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PARTICIPATION AND ACCOUNTABILITY: TWO ASPECTS OF THE INTERNAL AND INTERNATIONAL DIMENSION OF THE RIGHT TO DEVELOPMENT

Konrad Ginther*

I. An Overview

During the past three decades or so the world state community has not only increased in numbers of states, it has also undergone diversification and structural transformation. With the accession of formerly dependent colonial territories to formal statehood, a broadening of the spectrum of statehood with respect to levels of socio-economic development and the systems of internal governance can be observed. With new international institutions and regulations and repeatedly changing strategies with respect to development, cooperation and also the constitutional elements of the international legal order, the system of "international governance," is rapidly changing.

As a consequence of the failure of past development strategies and their underlying theories, and in particular after the failure of the theory of modernization, and of development strategies relying mainly on financial assistance and technology transfer as well as on the intervention of the state as a primary economic actor, development theory and practice seem now to turn towards the development of so-called "hidden resources." For example, the development of manpower and human skills as well as on the development of social, political and legal infrastructures.

"Top heavy" theories, i.e. development strategies from top down, are giving way to so called "bottom up" strategies of developing economic, political and constitutional orders in developing countries. The failure to promote public accountability

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and political democratization as part and parcel of an integral development strategy is today perceived as one major reason for the development disaster, which has been acknowledged worldwide, since the mid-eighties. Some have suggested suspension of development-cooperation altogether; others point to the need to embark on a new more participatory development strategy.

A new era of development theory and strategy, emphasising participatory development with the objective of strengthening democratic and accountable government as an indispensable prerequisite to “sustainable development,” was in fact ushered in by the “Declaration of Principles for Development Cooperation,” adopted by the member states of the Development Assistance Committee (DAC) of the *OECD* in December 1989.¹ The groundwork for this was done in the years before in the Working Group on the Right to Development.² Since the “Recovery of Africa”^{3 4} became a subject matter of major concern to the international community, succeeding declarations and enactments on the participatory dimension of a peoples’ right to development, such as the African Charter for Popular Participation, and a first attempt at an inchoate form of an international regime for the surveillance of a new more participatory development strategy, such as the Global Consultation for Africa,⁵ have their root-cause in the African context of development and developing constitutional orders.

Evidently, also the African Charter on Human and Peoples’ Rights, the Banjul Charter,⁶ and the Lome IV Convention⁷ will have to be considered with respect to their impact on the promotion of a peoples’ right to development and with respect to

1. *See below* section 2 a.

2. *See below* section 3 b.

3. *Cf.* United Nations Programme of Action for African Economic Recovery and Development, 1986-90.

4. *See below* section 2 b.

5. *See below* section 2 c.

6. *See below* section 2 e.

7. *See below* section 2 d.

public accountability in the African developmental context. A short reference to the *Case of Peru* should highlight the need for socio-economic and political self-help organizations at the grass-roots level. The legal problems occurring in Latin-America or in Africa are roughly the same.⁸

All the pronouncements on participatory development reflect the idea that “economic development” and “good government” require “empowerment and capacity building of and for the people.”⁹ This requires an enabling environment, which will depend on right policies and assistance by national governments and the international community, as well as by governmental and non-governmental organizations. It also requires an adequate “policy dialogue” in which people matter and the rights of people are respected.

With the promotion of a right to development as a human and peoples’ right under international law, peoples and so-called “intermediary groups” are supposed to gradually acquire participatory rights vis-a-vis their governments, as an expression both of long established basic needs and new demands for the promotion of public accountability and “good governance.”

This raises a number of theoretical problems revolving around the concept of a “peoples’ right to development” and a number of practical questions concerning the improvement of “political governance” with the support of the international community. It ultimately amounts to the question of how to improve “international governance” with respect to present-day developmental needs.

8. See below section 3 a.

9. Cf. Olusegun Obasanjo, Democracy and Good Government. Basis for Socio-Economic Development, lecture delivered at the Vienna Social Issues Forum, October 24, 1991, 8.

II. Recent Declarations and Mechanisms of Fostering Popular Participation in Economic and Political Development

A. *Declaration of Principles for Development Cooperation, DAC-OECD, December 1989*¹⁰

According to this Declaration of Principles, the broader participation of the people in the development process is one of the major principles of the Development Assistance Committee (DAC) for the nineties, and a new major thrust of development cooperation should go into stimulating productive forces through investment in man and through participatory strategies. The member states of the DAC declare to support private initiatives and private enterprise, to strengthen market economies and to support participatory development on the basis of ever more democracy and of a stronger role played by local organizations, auto-administration and protection of human rights.

