GOVERNING GLOBALIZATION
IN SOUTH ASIA
THROUGH A LEGAL PRAXIS OF HUMAN RIGHTS,
DEVELOPMENT AND DEMOCRACY

A thesis submitted in fulfilment of the requirements for the degree of

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by

Suranjika Erangani Tittawella

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ABSTRACT

This doctoral thesis in law seeks to understand, and begin to remedy, the immense and avoidable poverty that disenfranchises at least 30 percent of the world's most populous region. Defining South Asia as Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka, the study analyses the multidimensional nature, historical origins and modern dynamics of both this material poverty and poverties of human rights, democracy and development. Both critical analysis and creative response are framed within legal history, human rights jurisprudence, constitutional and administrative law, comparative law and public international law, but the author draws extensively on political economy and history, and partially on philosophy, and cultural studies.

Chapter 1 traces the Western evolution of the universal human rights regime, first "globalized" in 1948 by the Universal Declaration of Human Rights. It also traces South Asian sociopolitical and religious articulations of human dignity and limitations on legitimate power through the ages. Mostly contrary to culturally relativist claims, South Asia's human rights needs are found to be well served by a genuinely universalist regime including justiciable economic, social and cultural rights as inseparable from civil and political.

Chapters 2 and 3 survey the historical "globalizations" that have impacted on South Asia. Although globalization is shown to be a neutral phenomenon, the author identifies the insidious contemporary propagation of a particular neo-liberal ideology as being globalization's inevitable and optimal form. The study analyses this propagation by the International Financial Institutions the World Bank and International Monetary Fund, acting through Structural Adjustment Policies and only partially corrective Poverty Reduction Strategy Papers. Neo-liberalism supposedly unshackles benign market forces from distorting governmental rules to create spontaneous growth that trickles down to the poor; in fact it employs its own rules to privilege the already wealthy, especially Western capital and transnational corporations (TNCs).

The thesis urges South Asia to "govern globalization" pro-actively, seeking the virtuous circle of human rights, plural democracy and equitable development.

Positive signs have already included national membership in, and constitutional enshrinement of, universal human rights norms, and certain efforts of civil society and non-governmental organizations, fostered at times by activist judiciaries.

Chapter 4 nevertheless catalogues overriding failures to internalize plural democracy and the rule of law, leaving rights nominal and democratic structures hollow. Governments have been obsequious to neo-liberal hegemony, insouciant to their underclasses and exploitative of religious schisms in appeal to tyrannous majoritarianism. The South Asian Association for Regional Co-operation is shown as an inadequate response to the region's multidimensional poverties.

Adapting instead the best practices of the Council of Europe, the Organization of American States, the African Union, and the British Commonwealth from Chapter 5, Chapter 6 details a "South Asian Union for Human Rights Development and Democracy" to replace SAARC. This new regional response complements global human rights norms and offers South Asia solidarity in confronting neo-liberalism, and holding TNCs, IFIs and especially their own governments accountable to the rule of law, equitable development, deep democracy, wide human rights, and "larger freedom" in peace and security.

Acknowledgments

The interest in seeking a pragmatic solution to deficits of human rights, democratic governance and development in South Asia was kindled as a student of the Masters programme in Law and Development at the University of Warwick. Undertaking a doctoral thesis on issues relating to South Asia in the relative isolation of New Zealand (despite the interconnectedness that globalization provides) was on reflection a daunting task. I owe a deep debt of gratitude to Professor Margaret Bedggood and Dr Claire Breen for their commitment, intellectual stimulation, guidance and especially their patience that facilitated the completion of this thesis. Professor Bedggood's passion for human rights activism, yet quietly pragmatic approach to legal theory and human rights jurisprudence, influenced formulation of a praxis that is efficacious and relevant. Dr Breen's well-constructed discussions, astute comments and attention to detail have enriched the writing of this thesis.

Aristotle in *Nichomachean Ethics* observed that one cannot have many "true" friends in the fullest sense of the word as those who loved what is truly good and "wished it …for the other for the other's own sake". I consider it my privilege to be the recipient of the true friendship of Hilary Smeeton, who cared for my wellbeing with unequivocal kindness especially in situations when I struggled between work and family and when the completion of the thesis appeared a far too distant goal.

I am truly grateful for Dr Rosemary Tobin's encouragement and relentless insistence that I complete the thesis within a decent timeframe. Without her daily imperial commands to "let it go", this work would have remained uncompleted for longer. My colleagues at the Law Faculty office at Auckland have being remarkably tolerant and cooperative during the past year in particular and I thank them for their stoic acceptance of my sudden decisions to be "out of action" on some days. David Thompson with great diligence and enthusiasm devoted much time and energy to proof-read the thesis for submission.

Working fulltime, caring for two young children and studying would not have been possible but for the unwavering support and assistance of my family and

This thesis is dedicated to my uncles: Noel, Cuda, Bertram and Ivor

for giving me the greatest gifts a child could ever have ~

a thirst for knowledge and a love of reading….

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Chapter Five **REGIONAL AND CROSS-REGIONAL PARADIGMS AROUND THE GLOBE TO PROMOTE HUMAN RIGHTS AND DEMOCRACY**

Chapter Six   **THE WAY FORWARD: A NEW, AUTOCHTHONOUS REGIONAL PRAXIS IN SOUTH ASIA FOR PROMOTING HUMAN RIGHTS, DEMOCRACY AND EQUITABLE DEVELOPMENT**

Abbreviations

CoE   Council of Europe

ADB   Asian Development Bank

AfDB   African Development Bank

AU   African Union

BWI   Bretton Woods Institutions

EBRD   European Bank for Reconstruction and Development

EPZ   Export Processing Zone

FDI   Foreign Direct Investment

HIPC   Heavily Indebted Poor Countries

IADB   Inter-American Development Bank

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IBRD   International Bank for Reconstruction and Development

IDA   International Development Association

IEG   Independent Evaluation Group

IMF   International Monetary Fund

LDCs   Less Developed Countries

MNC   Multi National Corporations

OAS   Organisation of American States

OP   Operational Policy (statement)

OPCS   Operations Policy and Country Services

PA   Poverty Assessment

PER   Public Expenditure Review

PFM   Public financial management

PRSC   Poverty Reduction Support Credit

PRSP   Poverty Reduction Strategy Paper

PSIA   Poverty and Social Impact Analysis

SAARC   South Asian Association for Regional Coorporation

SAP   Structural Adjustment Programme

SAR   South Asian Region

TA   Technical assistance (nonlending)

INTRODUCTION

"Among the most painful manifestations of social injustice in India is the abject poverty of a large number of its people. A significant proportion of our citizens do not get enough to eat, do not have a secure roof over their heads or enough clothes to cover their bodies with.[...] Their self respect, their dignity, their rights – all become subservient to the predominant need for survival. But this great Indian poverty is not a poverty among shortages, it is a poverty among plenty.
India's great poverty, is therefore, not a poverty of resources.
It is a poverty of justice."[1]

This is an empirical study of a region[2] that is dominated by irreverence to pluralism, lackadaisical democratic governance, unequal development patterns, denial of human rights and imprudent policy formulation. Kothari's observation of the poverty of justice is applicable not only to India but to the whole South Asian region. With 30.8 per cent of the population living below the poverty line of US$1 a day, South Asia subjects its people to the worst kind of human deprivation.[3] Misplaced priorities of economic growth have segmented the people of South Asia, with the poorest being disenfranchised from the political and economic spheres, in violation of their civil and political rights as well as their economic, social and cultural rights.

The multidimensional quality of poverty is widely acknowledged.[4] In particular, Sen[5] has articulated that poverty can no longer be perceived as a purely economic phenomenon, but that inequitable and avoidable lack of opportunities, assets, and entitlements which results in the reduction of a person's basic human capability is equally a form of poverty; to reprise Kothari's phrase, it is a poverty of justice in the widest sense, and a poverty among plenty.

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The ubiquitous wealth at hand in South Asia in terms of manpower, natural resources, established (albeit dysfunctioning) structures of democracy, and a civilizational heritage with complex and advanced knowledge systems, has not been exploited positively to eradicate poverty or foster human-centred development. The culture of dependence, an inherited trait from a colonial past, has instead made the South Asian subcontinent reliant on the developed world for intellectual guidance and stimulation. Reliance on International Financial Institutions (IFIs) for policy formulation and direction for the region's development drive is a manifestation of that dependence.

The contemporary developmental trajectory of the region has been underpinned since the late 1970s by neo-liberal globalization. A scrutiny of the impact of neo-liberal globalization in South Asia and a proposed solution through a new regional praxis that addresses issues of governance of globalization, development, democracy and human rights — precisely towards remedying the poverties identified above in all these areas — is the central focus of this thesis. This study acknowledges the positive contributions of globalization as it offers new avenues for global integration and interaction, an exchange of knowledge and ideas, and opportunities for growth. However, the obsequiousness displayed by the South Asian states towards the IFIs and their policy formulation based on neo-liberal tenets has emasculated the capacity of South Asia to determine its own terms of engagement with globalization.

This study explores a situation that must compel the South Asian region to grapple with poverty, dysfunctional democracy, and a lack of respect for human rights and the rule of law. Through this exploration the study advocates a functional praxis that would address the dilemmas that contemporary South Asia continues to encounter.

Chapter 1 of this study surveys the historical evolution of the notion of human rights and the development of the contemporary universal human rights paradigm. This thesis advocates the hypothesis that the idea of rights is not an untranslatable "Western" construct and that comparable or at least compatible notions of justice, fairness, human dignity, compassion for human frailty and respect for the inherent worth of human beings were present in both ancient Western and Eastern

philosophical and religious articulations. Chapter 1 also discusses the role of the state and the individual, both essential ingredients of the contemporary mainstream discourse on human rights, and examines the impact of globalization on the capacity of the nation state to protect and promote human rights.

Chapter 1 also scrutinizes the legitimacy of the assertion of cultural relativism by, in particular, the East Asian states, and the relevance of that concept to South Asia. The reliance on what can justifiably be called the "spirit of human rights" by the independence movements in South Asia, and the utility of that spirit as a weapon to fight against dehumanizing cultural and social practices, granted the human rights paradigm a special moral authority within South Asia. The legitimacy of this paradigm was further reinforced by the inclusion of human rights charters into the letter of constitutional structures of the newly independent states in South Asia. This chapter, however, reiterates the existence of a wide chasm between the theory of human rights and its practical implementation in South Asia. It examines how the international treaty obligations relating to human rights and the constitutional guarantees thereof have been compromised due to economic, political and social exigencies, which this study identifies as a direct corollary of neo-liberal globalization. Chapter 1 identifies Social Action Litigation (SAL) as a phenomenon that has emerged as a response to the impotent mechanisms that are in place to protect human rights in South Asia. The chapter acknowledges the resourcefulness of this response and its considerable, though uneven, contribution towards compensating for that impotence, but the study also notes that SAL cannot be a substitutive means of human rights adjudication, nor should it have to. Its promise would be more fully realized in synergy with the new regional mechanism proposed in Chapter 6.

Chapter 2 follows the historical evolution of globalization and the concept's ramifications in a historical context, particularly its negative impact during the British Raj. Also discussed are contemporary theoretical analyses of globalization, stripping it back to lay bare its essentially neutral and negotiable character, but analysing how the concept's contemporary articulations and hard-sells have nevertheless indicated a definite skewing towards the neo-liberal brand. The chapter acknowledges that globalization has created irretrievable interdependent global financial and communication networks, and power relations whereby the

developing world has felt compelled to integrate globally on terms determined by those skewed neo-liberal dictates.

Chapter 2 examines the evolution of the nation state in South Asia and the way in which globalization has mutated its orthodoxy. The chapter acknowledges the emerging resentment towards the iniquitous packaging of globalization, particularly its hard selling as a non-negotiable neo-liberal unit. In this context, it traces the evolution of the anti-globalization movement and interrogates its capability to evolve an alternative vision based on equity and justice. The chapter concludes with the need for South Asia to determine its own terms of engagement with globalization in order to obtain the stripped-back concept's inherent potential benefits.

Chapter 3 observes that South Asia's desire for "development" is not new but has assumed several characteristics within the last six decades, contemporary globalization being another milestone of that journey. The chapter also identifies the main catalysts of globalization as the major IFIs: the World Bank (WB), the International Monetary Fund (IMF) and slightly more peripherally the World Trade Organization (WTO). Transnational Corporations (TNCs) are identified as the prime beneficiaries of contemporary globalization and this chapter discusses their considerable exploitation of influence and power over the developing world.

The enormous human cost of the neo-liberal brand of globalization implemented through the instrument of Structural Adjustment Policies (SAPs) and the only partially corrective Poverty Reduction Strategy Papers (PRSPs) that followed them are the central focus of Chapter 3. This chapter discusses numerous empirical examples of how structures of poverty and marginalization became entrenched as a direct consequence of policies that accorded primacy to economic growth rather than human wellbeing. The chapter examines how SAPs and PRSPs have eroded state sovereignty, rendering the state impotent to formulate people-centred developmental policies, and how these same instruments instead make states accountable to the IFIs. The rejection of these peoples' wishes and aspirations at the policy formulation stage by mainstream neo-liberal globalization has challenged the fundamental tenets of universal human rights and rendered meaningless the elaborate structures in place nationally to promote and protect

human rights and democracy. However, quite paradoxically, the donor-driven aspect of neo-liberal globalization has benefited civil societal mobilization and the drive for good governance within South Asia. These positive manifestations will be among the tools utilized in the proposal of a regional praxis for South Asia in Chapter 6.

A distinct aspect of the debate concerning marginalization and endemic poverty in South Asia is the region's democratic deficit and poor governance. Chapter 4 explores the cyclic effect of neo-liberal globalization as it discusses the dysfunctional democratic governance, the militarization of the region, and the nexus to economic deprivation and marginalization. Increased state-sponsored violence will be put forward as an expression of the sense of insecurity of the state, which has lost its legitimacy to govern amidst the negative repercussions of neo-liberal globalization. This study reiterates that such violence also compromises civil and political rights.

The increasing crisis of legitimacy to govern in the region, due to deteriorating democracy and human rights standards, prompts this study to explore alternative arrangements that would re-establish functional democracy, foster human rights and offer alternative mechanisms to determine developmental policy formulation in South Asia. The purpose of scrutinizing the role and function of the South Asian Association for Regional Cooperation (SAARC) in the second half of Chapter 4 is to establish whether the SAARC offers a viable alternative vision of standard-setting and governance. The chapter concludes that the SAARC cannot infuse member states with genuine commitment to human rights, the rule of law, democracy and sagacious, human-centred policy formulation.

Chapter 5 turns to the search for alternative visions to ameliorate South Asia's sociopolitical and economic dilemmas. The author focuses on regional and transnational innovations and structures that have reduced poverty and fostered economic, social and cultural rights, democratic governance and human-centred development: the regional arrangements in Europe, the Americas and Africa; and the Commonwealth Organization's promotion of democratic governance. The chapter concludes that a South Asian solution must be both tailored and autochthonous.

Chapter 6 concludes the study by advocating such an autochthonous praxis to replace the dysfunctional and outdated SAARC. The proposed South Asian Union on Development, Democracy and Human Rights (SAU) will contain regional mechanisms to ensure democratic governance nationally. The SAU will address inequitable policy formulations impinging upon the rights of the people through a legal regime promoting and protecting human rights in the region, which would in turn enhance both the legitimacy and the efficacy of the universal human rights regime. In this regard it will revitalize existing, yet ineffectual and dysfunctional, national human rights commissions and create new commissions in states yet to establish them. Through the Office of the Ombudsman Against Corruption, the SAU will also promote accountable governance and initiate strategies to end the culture of corruption pervading South Asia.

This study reiterates that human rights, development and democracy are synergistically intertwined in a symbiotic relationship, which Sen envisions as "development as freedom":[6]

> Development can be seen……as a process of expanding the real freedoms that people enjoy. Focusing on human freedoms contrasts with narrower views of development, such as identifying development with the growth of gross national product, or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization.

The enormous human cost of poor policy formulation that focussed on the "narrower views of development" and irresponsible governance of globalization in South Asia are highlighted through the poverties of democracy, human rights and democratic governance. The proposed praxis of regional collaboration is aimed at creating normative standards relating to human rights, democratic governance and development, which in turn will foster peace, stability and prosperity in South Asia, thus squarely addressing the region's poverties in their largest sense.

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CHAPTER 1

THE DISCOURSES AND REGIMES OF
HUMAN RIGHTS IN SOUTH ASIA AND THEIR GEO-HISTORICAL
BACKGROUND

*"The agenda of human rights still in the making, such as the human rights of indigenous
people, the human right to sexual orientation and conduct, and the human rights of people
with disability, more than fifty years after the Universal Declaration of Human Rights,
testifies to some originary practices of exclusion in the very production of international,
regional, and national human rights norms and standards. The politics of exclusion
in the making of human rights cuts deeper than the exigencies of politics of
intergovernmental desire in the making of human rights may suggest."*[1]

1.1   Introduction

The Introduction to this thesis noted the abject poverty in much of South Asia and its
intimate link to the denial of human rights. It also highlighted how contemporary
globalization has offered opportunities for worldwide trade and financial integration.
Globalization, moreover, has created new patterns of interaction between people and
their states. Globalization promised unprecedented material progress for all, yet has
delivered compounded economic marginalization and poverty. Legal and political
structures in South Asia aimed at protecting and enhancing human rights, particularly
socioeconomic rights, and eradicating all species of poverty, appear inadequate for
several reasons. It is against this complex scenario that an examination will be made
of the mainstream discourse on human rights in South Asia and of the human rights
regimes operating in the region. The study will investigate the geo-historical
background of those regimes, particularly in the West, and the legitimacy and
efficacy of their current incarnations.

The present chapter therefore traces the evolution and eventual confluence of rights
from both ancient Western and Asian political and religious thought. Contemporary
"human rights" are commonly regarded as a construct of Western political and

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[1] Upendra Baxi "Politics of reading Human Rights: Inclusion and Exclusion within the production of
human rights" Saladin Meckled-García and Basak Çali (eds) *The Legalization of Human Rights
Multidisciplinary perspectives of human rights and human rights law* (Routledge, Oxford, 2006) 182.

religious ideology which gained universal currency after World War II.[2] However, the tributaries of reasoning that fed into that mainstream, such as the notions of justice, fairness, human dignity, compassion for human frailty and respect for the inherent worth of human beings, flowed from both ancient Western and Eastern philosophical and religious thought, and the first part of this chapter maps that progression.

In discussing the roles of the state and the individual — both essential ingredients of the contemporary mainstream discourse on human rights — this chapter assesses the viability of those roles in South Asia in the context of globalization. It also queries assertions of cultural relativism within the human rights discourse highlighted by mainly the East Asian states and that concept's legitimacy in South Asia. Despite the allegations of Western cultural imperialism levelled against the international regime of human rights, the reliance on the "spirit" of human rights by the African Americans in their struggle for equality,[3] by those who fought for independence from colonial rule, and, more recently, in the fight against apartheid in South Africa,[4] has created a universal legitimacy for the idea of human rights transcending cultural and ethnoreligious boundaries. This position is further reinforced by the inclusion of human rights charters into the constitutional structures of many states including in South Asia, as a corollary of the colonial legacy and of the assertion of a new, post-colonial identity.

Empirical evidence nevertheless shows a wide chasm between the accepted theoretical legitimacy of human rights and the reality of their practical implementation in South Asia. In the last sections of this chapter an examination of the international human rights obligations of the South Asian states and the efficacy of the national human rights structures that are in place to realize those obligations will be made. The discussion highlights the essential dichotomy between the

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[2] This thesis employs the word "contemporary", with respect both to human rights and to economic globalization, specifically to refer to the period since World War II.
[3] Carol Anderson *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (Cambridge University Press, Cambridge, 2003).
[4] RL Abel *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994* (Routledge, London, 1995).

universal regime and its manifestation in South Asia's peculiar socioeconomic and political milieu.

1.2   Concepts of Human Rights as Evolving from Religions

The idea that human beings deserve humane, just and fair treatment that preserves and enhances their dignity traces back to the origin of most civilizational histories and all major religions of the world.[5] Khushlani asserts that, "the concept of human rights can be traced to the origin of the human race itself."[6] However, civic documentation of human rights applicable to all human beings because of their inalienable or ethical qualities, with legal applications actionable against society and its rulers, was by no means common at all times to all major pre-modern Western and non-Western societies.[7] The idea of human rights in its contemporary multifaceted package — described as civil and political rights; social, economic, and cultural rights; individual rights; group rights; and inter-generational rights — is indeed a construct of the post-World War II human rights regime.[8]

All major religions of the world — Christianity, Judaism, Hinduism, Buddhism, Taoism, Islam, and others — have pervasive, cogent moral codes. All promote the inherent dignity of humankind, common humanity, the sanctity of human life, justice,

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[5] PG Lauren *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, Philadelphia, 1998) (Lauren); Amartya Sen "Human Rights and Asian Values" (1997) 33 *The New Republic* 14; P Morgan and C Lawton (eds) *Ethical Issues in Six Religious Traditions* (Edinburgh University Press, Edinburgh, 1996); Damien Keown "Are There 'Human Rights' in Buddhism?" (1995) 2 Journal of Buddhist Ethics; Micheline Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, Berkeley, 2004).

[6] Yougindra Khushlani "Human Rights in Asia and Africa" (1984) 4 Human Rights Law Journal 403-442.

