders Forum (IBLF) and World Business Council for Sustainable Development (WBCSD) *A Business Guide to Development Actors*, 2004, www.wbcscd.org (accessed 23 November 2005), at p 24. Also see generally http://www.db.com/en/content/responsibility/social_responsibility.htm.

43 Note, for example, the explosion of corporate social reports and corporate codes of "social" conduct. See, for recent commentary on corporate social responsibility, Ilias Bantekas, "Corporate Social Responsibility in International Law" (2004), 22 *Boston University International Law Journal* 309 and Eric Engle, "Corporate Social Responsibility (CSR): Market-based remedies for International Human Rights Violations?" (2004), 40 *Willamette Law Review* 103. Of course, these remain arguments that social responsibilities, other than those demanded by local laws, are outside the remit of businesses. See, eg, Milton Friedman's seminal article, "The Social Responsibility of Business is to Increase Profits", *New York Times (Magazine)*, 13 September 1970, and, more recently, Clive Crook, "The Good Company: A Survey of Corporate Social Responsibility", *The Economist*, 22 January 2005. Few companies these days explicitly adhere to the Friedman mantra that the business of business is purely business.

44 Corporate social responsibility can be distinguished from corporate philanthropy. Corporate social responsibility relates to a company's operations, or how a company operates, while philanthropic acts are purely discretionary, and may have little connection with the corporation's operations. See A. McBeth and S. Joseph, "Are we speaking the same language? Corporate Perceptions of Human Rights Responsibilities", (2005) 11 *Australian Journal of Human Rights* 95, at 102.

consists of the billions of poor people, indeed, two thirds of the world's population. Yet these people are viable consumers, if markets are appropriately structured to facilitate their access. The viability of that market is evinced by the fact that the poor sometimes pay more than the rich for goods and services. For example, slum dwellers in Mumbai pay up to 350 percent more than residents in wealthier suburbs for water, and ten times more for medicine.⁴⁵ If MNCs can penetrate the market at the "Bottom of the Pyramid", they can gain access to vast numbers of new customers.

The profile of consumers at the "Bottom of the Pyramid" is very different to that of the traditional customer base of MNCs. For example, profits at the "Bottom of the Pyramid" are driven by the massive volume of sales, rather than profit margins per unit sales.⁴⁶ Purchasing patterns are different: the poor will buy a little every day rather than a lot on one day, so product sizes and packaging must change accordingly.⁴⁷ Therefore, MNCs can benefit significantly from the local knowledge and networks provided to them by building links with local entrepreneurs.

An example of a success story in this regard is that of Hindustan Lever (HL), a Unilever subsidiary based in India. Its business plan focused for many decades on catering to India's elite. In 1995, HL changed course and adopted a deliberate strategy of marketing products to India's rural poor at a low cost. Between 1995 and 2000, HL experienced a 25 percent growth in profits.⁴⁸ Simultaneously, HL has provided more job opportunities to local people and has utilised their knowledge to market and sell products. Its "ecosystem" was reported by the CPSD in 2004 to include 80 manufacturing facilities, 150 SME suppliers with 40,000 employees, 7,250 stockists, 12,000 wholesalers and retailers, 300,000 shop owners, and 150,000 individual entrepreneurs selling to around 200 million consumers.⁴⁹

Several other beneficial side effects of the HL story may be noted. First, HL deliberately formulated products to take account of the circumstances of the poor. For example, the poor often wash their clothes in public water systems, so there was a special need for HL to market a more environmentally friendly detergent.⁵⁰ Indeed, Pralahad and Hart note that the market at the bottom of the pyramid is "wide open for technological innovation", as businesses are forced by local conditions and the reality of dwindling natural global resources not to "repeat the environmental mistakes of developed countries over the past 50 years".⁵¹ Second, HL had to take a different approach to employment amongst the poor compared to its wealthier traditional employment base. There is a need to increase employment within the business eco-system rather than streamline it, in order to increase the pool of potential consumers.⁵² Third, Unilever has now transported the HL model to other developing countries, such as Brazil, where it

45 CPSD, *supra* note 9, at p 7.

46 Pralahad and Hart, *supra* note 35, at p 5.

47 *Ibid*, at p 10.

48 *Ibid*, at p 6.

49 CPSD, *supra* note 9, at p 31.

50 Pralahad and Hart, *supra* note 35, at p 5.

51 *Ibid*, at p 4. Wheeler and McCague, *supra* note 4, state at page 15 that southern businesses may use "leapfrog technologies" that "do not replicate the old, capital intensive and environmentally inefficient applications developed in the industrialised countries".

52 Pralahad and Hart, *supra* note 35, at p 13.

the Constitution. In addition to the Constitution and international treaties, India has promulgated a long list of laws which contribute to, facilitate and guarantee the protection and promotion of human rights. By 1996, over 50 statutes were issued many of which target the poor, disadvantaged, and marginalised groups. Both national and international human rights provisions could form a legal culture that makes these instruments a means of reducing social inequalities and the denial of rights.