The Declaration emphasises participatory development and more decentralization of development administration, which relies on national and local non-governmental organizations (NGOs).

The Declaration points out that participatory decision making means: to let the end user participate in design and implementation of development projects through appropriate organizations, to support cooperatives and like associations and NGOs, and to strengthen legislation and adjudication as well as democratic governance as such.

These principles have been agreed upon by the member states of the DAC and their implementation is supposed to be monitored in the course of the so-called "policy dialogue" with developing states' governments, on the one hand, and within development administrations of the DAC member states on the other hand.

10. See OECD (ed.), *Entwicklungszusammenarbeit in den 90-er Jahren, Bericht 1989* (1989), 5ff.

*B. The African Charter for Popular Participation
in Development and Transformation (Charter of Arusha, 1990)*¹¹

The Charter of Arusha was the outcome of the "International Conference on Popular Participation in the Recovery and Development Process in Africa," held in Arusha on the twelfth through the sixteenth of February 1990, and attended by governments, international organizations and above all by a great number of NGOs claiming to promote popular participation. It was conceived as a collaborative effort of African peoples' organizations, African governments, non-governmental organizations and voluntary development agencies from the "North" and the United Nations Agencies, in search for a collective understanding of the role of popular participation in the development and transformation of the region. The Charter of Arusha considers three levels of facilitating popular participation: the role of peoples, the role of African governments and the role of the international community.

It considers popular participation to be both a means to an end and an end in itself; namely an instrument of development and a mechanism allowing peoples "to establish independent organizations at various levels that are generally grass-roots, voluntary, democratically administered and self-reliant and that are rooted in the tradition and culture of the society," so as to ensure community empowerment and self-development.¹²

African governments are called upon to create an enabling environment for popular participation; i.e. to yield space to the people and to promote political accountability by the state to the people, and so to create "a new partnership between African governments and the people in development,"¹³ which the Charter considers to be imperative for the promotion and protection of basic human rights. Governments are urged to

11. Cf. African Charter for Popular Participation in Development and Transformation (Arusha 1990).

12. Cf. ¶ 13.

13. Cf. ¶ 16.

vigorously implement the African Charter on Human and Peoples Rights and other human rights enactments on the universal level.¹⁴

The international community is expected to support indigenous efforts which promote the emergence of a democratic environment and facilitate the peoples' effective participation and empowerment in the political life of their countries.¹⁵ The international community is in particular called upon to support the decentralization of development processes and the active participation of the people and their organizations in the formulation of development strategies and economic reform programmes.¹⁶ For this, autonomous grass-roots organizations should be established to promote participatory self-reliant development, and to increase the output and productivity of the masses.¹⁷

Finally, the Charter stresses the necessity of involving people in monitoring popular participation in Africa on the basis of agreed indicators, such as: freedom of association; democratic institutions; political parties; trade unions; grass-root organizations and professional associations; guarantee of constitutional rights; as well as the number and scope of grass-roots organizations who participate in development activities; producers' and consumers' cooperatives; and community projects.¹⁸

The Charter itself does not yet provide for an international regime with specific institutions to appeal to in case of violation or nonobservance. It proposes, however, that a joint OAU/ECA Regional Monitoring Machinery be established, which is required to submit progress reports on the implementation of the Charter every two years. It is, however, a crucial omission, that the Charter fails to refer to the African Charter on Human and Peoples' Rights as the very international legal framework to

14. Cf. ¶ 17.

15. Cf. ¶ 21.

16. Cf. ¶ 23 C.3.

17. Cf. ¶ 23 B.1.

18. Cf. ¶ 24.

promote and safeguard popular participation by reference to the right of peoples to development.¹⁹

The Charter of Arusha concludes by stating that it is manifestly unacceptable that popular participation be seen as anything less than the centerpiece in the struggle to achieve economic and social justice for all.²⁰ It goes on to say that the new partnership and compact must be forged among all the ACTORS in the process of social, political and economic change.²¹

Yet, the drafters of the Charter of Arusha had "no illusion that the Charter will be embraced overnight by all those to whom it is directed."²² Furthermore, some observers were critical of the Charter itself and of the conference from which it emanated, and suggested taking the Charter and other similar rhetoric at face value.