[7] For the legal code of the ancient Sumerian King Ur-Nammu, circa 2065 BC, see Peter N Stearns (ed) *The Encyclopedia of World History* (6th ed, Houghton Mifflin Company, Boston, 2001) and Daniel C Snell (ed) *A Companion to the Ancient Near East* (Blackwell,, Oxford, 2004). Another codification of rights was Persia's Cyrus Cylinder. circa 539 BC: see Ilya Gershevitch *The Cambridge History of Iran Vol. 2: The Median and Achaemenian Periods* (Cambridge University Press, Cambridge, 1985) and Heleen Sancisi-Weerdenburg "Darius I and the Persian Empire" in Jack M Sasson (ed) *Civilizations of the Ancient Near East* (Scribners, New York, 1995) 1035–1050.

[8] Leszek Kolakowski *"Modernity on Endless Trial"* in Stefan Czerniawski, Wolfgang Freis and Agnieszka Kolakowska (tr.) (University of Chicago Press, Chicago, 1990) cited in MJ Perry *The Idea of Human Rights (*Oxford University Press, Oxford, 1998).

equality, and compassion, and all stipulate duties and obligations towards fellow humans as well as to God or a higher being or ideal.[9] In Europe, however, these religious codes (based on a preoccupation with a good life after death) entered the political and civic arena only in the 17th century. As this study later elaborates, in South Asia such religious values of non-violence, respect, justice and notions of equality had sporadically infiltrated into governing practices centuries earlier.[10]

1.3   Concepts of Human Rights in the West: An Overview from Antiquity till the 20th Century

1.3.1   From Classical European Antiquity Until the 16th Century

The contemporary international human rights regime is epitomized by the Universal Declaration of Human Rights (UDHR),[11] which was adopted by the General Assembly of the United Nations in 1948. The UDHR is regarded by many as essentially a representation of ideas through the context of the European liberal political ideology,[12] while others subscribe to a more inclusive position on the basis that the Human Rights Commissioners, the core drafters of the UDHR, were drawn from diverse ethno religious backgrounds but worked in unison to create a Declaration that was truly representative of all major philosophical and religious traditions.[13] However, in structure and ideological content, the contemporary

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[9] Lauren, above n 5, 5–10. Lauren asserts that these common moral values are evident in all religious philosophies; JM Peek "Buddhism, Human Rights and the Japanese State" (1997) 17 HRQ 527; LC Green "Judaic Contribution to Human Rights" [1990] Canadian Year Book of Human Rights Law; Abdullah Ahmed An-Naim *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Contemporary Issues in the Middle East)* (Syracuse University Press, Syracuse, 1996).

[10] See below, text to n 133, the Edicts of Emperor Ashoka and the influence of Buddhism; William A Edmundson *An Introduction to Rights* (Cambridge University Press, Cambridge, 2004) 3–15.

[11] *Universal Declaration of Human Rights* Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948 <http://www.un.org/Overview/rights.html> (accessed 18 Feb 2006).

[12] Donnelly argues that the notion of human rights is essentially rooted in the West. See J Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 1989); Prem Kirpal Human Rights: "The Contemporary Situation – new orientations in education – looking ahead" in *Philosophical Foundations of Human Right,* (UNESCO 1986); RJ Vincent *Human Rights and International Relations* (Cambridge Press, 1986).

[13] "In their search for a new universal ethics, the commission members affirmed that the history of the philosophic tradition of human rights extended beyond the 'narrow limits of the Western tradition and [that] its beginning in the West as well as in the East coincides with the beginning of philosophy." Micheline Ishay *History of Human Rights from Ancient Times to Globalization Era* (University of

international human rights regime does appear to have evolved around religious, political and social phenomena of European origin whose normative and ethical lineage derives from classical Greek philosophy of the Athenian era[14] and the Stoic stimulus in Roman jurisprudence.[15]

Philosophers such as Aristotle[16] were the first to articulate notions of entitlements in philosophical discourse, despite apparently accepting the institution of slavery and the disenfranchisement of women.[17] In Roman philosophy the evolution of the theory of equality and altruism centred on the articulations of nature made by the Stoics.[18] The Stoics held that nature governed all things both physical and ethical, and they premised humans as equal members of the (universal) Roman Society.[19]

The Stoic influence is evident in the work of Roman jurists such as Ulpian and Gaius.[20] It contributed to the evolution of the distinction between *jus gentium*, connoting righteousness and justice, and the *jus civile*, based on a positive political order. The basis of *jus gentium* was *jus naturae*, and it was at this point that the ideas of natural law first began making contributions to the development of legal philosophy based on Stoic influences.[21] In both Greek and Roman philosophies the notions of equality were drawn from nature and thus laid the foundation for the future development of the theory of natural law. Subsequent articulations of morality,

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California Press, Berkeley, 2004) 17 (Ishay); see also L Chun "Human Rights and Democracy: the case for decoupling" (2001) 5 International Journal of Human Rights 19–44.

[14] AH Robertson, JG Merrills *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rightz,* (Manchester University Press, 1996).

[15] Ishay, above n 13.

[16] Aristotle (350 BC) *Politics* Ernest Barker (tr) revised with an introduction and notes by RF Stalley (Oxford University Press, Oxford, 1995); see also F Miller Jr *Nature, Justice and the Rights in Aristotle's Politics* (Clarendon Press, Oxford, 1995).

[17] RK Sinclair *Democracy and Participation in Athens* (Cambridge University Press, Cambridge, 1988).

[18] L Edelstein *The Meaning of Stoicism* (Harvard University Press, Cambridge, 1966).

[19] Roman philosophers Cicero, Seneca the Younger, Marcus Aurelius and Cato the Younger subscribed to the theoretical assertions of stoicism; see Brad Inwood (ed) *The Cambridge Companion to The Stoics* (Cambridge University Press, 2003).

[20] Marcia L Colish *The Stoic Tradition From Antiquity To The Early Middle Ages: I. Stoicism in Classical Latin Literature* (Brill, 1985); Karsten Friis Johansen *A History of Ancient Philosophy: From the Beginnings to Augustine* (Routledge, 1998).

[21] Melvin Rader *Ethics and the Human Community* (Holt, Rinehart and Winston, New York, 1966) 20; see also S Buckle *Natural Law A Companion to Ethics* (Blackwell, Oxford, 1993).

natural law and the inherent dignity of mankind, particularly from the 17th century onwards, drew inspiration from the philosophical reasoning of the earlier era.[22]

In medieval Europe natural law became embroiled in a new theological and religious discourse. Thus, natural law was redefined as the will and the command of God, and all humans were to be subjected to the authority of both God and the King under feudalism.[23] The most important philosopher of this era, Thomas Aquinas (circa 1225–1274), fused Aristotelian philosophical teachings and Catholic theology in *Summa de Veritate Catholicae Fidei contra Gentiles* (*Summa Contra Gentiles*) (1259–1264) and *Summa Theologica* (incomplete) (1265–1273). These works included his perceptions on the nature of God, means of proving God's existence and the relation to natural law. He was of the opinion that just positive law was derived from natural law and was achieved through logical deduction or through deliberative human choice.[24]

A massive medieval influence on the subsequent rights discourse was the Magna Carta (1215).[25] The Magna Carta articulated the idea of certainty of legal entitlements to (nominally) the people[26] and decreed that monarchical power be exercized in accordance with the law. Its significance is not that it is the first legal document to curtail the powers of a King, but that it substantially endured from the 13th century and has now become the spiritual, and to some extent literal or positive, basis of the rule of law, rights,[27] due process[28] and constitutionalism in Western political and legal thought.

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[22] R Tuck *Natural Rights Theories: Their Origin and Development* (Cambridge University Press, Cambridge, 1979).

[23] D Herlihy (ed) *The History of Feudalism* (McMillan, New York, 1970).

[24] R George "Natural Law and International Order" in DR Maple and T Nardin (eds) *International Society: Diverse Ethical Perspectives* (Princeton University Press, Princeton, 1998) ch 3.

[25] JC Holt *Magna Carta* (2nd ed, Cambridge University Press, Cambridge, 1992).

[26] Ibid. The Magna Carta was specifically designed to alleviate the grievances of the Pope and the Barons against the use of arbitrary power by the King.

[27] Roshwald asserts that the Magna Carta was in fact a legal document that referred to "rights" which contained legal entitlements.Ssee R Roshwald "The Concept of Human Rights" (1959) 19 Philosophy and Phenomenological Research 354-397, 362 (Roshwald).

[28] The inclusion of the clause "No person shall be ... deprived of life, liberty, or property, without due process of law" in the American Bill of Rights, which enumerates rights of the people and restrictions on the exercise of government power, has direct resonance to the Magna Carta. See HD Hazeltine "The Influence of Magna Carta on American Constitutional Development" (1917) 17 Columbia Law

1.3.2   The 17th Century: The Age of Enlightenment

The evidence of an embryonic evolution of the rights discourse in the mainstream political theory of Western Europe can be witnessed in retrospect during the English Revolution of 1640. The endorsement of the rights of the people, such as the right to political participation, the freedom of religion, and rights against tyrannical government, was the basis of this revolution.[29] The subsequent disintegration of the Civil Administration of Oliver Cromwell can also be attributed in spirit to the notion of people's rights against autocratic rulers. The fervour of the revolution of 1640 continued through to the Glorious Revolution of 1688, which led to the restoration of a much more curtailed monarchy and the formulation of the English Bill of Rights in 1689.[30]

By the 17th century, the status of rights theory— to the effect that the rights articulated could be vindicated against the rulers — and the related ideas of limited government were well established in mainstream political discourse in what was to become the United Kingdom. The Bill of Rights of 1689[31] addressed the fundamental political concerns felt not only in 17th century England but elsewhere in Europe. It made the King subject to the rule of law, like all other inhabitants of the realm, and the notion that the King ruled by divine right and was the sole source of law, and therefore above it, was rejected. The King was compelled to respect the wishes of the elected members of Parliament, who now controlled the state's money and property. The Bill of Rights also advocated some basic rights to justice, stipulating that there be no excessive bail or fines, cruel and unusual punishments or unfair trials, and guaranteeing juries, impartial courts and independent judges. It repeated some of the commitments made by King John in the Magna Carta to curtail the exercise of royal power.

Review 1–33.

[29] C Hill *The English Revolution 1640* (Lawrence and Wishart, London, 1940) 111.

[30] Jonathan I Israel (ed) *The Anglo-Dutch Moment: Essays on the Glorious Revolution and Its World Impact* (Cambridge University Press, 1991).

[31] The English Bill of Rights <http://www.constitution.org/bor/eng_bor.htm> (accessed 15 May 2006).

The drawback of both these Charters was that they benefited the privileged segments of society and had no universal application. However, as Lauterpatcht has observed, the evolution of the idea of rights is a long and gradual process and "the vindication of human liberties does not begin with their complete and triumphant assertion at the very outset; it commences with their recognition in *some* matters, to *some* extent, for *some* people, against *some* organ of the state."[32]

Tracing the evolution of natural rights, Freeman observes that the natural rights theorist Hugo Grotius was a crucial figure in "transforming medieval ideas into the modern concept of rights".[33] Grotius is credited with separating natural law from divine law in theoretical reasoning, a departure from the Calvinist position that all ethical values stem from God.[34] Although his position on Christianity is not always easy to determine, for his idea of ethics appears to be based on Christian values, he wrote that, "[t]he law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."[35] In the evolution of rights discourse, Grotius is notable for maintaining that the theory of natural law was not premised on the belief in God, thus becoming the first philosopher to articulate the theory of natural rights based on secularism.[36]

Thomas Hobbes' *The Leviathan* of 1651 lends particularly graphic empirical support to the position of the present writer that the evolution of rights discourses everywhere is influenced by the sociopolitical issues of the time and place. This work advocates for a social contract between the people and the sovereign.[37] Hobbes, who survived the three English Civil Wars between the Parliamentaries and the Royalists (1642–

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[32] H Lauterpatcht *International Law and Human Rights* (Anchor Books, 1968) 131.
[33] Michael Freeman *Human Rights: An Interdisciplinary Approach* (Polity, Cambridge, 2002) 18.
[34] Grotius' *De Jure Praedae (Commentary on the Law of Prize and Booty)* and *De Jure Belli ac Pacis (On the Law of War and Peace)* are regarded as his contribution to the development of the conception of natural law.
[35] Grotius *On the Law of War and Peace* (Bobbs-Merrill, Indianapolis, 1925) 38–39.
[36] B Tierney "Origins of Natural Rights Language: Texts, and Contexts 1150–1250" (1989) 10 History of Political Thought 617.
[37] Thomas Hobbes *The Leviathan* (Kessinger Publishing, Whitefish MT, 2004).

1651),[38] had witnessed the sociopolitical devastation that ensued. He equated war with the "state of nature" which created insecurity, and said that this state must be prevented by a social contract with a strong government. Founded on the premise that the social contract existed between the people and the sovereign, and that by it the people surrendered some of their liberties for the "peace and defence" of the realm, Hobbes' theory maintained that the contract would be ended if and when the Leviathan became incapable of protecting the people, at which point man would return to the state of nature.[39]

1.3.3　John Locke: 1632–1704

A particularly significant philosopher of the Age of Enlightenment, whose writings have considerably influenced the creation of the rights doctrine and qualified Hobbes' pessimism about man's need to surrender to even an arbitrary sovereign, is John Locke.[40] In the evolution of human rights, Hobbes, Locke and Rousseau are the three key, early advocates of contractarianism. Drawing inspiration from the just-concluded Glorious Revolution, Locke advocated the idea of natural rights in his 1689 work, *Second Treatise of Government*.[41] Of relevance to the current narrative, Locke embarks on his (convoluted) political theory on the premise that in a pre-social state of nature all humans have natural and equal *rights* to their lives, liberties, and estates. In the absence of government, he claims, these rights have no means of vindication and therefore lie dormant with little or no value. Such a society has no apparatus created for the fortification of these rights, and individual vindication of rights is a potential ground for conflict. Therefore, he claims, human beings created social groups or societies and through societies governments are formed that in turn are vested with the duty to protect and enhance an individual's natural rights.

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[38] Jane Ohlmeyer "The Wars of the Three Kingdoms The British and Irish Civil Wars" in John Kenyon and Jane Ohlmeyer (eds) *The British and Irish Civil Wars — A Military History of Scotland, Ireland and England 1638–1660* (Oxford University Press, Oxford, 1998).
[39] R Tuck *Natural Rights Theories: Their Origin and Development* (Cambridge University Press, Cambridge, 1979) 126–131.
[40] Roshwald, above ibid n 27, 370–371.
[41] John Locke *Second Treatise of Government — Chapter II: Of the State of Nature* <http://www.fordham.edu/halsall/mod/1690locke-sel.html> (accessed 15 Jan 2006).

The legitimacy of a government, asserted Locke, is based on a social contract in the form of an opaque voluntary social union between the rulers and the ruled. Members of the society are obligated to obey the government only if the government in turn upholds their human rights, which are held over and above the claims and interests of the government. According to Locke's theory, the validity of the government is thus conditional upon the systematic protection and enhancement of the human rights of its citizens.[42] Building on the thinking of Hobbes as well as modifying it, Locke relentlessly championed the supremacy of Parliament and justified the 1688 Revolution through his theory of rights.[43] It was his writings that inspired Thomas Jefferson to write of "life, liberty and the pursuit of happiness" in the Declaration of Independence in the infant United States of America nearly a century later.[44]

However, Locke's ideas were not without criticism — his notion of natural rights was initially associated with the middle classes.[45] It was the rising bourgeoisie of early modern Europe who made political claims based on Locke's theoretical reasoning of natural human equality and inalienable natural rights, and did so as a means of overcoming their lack of privileged birth and old money. This political revolution had a fundamental limitation because, despite Locke's claim of universalism in the language of natural rights, he had actually developed a political theory for the protection of the rights of landed gentry.

Locke's idea of rights was also essentially individualistic as he repeatedly referred to "lives, liberties and estates" of the individual members of a privileged segment of

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[42] Hector Gros Espiell "The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches" in BG Ramcharan (ed) *Human Rights: Thirty Years After the Universal Declaration.* (Martinus Nijhoff, The Hague, 1979) 41–67.

[43] Locke writes: "The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth...." see "Concerning Civil Government" 1690 in *Second Treatise of Government — Chapter II: Of the State of Nature*<http://www.fordham.edu/halsall/mod/1690locke-sel.html> (accessed 15 Jan 2006).

[44] US Declaration of Independence of the 13 American colonies on 4th July 1776; see Bernard Bailyn *The Ideological Origins of the American Revolution* (Harvard University Press, 1992).

[45] Donnelly traces the evolution of the contemporary human rights doctrine to the philosophical enunciations of 17th century Britain and particularly to Locke's *Second Treatise Of Government*, but concedes that his work represents a "bourgeois political revolution". Jack Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 1989) 104–105.

society. Roshwald observes: "This individualistic-atomistic conception of society becomes the foundation stone of the democratic-liberal trend in political philosophy."[46] Roshwald reiterates that it is at this time that the "concept of 'human rights' took shape and became a principle of decisive importance in the political conceptions of people" and she continues that further articulation of the idea of rights in the 18th century was essentially an application of the philosophy of Locke to real political life.[47]

By the conclusion of the 17th century, the natural law theory and its outgrowths described above were becoming well established in the legal, political and moral ethos of Western Europe. This liberal intellectual trend had a significant impact on the political thinking of the whole of the Western world. Philosophers such as Grotius, Hobbes and Locke worked in consonance with the expanding theory of natural law to create the doctrine of individual rights that is evident today. Their work concentrated on the prominent political concerns of that era, such as the liberation of the individual from absolute political tyranny and the emancipation of human reason from religious and social dogma.[48]

1.3.4   18th and 19th Century Europe

The Industrial Revolution in Europe simultaneously acted as a catalyst to the culmination of feudal social structures and the genesis of industry-based capitalism. During the 18th century, Immanuel Kant and Jean-Jacques Rousseau[49] were the predominant philosophers who fine-tuned the notion of rights through their theories based on rationalism. It is in their hands that the idea of natural rights metamorphosed into political liberalism, of which the focal point was the theory of individualism.

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[46] Roshwald, above n 27, 371.
[47] Roshwald, above n 27.
[48] Earnest Cassirer *The Philosophy of the Enlightenment* (Princeton University Press, New Jersey, 1979).
[49] Maurice W Cranston *Noble Savage: Jean-Jacques Rousseau, 1754–1762* (University of Chicago Press, Chicago, 1999).

Rousseau's seminal work, *The Social Contract*[50] (1762) describes a man's relationship with society in a more modern and conditional contractarian idiom than Hobbes in particular, but also Locke, had done a century earlier across the English Channel. Rousseau contended that the institutions of law and codes of morals were prerequisites in societies, for in the absence of law society will degenerate into a state of chaos. Rousseau, though an ardent follower of the natural law school, articulated rights in terms of the "general will" of the society. Rousseau's perspective on legislation mirrored many other philosophers throughout history, contending that the quest for common good might not always be the best resolution for all concerned. Rousseau relentlessly queried the postulate that the will of the majority — the common good — is always the accurate one, and he contended that the objective of government should be to assure freedom, equality, and justice for all within the state, despite the will of the majority. Rousseau endeavoured to make his readers comprehend that when people are compelled to obey, they might do so; but when the people are free of this compulsion to conform and are able do so voluntarily, they become true to themselves under the rights of liberty, and they obey even moreso. Rousseau maintained that social order is a sacred right that stands as the basis of all other rights, explaining that this right does not come from nature but must be founded upon conventions.[51]

The philosophical writings about, and the ideas of, the social contract, which restrained the powers of government on the basis of the morally prior rights of the governed who alone could surrender their sovereignty, inspired the American Declaration of Independence (1776) That Declaration entoned: "[W]e hold these truths to be self-evident; that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."[52] This revolutionary fervour had its impact in Europe. The Declaration of the Rights of Man and of the Citizen in France on 26 August 1789 spoke in the same idiom of rights when it proclaimed: "Men are born and remain free

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[50] Jean-Jacques Rousseau *"The Social Contract" and Other Later Political Writings* (Cambridge University Press, Cambridge, 2003).
[51] Dave Robinson and Judy Groves *Introducing Political Philosophy* (Icon Books, 2003).
[52] The complete text of the Declaration of Independence can be found at <http://www.americanrevolution.com/DeclarationofIndependence.htm> (accessed 16 May 2006)

and equal in rights…."[53] The influence of the idea of a social contract between the people and the state was so deep-rooted that the Declaration of Independence proclaimed that, "to secure these rights [Life, Liberty and the Pursuit of Happiness], the Governments are instituted among Men" and the French Declaration contained the words: "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."[54]

The violence of the French Revolution and the anxiety amongst conservative elements in the Old World that the ideas of natural rights were "too egalitarian and subversive"[55] resulted in these ideas being viewed with scepticism in Britain by the end of the 18th century. This general discontent was manifested by the universal rejection of natural law principles by British legal scholars. Philosophers such as David Hume (1711–1776),[56] and later Jeremy Bentham (1748–1832)[57] and John Austin (1790–1859), claimed that strict adherence to those principles would lead to social upheavals, and these thinkers sought to explore alternatives to the natural rights theory. According to Freeman, Bentham found the theory of natural rights to be defective in many respects. [58] Natural rights theory did not clearly specify the ambit of a specific right, and the claim that everyone was bestowed with equal rights was not tenable, for the natural rights theory itself did not recognize the rights of women, blacks and the poor. Bentham maintained that rights could only be derived from

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[53] Declaration of the Rights of Man and of the Citizen Article 1
<http://www.yale.edu/lawweb/avalon/rightsof.htm> (accessed 16 May 2006).
[54] M Sparhr *Readings in Recent Political Philosophy* (McMillan, New York, 1935), reprint of 1949 quoted in Roshwald, above n 27, 372.
[55] Michael Freeman *Human Rights: an Interdisciplinary Approach* (Polity Press, Cambridge, 2002) 25–27 (Freeman).
[56] Hume did not openly reject the ideas of natural law or the social contract that had gained considerable political currency. However, Hume's *A Treatise of Human Nature: Being an Attempt to introduce the experimental Method of Reasoning into Moral Subjects* (1739–1740), which articulated the ideas of "utility", later was relied on by Jeremy Bentham in his elaboration of the concept of utilitarianism. See also Dave Robinson and Judy Groves *Introducing Political Philosophy* (Icon Books, 2003).
[57] Best known for his ideas on utilitarianism, Jeremy Bentham took the position that laws must be created on the basis of rationality. He rejected the ambiguity of natural law. Bentham advocated for individual and economic freedom, freedom of expression, gender rights, and the abolition of slavery and corporal punishment for all. His theory of law and rights was located in the social and moral dilemas of 19th century England and this is reflected by his advocacy for the right to divorce and for free trade, and by his encouragement of the idea of the separation of church and state. See J Waldren (ed) *Nonsense upon stilts:Bentham, Burke, and Marx on the Rights of Man* (Methuen, London, 1987) 35–40.
[58] Freeman, above n 56, 28.

positive law, and the content and that the ambit of a right should be defined in accordance with the principle of utility.[59] As a result, the general incompatibility of the natural law theory with the sociopolitical exigencies of the 18th century caused its relegation to secondary position against the theory of utilitarianism during the political reforms of both Britain and France.