In general, the staff of ActionAid appear genuinely receptive to the rights-based approach to development and commit to its implementation. Though the level of understanding and implementation varies according to local context, the commitment is so pronounced that it puts the India team in a particularly good position vis-à-vis other countries.

There is a strong culture of human rights activism in India, both through NGOs, people's organisations and even, to a certain extent, through government agencies. Many movements are strong in terms of their working organisations, network, constituencies, and commitment (Child Watch India, Chetna, Bal Vikas Dhara, Novok, for instance). ActionAid India has witnessed the emergence of counterparts and now is witnessing an increasing number of full-time initiators and participants in its activities. The development of non-governmental agencies and people's organisations could lead to much wider awareness and burden sharing that raise the prospects of long term sustainability.

However, we do have two concerns to bear in mind. First, some organisations are ad hoc in origin, reflecting the will of a few individuals in response to a specific stimulus – all of which may not contribute to institutionalisation. Second, the objectives of many organisations may go beyond the abilities of their members as individuals. Capacity building, collaboration and consultation are needed.

Unlike many other countries in Asia, there exist numerous state and regional institutions for the protection and promotion of human rights, including the National Human Rights Commission, the National Commission for Backward Class, the National Commission for Minorities, the National Commission for Safai Karamcharies, and the National Commission for Women. Apart from national human rights institutions, state human rights commissions, human rights cells, and human rights courts were and are being established throughout the country – West Bengal and Himachal Pradesh, Madhya Pradesh, Jammu and Kashmir, Uttar Pradesh, Assam, etc. Most of the human rights issues taken up by the human rights institutions focus on women's rights, child's rights, child labour, trafficking, etc. With the same focus, ActionAid India and human rights institutions can share their experiences, views and information as well as resources. ActionAid India has also another platform to play and has another channel to interact with government on policy and legal issues.

Moreover, the Supreme Court of India, guarantor of the Constitution, to a certain extent, represents an apparatus of interpretation and enforcement of it. Many of the Court's rules and recommendations could contribute to the efforts of ActionAid India in the implementation of a human rights approach to development.

Indian democracy is far from perfect, but it does create a favourable environment for both human rights and development, and a rights-based approach to development. In the country, there is a "democratic space" for different groups to compete for and participate in the struggle for their rights. Also, in written policies and political discourses, national and state Indian governments commit to advance towards equality and social justices in order to overcome poverty. It is understood that democracy implies a society where a

of equal relationships prevails among its constituents. Development agencies like ActionAid, people's organisations, NGOs, and the rest of civil society should be able to equally enjoy political space.

(B) Challenges

Fighting against poverty requires the implementation and realisation of economic, social and cultural rights as well as political and civil rights. However, the protection and promotion of economic, social and cultural rights at the international and national level is weak and spasmodic, compared to the enforcement of civil and political rights. The primacy accorded to civil and political rights in the Indian Constitution is the case in point. Moreover, the Protection of Human Rights Act 1993 has excluded socio-economic rights from enforceability by the courts in India. In spite of the fact that the Supreme Court has opened up some possibilities for litigating economic and social rights through its "right to life" jurisprudence, it may be worthwhile to explore avenues to make further use of this approach, but the Court rules on a case-by-case basis. Since a rights-based approach is based primarily on the implementation of economic, social and cultural rights, and considering the level of poverty and the number of the poor, development organisations may have to acquire and spend more resources without many tangible results in the short run.

Many of the ongoing violations of rights that affect the poor are deeply rooted in the social structure of the society, particularly the caste system. Despite legal efforts to eliminate "untouchability", it continues to form tremendous barriers in the mindset of the population; in this context, it is not surprising that the law has been so ineffective. The emancipation of "untouchables" seems difficult to take place for the problem remains essentially in the social and cultural realm.

The social and cultural structures also affect the enjoyment of human rights of women. Although the Constitution of India gave women equal rights from the beginning, socio-economic and political inequalities between women and men still exist. Some of the strongest constraints on women are deeply rooted in religion and cultural practice. More seriously, discrimination against women is so deeply rooted that often it is not perceived as discrimination.

From the visits to India, it is evident that most women, in rural areas in particular, are invisible. They are, we learned, unprotected, underpaid, exploited and illiterate. Women are controlled by men, mainly by means of culture.

The deeply entrenched nature of the problems of caste and gender in Indian society pose particularly difficult problems in implementing a rights-based approach.

There remains some degree of confusion concerning the extent to which the transition from needs-based to rights-based programming requires changes. Some are still comfortable with charitable actions, which might hinder the opportunity of the poor to recognise and articulate their values. The rights-based approach requires a drastic change in conceptual thinking with respect to development planning. There is a strong belief among many that "everything" they do is human rights because, after all, it concerns elements essential to those rights – including education, housing, health, food, shelters, etc. The challenge is to make a distinction between provision of rights – or simply providing education, food, etc. – and facilitation for the realisation and enjoyment of rights. It needs a change of mind-set. This change of mind-set represents one of the challenges that development agencies have to undergo.