According to Md. Anisur Rahman²³ only a very small proportion of non-governmental organizations claiming to promote popular participation and peoples' self-reliance can show a track record of truly participation-promoting "facilitation," rather than creating new forms of dependence of the people on NGOs. According to the same source, the absence of some of the best grass-roots initiatives in Africa, and of European NGOs with good track records, was conspicuous. The NGOs represented at this conference had, according to Md. Anisur Rahman, little to show by way of promotion of grass-roots self-reliance. But still, Md. Anisur Rahman also admits there was some value in promoting policy pronouncements, charters, laws, etc., from the top, because it gave the struggle for self-reliance and popular participation by genuine grass-roots organizations greater legitimacy.²⁴

19. Cf. Art. 22, 47, 55, Charter of Banjul; and *see below* section 2 e.

20. Cf. ¶ 30.

21. Cf. ¶ 31.

22. Cf. ¶ 32.

23. Formerly with the Rural Employment Policies Branch, International Labour Organization, Geneva.

24. A communication by Md. Anisur Rahman to the author, in a letter, April 20, 1990.

*C. The Global Coalition for Africa/GCA
(Maastricht, July 1990)*

The GCA was set up by a conference in Maastricht in July 1990 with the participation by almost all African governments, donor agencies and multilateral and international organizations with specific involvement in Africa. The major objective of the coalition was to reach a joint appreciation and recognition by both African governments and NGOs, and the donors of mutual responsibilities.

The Issues Paper, prepared by the Minister for Development Cooperation of the Netherlands for the Maastricht Conference on Africa highlighted the need of a consensus at “policy-making” level and to generate also a consensus on programmes of action. With regard to the latter, special attention was given to endogenous initiatives, broad popular participation, and human resource development, which should give new impetus to African development activities.

The final document on the GCA reads: “Africans would take greater initiative in designing and implementing more effective economic and social programmes, would improve governance and would foster popular participation. The GCA would encourage donors to harmonize their efforts much more effectively and reevaluate technical assistance approaches so that the building of African capacities is assisted and sustained.”²⁵

In regard to the organizational structure, the Plenary Conference, as it was composed at Maastricht, should be regarded as the ultimate governing body of the GCA. The GCA concept embodies the features of an international regime in its inchoate stage: i.e. it includes agreed principles, norms and rules and

25. Cf. Global Coalition for Africa. A note for the diplomatic corps. GCA Secretariat, Washington D.C.: International Square Building, 8050 K Street, NW Suite 295. Washington D.C., 20006, USA.

decision making procedures around which actors' expectations may converge in a given area of international relations.²⁶

The GCA is thus an attempt to establish a global regime with the objective of continuously and systematically reviewing state policies in respect to the promotion of popular participation as an essential element of economic and political development in Africa. Its successful implementation will depend on a broadly based learning and training process, to which the legal profession, both academic and the practicing lawyers, will have to make their contribution in regard to the realisation of a peoples' right to development.²⁷

D. The Lome IV Convention

The declarations and mechanisms for the promotion of popular participation, which have been discussed so far, remain outside the realm of formal legal structures. In contrast, the provisions on popular participation enshrined in the Lome IV Convention²⁸ form part and parcel of an international treaty, the provisions of which are subject to be monitored and surveyed within the institutional framework and according to the procedures provided for in Chapter V of the Lome Convention. According to Art. 5 of the Lome IV Convention development shall be centered on man, the main protagonist and beneficiary of development. To accomplish this the development strategy underlying the Lome IV Convention is — following the OECD principles — geared towards decentralization and popular participation. The unique feature of this exercise in development cooperation is that it relies on a formal legal enactment and commitment under international law.

According to the development policy envisaged under the Lome IV Convention "the role and potential of initiatives taken by

26. This definition by St. Krasner was taken from St. Haggard and W.A. Simmons, "Theories of International Regimes," 41 *International Organization* 491 ff. (1987).

27. See below section 3 on method.

28. A.B.I.L. 229/3, August 17, 1991. C.

individuals and groups shall . . . be recognized and fostered in order to achieve in practice real participation of the population in the development process.”