The rapid industrialization of Europe in the 18th and 19th century created new political and social issues, such as urban poverty and the issue of the rights of the industrial labour force, which the natural law theory did not address. Karl Marx, writing from the 1840s onward, critiqued the theory of natural rights on the distinct basis that "the so-called *rights of man ...* are only the rights of the member of civil society, that is, of egoistic man, man separated from other men and from the community."[60] Marx continued that, "[t]his bourgeois conception of rights ignored the fundamental importance of labour, production and wealth to human wellbeing."[61] Therefore, to Marx, the bourgeois system represented a process that alienated man from nature, from himself and his own active functioning and stripped him of "his human essence". Marx asserted that Communism is the "actual phase necessary for the next stage of historical development in the process of human emancipation and recovery".[62] As much as Marx denounced the so-called bourgeois concept of rights, however, he had no alternative theory to substitute, a fact which remained a highly significant shortcoming in his political theory, especially in the context of the subsequent abuse of power by the Communist states at the cost of their citizens.[63]

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[59] CB Welch *Liberty and Utility: The French Ideologues and the transformation of liberalism* (Columbia University Press, New York, 1984) 193–194.
[60] Karl Marx and Federick Engles *On the Jewish Question* Collected works Vol III (International Publishers, New York, 1976) 162 (Marx and Engles).
[61] Ibid.
[62] Randhir Singh *Reasons, Revolution and Political Theory* (People's Publishing House, New Delhi, 1976) 217–218.
[63] Freeman, above n 56, 20.

1.3.5 Further Evolution, Export and Internationalization of Western Human Rights into the 20th Century

Sociopolitical issues which today would be classified as human rights issues continued to trouble both Western Europe and elsewhere throughout the latter part of the 19th century and the 20th century. Chief among them was the institution of slavery, whose abolition was attempted through two international treaties of 1890 and 1892.[64] Though not explicitly citing a violation of human rights, the anti-slavery movement drew inspiration from natural rights discourse and eventually was naturally incorporated into the discourse of human rights through the UDHR in 1948.[65] The negative social impacts of the rapid industrialization of Europe were emerging during the latter part of the 19th century, and the labour unions advocated for better working conditions, laws that guaranteed the right to strike, and regulations that controlled the use of child labour. It was against this background that the International Labour Organization (ILO)[66] was founded in 1919 with a mandate to create a code of international labour standards. Originally as an affiliated institution of the League of Nations, and now as a part of the United Nations, the ILO has worked with governments, employees and management for better work conditions and employment relations. Many of the issues handled by the ILO, such as negotiation of better workers' rights, higher wages, more favourable working conditions, trade union rights, health and safety standards, safeguards on female and child labour, and social security have strong human right connotations and draw inspiration from the rights–of–man discourse of the 18th and 19th centuries.

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[64] In 1926 the Slavery Convention was formulated under the aegis of the League of Nations and over 30 states ratified it. The Convention stipulated that the signatory states would work towards eliminating all forms of slavery. David Weissbrodt and Anti-Slavery International *Abolishing Slavery and its Contemporary Forms* (United Nations, New York and Geneva, 2002) <http://www.antislavery.org/homepage/resources/Weissbrodt%20report%20final%20edition%202003.pdf> (accessed 16 May 2006).

[65] The Universal Declaration of Human Rights states that "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms" (Art. 4). <http://www.un.org/Overview/rights.html> (accessed 17 Mar 2006).

[66] For an historical account see <http://www.ilo.org/public/english/about/history.htm> (accessed 10 May 2006).

The above analysis further supports the position that the evolution of the theory of rights in Western history was at each stage moulded by the sociopolitical and religious concerns of the time. The theories of reformulation of the political and social structures of the Western world were a direct result of the sociopolitical turmoil and failure of feudal rulers to respect the principles of liberty, equality and human dignity. The fear of tyrannical rule formed the foundation for the ideas of the rights of individuals against the excesses of state power. Significant milestones, such as the Magna Carta accepting the idea of the rights of "the people" vis-à-vis the ruler, were a covert means of legitimizing the rule of the feudal power-holders. The maturing of these ideas through the centuries in particular historical, cultural, political and social contexts, imbued them with certain inalienable characteristics, which were compatible with the ethical and moral values of Western civilization.

The idea of rights, which constituted the core of the 18th and 19th century struggles against political absolutism in Europe and North America, was revived in another context by the nascent struggles for independence from colonial rule in Latin America, Asia and Africa. The most significant among them in this context was the Quit India Movement[67] — the struggle for *Purna Swaraj* (independence) by the Indian National Congress under the leadership of M K Gandhi commencing in 1918.[68] The struggle was fuelled by the disenchantment of the Indians with the colonial rule and its systematic violation of civil liberties and political rights.[69]

International efforts to create normative standards that enhance human rights and preserve human dignity in the early 20th century can be traced in a different articulation to the League of Nations. Article 22 of the League's Covenant, relating to the people of the colonies and territories that had lost their sovereignty due to the war, stipulated that colonial rulers must honour "the principle that the well-being and

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[67] The Quit India Movement was officially launched on 9 August 1942 and was charaterized by the definitive organized movement of civil disobedience for the immediate independence from Britain. However, the agitation for independence had a longer history. B Chandra *India's Struggle for Independence 1857–1947* (Penguin Books, India, 1989).

[68] Jawaharlal Nehru *Discovery of India* ((Meridian Books Ltd, New Delhi, 1951).

[69] Anil Seal *The Emergence of Indian Nationalism: Competition and Collaboration in the Later Nineteenth Century* (Cambridge University Press, Cambridge, 1968).

development of such peoples form a sacred trust of civilization."[70] With little success, an effort to protect the rights of minorities was also undertaken during the 1920s by the League of Nations, the precursor to the United Nations.[71] A result of the Paris Peace Conference of 1919, the League of Nations' mandate was the prevention of war through collective security, pacific settlement of disputes between states through negotiation, and the promotion of global welfare.[72] However, its constituting documents made no reference to rights and were concerned exclusively with inter-state relations.

1.4 Antecedents and Alternatives to Human Rights Discourse in Ancient South Asia: An Overview

The following section traces the conceptual evolution of notions of humanism, justice and equity in South Asia. As in the West, early articulations of political philosophy were intrinsically interwoven with religious values in the Indian subcontinent.[73] While the above analysis indicates that the rights doctrine evolved in Western Europe as a tool against absolutist rulers, the parallel conceptual thinking in Asian political and religious philosophy was articulated more in terms of humanism, munificence and a sense of duty of protection by the rulers towards the people.[74]

The evolution of a concise political theory based on the sense of duty of the ruler towards the ruled, the refinement of the ideas of humanism in governance, or a theory of rights based on South Asia's own cultural or religious identities, did not arrive at its logical culmination in Asia, owing to the interruption from colonialism. Several centuries of external political domination instead bequeathed the legacy of liberal democracy that had evolved in a different sociopolitical and cultural context, which is

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[70] League of Nations Covenant Article 22 available at
<http://www.yale.edu/lawweb/avalon/leagcov.htm> (accessed 7 May 2006).
[71] P Thornberry *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991) 38–54.
[72] FP Walters *A History of the League of Nations* (Oxford University Press, London, 1965).
[73] For a detailed account of Indian Philosophical thought see PT Raju "The Western and Indian Philosophical Traditions" (1947) Philosophical Review 127–155.
[74] Appendix B.

partially imbued into the sociopolitical *mores* of the subcontinent.[75] In contrast, Western political philosophy's exposition of the rights doctrine enjoyed "much greater opportunities … to receive fuller consideration, articulation, and eventual implementation",[76] and the contemporary human rights regime worldwide is the culmination of that process.

1.4.1   The Influence of Major Subcontinental Religions

As the following paragraphs elaborate, in ancient India religion performed a legitimizing function in state affairs, for "[t]he imagination, the minds, and the hearts of the people of the subcontinent were profoundly shaped by religion … so it was natural that any traditional ruler in search of legitimizing credentials would turn to religion."[77] The Hindu Vedas, the hymns and prayers of circa 1200 BC, defined social relations between the King and the people. It was during the Vedic period that the complex social organization based on caste evolved in India. The *Brahmins* were at the apex of the social structure, followed by the *kshastriya* (warriors). The *vaishya* (traders) occupied the middle social strata, followed by the *sudras* (the *dalits*, or untouchables). Malhotra explains the reasons as to why social or political "equality could not develop at the empirical level" during the Vedic period:[78]

> … the ancient Indians could not develop the concept of social and political equality because of their faith in the doctrine of *karma*, the caste system and the variations of the spiritual level of different persons. The doctrine of *karma* implies that whatever the status an individual holds in society is the result of past deeds, and so he must ungrudgingly accept his station in life and play his part accordingly, since the spiritual merit lies not in the nature of work performed but in the spirit in which it is performed.

Therefore early religious manifestations during the Vedic period did not promote ideas of social equality but advocated concepts of humanism and human dignity

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[75] The problems that stem from this partial internalization are discussed in this chapter.
[76] Lauren above n 5, 6.
[77] Ralph Buultjens "India: Religion, Political Legitimacy, and the Secular State" (1986) 483 Annals of the American Academy of Political and Social Science 93–109, 94. Stable URL: <http://links.jstor.org/sici?sici=0002162%28198601%29483%3C93%3AIRPLAT%3E2.0. CO%3B2-K (accessed 17 Jul 2006)> (Buultjens).
[78] Shadi Lal Malhotra "The Social and Political Orientations of Neo-Vedantism" (1966) 16 Philosophy East and West 67–80, 75(Malhotra).

within the constraints of the social strata, similar to the ideas of "separate but equal" policies of racially divided America in the 20th century. Baxter et al. observe that, "[d]espite repeated attacks on the caste system by subsequent reform oriented social and religious movements, it still exists in India and has a strong impact on socio political behaviour of Hindus."[79] This is primarily due to the religious sanction extended to the social organization during the Vedic period and subsequently in Hinduism. As ideas of constitutional structures and popular democratic mandates had not evolved, the "[r]eligious sanction was probably the only credential widely agreed upon by everyone in society".[80]

1.4.1.1 Hinduism

Indian religious history provides numerous examples to support the premise that the subcontinent had a rich culture of honouring humanist values and human dignity and accommodating cultural diversity and pluralism within governance. Before the delineation of the main subcontinental religions of Hinduism, Buddhism, Jainism, Sikhism and Islam, which all expound tolerance and compassion, the Indian epics of *Mahabaratha*[81] and *Ramayana*[82] elaborated on the ideas of human dignity, justice and fairness.

Both epics depict the intellectual articulations of the ancient Indian religious, philosophical and ethical thinking and contain commentaries on issues that would today be considered as prerequisites of governance. For instance, *Ramayana* 2.67.31

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[79] Craig Baxter et al *Government and Politics in South Asia* (Westview Press, Colarado, 2001) 23, 55 –90.

[80] Buultjens, above n 78.

[81] Containing 18 Chapters, Mabharatha dates from circa 1,952 BC (see Mohan Gupta Mahabharatka Kala-Nirnaya:, Visva-Vidyalaya-Prakashan, Chowk, Varanasi-221001). It is referred to as the epic depicting the history of India and is of immense philosophical and religious significance. The relevance in the present context is its representation of ethical and moral standpoints. See John L Brockington *The Sanskrit Epics* (Leiden, Netherlands, 1998); E Washburn Hopkins *The Great Epic of India* (Charles Scribner's Sons, New York, 1902).

[82] Composition attributed to the legendary poet Valmiki in the 4th century BC though its existence in the oral tradition is dated circa 1,500 BC or before. The epic, which has a strong didactic element, contains the epic story of Rama the avatar of god Vishnu and Sita, his wife, who was abducted by the demon king Ravana. Washburn Hopkins "The Original Ramayana" (1926) 46 Journal of the American Oriental Society 202–219.

states, "[n]o soul is peaceful in a state without a ruler. In such a state men exploit one another like fish who swallow each other." The epics describe the primary protector of the social organization of ancient India as *kshatriya* the warrior who protected people from *kshat* or unhappiness. The essential characteristics of a ruler, according to *Mahabaratha*, were bravery, courage, vigilance, charity, and the ability to display prowess and not retreat from battle (*Mahabaratha* 6.42.43). A legitimate ruler was invested with the duty to protect all beings (*Mahabaratha* 12.120.3) and had to foster the righteous and destroy those who were cruel (*Mahabaratha* 12.14.16).[83] These ethical guidelines extracted from the two epics denote the existence of acceptable standards of conduct for persons who wielded political power, which in turn demarcated the existence of the idea of a social contract, albeit in embryonic form, between the people and the ruler in ancient Indian political discourse.

Hinduism,[84] the main religion of the subcontinent, evolved from the Vedic traditions and advocates the concepts of *Ahimsa* (non-violence) and respect for all forms of life —both human and animal— as well as piety, prayer and the notion of personal sacrifice.[85] Hinduism was inherently devoid of egalitarian qualities for it sanctioned the process of social demarcation based on birth (the caste system), but paradoxically it advocated tolerance of other religious traditions and faiths as a fundamental tenet. For instance, *Rig Veda* asserts, "*ekam sat viprā bahudhā vadanti*" : "Truth is One, but sages call it by many names."[86] The early expositions of human dignity and freedom are also to be found in the Vedas.[87] The concept of *rita* (supreme order) cited in the Vedas is similar to the notion of natural law and denotes freedom and human rights, for it represents "both the *satya* or the truth of things, as well as *dharma* or the law of evolution."[88] *Rita* in this sense denotes "the law that governs the universe, the

[83] *Mahabharata* (Kamala Subramaniam (tr),Bharatiya Vidya Bhavan, Bombay, 1982).
[84] Hinduism, the oldest religion in the world and with 900 million adherents, evolved around 1000–700 BC. <http://www.adherents.com/Religions_By_Adherents.html> (accessed 19 Jan 2007).
[85] AL Balsham *The Wonder that was India* (Grove Press, New York, 1954) 341.
[86] Rig Veda 1:164:46. <http://www.astrojyoti.com/scripturesindex.htm> (accessed 12 May 2006).
[87] The Vedas are an ancient Hindu – Aryan religious literature consisting of hymns, chants and prayers dating from 1,500–500 BC. See JC Chatterji *Wisdom of the Vedas* (Quest Books, India,1992).
[88] S Radhakrishnan *The Hindu View of Life* (Unwin Books, England, 1963) 56.

law that operates in ritual and sacrifice and the law that, with equal impartiality, regulates the conduct of human beings."[89]

Similarly to Buddhism, the superiority of *dharma* forms the basis of Hinduism, and is defined as "implying enjoyment of particular rights or fulfilment of certain obligations, individual and collective, with a moral and a spiritual sense of duty towards others or towards the society in general. To *dharma,* both the King and the people owed allegiance. It was a powerful motive for restraining the wilful exercise of sovereign authority by the King. In fact, the Hindu-Buddhist political theory vests sovereignty on *dharma.*"[90] The notion of *dharma* being superior to the edicts of the King parallels the notion of natural law in Western tradition as articulated by Locke.

In terms of the individual, *dharma* stipulated that individuals were entrusted with certain duties regarding others within the social organization and had to follow the stipulations of *dharma* in their actions, which would result in a better life. The concept of *dharma* permeates both public and private life for it "gives coherence and direction to different activities of life … It is the complete rule of life, the harmony of the whole man who finds a right and just law of his living. Each man and group, each activity of soul, mind, life and body, has its *dharma*."[91] This South Asian value of social behaviour can be equated to the notion of duty as opposed to rights. Nehru explained: "If a man did his duty and was ethically right in his actions, the right consequences would always follow. Rights as such were not emphasized — this outlook stands out in marked contrast with the modern assertion of rights — rights of individuals, of groups and of nations."[92]

Values of tolerance of plurality, compassion and non-violence formed the basis of *dharma,* which is nevertheless compatible with the discourse of contemporary human rights, and were the fundamental tenets that fashioned the subcontinent's political and

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[89] Lal-dhoj Deosa Rai "Human Rights Development in Ancient Nepal" (1981) 3 HQR 37–46.
[90] Ibid.
[91] S Radhakrishnan *Eastern Religion and Western Thought* (London, 1939) 353.
[92] J Nehru *The Discovery of India* (Meridian Books Ltd, New Delhi, 1951) 70.

cultural tradition.[93] These values were not limited to the realms of religion or to individual conduct alone but rather were frequently utilized to elaborate on the fundamentals of good governance by the Kings (*rajadharma*).[94] "The King was far more than merely the political head of the State,"[95] for he was entrusted with the well-being of the entire kingdom and its people. This implied that the kingdom was held in trust by the kings for the benefit of the people.[96] It has also been observed that in this context revolt or rebellion against tyrannical or oppressive kingship was justified.[97]

In this sense, the Hindu sociopolitical culture that governs the lives of the people is founded on an amalgamation of notions of freedom, pluralism, common good (in contrast to the values of utilitarianism) and good conscience (the multifaceted notion of *dharma*). Corti elaborates on the disjuncture between rights and freedoms, and *dharma*, thus: "The peoples of Asia neither understand nor desire freedom in our sense of the word, as we understand it. Truth, humanity and liberty belong inseparably together. We ourselves must constantly bear this interdependence in mind."[98]

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[93] Arvind Sharma *Hinduism and Human Rights: A Conceptual Approach* (Oxford University Press, 2004).

[94] *Rajadharma* is a concept of governance drawn from Vedic literature (Rig Veda and Atharva Veda) which is based on the duties of the King towards the welfare of the people. The essence of the concept was the duties of the King to maintain social order, protect the people and administer justice. Governance is therefore expressed essentially in terms of the duties of the rulers.See Michael (ed) *The Concept of Rajadharma* (Sundeep Prakashan, New Delhi, 2005).

[95] John W Spellman Political *Theory of Ancient India: A Study of Kingship from earliest times to circa 300 AD* (Clarendon Press, Oxford, 1964) 221.

[96] "The birds that fly in the air and the wild animals that dwell in the jungles have the same rights as you, O great King, to live wherever they wish or to roam wherever they will. The land belongs to the people of the country and to all other beings that inhabit it, while you are only its guardian" Arahat Mahinda, son of Ashoka the Mauryan Emperor to King Devanampiyatissa of Sri Lanka c 250–210 BC found on a rock inscription in Pollonnaruwa, as quoted in Nihal Jayawickram *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, Cambridge, 2002) v.

[97] The *Mahabaratha* provides that the people can revolt against tyrannical political leaders. See Lal-dhoj Deosa Rai "Human Rights Development in Ancient Nepal" (1981) 3 HRQ 37–46.

[98] WR Corti "The role of the individual in the Ideological Struggle of out Time" in Tony Hagen (ed) *Nepal* (Oxford and IBM Publicity Co, New York, 1961) 25.

1.4.1.2 Buddhism

Like Hinduism, Buddhism[99] evolved from a common spiritual and philosophical heritage through *dhamma*.[100] Buddhism promotes the idea of controlling the mind to overcome actions that are violent and evil.[101] Buddhist philosophy exalts the virtues of non-violence and the sanctity of life.[102] The essence of Buddhism is to lead a virtuous, restrained and peaceful life based on the *madyama prathipadhawa*[103] (middle way) with the aim of ending all suffering in life and attaining the ultimate liberation, termed *nibbhana*.[104] The flourishing of Buddhism amidst the orthodox Hindu political and religious culture circa 585 BC is seen by some as a response to the social injustices that prevailed in Indian society at that time, particularly the oppressive caste system and the low status accorded to women.[105] Buddhism, in contrast, articulated respect for all living beings, which included women[106] and

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[99] Religious philosophy of Gautama Buddha circa 5th century BC.