Development cooperation shall be administered project-wise in a “decentralized cooperation,” i.e. in cooperation with “decentralized public authorities, rural and village groupings, cooperatives, firms, trade unions, teaching and research centres, non-governmental organizations, various associations and all groups and parties that are able and wish to make their own spontaneous and original contribution to the development of the ACP countries.”²⁹

It was critically noted that these provisions appear unlikely to be able to “decentralize” Convention activities and to involve genuine “development agents,” meaning genuine grass-roots organizations. It was also said that the Convention still had no bottom-to-top-approach as an essential guarantee for long term development activities. Furthermore, the Lome provisions for decentralized cooperation had to be applied “within the limits laid down by the ACP states concerned.” One other criticism was that it was extremely difficult to inform local grass-roots organizations and small development agents about the provisions from which they could benefit.³⁰

However, the Lome IV Convention also provides institutional mechanisms for its implementation, which, if properly applied, should effectively remedy at least some of the criticisms advanced. It should be expected that the Commission of the European Communities will continue to take the initiative in giving the provisions of the Lome Convention an operational meaning in support of the promotion of popular participation and democratization, as it has done already by its “Commission Communication to the Council and Parliament,” March 25, 1991 under the title “Human Rights, Democracy and Development Cooperation Policy.”³¹ There, the Commission took the view that

29. Cf. Art. 20 Lome IV Convention.

30. See Lome briefing No. 14, January-February 1990.

31. SEC (91) 61 final, Brussels, 25 March 1991.

democracy cannot be imposed from outside, nor can it take root without domestic structures. The essential task now is to lay the foundations of a deep-rooted lasting democracy that springs from initiatives of the local population itself. Acknowledging the need of grass-roots participation in development and recognizing the link between the latter and democracy, the Commission also stressed the particular need for more in-depth dialogue with partner countries on the subject of development policy.

The Lome process has evolved from its very beginning as an international legal codification of a "North-South" "policy dialogue." It regards the handling of the issues of popular participation and public accountability as subjects of a Euro-African "policy dialogue," the promotion of Human and Peoples' Rights, in particular of a "peoples' right to development" under the Banjul Charter, and vice-versa.

E. The African Charter on Human and Peoples' Rights (Banjul Charter)

When determining the meaning of "people" in the African Charter on Human and Peoples' Rights,³² the founding fathers, it is said, were guided by a considerable deference to sovereignty and other state rights and consequently did not intend to endow peoples or their subgroups with an independent legal standing and legitimacy of their own.

Yet, the meaning to be attached to the notion of a "peoples' right to development" as it appears in the Banjul Charter, is not forever tied to the intention of the "founding fathers" of the African Charter on Human and Peoples' Rights;³³ the more so since the concept of a "peoples' right to development" is by its very nature itself subject to an evolutionary interpretation and application.

32. OAU: CAB/LEG/67/3/Rev, 5.

33. Cf. R.N. Kiwanuka, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights," in *82 American Journal of International Law* 80, 83 (1988).

According to the Banjul Charter one of the main tasks to be performed under the Charter is the promotion of human and peoples' rights;³⁴ and the "right to development" is a "promotional right" *par excellence*. In its preamble, the Banjul Charter refers to the "virtues of African historical tradition and values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights." The preamble speaks here also of "the reality of peoples' rights."

There is now an increasing awareness that the traditional African social and normative culture, in particular a "communal" approach to questions of law and society, constitutes an indispensable component of institution building and development in Africa.³⁵

If the right of peoples to development, as enshrined in the Banjul Charter, is explored as an evolutionary concept and interpreted and developed in the light of the specific African socio-cultural milieu and in response to the everyday needs of those directly concerned, as the ultimately driving force for the formation of law,³⁶ it may well lend itself to provide a legal basis for enhancing popular participation in development and have the effect of promoting political accountability.

34. See on this: K. Ginther, "The Promotion and Protection of Human Rights under the Banjul Charter: Peoples' Right to Development and the Position of 'Intermediary Groups'," in *Gesellschaft für Afrikanisches Recht* (Hg.), *Human Rights, Peoples' Rights. A seminar on the African Charter* (forthcoming, Marburg 1992).

35. Cf. African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation (AAFSAP), UN-ECA, E/ECA/CM. 15/6/Rev.3, 10th April 1989, ¶ 34f.: "Establishing a Self-Sustaining Process of Economic Growth And Development" and A. ALLOTT, *THE LIMITS OF LAW* (1980), 99 ff.

36. Cf. MAX WEBER, *RECHTSSOZIOLOGIE, HGG. UND EINGEL. VON JOHANNES WINCKELMANN* (2. Aufl., Neuwied 1967), 243: "The rational systematic pattern of legal thought may induce the legal mind to dissociate itself largely from the everyday needs of those who are most affected by the law, and so does a lack of their concrete substantiation. The power of the unleashed dictates of pure logics in legal theory and in practice under its sway may in effect largely eliminate the demands of those directly concerned as the driving force for the formation of law." (Translation K.G.) and K. Ginther, Re-defining international law from the point of view of de-colonization and development and African regionalism, 26 *Journal of African Law* (1982), 49-67.