[100] *Dhamma* (Pali) or *dharma* (Sanskrit) denotes the truth, spirituality or the natural law in both Buddhist and Hindu religious philosophy. A person who lives in synergy with *Dhamma* is to attain the *Moksha* (Hindu) or *Nirvana* (Buddhist) state of enlightenment. In this context *Dhamma* denotes virtuous dutiful living and proper social conduct. See S Radhakrishnan *Indian Philosophy Vol.1* (Centenary Revised Ed, OUP, India, 1996).

[101] "1. Mind precedes all mental states. Mind is their chief; they are all mind-wrought. If with an impure mind a person speaks or acts suffering follows him like the wheel that follows the foot of the ox.
2. Mind precedes all mental states. Mind is their chief; they are all mind-wrought. If with a pure mind a person speaks or acts happiness follows him like his never-departing shadow." *No 1 The Dhammapada* (Ven Narada tr, Colombo Apothecaries Co. Ltd, 1972).

[102] "If a person destroys life, is a hunter, besmears his hand with blood, is engaged in killing and wounding, and is not merciful towards living beings, he, as a result of his killing, when born amongst mankind, will be short lived." Narada Maha Thera *The Buddha and His Teachings* (Associated Newspapers of Ceylon Ltd, Colombo, 1972) 309.

[103] "The middle way discovered by a Perfect One avoids both these extremes; it gives vision, it gives knowledge, and it leads to peace, to direct acquaintance, to discovery, to nibbana. And what is that middle way? It is simply the noble eightfold path, that is to say, right view, right intention; right speech, right action, right livelihood; right effort, right mindfulness, right concentration. That is the middle way discovered by a Perfect One, which gives vision, which gives knowledge, and which leads to peace, to direct acquaintance, to discovery, to nibbana." Gautama Buddha from the *Dhammacakkappavattana Sutta*<http://www.accesstoinsight.org/tipitaka/sn/sn56/sn56.011.than.html> (accessed 17 Jan 2008)

[104] Peter Harvey *An Introduction to Buddhism: Teachings, History and Practices* (Cambridge University Press, 1990).

[105] Nalin Swaris *Buddhism, Human Rights and Social Renewal* (Asian Human Rights Commission, Hong Kong, 2000) and Susan Murcott *The First Buddhist Women: Translations and Commentaries on the Therigatha* (Pub Group West, 1991).

[106] Bernard Faure *The Power of Denial: Buddhism, Purity, and Gender* (Princeton University Press, 2003) 21–51.

animals, and Buddhist philosophy sought social reform through attempts at social assimilation of the marginalized lower castes and through the granting of equal recognition to women within the *sanga* (Buddhist priesthood).[107] Gender equality was a basic tenet of Buddhism as, "[t]he Buddha saw the spiritual potential of both men and women and founded, after considerable hesitation, the Order of *Bhikkhunis* or Nuns, one of the earliest organizations for women. The *Sasana*, or Church, consisted of the *Bhikkhus* (Monks), *Bhikkhunis* (Nuns), laymen and laywomen so that the women were not left out of any sphere of religious activity."[108]

Buddha's teachings were not restricted to the spiritual well-being of individuals, according to Walpola Rahula Thero, for Buddhist scriptures articulated duties of Kingship which maintained that a just King would be liberal, generous and charitable. The qualities of a King also included the practice of non-violence and the ability to sacrifice one's self for the benefit of the community.[109] Several analogies between Buddhist teachings and contemporary rights discourse can be drawn.[110] Jayawickrama observes that Buddha encouraged the idea of travel amongst his disciples so that the word of the Buddha could bring welfare and happiness to many; intrinsic in this is the idea that Buddha promoted freedom of movement.[111] Citing another similarity with rights discourse, Jayawickrama observes that *Mahaparinibbanasutta* (a Buddhist sermon) states that the people must assemble frequently and peacefully and transact business peacefully.[112]

Buddhism was advocated as a way of life that had universal validity. Norms advocated in the Buddhist philosophy were based on rationality and the followers were encouraged to follow the Buddhist way of life only after rational deliberation.

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[107] "To this day the egalitarian ethos of Buddhism appeals to the marginalized communities in India. Buddhism's appeal for low-caste Hindus" Monday, 5 November 2001, <http://news.bbc.co.uk/2/hi/south_asia/1639245.stm> (accessed 30 May 2006).
[108] LS Dewaraja *The Position of Women in Buddhism* (The Wheel Publication No. 280, Buddhist Publication Society, Kandy, 1981) 16.
[109] The ten duties of a King (*dasa raja dharma*) in Walpola Rahula Thero *What the Buddha taught* (Gorden Fraser Gallery, Bedford, 1967) 85.
[110] Perera demonstrates the connectivity between Buddhist principles and the Universal Declaration of Human Rights; see LPN Perera *Buddhism and Human Rights* (Karunaratne and Sons, Colombo, 1991).
[111] Nihal Jayawickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002) 12.
[112] Ibid.

Such requirements would be regarded in the contemporary human rights discourse as respect for the right to freedom of thought and expression.[113]

1.4.1.3 Islam

Islam, as a religious force that impacted on the political and cultural ethos of India, commenced with the Delhi Sultanate, circa 1211 AD, before the formal establishment of the Mogul Empire in 1526 AD.[114] Owing to Arabian traders, relations between Arabia and the Asian subcontinent were long-established even before the advent of Islam. The initial Islamic rule of the subcontinent was violent and repressive for it was essentially an invasion to plunder and control.[115] The Muslim rule was based on the laws of the Qur'an and on *Sharia*[116] (Islamic law) but the humanist qualities that are the essence of Islamic law were not evident at these initial stages in South Asia. Because of repeated invasions by the Arabs, the notion that Islam was a destructive and violent force was fairly well-embedded in the Hindu psyche, as illustrated by the observation by Jawaharlal Nehru, India's first Prime Minister: "The impact of the invaders from the north-west and of Islam on India had been considerable. It had pointed out and shone up the abuses that had crept into Hindu society — the petrification of caste, untouchability, and exclusiveness carried to fantastic lengths."[117]

The establishment of the Mogul Empire by Babur in 1526 brought a systematic administration to the occupied territory based on Islamic traditions and law.[118] Both the Qur'an and *Sharia* laws spring from the desire to create a society based on the type of moral responsibility and justice that would enhance human dignity.[119] Malik

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[113] Baidyanath Labh "Human Rights in the Buddhist Perspective*"* in BP.Singh (ed) *Human Rights in India* (Deep and Deep Publications, New Delhi, India, 1995) 245.
[114] Craig Baxter et al. *Government and Politics in South Asia* (Westview Press, 2001) 6–8, 25–27.
[115] Will Durant and Ariel Durant *The Story of Civilization* (Easton Press, 1992).
[116] On the origins and development of that historical understanding of *sharia*, see "Abdullahi Ahmed An-Naim" *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New Edition, Syracuse University Press, 1996) ch 2.
[117] Jawahalal Nehru *Discovery of India* (Meridian Books Ltd, New Delhi, 1951) 218.
[118] KS Lal *The Legacy of Muslim Rule in India* (New Delhi, Aditya Prakashan, 1992).
[119] MI Malik "The Concept of Human Rights in Islamic Jurisprudence" (1981) 3 HRQ 56–67 (Malik).

further asserts that the "Muslim jurists regarded human rights as an integral part of faith,"[120] and therefore during the Mogul Empire, especially during the reign of Akbar,[121] religious tolerance and the freedom to follow one's own religion was vigorously advocated. Akbar's reign was marked by this general ethos of equality and tolerance, which resulted in a revival of Hindu literature and arts as well as philosophical debates between Islam, Hinduism and Jainism.[122]

Similar to the Hindu and Buddhist philosophical ethos, "[j]ust — and accountable — government has long been considered a *desideratum* in Islamic political and religious thought. The Qur'an states that the righteous 'inherit the earth', righteous in this case referring to the morally upright rather than the members of any privileged confessional community. A righteous and just leader ruling by at least the tacit consent of the people and liable to being deposed for unrighteous conduct remained the ideal for most Muslims through much of the Middle Ages …"[123]

The early Islamic concept of *shura* refers to public consultation, which can include matters of governance, and to public affairs, and it is similar to the concepts of democratic governance that evolved centuries later in Western Europe. However, the emergence of political absolutism in the Arab region stifled the evolution of *shura* into a sustained political ideology. Asserting values of religious pluralism, Qur'anic teachings indicate that a person's faith is a matter between himself and God and that all persons have the freedom to choose their faith.[124] Several comparable notions between Islam and contemporary human rights discourse can be discerned. The Qur'an contains values of equality between people and equality before the law, freedom of religion, the right to hold property, freedom of the person and freedom of expression. These humanistic and tolerant facets, which were inherent in early manifestations of Islam, held a special attraction to the socially marginalized

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[120] Malik, above n 120.
[121] Ruler of the Mughal Empire from 1556 until 1605.
[122] Amartya Sen *The Argumentative Indian: Writings on Indian History, Culture and Identity* (Penguin, London, 2005) 39–42, 287–293.
[123] Asma Afsaruddin *Tolerance and Diversity in Islam* (2002) 2 Peace Colloquy <http://www.nd.edu/~krocinst/colloquy/issue2/feature_afsaruddin.shtml> (accesed 2 June 2006).
[124] Malik, above n 120.

communities (untouchables) in India, which helps explain the religion's rapid establishment in the region.

1.4.2 Human Rights and Early South Asian Political Philosophy

The earliest articulations of justice, equity and good governance in Indian political philosophy are found in the *Arthashastra*[125] or the Science of Economics, compiled by Kautilya, a Minister in the Court of the Mauryan Emperor Chandragupta circa 321 BC. It is often alleged that his work exalts stringency in governance and intolerance, but Sen draws attention to another aspect less often highlighted. Sen explains, "First, Kautilya is a consequentialist of quite a narrow kind. While the objectives of promoting the happiness of the subjects and the order in the kingdom are strongly backed up by detailed policy advice, the King is seen as a benevolent autocrat, whose power, albeit to do good, is to be maximized through proper organization."[126] His treatise on the essence of effective governance included issues such as the impartiality of judges similar to a contemporary code of conduct for the judiciary, saying, "judges and magistrates shall not impose a fine when it is not prescribed, impose a fine which is higher or lower that the prescribed one, award physical punishment when it is not prescribed."[127]

The *Arthashastra* presents ideas and suggestions on such practical subjects as famine prevention and administrative effectiveness that remain relevant even today — and "at the same time advises the King about how to get his way, if necessary through the violation of the freedom of his adversaries."[128] Despite the essential non-egalitarian flavour in his treatise, he emphasizes that the duty of the King is to "provide the orphans, the aged, the infirm, the afflicted, and the helpless with maintenance," along with providing "subsistence to helpless women when they are carrying and also to the

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[125] LN Rangarajan (ed) *Kautilya: The Arthashasthra* (Penguin Books, New Delhi, 1992); see also RP Kangle *The Kautilya Arthasatra* (Motilal Banarsidass Publishers, India, 1997).
[126] Sen (1997) above n 5.
[127] The *Arthashastra* 4.9.17, 18 quoted in Micheline Ishay *History of Human Rights from Ancient Times to the Globalization Era* (University of California Press, Berkeley, 2004) 29
[128] Sen, above n 127.

[newborn] children they give birth to."[129] Kautilya's observations that the King has a duty to serve the people and foster social welfare are illustrated by the following excerpt: "In the happiness of subjects lies his happiness; in their welfare his welfare; what ever pleases him he shall not consider as good, but what ever pleases his subjects he shall consider good."[130] This also encapsulates the intrinsic relationship between the governor and the governed in ancient Indian politics especially the notion that kingship denotes the idea of a "trustee" of the peoples' well-being rather than a ruler.

Sen observes that in the *Arthashastra* the "tolerance of heterodoxy" is absent and in that sense Kautilya's writings do not reflect the values of freedom and charity.[131] In this context, Baxter et al. assert: "There was little of the theoretical basis of politics and political institutions in Hindu India. Unlike the ancient Greeks, the ancient Hindus did not develop a formal political philosophy."[132] Paradoxically, Kautilya's *Arthashastra* was not meant to be an exposition on the virtues of freedom, or a treatise on rights, nor was it concerned with theoretical issues of political philosophy. It was rather a manual for effective governance or state-craft, and traces of it are echoed in the modern concept of good governance.

The earliest expressions of values of dignity, non-violence and equality in the subcontinent are found in the emperor Ashoka's *Edicts* in the third century BC. These *Edicts* were essentially based on Buddhist strictures to which Ashoka converted after realizing the futility of war.[133] Emperor Ashoka modelled himself on the notion of the "righteous king" on the basis of Buddhist *dharma*.[134] His *Edicts*, erected in the four corners of his empire such as at Erragudi, contain the teachings of Buddha that

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[129] Sen, above note 127.

[130] Quoted in Satish Kumar "Human Rights and Economic Development: The Indian Tradition" (1981) 3 Human Rights Quarterly 3.

[131] Amartya Sen "Human Rights and Asian Values: What Lee Kuan Yew and Le Peng don't understand about Asia" (1997) 217 The New Republic 33.

[132] Craig Baxter et al. *Government and Politics in South Asia* (Westview Press, Boulder, 2001) 24.

[133] For an account of Ashoka's rule see M Wood *Legacy: A Search for the Origins of Civilization* (BBC Worldwide, London, 1999).

[134] P Morgan "Buddhism." in P Morgan and C Lawton (eds) *Ethical Issues in Six Religious Traditions* (Edinburgh University Press, Edinburgh, 1996) 55–98.

exalted the virtues of *ahimsa, upeksha*, *mettha*, *muditha*, and *karuna* (non-violence, kindness, tolerance, empathy and compassion).[135] *Edict XII* at Erragudi states:[136]

> … a man must not do reverence to his own sect or disparage that of another man without reason. Deprecation should be for specific reason only, because the sects of other people all deserve reverence for one reason or another. By thus acting, a man exalts his own sect, and at the same time does service to the sects of other people. By acting contrariwise, a man hurts his own sect, and does disservice to the sects of other people. For he who does reverence to his own sect while disparaging the sects of others wholly from attachment to his own, with intent to enhance the splendour of his own sect, in reality by such conduct inflicts the severest injury on his own sect.

Sen provides other examples from the *Edicts*[137] relating to marginalized communities such as the forest dwellers, tribal people and the peasantry which support the premise that Ashoka's theory of governance based on *dharma* was inspired by the religious teachings of the time. Ashoka's rule was based on values of "non-injury, restraint, impartiality, and mild behaviour," which were applicable to all within his empire.[138] He abolished the death penalty[139] and was committed to religious pluralism as "[t]he best traditions of both Buddhism and Indian kingship coincided in Ashoka's declared support for all religions. This support went far beyond passive toleration: he dedicated caves to non-Buddhist ascetics, repeatedly said that Brahmins and renouncers (*sramaa*) all deserved respect, and told people never to denigrate other sects but to inform themselves about them."[140]

The influence of Buddhism had fundamentally altered Ashoka's world view. Justice, equality and humanism formed the core of his political philosophy, which has been described by Romila Thapar thus: "Buddhism of [Emperor Ashoka's] age was not merely a religious belief; it was in addition a social and intellectual movement at

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[135] Lord Avebury "Human Rights" *Naya Dut* (1978) 8 Nepal Bar Association 25.
[136] Ven S Dhammika *Edicts of King Ashoka* (The Wheel Publication No. 386/387, Buddhist Publication Society, Kandy, 1993).
[137] Sen (1997) above n 5.
[138] Sen points out that Ashoka's "toleration of diversity" contributed greatly to the secularist ethos if the intellectual history of India which is reflected in Constitution of India. He contrasts the understanding of secularism in the West to Indian secularism, which is not the separation of church from state and the restriction on religious manifestations, but the tolerance of a profusion of religions, none of which is privileged by the state. Amartya (2005) above n 122, 34–44.
[139] Pillar *Edict IV*, see KR Norman "Aśoka and Capital Punishment" 1 Journal of the Royal Asiatic Society, 16–24.
[140] Richard Gombrich "Aśoka The Great" in Anuradha Seneviratna (ed) *Upāsakaking Aśoka and Buddhism Historical and Literary Studies* (Buddhist Publication Society, Kandy, Sri Lanka, 1994).

many levels, influencing many aspects of society."[141] The Emperor and his Ministers would make tours of the land every five years to check on the welfare of the subjects. Ashoka had appointed plenipotentiary supervisors termed *dharma-mahamatra* (ministers of morality) who would regulate the welfare funds, charities and religious affairs.[142] Such sociopolitical organization during the Ashokan era not only denotes governance based on *dhamma* but also the existence of a highly evolved concept of *duty* towards the people by the rulers, which is the converse of the *rights* discourse that evolved in Western Europe; both were essentially mechanisms to rein in the absolutism of the rulers.

Notions of fairness and equity were familiar concepts to the rulers of other parts of the subcontinent as well. The *Mahawamsa*[143] recites the story of King Erala fixing a bell at his palace to be rung by his subjects in the event there was a need for justice to be administered by the King. This is perhaps one of the earliest recorded instances where the King ensured universal access to justice.

Mechanisms to control monarchical power also existed in South Asia, as Sheth and Nandy observe:[144]

> … rulers, although they did not often depend on the direct consent of the subject populations, sought to retain legitimacy of their rule through a multi-layered structure of authority that accommodated various interests and identities in the society. The ruler, while representing power as sanctified authority, presided over a system of multiple governances in the society.

Such governance, though not based on the democratic governing mechanisms as in the West, nevertheless sought legitimacy through the various institutions of the society such as councils of ministers.[145] These councils appear to have wielded considerable power and some are attributed with having the powers of electing the King. Sharma describes the Vedic councils, *sabha* and *samithi*, of which the *sabha*

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[141] Romila Thapar *History of India* Volume 1 (Penguin Books, 1966) 85.
[142] DD Kosambi *The culture and civilization of Ancient India* (Vikas Publishing House, New Delhi, 1977) 141–48.
[143] A chronicle of the history of Sri Lanka. It covers the period from the coming of King Vijaya in 543 BC to the reign of King Mahasena (334–361AD) and was written by Mahanama a Buddhist monk in 6th century AD.
[144] DL Sheth and Ashis Nandy (eds) *Multi Verse of Democracy* (Sage Publications, Delhi,1996) 14.
[145] John W Spellman *Political Theory of Ancient India : A Study of Kingship from earliest times to circa 300 AD* (Clarendon Press, Oxford, 1964).

"was a comparatively small council chiefly composed of the most influential members of the community whereas the *samithi* was a bigger assembly consisting of the Heads of the Families of the Tribes."[146] The councils wielded considerable political power within the kingdom where decision-making was done on the basis of consultation and consensus.[147]

While these structures were perhaps not comparable to the democratic systems of governance that emerged later in Western Europe, the ideas of consensual and republican governance did exist in the subcontinent as early as 200 AD. The Licchavi Kings[148] ruled their kingdom (present day Nepal) from 200 AD to 900 AD through a system of governance that resembles a contemporary republican system. At the apex of the power structure was a *Maharaja* who in theory commanded absolute power, but in reality had little impact on the daily lives of the people. The *Maharaja* was aided by the *Amsuvarman* (the Prime Minister) and other officials. Though not a theocracy, the Licchavi rule was governed by the values of Hindhu-Buddhist principles of *dharma*. *Dharma*, which can be equated to collective good and the rule of law among other things, "was considered to be superior to the King"[149] and formed the fundamental tenet of the "entire range of Indian thought."[150]

The rituals of governance during the Licchavi rule included *purohitas* (advisers), which again symbolizes governance by consultation and consensus.[151] The Licchavi rule was also significant for the use of people's organizations of *Panchalis*, *Gosthis*, and the *Sangas*. These organizations curtailed absolutism, and equally functioned as institutions of the collective will of the people. They were responsible for the formulation and direction of educational, health and religious affairs of the kingdom.

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[146] JP Sharma *Republics in Ancient India c 1500 BC – 500 BC* (E J Brill, 1968) 3.
[147] Ibid.
[148] The Licchavi Kings of Vaisala had established their rule in Nepal by circa 200 AD. See Kashinath Tamot and Ian Alsop *A Kushan-period Sculpture, The Licchavi Kings* Published on Asianart.com at <http://www.asianart.com/articles/jaya/kings.html> (accessed 16 Feb 2005).
[149] Lal-Dhoj Deosa Rai "Human Rights development in Ancient Nepal" (1998) 3 HRQ 40 (Deosa).
[150] John W Spellman *Political Theory of Ancient India: A Study of Kingship from earliest times to circa 300 AD* (Clarendon Press, Oxford, 1964) 98.
[151] M Witzel "On the History and the Present State of Vedic Tradition in Nepal" (1976) XV *VASUDHA* (Kathmandu) 12, 17–24, 35–39

The continued existence of some of these institutions in modern Nepal,[152] against the backdrop of the incessant quest for modern democracy, suggests the nexus and the compatibility between these institutions and the idea of human rights and freedom, which will be elaborated in Chapter 4 of the present study.

1.4.3   Recent History of Human Rights in South Asia, from the 18th to the 20th Century

The recent history of the subcontinent has been dominated by struggles for independence from the British as well as a struggle within against the repressive features of subcontinental culture. Agitators for independence, such as Swami Vivekananda, Rabindranath Tagore and Nehru, drew both inspiration and legitimation from the ancient Hindu philosophical teachings as well as 18th century Enlightenment rights rhetoric. Social reformers like BR Ambedkar and Ram Mohan Roy likewise relied on egalitarian religious traditions such as both Buddhism and Hinduism.[153] Roy, the "Hindu Unitarian", synthesized other religions including Christianity and Islam into his vision.[154] Roy is also regarded as a pioneer of the revival of the Vedantic philosophy in the 19th century, for he claimed that, "monotheism, as expounded in the Upanishads, represented the true religion of the Hindus. For him it not only constituted India's national religion but furnished the basis for a universal religion that embraced all worshippers of God irrespective of national and denominational peculiarities."[155] He condemned idol worship, polygamy, and the immolation of widows, and, like Tagore, he advocated equal educational opportunities. As Buultjens observes, "[t]he great Indian nationalists of the nineteenth century were not only political figures, but also religious revivalists or reformers. Most of them saw the liberation of India in both political and religious terms. Their close association with religion helped to legitimize their nationalist

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[152] Deosa, above n 150, 46.
[153] Buultjens, above n 78.
[154] CA Bayly "Rammohan Roy and the Advent of Constitutional Liberalism in India, 1800–30" (2007) 4 Modern Intellectual 25-41; Malhotra, above n 79.
[155] Malhotra, above n79.

aspirations in the public mind."[156] The bells of social equality and non-discrimination that had tolled in Western Europe and America were echoed in the comprehensive rights charter in the Independent Constitution of India.

Article 17 of the Constitution, abolishing untouchability, perhaps epitomizes reform of Indian social structures through advocacy of equal human rights.[157] The architect of the Article, and Chairman of the Constitutional Drafting Committee, himself a *dalit*, was BR Ambedkar.[158] Ambedkar's education in America and England exposed him to egalitarian rights discourse. He also revived the egalitarian features of the Indian socioreligious culture, particularly Buddhism, after centuries of Hindu domination. This religious aspect was no mere add-on, for Ambedkar realized Constitutional stipulation alone would not alter deep-rooted religious and cultural biases.[159]

The author Tagore[160] viewed himself as made up of "a confluence of three cultures: Hindu, Mohammedan, and British."[161] His writings were non-sectarian and liberal, and his political outlook reflected a similar universalist approach: British imperialism was not a primary evil, but a "political symptom of *our* social disease." [emphasis added][162] Tagore bravely defied nationalism's violent overtones that engulfed India in the guise of the freedom struggle in the late 19th century and, in the words of Isaiah Berlin, he "condemned romantic over-attachment to the past, what he called the tying of India to the past 'like a sacrificial goat tethered to a post'."[163] His own words in,

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[156] Buultjens, above n 78.

[157] "Article 17 Abolition of Untouchability – 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law." <http://www.hrw.org/reports/1999/india/India994-15.htm> (accessed 2 Jun 2006).

[158] C Gautam *Life of Babasaheb Ambedkar* (2nd ed, Ambedkar Memorial Trust, London, 2000).

[159] BR Ambedkar *Untouchables or The Children of India's Ghetto* <http://www.ambedkar.org/ambcd/> (accessed 29 May 2006) (Ambedkar).

[160] Rabindranath Tagore (1861–1941), as a son of a leader of the Brahmo Samaj, was exposed to the ideas of nationalism and freedom struggle at an early age. His interests in social reform, liberal ideas of freedom and the sense of humanism are represented in his writings.

[161] Rabindranath Tagore *The Religion of Man* (2nd ed, Unwin, London, 1931, 1961) 105 quoted in Amartya Sen "Tagore and His India" <http://nobelprize.org/nobel_prizes/literature/articles/sen/index.html> (accessed 14 Feb 2005) (Sen).

[162] K Dutta and A Robinson (eds) *Rabindranath Tagore: An Anthology* (St Martin's Press, 1997) 239–240.

[163] Isaiah Berlin "Rabindranath Tagore and the Consciousness of Nationality" in *The Sense of Reality:*

for instance, the poem *Githanjali*, emphasized the need for self-help and the intellectual uplift of the masses through education, on the basis that true freedom could be achieved only through a social transformation of India:[164]

Where the mind is without fear
and the head is held high
Where knowledge is free
Where the world has not been
broken up into fragments
by narrow domestic walls
Where the clear stream of reason
has not lost its way into the
dreary desert sand of dead habit
Into that heaven of freedom
my Father, let my country awake.

Tagore's vision of "openness" to the *best* of educational, cultural and technological integration between the West and the East is nevertheless especially pertinent in the contemporary globalization context. Significantly, he discerned the values of freedom, respect for the rule of law and notions of equity that were an integral part of the British political philosophy, from the repressive manifestation of British colonial rule. Tagore's 1941 speech "The Crisis in Civilization" acknowledged positive liberal legacies of Britain, but he later commented that what "was truly best in their own civilization, the upholding of dignity of human relationships, has no place in the British administration of this country."[165] After the massacre in Amritsar,[166] Tagore wrote to the Viceroy of India requesting to be relieved of his knighthood.[167]

Indian philosophy emphasizes "unity in diversity", and the ethnoreligious pluralism in South Asia is a living example of this notion. Gandhi, through his activism for *purnaswaraj*, synthesized the ancient religious and philosophical teachings of non-violence, tolerance and the search for truth and oneness as an effective means of advocating for national freedom, equality, freedom from exploitation, and for a

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Studies in Ideas and Their History (Farrar, Straus and Giroux, New York, 1997) 265.
[164] Rabindranath Tagore, Gitanjali, Song Offerings <http://www.sacred-texts.com/hin/tagore/gitnjali.htm> (accessed 16 Nov 2006).
[165] Sen above n 161.
[166] On 13 April 1919 in Amritsar, India, the British army opened fire on a peaceful protest march killing 379 people and wounding over 2,000.
[167] Sen, above n 161.

change in the inequitable social order based on caste. Despite a dislike for "rights-talk", Gandhi expressed his struggle at least once in the idiom of rights when he said, "I wish I could persuade everybody that civil disobedience is the inherent right of a citizen ... Civil disobedience ... becomes a sacred duty when the State has become lawless, or ... corrupt ... [The right to civil disobedience] is a birthright that cannot be surrendered without surrender of one's self-respect."[168] The salient feature of his political and philosophical doctrine was the pursuit of common good (*sarvoyada*) through non-violent and truthful means (*satyagraha*).[169] In the longer view, of course, Gandhi was by no means the first to merge the pursuit of peace or virtue with political activism. Aristotle, Plato and Thomas Aquinas, to name but a few, had all espoused wisdom, truth and justice in political theory, though not non-violent protest.

To Gandhi, politics and *dharma* were intimately linked. Moreover, the Mahatma said, "those who want to be passive resisters for the service of the country have to observe chastity, adopt poverty, follow truth and cultivate fearlessness."[170] Each of these qualities has special resonance with early Indian philosophical teachings and was compatible with Gandhi's ideas of *swaraj*, which denoted ideological and political independence from colonial rule; while Raychaudhuri observed that, "Underlying Gandhi's statements on the superior worth of India's civilization one can detect his attachment to a pattern of social interaction which did not privilege the individual or emphasize achievement over other objects of human aspiration."[171]

Although Gandhi's philosophy was never applied globally to remedy injustice, his theory of non-violent civic protest did gain legitimacy as a moral and political force.[172] Ghandhi's philosophy has inspired many struggles of liberation across the

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[168] M King *Mahatma Ghandhi and Martin Luther King Jr: The Power of Nonviolent Action* (UNESCO, Paris, 1999) 286–7.

[169] Jerry M Tinker "The Political Power of Non-Violent Resistance: The Gandhian Technique" (1971) 24 The Western Political Quarterly 775–788; and see generally JV Bondurant *Conquest of Violence* (California Press, Berkeley,, 1967); Paul F Power *Gandhi on World Affairs* (Public Affairs Press, Washington DC, 1960).

[170] MK Gandhi *Hind Swaraj Indian Home Rule* (Ahamedabad, 1909) ch 17. <http://www.mkgandhi.org/swarajya/coverpage.htm> (accessed 20 Nov 2006).

[171] Tapan Raychaudhuri *Perceptions, Emotions, Sensibilities: Essays on India's Colonial and Post-colonial Experiences* (Oxford University Press, New Delhi, 1999).

[172] Paul F Power *Gandhi on World Affairs* (Washington DC Public Affairs Press, 1960).

globe, such as the fight against apartheid, the protests for democracy in Tian'anmen Square, and the struggle for democracy in Myanmar, as well as the mass protests against globalization in places such as Cancun, Davos, Quebec, Geneva, Port Algiers and Melbourne.

South Asia has a rich tradition drawn from both political philosophy and religious teachings that celebrates notions of human dignity, cultural diversity and human freedoms, which together comprise the spirit of the UDHR. However, the fundamental distinction between Western and South Asian expositions of rights is that the South Asian theoretical reasoning did not use the idiom of rights itself. The idea of rights and its spirit is *evident* in the religious, cultural and political articulations but seldom *expressed* in rights terms. Gewirth distinguishes between "having or using a concept and the clear or explicit recognition and elucidation of it ... Thus persons might have and use the concept of a right without explicitly having a single word for it."[173]

Values of tolerance, non-violence and the quest for justice and equity were prevalent in the ancient philosophies of the subcontinent but they were not articulated in the language of rights as Locke, Rousseau or Hobbes articulated them in Europe in the Age of Enlightenment. It bears repeating that the contemporary mainstream human rights discourse emphasizes "individual rights vindicated against the liberal democratic state," and this is essentially a construction of post-War international politics. Similar end results of safety from tyrannical rule were achieved in Asia through different conceptual articulations. Cmiel succinctly elaborates this point[174] when he observes that "Mohandas Gandhi, for one, is mentioned in several of the books discussed here as a friend of human rights. Yet Gandhi generally disliked 'rights-talk' of all kinds, associating it with the self-indulgence of the modern age."[175]

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[173] Richard Dagger "Rights" in Terence Ball et al. (ed) *Political Innovation and Conceptual Change* (Cambridge University Press, Cambridge,1989) 286, 292.

[174] K Cmiel "The Recent History of Human Rights" (2004) 109 The American Historical Review <http://historycooperative.press.uiuc.edu/journals/ahr/109.1/cmiel.html> (accessed 23 Mar 2005).

[175] Gandhi expressed his distrust of rights-talk as early as 1910 in Hind Swaraj; see Anthony J Parel (ed) *MK Gandhi: Hind Swaraj and Other Writings,* (Cambridge, 1997) 81–82. In the 1940s, he expressed his scepticism about human rights projects to both HG Wells and a UNESCO symposium

Gandhi emphasized the importance of obligation not only as a basis of, but as prior to, rights: "I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for."[176]

Thus what is articulated as a right of the individual against society and the state in the Western philosophical discourse was traditionally voiced in South Asian political philosophy as one of its reciprocals, namely a duty of the society or the ruler towards the individual or the ruled.[177] Those who spearheaded independence in the subcontinent synthesized the European rights discourse and the fundamental tenets of South Asian philosophy: humanism, non-violence and *dharma*. It is this synthesis that formed the foundation of the constitutions of South Asia and their charters of fundamental rights. These charters conform to the structure of the Western liberal constitutional model but represent a synthesis of ancient Indian and Enlightenment European discourse.

1.5   The "Globalization" of Human Rights

Historians compete to locate the point of re-emergence of rights discourse onto the global stage in its modern form. Burgers points to Roosevelt's State of the Union address of 1941, just months before Pearl Harbour brought America actively into the

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that asked for his comments on the proposed Universal Declaration of Human Rights. In both cases, he urged people to think about their duties instead of rights. See Gandhi to Wells, undated, H. G. Wells Papers, Folder G-22, Rarebook and Special Collections Library, University of Illinois, Champaign-Urbana; Jacques Maritain, et al. *Human Rights: Comments and Interpretations* (New York, 1949) 18. Quoted in K.Cmiel 'The Recent History of Human Rights' (2004) 109/1 The American Historical Review <http://historycooperative.press.uiuc.edu/journals/ahr/109.1/cmiel.html> (accessed 23 Mar 2005)

[176] *Ghandi and the non-violent path to human rights* quoted in Polly Vizard "Antecedents of the Idea of Human Rights: A Survey Of Perspectives" Human Development Report 2000 Background Paper. <http://hdr.undp.org/en/reports/global/hdr2000/papers/polly%20vizard.pdf> (accessed 4 Feb 2008).
[177] See the discussion on Dasaraja dharma above.

world's most global ever war.[178] The President defined liberty in rights terms: "Freedom means the supremacy of human rights everywhere." By the end of that year the newly reinforced Allied Powers had incorporated as one of their war aims "to preserve human rights and justice in their own lands as well as in other lands."[179] Lauterpatcht, however, observes that constitutional protection of human rights had emerged in the 19th century and many constitutions in Europe including those of Scandinavian states had included charters of fundamental rights into their national constitutions.[180]

Ironically, the world had to be plunged, again, into the truly global conflict of World War II, and be shocked by the unprecedented scale and publicization of that conflict's associated atrocities, before a truly global consciousness could emerge for the need for global human rights protection. German and Japanese genocide and persecution of vulnerable minorities, and the culmination of it all with the devastation at Hiroshima and Nagasaki, became the catalyst for the founding of the contemporary international human rights regime.[181] Before the Holocaust, atrocities such as the Russian pogroms and the Turkish massacre of Armenians drew little attention from the international community, for the concepts of state sovereignty and the sanctity of internal matters were ardently protected. According to Jayawickrama, those twin concepts were the most significant "obstacle to the development of the international law of human rights" in the first half of the 20th century.[182]

1.5.1 The United Nations and the Universal Declaration of Human Rights

The modern narrative of human rights instruments begins with the Charter of the United Nations, which was the eventual successor to the League of Nations The

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[178] JH Burgers "The Road to San Francisco: The Revival of Human Rights Ideas? The Human Right Idea in the Twentieth Century" (1992) 14 Human Rights Quarterly 447–477.
[179] <http://www.fdrlibrary.marist.edu/od4frees.html> (accessed 29 Jan 2008).
[180] H Lauterpatcht *International Law and Human Rights* (Garland, New York, 1973) 89.
[181] Steven R Ratner and Jason S Abrams *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, Oxford, 2001).
[182] Nihal Jayawickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, Cambridge, 2002) 17. (Jayawickrama).

unpardonable actions of the Nazis made the international community realize that there was a lacuna in its legal and political machinery to condemn and to punish the German Government, as, "[a]ccording to the strict doctrine of state sovereignty, any foreign criticism of the domestic laws that authorized these atrocities was illegitimate; according to the theory of legal positivism, it was also meaningless."[183] The atrocities of World War II, however, highlighted the need to define parameters for state behaviour in relation to warfare and human rights; and, aided by the lobbying of Non-Governmental Organizations (NGOs), the final draft of the UN's Charter adopted as a basic principle and a legal obligation upon member states the promotion and encouragement of respect for human rights and fundamental freedoms.

The sense of urgency in the creation of a human rights regime was viewed with cynicism by some who observed that the post-war leaders "either displayed a moral reaction to fascist atrocities, or they believed that states engaging in gross violations of human rights were also likely to violate the law against aggressive war."[184] On the other hand, "[h]earing about and experiencing the horrors of the war convinced the drafters of the rightness of what they were doing. The moral outrage thus created gave them a common platform from which to operate and do the drafting."[185] This concern was translated into the UDHR adopted by the UN General Assembly in 1948.

The number and nature of rights since declared by the UN have evolved from the UDHR following several interlinked trends . The first trend is from purely moral aspirations to more politically and even legally binding guarantees. The second is the gaining by the UDHR rights and later coinages of universal legitimacy as at least a benchmark of aspiration. The third is a trend from few rights to many and from less to more specific, but with a division between, on the one hand, civil and political

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[183] Above n 181, 20.
[184] David P Forsythe *Human Rights and World Politics* (University of Nebraska Press, Lincoln and London, 1989) 10–11.
[185] Johannes Morsink *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia, 1999) 37 (Morsink).

rights, essentially enjoyed as individuals; and, on the other hand, economic social and cultural rights, more often associated (correctly or incorrectly) with groups.

The most fundamental contribution of the UDHR was the contribution it made towards the development of the international legalistic character of human rights. The creation of several treaties to safeguard individual rights had the result of transforming the individual from an "object of international compassion" to a subject of international law who has recourse to international remedies to protect their fundamental rights.[186] According to Eleanor Roosevelt, at inception the UDHR did "not purport to be a statement of [even] basic principles of law or legal obligation".[187] Morsink confirms this: "The view that the Declaration had no legal and only moral force was nearly a unanimous view of the delegations involved in the drafting."[188] However, neither Roosevelt nor Morsink believed this made the Declaration toothless. Roosevelt hoped that by being freely adopted by the General Assembly, the rights in the UDHR would serve as "a common standard of achievement for all peoples of all nations"[189]. History has largely borne out this hope; looking back, Morsink reflects that there was indeed "tremendous philosophical and moral power in this position [moral rather than legal status] and it explains why the Declaration has become a moral beacon in the affairs of individuals as well as of states."[190]

As well as becoming part of international law, rights become entrenched through incorporation into domestic constitutional laws either as a ratification and adoption of the UDHR or later instruments, or as a mirroring of those instruments in member states' creation of their own charters. The United Kingdom is a recent example, its 1998 Human Rights Act reflecting the European Convention on Human Rights, which in turn reflected the UDHR.[191]

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[186] H Lauterpactht *International Law International Law and Human Rights* (Garland, New York, 1973) 4.
[187] Eleanor Roosevelt "Adoption of the Declaration of Human Rights"
<http://www.udhr.org/history/ergeas48.htm> (accessed 14 Feb 2005) (Roosevelt).
[188] Morsink, above n 187, 295–296.
[189] Roosevelt, above n 189.
[190] Morsink, above n 187, 296.
[191] <http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1> (accessed 4 Feb 2008).

The evolution of a comprehensive human rights body with specialized treaty regimes within the span of three to four decades is a considerable achievement.[192] The creation of legally formulated documents enshrining specific rights has helped the idea of rights to emancipate from the realms of ethics and moral stipulations into enforceable law.[193] A significant impediment in the evolution of human rights from a moral ideal to a legal regime is the differentiation of civil or political from economic, social and cultural rights. The two key UN instruments building on the UDHR, the International Covenant on Civil and Political Rights (ICCPR)[194] and the International Covenant on Economic Social and Cultural Rights (ICESCR),[195] which came into effect in 1976, have evolved separately of each other, claiming legitimacy from two different political ideologies that dominated world politics in the post-World War II era. The fundamental civil rights that were the kernel of the political struggles of the 17th-19th century in Europe emerged in the UDHR in the form of civil and political rights and were converted into legal obligations under the ICCPR. The economic, social and cultural rights reflecting a more socialist ideology were incorporated into a second covenant and remained in the realms of "progressive realization" on the basis of available resources.

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[192] **International Convention on the Elimination of All Forms of Discrimination 1969** Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19; **International Convention on the Suppression and Punishment of the Crime of Apartheid 1976** Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973, entry into force 18 July 1976, in accordance with article XV; **Convention on the Elimination of All Forms of Discrimination against Women 1981** Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1); **Convention on the Rights of the Child 1990** Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989,entry into force 2 September 1990, in accordance with article 49; **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987** Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1) declarations and reservations. <http://www2.ohchr.org/english/law/index.htm> (accessed 4 Feb 2008).
[193] Drawing inspiration from the UDHR, many states have adopted justiciable human rights regimes nationally; see for example the Constitutions of India and Sri Lanka.
[194] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March1976.
[195] International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

Meanwhile, rights have also been strengthened from top down to some extent through the UN itself by the creation of monitoring, reporting, enforcement and some adjudicative bodies.[196] However, these mechanisms have lagged behind the coining of new treaties. Tony Evans observes that, "the international community has not matched its enthusiasm for setting human rights standards with similar enthusiasm for creating necessary machinery to implement those standards. Although the Commission on Human Rights has developed monitoring procedures and advisory programmes for implementing state obligations under international law, the commentators generally agree that these are weak."[197] A comprehensive international legal framework for the implementation of human rights, through which a state's obligations to ensure human rights domestically can be legally challenged, is yet to be achieved. This is predominantly due to a lack of effective mechanisms at international level to make states adhere to, and comply with, the legal obligations they undertake as treaties.[198]

The division between the ICCPR and the ICESCR points up another, more arguable distinction. Because human rights were regarded as a quintessential weapon of the individual against the state, some view the notion that human rights can be associated with social groups, communities, tribes, castes, races or any other collective entities with a degree of scepticism.[199] Others consider the dichotomy between individual rights and group rights can be resolved by perceiving that "group rights" also serve the interests of the individual.[200] However, the adoption of several international

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[196] Philip Alston "Reconceiving the UN Human Rights regime: challenges confronting the new UN Human Rights Council.(The Cultures of Human Rights)" (2006) 7 Melbourne Journal of International Law 185–225.

[197] Tony Evans *The Politics of Human Rights: A Global Perspective* (Pluto Press, London, 2001) 15.