The Banjul Charter does not contain a precise directive to this effect. In Art. 60, however, the Commission is asked to draw inspiration from international law on human and peoples' rights in general and from the provisions of various African instruments on human and peoples' rights in particular. In Art. 61 the Commission is asked to take into consideration, as subsidiary means to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity. These provisions contain a broad reference to international law as it is presently developed on a regional, universal and inter-regional levels.³⁷

The promotion of human rights in general and of a people's right to development in particular requires that the idea of human rights be related to the social fabric and body politic of given states and ultimately to their normative culture and fundamental categories of social ethics. As envisaged by the Banjul Charter the promotion of human and peoples' rights will have to draw also from the law and the legal thought developed by other international institutions, regional, interregional and global. The concepts of a "peoples' right to development" and of enhancing public accountability and democratic governance, raise fundamental theoretical questions.

37. See for more details: K. Ginther (footnote 34).

III. The “Artificiality” of “Weak” States and Some Theoretical Aspects of Enhancing Popular Participation and Public Accountability by Reference to the Right to Development

A. The Artificiality of National Constitutions and the Functions of Peoples’ Organizations: The Case of Peru

In “weak states,”³⁸ as for instance in Peru, peoples’ organizations are, according to Professor Iquiniz,³⁹ increasingly taking over functions normally ascribed to the state. These peoples’ organizations are formed to meet the basic needs of the population and to secure their survival, or to guard the local population against terrorist or state repression, and also to increase the peoples’ capacity for self-management and self-help (planning committees, housing, or consumer committees).

The “artificiality” of national constitutions derives — as Iquiniz points out in respect to Peru — from the poor participation of the people in the process of their interpretation. A low level of democratization and a lack of peoples’ participation in the decision making process engenders “overbureaucratization” of states. Therefore, the participation of the people in the process of constitution building and in the formation of administrative structures is all important, while the “idleness of the state” necessitates the takeover of traditional state functions by peoples’ organizations.⁴⁰

38. Cf. R.H. Jackson/C.G. Rosberg, *Why Africa’s Weak States Persist. The Empirical and the Juridical in Statehood*, in: 35 *World Politics* 1-25 (1982). The concept of “weak state” was introduced by GUNNAR MYRDAL, *MANIFEST UBER DIE ARMUT IN DER WELT* (Frankfurt 1970), 25 ff. With regard to the dependent weak African state see: F. NUSCHELER/K. ZIEMER, *POLITISCHE HERRSCHAFT IN SCHWARZAFRIKA* (München 1980), 148 ff.

39. Cf. J. Iquiniz, *Peoples Participation and the Right to Development*, Paper presented at the “Global Consultation on the Right to Development as a Human Right at the Human Rights Center,” Geneva, 8-10 January, 1990 (original Spanish); HR/RD/1990/ CONF.17.

40. Cf. Iquiniz (footnote 32).

The Declaration on the Right to Development by the General Assembly of the UN⁴¹ lends itself, according to Professor Iquiniz, to support group rights assumed by peoples' organizations in Peru on their own. The inclusion in the human rights' canon of collective rights of groups which serve an indispensable function in developing democratic governance and public accountability constitutes, in view of the many impediments to popular participation, be it the power structure, the institutional arrangements for peoples' participation in a given state or the dependency on the international environment, a substantial amendment of the Universal Declaration of Human Rights.

*B. The Declaration on the Right to Development by
General Assembly of the UN⁴²*

The Declaration on the Right to Development states in Article 1, the "right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." According to Article 2 ¶ 3 of the Declaration, the appropriate national development policies of states should aim at the constant improvement of the well-being of ". . . all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom." Article 8 calls upon states to "encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights."

41. See the following section.

42. Res. 41/128. The Declaration was adopted by a recorded vote: 146-1 (USA)-8. Cf. H. Petersmann, *The Right to Development in the United Nations: An Opportunity for Strengthening Popular Participation in Development*, in: J. Jekewitz et al. (eds.), *DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG*, FESTSCHRIFT K.J. PARTSCH (Berlin, 1989), 125-140.

The Declaration does not, however, give guidance on how to translate the phrase, “all peoples are entitled to participate in development,” into operational legal terms.