[198] The universal jurisdiction of the International Criminal Court is an exception but such jurisdiction does not extend to violation of human rights. See William S Schabas, *Introduction to the International Criminal Court* (Cambridge University Press, 2001); Mahnoush H Arsanjani "The Rome Statute of the International Criminal Court" (1999) 93 American Journal of International Law 22–43.

[199] Imre Szabo "Historical Foundations of Human Rights and Subsequent Developments" in Karel Vasak (ed) *The International Dimensions of Human Rights* (Greenwood, Connecticut, 1982) 11; Jack Donnelly, Universal Human Rights in Theory and Practice (Cornell University Press, Ithaca, 1989); Jean-Bernard Marie" Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions" (1986) 7 Hum Rts. LJ 195.

[200] Neus Torbisco Casals *Group Rights as Human Rights A Liberal Approach to Multiculturalism* (Springer, Netherlands, 2006).

human rights treaties concerning the issue of group rights has transformed the narrow conceptualization of human rights which equated human rights to individual rights.[201]

It is in the form of a "common standard of achievement for all peoples of all nations" as Eleanor Roosevelt hoped that the UDHR has gained prominence and legitimacy today. The Declaration contains a universally acknowledged set of norms and standards dictating all perspectives of our relations as individuals and as collective members of groups, within communities and among the states.

The UDHR is a comprehensive moral code, which created a political consensus on the idea of rights that is a unique creation at a time when there was no articulation of human rights in the international arena. However, the UDHR has set the precedent for the creation of standards and not the creation of implementation mechanisms. The ICCPR, the ICESCR and the corresponding Protocols, which were envisaged to be the enforceable mechanism, fell short of that expectation due to political bickering and insecurities related to the Cold War. The long list of subsequent conventions and resolutions identified specific areas of human rights that needed to be addressed, but, as the culture of abstract standard setting was well established, little effort was made to proceed with enforcing those rights in an international or national context. One reason for the lack of vigour in implementation, according to Shale Horowitz and Albrecht Schnabel, is the principle of non-intervention in the internal affairs of other states, a principle that has great prominence in the UN Charter.[202]

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[201] See for example Article 27 of ICCPR which stipulates that persons belonging to ethnic, religious, or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." See <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (accessed 21Nov 2005) and the Convention on the Prevention and Punishment of the Crime of Genocide " … genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."
<http://www.hrweb.org/legal/genocide.html> (accessed 21Nov 2005).
[202] Shale Horowitz and Albrecht Schnabel (eds) *Human Rights and Societies in Transition: Causes, Consequences, Responses* (UNU Press, 2004) 45.

1.5.2 Accusations of Cultural Imperialism Levelled against the Universal Rights Regime, and a Preview of Cultural Relativism

Despite the imperfections of the implementation strategies, the UDHR and the two Covenants of 1976 represent the mainstream human rights discourse that has established itself as the universal standard of human rights. However, this assertion of universal relevance and legitimacy has exposed the UDHR to accusations of cultural imperialism.[203] These challenges, arising mainly from the non-Western developing world, raise important queries as to whether the contemporary human rights norms warrant the predominance they have attained, whether their claims to universality are legitimate, and whether such claims of universality are realistic given the contemporary political, cultural, economic and social ethos of the Third World, and the fact that the UDHR was formulated at a time when most of the developing world was under colonial rule.[204]

For instance, questions regarding the relevance of the rights enshrined had been made by the Islamic states at the drafting stages of the UDHR. In 1947, the Saudi Arabian delegation queried the legitimacy of Article 16 (free marriage choice), and Article 18 (freedom of religion). Regarding Article 16, the Saudi delegation complained to the drafting committee that the draft UDHR had considered only Western sociocultural practices and disregarded more ancient civilizations that had passed the experimental stage with institutions such as marriage and evolved their own rules and values regarding it. The Saudi delegates further asserted that it was not for the Committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries.[205]

The Saudi delegation's[206] query was a defence of the Islamic faith and patriarchal authority, for an essential manifestation of the Islamic culture was deemed to be

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[203] Michael Ignatieff "The Attack on Human Rights" (2001) Foreign Affairs.

[204] S Myres et al. *Human Rights and World Public Order* (Yale University Press, 1980).

[205] See for a detailed analysis of the concerns of the Islamic countries S Waltz "Universal Human Rights: The Contribution of Muslim States" (2004) 26 HRQ 799–844.

[206] On the basis of these objections to Articles 16 and 18, the Saudi delegation refused to ratify the declaration. Seven other countries likewise abstained: South Africa, the USSR and five other Eastern

undermined by the values in the UDHR. From a Western liberal and gender-egalitarian perspective, it is easy to dismiss the Saudi argument as a self-interested attempt to perpetuate the indefensible restriction of female choice in marriage that was central to intolerable patriarchal property relations in Islam. Yet the Saudi argument still raises tensions of principle that are at least prima facie problematic, and the ensuing paragraphs of the present chapter query the legitimacy of such cultural relativist contentions.

This ideological incongruity continues to raise questions about the validity and the relevance of the universal regime of human rights.[207] However, suffice it to say for now that such cynicism as surely underlay the Saudi case and will be noted in certain other protestations of "relativism" against alleged "cultural imperialism" does not detract from what the present writer agrees with the consensus of commentators to be the very real value and the legitimacy of the UDHR. Indeed, that consensus has if anything actually grown, to the point where we even risk forgetting that some such objections were ever seriously raised. As Steiner reiterates: "[h]owever self evident it may appear today, the Declaration bore a more radical message that many of its framers perhaps recognized. It proceeded to work its subversive path through many rooted doctrines of international law, forever changing the discourse of international relations on issues vital to human decency and peace."[208]

1.6 Contemporary Human Rights in South Asia: Underlying Principles and Problems

The success of a universal regime of human rights depends ultimately on individual states implementing the obligations they have undertaken to guarantee for the benefit of individuals at national level. Some commentators believe that there has been

Bloc countries.
[207] See the further discussion on cultural relativism below.
[208] Henry Steiner *Securing Human Rights: The First Half Century of The Universal Declaration and Beyond*, quoted in Steiner and Alston *International Human Rights in Context* (Oxford University Press, 2000) 48.

"amazing progress in guaranteeing human rights"[209] since the UDHR. However, the empirical reality of South Asia is that there is a disjuncture between the international human rights regime, the constitutional prescriptions and the actual implementation of the rights at national level. The comprehensive charters enshrined in many of the South Asian constitutions prescribe legal remedies for violations. In reality, many of the laws and institutional practices in place for the protection of human rights prove to be insufficient or unworkable and the "rights regimes" articulated in the national constitutions are rendered powerless due to lack of resources and infrastructure for effective implementation. Therefore, despite the apparent universal subscription to the "idea" of human rights, its effective implementation in the particular sociopolitical context of South Asia is questionable.[210]

British colonial rule has significantly influenced the governing structure and the political ethos of modern South Asia.[211] The British managed to consolidate their rule over the entire Indian subcontinent by acquiring Ceylon (Sri Lanka) in 1815 and India in 1858 with the result that, "[a]dministratively, India became one — an achievement unparalleled in the political history of India."[212] The result of such territorial integration was the supposed establishment of a British system of centralized administration based on principles of the rule of law, respect for personal liberty, and equal treatment for all colonial people without caste-based or religious distinction.[213]

Adoptions of Bills of Rights in former colonial territories have been either as a recommendation of the colonial power; an initiative of the post-independence

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[209] T Opsahl "Instruments for implementing human rights" (1989) 10 Human Rights Quarterly 33.
[210] BP Singh (ed) *Human Rights in India: Problems and Perspectives* (Deep and Deep Publications, New Delhi, 1995); Stig Toft Madsen *State, Society and Human Rights in South Asia* (Manohar, 1996); ARB Amarasinghe and SS Wijeratne (eds) *Human Rights, Human Values and the Rule of Law* (Legal Aid Foundation, Colombo, 2003).
[211] Ranajit Guha *Dominance without Hegemony: History and Power in Colonial India* (Harvard University Press, Cambridge, Mass., 1998); KM De Silva *A History of Sri Lanka* (Vijitha Yapa Publications, 2005).
[212] Craig Baxter et al. *Government and Politics in South Asia* (Westview Press, 2001) 27.
[213] For an account of the traditional social organization and how the colonial rule impacted on it, see Bernard S Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton University Press, 1996).

constitutional councils; or the result of a revolutionary process.[214] The request to include charters of human rights into the constitutional structures of the countries in South Asia was made by their political leaders, especially India's, long before independence in 1947. Years of exposure to Western education had molded a new class of political elite who were familiar with the concepts of constitutional liberalism and the rights theory that was articulated in Western Europe. The need to include the newly flourishing norms of equality, social justice and standards of human rights into the constitutional structures was justified on the basis that it would remedy the inherent social inequalities that existed in the traditional Indian political culture.[215] The relentless quest to establish a liberal constitutional structure in India by the political elite in the late 19th and early 20th centuries was described by Field as one where "Indians struggled against Englishmen for the right to run a British system in India."[216]

India, during its struggle for independence from the British Raj, demanded the inclusion of a Bill of Rights into its Constitution. The Simon Commission was entrusted with the formulation of the Indian Constitution but rejected this request on the basis that: "Experience however, has not shown [such constitutional enshrinements] to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective."[217]

Jayawickrama observes, however, that the will to make the Bill of Rights work did exist amongst the Indian political elite, such as Jawahalal and Motilal Nehru, Chittaranjan Das, and Subhas Chandra Bose, who were all exposed to English education in the early years of the 20th century and were familiar with the Western European political struggles and quests for human rights.[218] In situations where the British did not recommend the inclusion of a Bill of Rights into the Constitution of a

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[214] Nihal Jayawickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002) 127.
[215] See the discussion on BR Ambedkar above n 159 and related text.
[216] John Osgood Field *Consolidating Democracy: Politicization and Participation in India* (Manohar, New Delhi, 1980) 347.
[217] Cmd 3569 (1930) 22–23. cited in Jayawickrama abov n 181, 103.
[218] Jayawickrama above n 181. See also for the historical background Brij Kishore Sharma *Introduction to the Constitution of India* (Prentice Hall of India, 2004).

colony, it was justified on the basis of their own circumstances. Britain, until recently, had no domestic regime of human rights[219] and placed reliance on common law to offer protection for human rights violations. Sir Ivor Jennings, essentially taking the same view as the Simon Commission, explained the position of Britain in 1958 by saying, "in Britain we have no Bill of Rights; we merely have liberty according to law; and we think – truly, I believe – that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man."[220]

Contrary to the position in India, when constitutional preparations were made to grant independence to Ceylon, the British government requested that the Council of Ministers submit a proposal of a Bill of Rights to the Constitutional Commission. Though a draft proposal of a rights charter was formulated, Sir Ivor encouraged its exclusion on the basis that such a Charter was not required in the context of the unitary constitution fashioned on the Westminster model.[221] As there was also no request from the minority communal parties for the inclusion of a Bill of Rights, the Ceylon (Constitution) Order in Council 1946 (the Soulbury Constitution) was formulated without a Bill of Rights. The nearest to a Bill of Rights in the Ceylon Constitution of 1946 was Article 29 (2). [222] It was the belief of the drafters of the Constitution "that the customs and the conventions of the British parliamentary practice and British judicial precedent would fill the gaps."[223] Some hailed the enactment of Article 29 as a comprehensive mechanism and claimed that the Soulbury Constitution "entrenched in it all the protective provisions for minorities

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[219] The Human Rights Act 1998 is a United Kingdom Act of Parliament which came into force on 2 October 2000. It gives effect in UK law to the rights contained in the European Convention on Human Rights, which is discussed in detail in Chapter 5 of this study.
[220] WI Jennings *The Approach to Self Government* (Cambridge University Press, 1958) 20.
[221] Radhika Coomaraswamy *Ideology and the Constitution Essays on Constitutional Jurisprudence* (Konark Publishers Pvt Ltd, 1997) 20.
[222] Independence Constitution of Ceylon 1948.
 "29. (2) No such law shall -
(a) prohibit or restrict the free exercise of any religion; or
(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions"
[223] Radhika Coomaraswamy *Ideology and the Constitution Essays on Constitutional Jurisprudence* (Konark Publishers Pvt Ltd, New Delhi, 1997) 20.

that the wit of man could devise."[224] Subsequent communal strife in Ceylon, however, made even Sir Ivor alter his views on including a Bill of Rights into the Constitution. In a BBC interview in the early 1960s he conceded that if he had had an intimation of the political troubles that would emanate in heterogeneous societies such as Ceylon he would have insisted on the inclusion of a comprehensive Bill of Rights into the Soulbury Constitution.[225]

The second attempt at creating a charter of fundamental rights, which was for India in 1949, was more successful. The 1949 Independent Constitution, which remains in force, contained an elaborate Charter of Fundamental Rights, soon followed by Pakistan establishing one in 1956. Bangladesh and Sri Lanka followed suit in 1972. However, the Bill of Rights in the 1972 First Republican Constitution of Sri Lanka was "hamstrung by an ideological debate on the relative supremacy of a Bill of Rights and parliament."[226] The result was an impotent Bill of Rights secondary to the legislature, the latter being the "supreme instrument of state power."[227] The Second Republican Constitution of 1978 contained an entrenched comprehensive Charter of Fundamental Rights, which specified enforcement procedures of rights guaranteed under the Constitution.[228]

The Fundamental Rights Charter enshrined in Part III of the 1949 Indian Constitution guarantees the basic fundamental rights of equality, non-discrimination, religious freedom, freedom from exploitation, freedom of speech and expression and other analogous civil and political rights. The Constitution also guarantees the means of vindicating these rights following applications made to the Supreme Court or the High Courts of India. This fundamental "rights charter" was designed to be a tool of social transformation for it was "set to make a confluence of human rights and social welfare by evolving a concept of social justice".[229] Therefore, constitutional

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[224] Charles Jeffries *Ceylon — The Path to Independence* (Praeger, New York, 1963) 37.
[225] JAL Cooray *Constitutional and Administrative Law of Sri Lanka* (Hansa Publications, Colombo, 1973) 509.
[226] Jayawickrama above n 181,112.
[227] 1972 Constitution of Sri Lanka Article 5.
[228] Article 127 of the 1978 Constitution <http://www.priu.gov.lk/Cons/1978Constitution> (accessed 23 Jun 2005).
[229] *Chaudhari and Chaturvedi's Law of Fundamental Rights*, Panel of Lawyers (eds) (Law Publishers

provisions abolishing untouchability (as already mentioned) and forced labour, and prohibiting discrimination on grounds of ethnic, religious, caste and gender identities, were included.[230]

1.7   Social Action Litigation

In the context of human rights jurisprudence of the subcontinent the most significant development has been the judicial activism through the Social Action Litigation that was first initiated in India.[231] With the intention of promoting social justice and enhancing access to the judicial process, the Indian judiciary have expanded the interpretations of Articles 14[232] and 21[233] of the Indian Constitution to include due process. The result has been the initiation of class action suits and writ petitions from, or on behalf of, the marginalized segments of Indian society, who under normal circumstances would have been excluded from the judicial process due to lack of resources or sociopolitical acumen.[234]

This brief discussion on Social Action Litigation is directed towards the possible expansion of SAL across the region and to establishing common regional procedures in relation to protecting economic, social and cultural rights, which do not have the

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(India) Private Ltd., 1995) 8.

[230] Articles 15, 17 and 23 of the Constitution of India <http://indiacode.nic.in/coiweb/welcome.html> (accessed 23 Jun 2005).

[231] For an historical account and contemporary relevance and efficacy, see Upendra Baxi "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in Neelan Tiruchelvam and Radhika Coomaraswamy (eds) *The Role of the Judiciary in Plural Societies* (St. Martin's Press, New York, 1987) 32; Wouter Vandenhole "Human Rights Law, Development and Social Action Litigation in India" (2002) 2 Asia Pacific Journal on Human Rights and the Law 136–210; Upendra Baxi "Judicial Discourse: The Dialectics of the Face and the Mask" (1993) 35 Journal of the Indian Law Institute*;* Jamie Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 American Journal of Comparative Law 495–519; Upendra Baxi "Introduction" in I P Massey *Administrative Law* (3rd ed, Lucknow, Lucknow Eastern Book Company, 1990); SK Agarwala, *Public Interest Litigation in India: A Critique* (NM Tripati, Bombay, 1985); PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) Col Jnl Int L 561.

[232] "Article 14. Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

[233] "Article21. Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law."

[234] Jayana Kothari "Social Rights and the Indian Constitution" 2004 (2) Law, Social Justice and Global Development Journal (LGD) <http://www.go.warwick.ac.uk/ elj/lgd/2004_2/kothari> (accessed 26 Mar 2005).

same constitutional protection as civil and political rights in South Asia, but are rather claimed to be protected and promoted through public policy and ordinary legislation.[235]

Commonly perceived to be a judicial innovation rooted in the repressive regime of Indira Gandhi, the liberalization processes that induced economic hardship on the poor also fuelled SAL in India. The ubiquitous inequitable power relations that dominated the Indian legal system saw the economically and the politically powerless being discriminated against, negating the effectiveness of the rights enshrined in the Constitution. The empathy of the judiciary towards the marginalized segments of society resulted in creative judicial activism which challenged the "received notions of the judiciary."[236] This was evidenced in the case *Bihar Legal Support Society* v. *Chief Justice of India,* when the Court observed:[237]

> [t]he concern shown [by the law] to the poor and the disadvantaged is much greater than that shown to the rich and well-to-do because the latter can, on account of their dominant social and economic position and large material resources, resist aggression on their rights where the poor and the deprived just do not have the capacity or the will to resist and fight.

In the same case Bhagwati, CJ, who ardently justified the concept of Social Action Litigation, described it as an obligation of the judiciary towards the marginalized:[238]

> The weaker sections of Indian humanity have been deprived of justice for long years; they have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights, and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice.

The most innovative aspect of SAL was the relaxation of the rules relating to standing. The Indian Supreme Court invited the public, provided they were acting

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[235] Social, economic and cultural rights are traditionally cited in the "Directive Principles of State Policy" and are not enforceable by the courts, but are fundamental guidelines for governance which the State is deemed to consider when formulating policy and law.
[236] Kothari above n 234.
[237] *Bihar Legal Support Society* v. *Chief Justice of India* 1986 14 SCC 767.
[238] Ibid.

bona fide, to initiate judicial proceedings on behalf of another in situations where the legal rights of a person were being denied, through the relaxation of the *locus standi* rules.[239] As Bhagwati J observed:[240]

> [i]t may now be taken as well settled that Article 32 does not merely confer power on this Court to issue direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights.

Therefore, the Court declared that an injured party could invoke the jurisdiction of the Supreme Court through Article 32 and the High Court through Article 226, and that in the event that the person whose rights were violated could not invoke the jurisdiction of the court any member of the public could do so on their behalf.[241]

The judgment in *S. P. Gupta* v. *Union of India* paved the way to "epistolary jurisdiction" and displayed the proactive role of the judiciary in creating room for grievances to be brought before the courts by people without locus standi, through letters and even news items.[242] A reduction in the conventional procedural formalities further enhanced SAL as a tool of empowerment to those whose grievances against the executive and the legal system had always been ignored.[243] The Supreme Court also took the initiative to provide schemes of legal aid to litigants for whom legal

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[239] *S. P. Gupta* v. *Union of India* (1982) 1981 (Supp) SCC 87 per Justice Bhagwati "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position is unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons."

[240] *M. C. Mehta* v. *Union of India* AIR 1987 SC. 1089.

[241] *S. P. Gupta* v. *Union of lndia* 1982 1 2 S.C.R. 365. The "epistolary jurisdiction" very innovatively reformulated the procedural requirements in invoking the Supreme Court and High Court jurisdiction.

[242] Carl Baar "Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary" (1990) 19 Pol'y Stud J 140, 142–147; Rajeev Dhavan "Law as Struggle: Public Interest Law in India" (1994) 36 J of the Indian Law Inst 302, 306–308.

[243] Marc Galanter "New Patterns of Legal Services in India" in Rajeev Dhavan (ed) *Law and Society in Modern India* (Oxford University Press, 1989) 279–295.

costs were often prohibitive further dismantling the debacles to invoke its jurisdiction.[244]

SAL in the Indian context created a pathway to litigate the rights enshrined in Part IV of the Indian Constitution — the Directive Principles of State Policy (DPSPs). These include a myriad of social, economic and cultural rights, such as the right to education, the right to livelihood and the right to health and housing, but which are deemed non-justiciable, unlike the rights which are enshrined in Part III of the Constitution and which are declared fundamental rights.[245] The conceptualization of SAL was based on the premise that there was no distinction between Parts III and IV of the Indian Constitution and that they supplemented each other in achieving the common end of creating a society where rights and entitlements were ensured by the Constitution.[246] To this end Justice Reddy declared: "The provisions of Part III and IV are supplementary and complementary to each other and not exclusionary of each other and […] the fundamental rights are but a means to achieve the goal indicated in Part IV."[247] Judicial innovation was creatively utilized to enforce the DPSPs through Article 21 of the Constitution, which guaranteed the right to life.[248] The concept of SAL has since been utilized in Pakistan, Sri Lanka, Nepal and Bangladesh, with varying degrees of success, to expand access to the judicial system.[249] Litigation relating to access to basic social and economic rights, environmental rights, consumer protection and tribal rights has taken place in Pakistan, Bangladesh, Sri Lanka and

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[244] The Committee on Implementation of Legal Aid Schemes (CILAS) was established in 1980 by the government of India with Supreme Court Justice (as he was then) PC Bhagwati as Chair of Budget Activities.