In his discussion of the “Working Group of Governmental Experts,” the United States delegate Peter L. Berger took a common sense approach of defining the meaning of ‘peoples’ based on empirical evidence and on what the sociologist calls “mediating structures.” Berger considered, as holders of a peoples’ right to development:

various forms of “collectivities other than the State” which are “crucial for development”: Even if a system does not permit private enterprise by individuals, the economic effort of families, villages, various traditional groupings (such as the groupings of kinship, tribe or ethnicity) and more modern forms of association (cooperatives and the like) are the true carriers of development. In sociological parlance, all such collectivities have been subsumed under the category of “mediating structures” — that is, collectivities that stand between and thus mediate between the individuals and the macro-structures of modern states. These “mediating structures” are essential to development under any system, be it a market or command economy; language which obscures their role *ipso facto* obscures the real dynamics of development, by the same token, and very importantly, if one talks about collective rights in the area of development, one must also bear these collectivities in mind.⁴³

This approach relied, as Berger pointed out on another occasion, on the “deeply communal, non-individualistic character” of non-Western cultures as well as on the mediating structures as “the soil from which political democracy may grow.”⁴⁴

Peter Berger pointed thus to the broadening spectrum of statehood, embracing today so-called developing states with their specific historical and socio-cultural background. The promotion of a right to development as a peoples’ right, if seriously pursued,

43. Cf. General United States approach: Contribution by Prof. Peter L. Berger, United States Expert, 25 November 1981; E/CN.4/AC.34/WP13 (26 November 1981).

44. Cf. P.L. Berger, “Democracy in Today’s World,” in: *United States Information and Communication Agency (ed.), Dialogue 2/1984*, 2 ff. (4, 6).

cannot avoid addressing the issue of developing constitutional orders within developing societies of Third World countries.

Berger's position recalls liberal theories of constitutionalism, such as the von Hayek's idea of a spontaneous social order.⁴⁵

Although Berger is suggesting for collectivities what civil rights do for individuals, namely to create freedoms of action, he does not go as far as to reject statism altogether in the promotion of human rights, as, e.g., Richard Falk suggests separating the people from the state and entrusting them with a legitimacy of their own.⁴⁶

C. The "Inner Dimension" of the Right to Development and Some Fundamental Questions of Theory

To speak of the "inner dimension" of the right of peoples to development⁴⁷ means to address its policy function on the internal level of national constitutional orders. It refers to rights of peoples under international law to create an enabling legal and political environment for popular participation and grass-roots initiatives, so as to allow them to make a full contribution to the economic and political development of the society at large. This raises fundamental questions concerning the theory of law and state.

(1) A Provisional Catalogue of Questions

A first group of questions concerns the basis of the validity of claims of a right to development. Is the validity of a claim of "intermediary groups" to participate in the economic and political development of their society or state to be judged in political

45. Cf. J. GRAY, *HAYEK ON LIBERTY* (2nd ed.), 27 ff.

46. Cf. R. FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* (1981), 189 f.

47. Cf. Ph Künig, *Die "innere Dimension" des Rechtes auf Entwicklung. Rechtspolitische Überlegungen zur Inpflichtnahme von Entwicklungslandern (with an English Summary)*, in: *LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA* 383-400 (1986).

terms only, when the specific participatory rights claimed have not yet a basis in the positive law of the legal order of the state concerned?

Or, are the rights claimed by a people, i.e. mostly its “intermediary groups,” “inherent rights” of the claimants contained in a “general principle of law,” having its basis of validity in general international law? Or, are the participatory rights claimed under the title of a right to development simply the logical prolongation of the international law principle of self-determination, while resolutions of the United Nations give only precision to an existing principle of international law?

Another group of questions concerns the issue of who is supposed to or obliged to respond to the claim of a right to development, and under what procedure.

Does the right of peoples to development entitle the people concerned only to claim a right to certain conduct from their home state? Or, can a people or “intermediary groups” rightly claim under their right to development support from the international community, i.e. third states, international organisations and NGOs? Are third parties entitled or even under certain conditions obliged to give a certain measure of support?

What are the preconditions in procedural terms for third states to assist in creating an enabling environment for popular participation? Can the international community or any single state intervene only under an international regime agreed upon in advance? Or, is any support by third states to the claims of participatory rights under the title of a right to development always admissible under the title of “policy dialogue” within any given framework of development cooperation?

The last and most important set of questions concerns, however, the issue of which people and which groups can claim a right to development in general, and to specific participatory rights in particular, and, what are the criteria for defining and ascertaining the recipients of a right to development in practice?

(2) *On the Theory of Popular Participation: Two Expert Opinions*

The movement of genuine popular participation and grass-roots self-reliance is growing and finds support — in any case rhetorical support — in policy pronouncements and legal enactments “from the top,” such as in the case of the African Charter of Human and Peoples’ Rights and of the UN Declaration on the Right to Development. More pronouncements to the same effect have been registered in recent years.

Yet, at the same time the policy of governments is to maintain control; and the move towards promulgation of the rhetoric of participation while disadvantaging genuine grass-roots movements has already been called alarming.⁴⁸

The essence of genuine participation are organic entities created by the people for collective operations, and shaped and patterned according to their design.⁴⁹ According to Tilikaratna, self-reliant popular participation in rural development, and the pursuit of an autonomous course of action require a combination of material, intellectual, organizational and management capabilities. The requirement of organizational and management capabilities implies the building of organizations and institutions over which people have effective control and which they can use as instruments of action. Popular participation will thus amount to structural changes through which peoples’ access to material and intellectual resources will be improved.

Oakley distinguishes between participation as a technical means to implement a development project more efficiently — he calls it the passive form of participation — on the one hand, and participation as a process in which confidence and solidarity between rural people are built up — the active form of

48. Cf. Md. Anisur Rahman, letter to the author.

49. Cf. S. TILIKARATNA, *THE ANIMATOR IN PARTICIPATORY RURAL DEVELOPMENT* (Concept and Practice), (IL, Geneva, 1987), 5 f. See further IL (ed.), *The participation of the rural poor in development. Releasing the creative energies of rural workers* (IL, s.a.) and IL (ed.), *Promoting People’s Participation and Self-Reliance* (Proceedings of a Workshop of Trainers in Participatory Development, Philippines, August 1988), (IL 1988).

participation — on the other. While the former, the passive form of participation, amounts to a managerial technique, the latter, the active form, is a technique to enable rural people to have more direct involvement in rural development. The critical elements in this process are awareness raising and organization building: the two fundamental bases for effective participation.⁵⁰

Awareness raising and organization building will have to be combined with a learning process and a “search for new knowledge”: “The growing complexity suggests that there are natural and social developments which we cannot adequately explain without generating new knowledge.”⁵¹

One of the areas that require the generation of new knowledge is the application of science and technology to development; another area is the application of legal science to development,⁵² in particular to “popular participation.” If the international lawyer, who turns his attention to the legal status of both people and organizations of popular participation under international law, is to make any practically meaningful contribution to enhancing democratic governance and public accountability in a developmental context, he or she will have to accept, with the notions of “intermediary groups” and “parallel structures,” a conceptualization of a developmental situation which

50. Cf. P. Oakley, “People’s Participation in Conservation: A Review,” in: *SADCC Soil and Water Conservation and Land Utilization Programme, People’s Participation in Soil and Water Conservation*, Report No. 10 (April 1987), 1-43, 3 ff.

51. See on this: M. Nwagboso, “The Agricultural Crisis,” in: *West Africa*, January 30 — February 5, 1989, 136 ff. on A. Mafeje’s Critique of the Report by the Food and Agriculture Organisation (FAO, *African Agriculture: The Next 25 Years* (1986), in: CODESRIA Vol. XII, No. 2 (African Development, 1987).

52. There is an abundant literature focussing to a large extent on the issue of human rights; cf. International Legal Center (ed.), *Law and Development. The Future of Law and Development Research*. Report of the Research Advisory Committee (International Legal Center, New York 1974); International Commission of Jurists (ed.), *Development, Human Rights and the Rule of Law* (Oxford etc. 1981); *id.* (ed.), *Rural Development and Human Rights in South East Asia* (Penang, 1981); see for the more general aspects: R. Luckham ed.), *Law and Social Enquiry: Case Studies of Research* (Uppsala/New York 1981); C.J. Diaz et al. (eds.), *Lawyers in the Third World: Comparative and Developmental Perspectives* (Uppsala New York 1981); in particular: Z.J. Diaz and J.C.N. Paul, *Observations on Lawyers in Development and under Development*, *ibid.*, 337-361 and C.J. Diaz and J.C.N. Paul, *Lawyers, Legal Resources and Alternative Approaches to Development*, *ibid.*, 362-380.

is characterized by a dichotomy between state and people, a situation which bears the seeds of fragmentation as well as growth potential for democracy through "government by partnership."⁵³

(3) The Role of Lawyers and the Question of Method

The lawyer, interested in looking to the law and legal processes inherent in institution building through popular participation, will first have to open his "doors of perception" to spontaneous popular initiatives as driving forces for the development of the law, and for developing sustainable constitutional orders, which allow for democratic participation. Yet, when characterizing institutions of popular participation in normative terms, he will have to transcend the bounds of the normal discipline of law and will have to become a participant in popular participation himself; i.e. he or she will have to risk, what is called participatory or action research.⁵⁴

With regard to legal theory, the theory of "institutional positivism"⁵⁵ addresses institutions as societal arrangements, in which certain interactions or forms of cooperation are pursued as particularly desirable or even indispensable efforts of collective action.