[245] Article 37 of the Indian Constitution states: "The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

[246] *Kesavananda Bharati* v. *State of Kerala* 1973 4 SCC 225.

[247] *Unnikrishnan J P* v. *State of A P*, AIR 1993 SC 2178.

[248] "Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law." See *Francis Coralie Mullin* v. *Union Territory of Delhi* 1981 1 SCC 608.

[249] *Benazir Bhutto vs. The Federation of Pakistan and others* 1988 PLD SC 416 and *Shehla Zia* v. *WAPDA* 1994 PLD SC 693 in Pakistan; and R Hoque Taking justice seriously: judicial public interest and constitutional activism in Bangladesh Contemporary South Asia 2006; Sangeeta Ahuja *People, Law and Justice: Casebook on Public Interest Litigation* (Sangam Books, London, 1997); G. L. Peiris. "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" (1991) 40 The International and Comparative Law Quarterly 66–90.

Nepal.[250] The impetus to promote and safeguard human rights through SAL in other states in South Asia emanates largely from the media and the NGO community, which agitates for greater accountability in political governance in South Asia, with less enthusiasm from the judiciary.

The influence of SAL is that the subcontinent goes beyond a narrow focus of the constitutions' rights and instead gives teeth to the otherwise impotent constitutional provisions assuring socioeconomic and cultural rights. SAL has assumed a vibrant character that agitates for restoration and the continuance of democratic governance where that is broken,[251] and for social justice, both of which are pivotal to the sustenance of human rights in South Asia as explained by Mehta:[252]

> The PIL [Public Interest Litigation] movement has allowed all kinds of public-interest matters to be heard, and given hundreds of poor people a route by which to approach the Court. While PIL cases to date have had mixed success at shrinking poverty or correcting injustices, the provision of a forum to which citizens marginalised by the corruptions of routine politics can turn has arguably given serious moral and psychological reinforcement to the legitimacy of the democratic system.

However, in general the commitment to SAL that has been displayed by the Indian judiciary is not reflected in other jurisdictions across the subcontinent and this has limited its success. Observing the operation of SAL in an Indian context, Peiris in 1991 commented:[253]

> … the novelty and vigour of the judicial initiative, which has disturbed assumptions relating to the judicial function and cast judicial policy adrift on uncharted waters, have been the precursor of intractable dilemmas. These involve core elements of the relationship between the judiciary and other organs of government, each discharging its constitutional responsibility. At the heart of the problem is the political accountability of the courts, and the legitimacy, if not the practicality, of their leadership role in the formulation and implementation of broad social policy, often impinging on matters of acute controversy.

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[250] Sara Hossain, Mallik Shahdeen and Musa Bushra (eds) *Public Interest Litigation South Asia: Rights in Search of Remedies* (Dhaka University Press Ltd, 1997).
[251] The issue of democratic governance in South Asia is discussed in Chapter 4 of this study.
[252] Pratap Bhanu Mehta "The Rise of Judicial Sovereignty" (2007) 18 Journal of Democracy 70–83.
[253] G L Peiris "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" (1991) 40 The International and Comparative Law Quarterly 66–90, 74.

The long term viability of SAL as an innovative concept for social transformation has been queried also by Baxi, who observes that judicial activism can never be a substitute for "political action" in the battle against impoverishment. He observes that "[c]ourts are, at the end of the day, never an instrument of total social revolution; they are, at best, in the images of Roscoe Pound and Karl Popper, instruments of *piecemeal social engineering*".[254] Although conceptually appealing, it has since met with hurdles with regard to the courts' inability to resolve issues relating to disputed accounts of fact, and with regard also to providing effective remedies and effective means to implement those remedies.[255] To ensure the success of SAL litigation the Supreme Court has established specialized commissions to establish the facts of a particular litigation.[256] The Commissions are vested with the responsibility of finding data and facts relating to fundamental rights violations.[257] The Court also appointed an Ombudsman to ensure the implementation of its orders in the case of *People's Union for Democratic Rights* v. *Union of India*, which concerned the implementation of the labour laws by the city contactors and the Delhi City Council.[258] In *Sheela Berse* v. *State of Maharashtra*,[259] a female judicial officer was appointed to supervize the implementation of the Court's order relating to the treatment of prisoners.

The effectiveness of SAL remedies firstly depends on the extent to which the judiciary is going to expand the constitutional mandate relating to socioeconomic rights, as illustrated by the Constitutional Court of South Africa, which has been especially successful in guaranteeing socioeconomic rights. Secondly SAL must be regarded as just one of the several mechanisms that are or can be established to eradicate poverty and ensure social justice.

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[254] Upendra Baxi "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice" in K Kusum and SK Verma (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, 2000) 164.

[255] SK Agrawala *Public Interest Litigation in India: A Critique* (Tripathi, Bombay, 1985).

[256] Through the *Agra Protective Home* case and the *Bandhua Mukti Marcha* case, the Court institutionalized the "practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material in public interest litigation" per P N Bhagwati, cited in "Judicial activism and public interest litigation" (1985) 23 Columbia Journal of Transnational Law 561.

[257] PN Bhagwati "Social Action Litigation: the Indian Experience" in *Judiciary in Plural Societies* N Thiruchelvam and R Coomaraswamy (eds) (Frances Pinter, London, 1987).

[258] *People's Union for Democratic Rights* v. *Union of India* AIR 1983 SC 1473.

[259] *Sheela Berse* v. *State of Maharashtra* AIR 1983 SC 378.

Post-apartheid South Africa, with its endemic social and economic inequalities that were accentuated by the neo-liberal macroeconomic policies,[260] has incorporated justiciable social and economic rights into its Constitution.[261] The Constitution, which enshrines the right to have access to health services, food, water and social security and guarantees the right to education, nevertheless has a restriction clause to the effect that "[t]he State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[262] The recognition of these rights was a reaction to the endemic material deprivation and the moral obligation to provide access to land, healthcare, housing and public services to a nation that has endured apartheid policies. The combined effect of poverty and social marginalization justified the inclusion of socioeconomic rights in the South African Constitution.[263]

The South African Constitutional Court, in several instances, has been able to utilize the Constitutional mandate relating to social and economic rights creatively. In the case of *South Africa* v. *Grootboom* Justice Yacoob observed, "I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognized by the Constitution, which expressly provides that the State is not obliged to go beyond available resources or to realize these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce."[264] Therefore, the Constitutional Court directed the state to "devise a comprehensive and

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[260] J Daniel, A Habib and R Southall (eds) *State of the Nation South Africa 2003-2004* (HRSC Press, Johannesburg, 2003).
[261] Cass R Sunstein "Social and Economic Rights? Lessons from South Africa" May 2001 U of Chicago, Public Law Working Paper No. 12
<http://www.law.uchicago.edu/academics/publiclaw/resources/12.CRS.pdf.> (accessed 11 Jan 2007).
[262] Article 27(2).
[263] For an account of the ongoing struggle for socioeconomic equity in post-Apartheid South Africa see A Desai *We are the Poor: Community Struggles in Post-Apartheid South Africa* (Monthly Review Press, New York, 2003).
[264] *Government of the Republic of South Africa & Ors* v. *Grootboom & Ors* 2000 ICHRL 72 4 October 2000.

workable plan to meet the needs of people in desperate need."[265] The relevance of SAL goes beyond the outcome in the courtroom, as Schultz and Gottlieb observe when they say, "the most important aspect of judicial influence [is] the power of courts to redefine structures and expectations."[266] As the best possible outcome not only will the judgment be implemented but the repercussions can be wider with possible legislative or policy changes. It also creates opportunities of public debate on issues of social concern that were denied public and institutional attention before.[267] In the context of South Asia, as much as the role of SAL is a means of affirming social and economic rights as justiciable human rights, it is also evolving into an avenue for defining social policy. Judicial deliberation on social policy is a means of scrutinizing policy and this is significant in a climate where other avenues of public and parliamentary debate are defunct or dysfunctional and results of elections may not be a true reflection of public opinion.

The rich jurisprudence emanating from the SAL process in South Asia indicates that it has immense capacity to vindicate socioeconomic rights of the poor in the South Asian region particularly as a tool to audit policy formulation in relation to socioeconomic development and poverty eradication.

1.8   Disjunction between Normative Obligations and Political Reality

The sustained success of a charter of rights depends on other sociopolitical circumstances of the state and the legal infrastructure that sustains it, as explained by Read:[268]

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[265] The Court said that the State was obliged to take "reasonable legislative and other measures…to achieve the progressive realisation of the right…within available resources", but maintained that in doing so the State could choose between a range of measures. For an analysis of the *Grootboom* judgment, see Siri Gloppen "Public Interest Litigation, Social Rights And Social Policy" The Arusha Conference New Frontiers of Social Policy– 12–15December 2005.

[266] D Schultz and SE Gottlieb "Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring about Social Change" (1996) 12/1 Journal of Law and Politics 66.

[267] R Véron "Remaking urban environments: the political ecology of air pollution in Delhi" (2006) 38/11 Environment and Planning A 2093–2109.

[268] James S Read "The protection of Human Rights in Municipal Law" CF Forsyth and JE Schiller (ed)

The new states emerged often hurriedly from authoritarian colonialism with dominant nationalist movements but essentially weak political systems, with vulnerable political parties and institutions like the judiciary, the press and the professions too weak to exert effective pressures on the government, with poor and poorly educated populations and struggling economies — rocky soil for the nurture of human rights.

In terms of content the South Asian states have gone to extreme lengths to create extensive charters of human rights reflecting the UDHR but these rights are often restricted on the basis of national security or emergency.[269] For instance, India, Sri Lanka, Pakistan, Nepal, the Maldives and Bangladesh have comprehensive charters of fundamental rights and directive principles in their constitutions and provide judicial mechanisms for partial adjudication.[270] However, few of the countries in the region have institutionalized a durable system to achieve the rights enumerated in the constitutions. Protection of human rights cannot be restricted to the creation of intricate mechanisms but requires political will and commitment, which for reasons articulated in Chapters 3 and 4 of this study are lacking within the governments of South Asia. Furthermore the commitment to pluralist democracy based on respect for the rule of law and true constitutionalism with effective systems of checks and balances is absent within the governance structures of states in South Asia..[271] Pakistan and Bangladesh have both been under military rule and Nepal has had a long history of struggle against monarchical power.[272] Free media and an impartial judiciary, integral features that should help sustain human rights and lend legitimacy to the democratic regime, are absent in many of the countries in South Asia.[273]

Human Rights: the Cape Town Conference (Juta and Co Ltd, Cape Town, , 1979) 156.

[269] Nasser Hussain *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003); Radhika Coomaraswamy and Charmaine de los Reyes "Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience" (2004) 2 International Journal of Constitutional Law 272–295.

[270] Appendix C.

[271] Edward A Kolodziej (ed) *A Force Profonde* (University of Pennsylvania Press, 2003) 144–162; Rohan Edirisinha "Constitutions without Constitutionalism: Sri Lanka' Crisis of Constitutional First Principles" in ARB Amarasinghe and S S Wijeratne (eds) *Human Rights, Human values and the Rule of Law* (Legal Foundation, Colombo, Sri Lanka, 2003).

[272] L Diamond "Is Pakistan the (Reverse) Wave of the Future?" (2000) 11 Journal Of Democracy 91–106.

[273]Maldives -Human rights violations in the context of political reforms Amnesty International Report 2005 http://web.amnesty.org/library/index/engasa290012005; Amnesty International Report Pakistan http://thereport.amnesty.org/eng/Regions/Asia-Pacific/Pakistan; Amnesty International Report – Nepal http://thereport.amnesty.org/page/1139/eng/ Amnesty International Report Sri Lanka

The South Asian states are signatories to several international covenants on human rights but the international obligations undertaken through the treaties are rarely converted into domestic legal obligations.[274] Though ratification of human rights treaties denotes acceptance of international human rights standards, inaction in the domestic sphere indicates that the states are not committed to honouring the treaty obligations.[275] Few states have initiated programmes that give effect to their treaty obligations nationally, as all of the South Asian states have a "dualist approach" in relation to the applicability of international treaty obligations nationally. There is an urgent need to create a system that encourages South Asian states to systematically realize the human rights obligations the states accept at an international level through the initiation of legislation nationally.

The dire need to synchronize the international human rights obligations of South Asian states with domestic laws is well illustrated by the recent Supreme Court case of *Nallaratnam Singarasa vs AG*.[276] In this case the Supreme Court of Sri Lanka determined that Sri Lanka's becoming a party to the Optional Protocol of the ICCPR was ultra vires Article 4 (c) of the Constitution of Sri Lanka, for it bestowed "a judicial power" upon the Human Rights Committee at Geneva.[277] Based on this judgment the government of Sri Lanka claimed:[278]

> The government of Sri Lanka was unable to respond to the Human Rights Committee by submitting its observations, owing to the Supreme Court judgment in Nallaratnam Sinharasa's Case. While the government of Sri Lanka is conscious of its obligations in Treaties, Conventions and Protocols, it is also imperative that the Government of Sri Lanka respects the judgments of its domestic courts.

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http://thereport.amnesty.org/page/1126/eng/ and Amnesty International Report Bangladesh http://thereport.amnesty.org/page/1151/eng/ (accessed 1 Nov 2007) also See Chapter 4 of this study.

[274] Appendix D

[275] Eric Neumayer "Do International Human Rights Treaties Improve Respect for Human Rights" (2005) 49 Journal of Conflict Resolution 925–953.

[276] *Nallaratnam Singarasa vs. The AG* S.C. Spl (LA) No. 182/99 2006.

[277] Article 4. "The sovereignty of the People shall be exercised and enjoyed in the following manner:
 (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution or created and established by law, except in matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law."

[278] The reply of the government of Sri Lanka to the communication under reference G/SO 215/51 SRI (16) MS/EAR/sn 1432/2005 dated 01.03.2007.

This is a strange position for the government to adopt as a previous ruling of the Supreme Court of Sri Lanka had maintained per Fernando J:[279]

> A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.
>
> Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises.

Hathaway in her extensive study of state compliance with international human rights treaties observes that "because human rights treaties are generally only minimally monitored and enforced, there is little incentive for ratifying countries to make the costly changes in actual policy that would be necessary to meet their treaty commitments."[280] She continues that domestic implementation of international human rights norms may be more successful in a regional context "because regional political and economic interdependence generates greater external pressure on countries to exhibit a commitment to human rights norms."[281]

Hathaway's final observation is that:[282]

> the strongest democracies may be more likely to adhere to their treaty obligations because the existence of internal monitors makes it more difficult for such countries to conceal a dissonance between their expressive and actual behavior or because liberal democracies have a true normative commitment to the aspirations embedded in the human rights treaties.

This appears anomalous, as some states in the region such as India and Sri Lanka do have a long tradition of democratic governance and international co-operation. However, even in states like India and Sri Lanka, which have done better than many

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[279] *Weerawansa vs. AG and others* SC application No. 730/96.
[280] Oona A Hathaway "Do Human Rights Treaties Make a Difference?" (2002) 111 The Yale Law Journal 1935, 2020 (Hathaway).
[281] Ibid.
[282] Hathaway, above n 280.

others in the region in terms of adhering to orthodox liberal democratic constitutional structures and practices and have reached certain goals implicit in the mainstream ideology of human rights, there appear to be human rights violations of epidemic proportions.[283] Chapters 3 and 4 of this study examine the reasons for these incongruent patterns of near-perfect formal structures and the horrific empirical evidence of human rights abuses particularly in sociocultural and economic spheres.

The issues discussed above highlight the dilemmas relating to the scope and the validity of the universal regime of human rights, the substantive human rights within the domestic sphere, and the methodology of protecting human rights. A Human Rights Watch report illustrates the empirical dilemmas of implementing human rights amidst poverty and insecurity in South Asia in the following manner:[284]

> Poverty contributes to bonded child labor, but it is not the only cause. A lack of access to credit and lack of a concerted social welfare scheme to safeguard against hunger and illness; inaccessible, low quality, and discriminatory schools; the lack of employment and living wages for adults; corruption and apathy among government officials; and historical economic relationships based on the hierarchy of caste are other key elements. Moreover, bonded children are likely destined for poverty as adults, and likely to bond their own children in order to survive. Fourteen-year-old Ashish M. told Human Rights Watch that he could not leave his loom owner because he was paying off an advance, which in two years he had reduced from Rs. 2,500 (U.S.$52) to Rs. 475 ($9.90). 'The owner pays but deducts for the advance,' he said. 'He deducts but won't write off the whole advance. . . . We only make enough to eat.'[285]

> With wages too low to survive, workers are forced to keep borrowing from their employers, ensuring that they never pay off all of their debts, even though their labor has, in fact, paid them many times over. And as NHRC Special Rapporteur Chaman Lal explained, 'poverty is one of the causes of child labor but also one of the consequences - because it is so cheap it causes adult unemployment and wage suppression.

The reason for the high incidence of child labour in India is perceived by the above Report to be primarily economic. The Report also acknowledges another significant contributory factor —views among Indians about the social order, notions concerning

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[283] Freedom in the World 2007 (Freedom House, Rowman and Littlefield Publishers Inc, 2007) http://www.freedomhouse.org/template.cfm?page=363&year=2007 (accessed 19th Jan 2008).
[284] India Small Change: Bonded Child Labor in India's Silk Industry January 2003 Vol.15, No. 2 (C) http://www.hrw.org/reports/2003/india/ (accessed 1 Nov 2007).
[285] Human Rights Watch interview with fourteen-year-old boy, Varanasi, Uttar Pradesh, 13 March 2002.

the respective roles of upper and lower social strata and the tacit belief in the role of education as a tool to maintain differences among social classes. These sociocultural notions premised on the caste system and the deep cleavages between ethnic and religious groups dominate the list of obstacles to the realization of human rights in South Asia. The violent manifestation of these diversities, often fuelled by political and economic considerations, is contrary to the humanistic and tolerant image that South Asia presents through its philosophical articulations.[286]

As discussed later in Chapter 4 of this study, manipulation of the political system, state- sponsored or sanctioned abuse of human rights, and the increasing incidence of social inequity has resulted in internal political instability within the states in South Asia. These incidents have undermined the confidence amongst the people in traditional judicial institutions and orthodox structures in place for the remedying of human rights violations. The situation also raises fundamental questions about the "utility value" of the human rights structures within the countries that have a penchant for authoritarianism rooted in their history, and about the viability of a genuine human rights culture reflecting the international normative standards.

The norms of human rights enshrined within the constitutional structures were regarded as the formal goals designed to realize the hopes and aspirations of the people who live within the state. However, given the complex economic, social and political matrix of the states in South Asia, these goals were not materialized and have been relegated to the side as some romantic idealism of the first generation of political leaders after independence from colonial rule. In essence, while the institutional frameworks to entrench liberal democratic political processes and reflect international human rights norms have been perfected, the implementation has consistently ignored de facto the recognition of the rights and freedoms of individuals. This has resulted in the escalation of ethnic, religious and political violence that threatens the very foundation of these states.[287]

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[286] See Chapter 4 of this study.
[287] PC Chatterji *Secular Values for Secular India* (Manohar, New Delhi, 1995); Rohan Gunaratna *War and Peace in Sri Lanka: With a Post-Accord Report From Jaffna*. (Institute of Fundamental Studies, Sri Lanka, 1987); Ramesh Chandra Thakur and Oddny Wiggen (eds) *South Asia in the World:*

In addition, as discussed in Chapter 3 of this study, the neo-liberal obsession with economic development has also been deemed a sufficient justification to restrict certain fundamental rights and liberties.[288] The states that followed a socialist political ideology often justified the limitation of civil and political rights with the assertion that economic and social rights must take precedence over others. As in the rest of the Third World, in South Asia too, the existing human rights norms are questioned in economic terms. Successive governments have argued that the emphasis should be on economic progress rather than on human rights, negating the identity of the individual against a common aspiration of economic prosperity.[289] This position reflects the viewpoint that development is a collective process precipitated by state agencies and that human rights can be set aside for this common good. Workers' rights and other related rights are conceived as less important than economic development and if these rights are infringed upon it is regarded as a consequence of the development process to which the state has attributed precedence.[290] There is no promise that once a satisfactory development stage is realized there would be an automatic extension of rights. Leaving human rights aside until economic progress is achieved assumes a trade-off between basic needs and luxuries, but with human rights classified as luxuries.[291]

The validity of the argument of a trade-off between human rights and the collective good appears to be entrenched in the political and legal jurisprudence of the states in the region. The following is the view of a Supreme Court judge of Sri Lanka:[292]

Problem Solving Perspectives on Security, Sustainable Development and Good Governance, (UNU Press, Tokyo, 2004).

[288] The major economies in the region — Sri Lanka, India, Pakistan and Bangaladesh — have adopted liberal free market policies and are committed to the IMF/WB policies of economic development. India, which had resisted this almost universal trend, succumbed to it 1991. See CD Whadva *Economic Reforms in India and the Market Economy* (Allied Press, New Delhi, 1994).

[289] India's conservative Bharatha Janatha Party (BJP) was very vocal in opposing unrestricted entry of the multinational companies but has gradually acquiesced to the inevitable trend and in fact has been hugely supportive of the policies since 1996. The People's Alliance of Sri Lanka prior to 1977 adopted a closed economic policy but reversed its stand when reassuming power in 1994. Similar trends can be observed elsewhere in the region.