According to the theory of "institutional positivism," law also comes into existence spontaneously through emerging institution-building factors, or "from the bottom up."

According to this theory, the normative nucleus of spontaneous institutions lies outside the legal order of a given state and its regulatory institutions. Spontaneous institutions will serve their function of promoting public accountability and they will

53. Cf. Charter of Arusha (footnote 11), ¶ 16.

54. Cf. IL Guidelines on Popular Participation, Supplement to the IL's Role in Promoting People's Participation in Rural Development, DGA/TEC (23.3.1984).

55. Cf. O. Weinberger, "Reine oder funktionalistische Rechtsbetrachtung?" in: O. Weinberger und B. Krawietz (Hg.), REINE RECHTSLEHRE IM SPIEGEL IHRER FORTSETZER UND KRITIKER, (1988) 217 ff. (245 f.). See further: D.N. MACCORMICK AND O. WEINBERGER, AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM (1986).

gradually grow through a process of legalization into the body of a given national legal system, however, only if they find the attention and the support of the academic and the practicing lawyer from their inception. For this to occur, the ideal of methodological purism will have to be abandoned, in order to opt for a “[m]ethodological pluralism which, although it obviously sacrifices parsimony and elegance, more than makes up for it by affording balance and comprehensiveness” Methodological pluralism seeks to be faithful to the observed pluralism of international political life.⁵⁶

IV. Conclusion: The Need for Adequate Supervisory Mechanisms and for More Research

In order to enlist an adequate support of international law for promoting participatory rights of peoples one will have to take into account that international law is still conceived of as the legal order regulating primarily state conduct on the basis of consent. It is, however, equally true, that states find themselves more and more obliged to respond to the demands of sub-national actors, i.e. peoples and “intermediary groups,” and to submit to multilateral supervisory mechanisms in respect both to their conduct of foreign and internal policy. In fact, the institutional framework of the OECD, of the Lome IV Convention and of the African Charter on Human and Peoples’ Rights provide a network of supervisory mechanisms in respect to the implementation of the right of peoples to popular participation in development, and in developing democratic constitutional orders. A growing network of supervisory mechanisms will provide increasing opportunities for spelling out the right of peoples to development in operational terms; it will also broaden and strengthen its basis of legitimacy.

When Pieter van Dijk and Jan Rood presented some years ago, on the occasion of the 350th anniversary of the University of Utrecht, their model of supervisory mechanisms as instruments of

56. Cf. Pieter van Dijk et al. (ed.), *RESTRUCTURING THE INTERNATIONAL ECONOMIC ORDER: THE ROLE OF LAWYERS* (1987), 135 ff. and 259 ff.

restructuring the International Economic Order, it was suggested that they should include in their research also the impact of national actors and national policy on international law and international supervision. The important role of individuals and companies in initiating national and international supervisory procedures was then pointed out; and it was said, that the review and corrective functions of mechanisms of supervision in respect to programmatic principles encompassed significant creative aspects.⁵⁷

This debate on the role of law and lawyers in development needs to be continued, focusing now on the role of peoples and "intermediary groups" in development and on developing public accountability and democracy.

Under the title of the right of peoples to self-determination and development, the international legal order's concern and the international lawyer's interests extend today by necessity also to fields which lie outside the law *stricto sensu*. The promotion of a right of peoples to participation in development means also an encroachment on what was hitherto considered to fall into the domain of "domestic matters" and was shielded by the "principle of nonintervention."

However, the promotion of participatory rights of peoples constitutes today a legitimate subject of the "policy dialogue" between development partners. One major objective of development and development cooperation today is to develop the so-called "hidden resources," i.e. human skills, social and legal infrastructures. To accomplish this, still more research is needed on popular participation and on "Action at the Grassroots,"⁵⁸ in order to attempt a more reliable answer to the catalogue of questions outlined above⁵⁹ or, as the case may be, to dismiss them.

57. R.H. Jackson, "Quasi-States, Dual Regimes, and Neo-Classical Theory: International Jurisprudence and the Third World," 41 *International Organizations*, 519-549, 548 f. (1987).

58. See A.B. Durning, "Action at the Grassroots: Fighting Poverty an Environmental Decline," *World Watch Paper* 88 (January 1989).

59. See above section 3 c, aa.