[290] See the discussion on workers' rights in South Asia in Chapter 4 of this study.

[291] See Jack Donnelly "Human Rights and Development: complementary or competing concerns?" in GW Shepard Jr and VP Nanda (eds) *Human Rights and Third World Development* (Greenwood Press, 1987) 27–28.

[292] ARB Amarasinghe *Our Fundamental Rights of Personal Liberty and Security* (Sarvodaya Publishers, Sri Lanka, 1996) 27.

> We must recognize both the fact that fundamental individual freedom needs to be modified in application having regard to the common good and the fact that the rights of the individual recognized and declared by the people as being fundamental are, therefore, important and cannot be arbitrarily interfered with by the state. Attempting to achieve a balance between the rights of the individual and the obligation of the state and the community is not an easy matter. However, in the last analysis individual rights must be weighed against the interests of the community as a whole. That is why every nation and groups of nations recognise the right to derogate from guarantees and assurances to individuals of fundamental rights where wider interests are at peril.

This almost Bentham-like postulate relying on the principle of utilitarianism has created a hierarchy of state obligations in which human rights rate a low score.

It is in this circumstance that a sense of scepticism arises regarding the contemporary norms of human rights and their implementation in South Asia. Despite the formal excellence of mechanisms in place to adhere to and maintain international human rights norms, the universal norms become have become an unrealistic aspiration because of intervening socioeconomic circumstances and because they are wilfully ignored for political expediency. In the context of ineffectual human rights regimes within South Asia the following paragraphs explore the legitimacy of the arguments of the alleged Western liberal political bias within the universal rights paradigm.

1.8.1 The Western Liberal Political Tradition

The following analysis highlights different aspects of the debate regarding the "legitimacy" of universal human rights regimes in the context of globalization and the dilemmas that this debate poses to the South Asian states. A fuller conceptual analysis of globalization and its impacts on human rights, on the state and on governance is contained in Chapters 2, 3 and 4 respectively. The brief discussion below is intended to be a prelude to the detailed discussion in the ensuing chapters, which underline the need to explore alternative methods of protecting human rights in South Asia.

The contemporary culture of human rights has been seen to have its roots in the liberal political tradition that the West espouses. Therefore, for such a culture of human rights to be successful one must not only accept it but also adopt a Western liberal political tradition that facilitates and fosters a theory of human rights from a characteristically individualistic stand-point. The requirement of adopting the liberal political state is emphasized by Howard and Donnelly, when they contend that:[293]

> [i]t is often argued that internationally recognized human rights are common to all cultural traditions and adaptable to a great variety of social structures and political regimes. Such arguments confuse human rights with human dignity. All societies possess conceptions of human dignity but the conception of human dignity underlying international human rights standards requires a particular type of 'liberal' regime. This conclusion is reached through a comparison of social structures of ideal type of liberal, minimal, traditional, communist, corporatist and developmental regimes and their impact on autonomy, equality, privacy, social conflict and the definition of societal membership.

The present writer agrees that any claims[294] of equal compatibility between human rights and other political regimes are thus a result of confusing human rights with human dignity.[295]

The classical tenets of liberalism, which propound individualism to act as a constraint on the excessive use of power by the state, are clearly visible in the international documents that constitute the international regime of human rights.[296] The dignity and the autonomy of the individual, equal protection before the law, and equal opportunities for all form the cardinal values of political liberalism. The liberal state stems from the consent of the people that constitutes the state. This consent, expressed in terms of the social contract, is manifested through representative government and periodic elections. The international regime of human rights has recognized these liberal tenets and has legitimized them.[297] However, many of the

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[293] RE Howard and Jack Donnelly "Human Dignity, Human Rights and Political Regimes" (1986) 80 American Political Science Review 801.

[294] Lakshman Marasinghe "Traditional Human Rights Conceptions in Africa" in CE Welch Jr & RI Meltzer (eds) *Human Rights and Development in Africa* (Albany State University, New York Press, 1984); A Pollis "Liberal, Socialist and Third World Perspectives on Human Rights" in A Pollis and P Schwab (eds) *Towards a Human Rights Framework* (Praeger Publishers, New York, 1982).

[295] Pollis ibid.

[296] ICCPR see http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (accessed 17 Oct 2006).

[297] Article 21 of the UDHR – "The will of the people shall be the basis of the authority of

states in the developing world, particularly in South Asia, do not enjoy the luxury of de facto liberal democracy, which creates problems for the effective implementation of the liberal democratic construct of human rights.

1.8.2   The Individualist Premise

In South Asia, individuals conceptualize themselves in terms of the kinship system, the clan, the caste, the tribe, the village — regardless of the underlying diverse ethnoreligious and cultural manifestations of the society. Despite encounters with the West which reiterate the advantages of secularism, and in spite also of the anti-hierarchical currents within the society, people still perceive themselves to be members of a society based on *varna* (caste), particularly the Hindus, who form 64 per cent of the region's population.[298] The rights and duties of an individual in the traditional Hindu society are determined by their position within the hierarchical caste-based system and therefore one is never perceived as an autonomous individual with specific rights detached from one's communal life. From such a stand-point, Chiriyankandath argues that "the duty of any Hindu [state] ruler is to recognize and maintain the caste system ... and consequently reject the primacy accorded to individual rights and to the idea of human equality."[299]

However, the juridical character of human rights in the liberal legal system is given effect through areas of law, such as constitutional law, administrative law and international law. As a part of the region's colonial heritage, this individual bias in the international regime is reflected in all of the charters of rights in domestic constitutions whereby human rights are exclusively vested in individuals and not in social groups, communities, tribes, castes or other such entities. Socialist thinkers critiqued this overwhelming obsession with the notion of individualism in human

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government' and Article 25 of the ICCPR guarantees the free expression of the will of the electors."
[298] BBC Poll –"Indians proud of country but worried caste system is holding country back. Majority taking part in the poll (55%) believe that the 'caste system is a barrier to social harmony." These views are common among age, income and religious groups.
<http://www.globescan.com/news_archives/bbc_india/detail.html> (accessed 16 Apr 2007).
[299] J Chiriyankandath *Human Rights in India: concepts and contexts* Contemporary South Asia 2/3 245–263, 250.

rights theory long before Third World countries raised their objections. This chapter has already considered (at text to footnote 61 above) Marx's critique of the rights of man as being "nothing but … the rights of egoistic man, of man separated from other men and from the community."[300]

Commenting on this individualist premise, Legesse asserts that a person's individual worth, "his personal autonomy and property", is not the conception of human rights for every person in this world.[301] He continues, "If Africans were the sole authors of the Universal Declaration of Human Rights, they might have ranked the rights of the communities above those of individuals." This individual-centred philosophical premise of the Western liberal human rights concept is also criticized by Yamani. He argues that "[Western society] is overzealous in its defence of individual freedom, rights and dignity so that it overlooks the acts of some individuals in exercizing such rights in a way that jeopardizes the community".[302] In contrast to the individualist approach of the West, the African or the Asian approach to society is essentially communitarian. The argument is brought out forcefully by James Hsiung when he asserts that, "pressing for one's own interests without regard for the interests of others is seen as no more than the pursuit of individual self-interest not the pursuit of human rights defined as rights of fellow humans."[303] Legesse therefore argues that any system that claims to be universal must contain elements in it that are definitely of African, Asian, Latin American or Arabic derivation and that the regime must be representative of community or group rights as well as individual rights.[304]

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[300] Marx and Engels ibid n 61,62.
[301] Asmoram Legesse "Human Rights in African Political Culture" in KW Thompson (ed) *The Moral Imperatives of Human Rights: A World Survey* (University Press of America, Washington, 1980) 124.
[302] Ahmad Yamani *Islamic Law and Contemporary Issues* (The Saudi Publishing House, Jidda, 1968) 15.
[303] James Hsiung *Human Rights in East Asia: a cultural perspective* (Paragon House, New York, 1985) 25.
[304] Asmoram Legesse "Human Rights in African Political Culture" in KW Thompson (ed) *The Moral Imperatives of Human Rights: A World Survey* (University Press of America, Washington, 1980) 124.

1.8.3   The Role of the State

Just as the dominant discourse of rights conceives of rights-holders primarily as individual citizens of a nation, so it conceives of the reciprocal duty-bearers as being those citizens' respective nation states. A huge proportion of the Third World consists of colonial territories. Many have inherited territorial segments as independent states devoid of a politically constituted "nation". Under a universal human rights regime, states are primarily responsible for the realization as well as the protection of human rights. But in situations where the very notion of the state is still uncertain, and at times in actual jeopardy due to competing issues of warfare for self-determination, it is difficult to presume that the state as an entity is capable of ensuring the rights of those it seeks to govern.[305] This issue is particularly pertinent to the situation in Jammu Kashmir and to the Tamils in Sri Lanka where the identity of the "state" is vehemently contested.[306]

A significant aspect of the idea of individual rights in the Western notion of rights is thus precisely the empowerment of the individual with the corresponding disempowerment, or subjection to obligations, of the state and its executive organs. The philosophical premise of human rights is that the individual must be bestowed with rights to be exercized against the state, for the very evolution of the dominant discourse on human rights was based on the protection of the individual against absolutism by the state. A literal interpretation of this position poses a dilemma to most developing countries that wish to subscribe to the universalist approach to human rights. As Baxi succinctly argues:[307]

> The notion of disempowerment makes sense. But should it go all the way? Obviously not. Activists ask that new laws may be made addressing the worst forms of violations of human rights in the Civil Society usually associated with the most regressive forms of social behavior associated with the revival of religion, culture and ethnicity. Should there not be strict laws and state action for example on *sati,* dowry murders, sex selective abortions through the abuse of amniocentesis

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[305] See Chapters 3 and 4 of this study.
[306] Robert Johnson *A Region in Turmoil* (Reaktion, London and New York, 2005).
[307] Upendra Baxi "Law Democracy, and Human Rights" in Haresh Sethi and Smithu Kothari (eds) *Rethinking Human Rights* (Lokayan, New Delhi, 1989) 108–109.

techniques, nutritional sex discrimination, which creates new forms of differed female infanticide, child abuse, familial violence against women, atrocities against *dalits*, exploitation of bonded, migrant and contract labour? The answer is yes. The difficulty with this answer is that it empowers the state.

Baxi's contention is a dilemma for India as well as other developing countries where there is an appeal for group or peoples' rights to be recognized and safeguarded through the positive intervention of the state over individual rights. Such schemes of social engineering do not always rest comfortably with the idea of classical liberal rights.

The imposition of the liberal democratic political structures by the political leaders who assumed power from the colonial rulers can also be viewed through this prism. For example, the agnostic Jawahalal Nehru, India's first Prime Minister and the chief architect of the Indian Constitution, was a progressive political leader who sought relentlessly to sever the ties with, as he saw it, absurd Hindu traditionalism and to modernize the popular psyche of India.[308] He oversaw the introduction of the Independent Constitution of India that was fashioned on a liberal democratic model. This secular constitution imposes legal obligations to secure the rights enshrined in the UDHR and could be regarded as a huge state-sponsored project towards developing a secular state.

Traditionally, under the universal regime states are primarily responsible for the realization of human rights as well as their protection. International human rights instruments also constitute among other things inter-state obligations in protecting human rights. The methods of protection available to state parties such as monitoring, reporting and holding state-parties accountable for non-compliance, take into account and operate within the concept of state sovereignty. However, it is becoming increasingly evident that the international control and compliance mechanisms based on the state system and the very idea of a sovereign state are fast being rendered impotent with the supervention of contemporary globalization. As Chapters 2 and 3 indicate, the view that the international system is dominated by sovereign states is

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[308] WJ Morris-Jones "From Beyond the Ganges: A letter from Jawahalal Nehru" in DL Sheth and Ashis Nandy (eds) *Multiverse of Democracy* (Sage Publications, New Delhi,1996) 200.

also fast becoming obsolete. The Westphalian system of absolute state sovereignty, which has been the cornerstone of international relations since the Thirty Years' War, is now diminishing, and a complex novel system of international institutions and transnational corporations is dominating the international scene, beyond the power and the will of national governments to control.

As Chapters 2 and 3 also illustrate, globalization assaults the traditional concepts of nation state and sovereignty. These concepts have undergone a metamorphosis resulting in the erosion of the authority of the state. Diluted state structures and the narrowed range of sovereignty have resulted in individual states being impotent to control the flow of ideas (good, bad or ugly), money, drugs, and crime across their borders. The reduction of state sovereignty has also resulted in an inability to hold together its people who belong to diverse sociocultural heritages. Thus state sovereignty is diminished from both outside and within: by agglomerative and homogenizing globalization on the one hand, and by bitterly fragmentative struggles for independent identity by those sociocultural subsets of the state, sometimes to the point of civil war.

If state structures are permeable and facing the danger of fragmentation, and if state sovereignty is dwindling, how credible is it to presume that a regime of human rights founded on nation states will be successful in protecting those very rights? If the state has experienced a transmutation crippling it from executing the responsibilities of the contemporary international human rights regime, which is founded on the basis of nation states, an alternative regional normative framework on a consensual basis may be more realistic to promote and protect human rights. It would also complement and enhance the universal regime and make it more compatible with contemporary global trends.

The impediments and the obstacles to implementing the universal normative human rights regime in Asia have been articulated on the basis of cultural relativism by several East Asian states. The following section explores the idea of cultural

relativism and inquires into the legitimacy of the relativist approach to human rights implementation.

1.9   The Legitimacy of the Debate on Cultural Relativism

The claim of the framers of the Universal Declaration of Human Rights that it has universal validity and does not underpin any particular cultural tradition has been challenged by many on the basis of cultural relativism. Cultural relativism is defined as an "assertion that human values, far from being universal, vary a great deal according to different cultural perspectives. Some would apply this relativism to … human rights. In other words, according to this view, human rights are culturally relative rather than universal."[309] Those who subscribe to this viewpoint premise their articulations on the idea that normative values derive authority from context and that a particular society does not have the moral authority or the legitimacy to judge the political and social practices of another society.

Huntingdon, observing the contemporary debates surrounding cultural relativism, comments: "Western ideas of individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, the separation of church and state often have little resonance in Islamic, Confucian, Japanese, Hindu, Buddhist or Orthodox cultures. Western efforts to propagate such ideas produce instead a reaction against 'human rights imperialism' and a reaffirmation of indigenous values, as can be seen in the support for religious fundamentalism …".[310] The critics of the universal validity claim, particularly in East Asia and Western Asia, view the contemporary regime of human rights as a hegemonic thrust of the Western powers. Secondly they argue that different societies have different moral standards and therefore the moral claims of the Universal Declaration of Human Rights have no legitimacy outside the Western cultural context. Thirdly the critics claim that the

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[309] Diana Ayton-Shenker, "The Challenge of Human Rights and Cultural Relativism" <www.un.org/right/dpil627e.htm> (accessed 17 Feb 2008).
[310] Samuel P Huntington 'The Clash of Civilizations?' (1993) Foreign Affairs 72 http://www.foreignaffairs.org/1993/3.html (accessed 10 Dec 2005).

sociopolitical and economic reality of their societies demand a different approach to human rights, which they claim the mainstream paradigm does not take into account.[311]

The most recent reiteration of the universal validity of human rights is the Vienna Declaration and Programme of Action, 1993, where the states reaffirmed that the Universal Declaration of Human Rights, "constitutes a common standard of achievement for all peoples and all nations" and that the, "universal nature of these rights and freedoms is beyond question."[312]

While asserting the quintessential universal legitimacy of human rights, the participant states acknowledged quite contradictorily that human rights must also be regarded in the context of a dynamic and evolving process of international norm-creating, taking into consideration the regional and national particularities and the varied historical, cultural and political backgrounds. Therefore, the Vienna Declaration on Human Rights provides:[313]

> All human rights are universal, indivisible and interdependent and inter related … while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

However, the same Conference became a forum where the validity of the assertion of the universal quality of human rights was queried as the statement of the Foreign Minister of Singapore indicated. His contention was that the "universal recognition of the ideal of human rights can be harmful if universalism is used to deny or mask the reality of diversity."[314]

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[311] This aspect of asserting a "social and economic relativism" was discussed in subsection 1.8 of this chapter.

[312] Vienna Declaration And Programme Of Action, World Conference On Human Rights, Vienna, 14–25 June 1993
<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument >
(accessed 10 Dec 2005).

[313] Ibid Sec.1, para 5.

[314] Foreign Minister Wong Kan Seng of Singapore "Real World of Human Rights" at the World Conference on Human Rights, Vienna, 16 June 1993 in James H.Tang (ed) *Human Rights and International Relations in the Asia Pacific Region* (Pinter, London and New York, 1995) 242.

The Chinese Delegation to the Vienna Conference also reiterated the notion of cultural relativism, stating:[315]

> The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development stages have different human right requirements. Countries at different development stages have different human right requirements. Countries at different development stages or with different historical traditions and cultural backgrounds also have different understanding and practices of human rights. Thus one should not and cannot think of the human rights standards and models of certain countries as the only proper ones and demand that all countries comply with them.

The above statement follows the trend of arguments that allege that the contemporary regime of international human rights representing the mainstream paradigm of human rights lacks universal legitimacy because of the particular cultural, political and religious foundations it represents.[316] The proponents of the relativist position claimed that the UDHR and the two Covenants that reflect the existing regime of international human rights are alien, disruptive and insensitive to non-"Western" cultures and political structures, particularly to East Asian cultures which do not conform to the Western model. Prime Minister Mahathir Mohamad of Malaysia was an ardent proponent of this stand-point. He claims that so-called universal values enshrined in the mainstream paradigm of human rights are in fact of Western origin and therefore not compatible with the East Asian sociopolitical ethos.[317]

This particular perspective of Asian Values was further elaborated by the proponents of the Singapore School[318] of thought headed by Lee Kwan Yew, Senior Minister of Singapore. Explaining their position, Singapore's representative to the United

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[315] Speech of Liu Huaqiu Head of the Chinese delegation to the Vienna Conference on Human Rights. Vienna 15 June 1993 in James TH Hang *Human Rights and International Relations in the Asia Pacific* (Pinter, London, 1995) 213

[316] A Pollis and P Schwab "Human Rights: A Western Construct with Limited Applicability" in A Pollis, and P Schwab (eds) *Human Rights: Cultural and Ideological Perspective* (Praeger, New York, 1979) 1–18.

[317] Mahathir bin Mohamad "The Asian Values Debate" speech delivered at the 29th International General Meeting of the Pacific Basin Economic Council at Washington, D.C. on 21 May 1996.

[318] The original members of that "School" were Senior Minister Lee Kuan Yew, Foreign Affairs Permanent Secretary Bilahari Kausikan, Ambassador to the United States, Chan Heng Chee, and Professor Tommy Koh of the Institute of Policy Studies in Singapore.

Nations, Kishore Mahbubani, elaborated that, "it is necessary for a developing society to first succeed in economic development before it can attain the social and political freedoms found in developed societies."[319] The essence of the argument of the Singapore School is that it is necessary to create a hierarchy of human rights where economics take precedence over civil and political rights, for there is a need for economic development for the effective realization of the economic and social rights of the Asian community.[320] The representative of the Chinese government at the World Conference further explained the rationale for this stand-point on Human Rights. The Chinese representative, Liu Huaqiu, stated, "when poverty and lack of adequate food and clothing are commonplace and people's basic needs are not guaranteed, priority should be given to economic development."[321] The South East Asian leaders also claimed that the emerging nation states in the region that were accommodating sociocultural pluralism needed specific political and legal arrangements that were not acceptable to Western liberal democracies. The very stringent laws curbing political rights such as freedom of speech and political association in Singapore and Malaysia were justified on this basis.

Those seeking cultural specificity in human rights, particularly from Western Asia, also attempted to reiterate exclusion of Asian cultural leanings and beliefs from the mainstream discourse. It is along these lines that the Iranian Foreign Minister explained,[322]

> … [t]o enhance the universality of human rights and relevant instruments it is imperative to be cognizant of the cultural diversity of the human family and respect the values of various cultures. This would not only contribute to the richness of human rights norms, but also provide the best guarantee for their universal

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[319] Kishore Mahbubani "An Asian Perspective on Human Rights and Freedom of the Press" in Kishore Mahbubani (ed) *Can Asians Think?* (Times Book International, Singapore and Kuala Lumpur, 1998) 73.

[320] Melanie Chew "Human Rights in Singapore: Perceptions and Problems" (1994) XXXIV 11 Asian Survey 934–935.

[321] Statement by HE Liu Huaqiu, Head of the Chinese Delegation at the World Conference on Human Rights (Vienna, 15 June, 1993). Also see the *White Paper on Chinese Progress in Human Rights* published by the Chinese Government in 1991, 1995 and in 1997 http://www.china-embassy.org/eng/zt/ppflg/t36623.htm (accessed at 19 May 2006).

[322] Statement by Dr MJ Zarif, Asian Regional Meeting on Human Rights, Bangkok, 31 March 1993 as part of Asia Intergovernmental Meeting 29 March to 2 April, 1993 just prior to the Second World Conference on Human Rights held in Vienna.

observance. The political predominance of one group of countries in international relations, which is temporary by nature and history, cannot provide a licence for the imposition of a set of guidelines and norms for the behaviour of the entire international community, especially since these States do not present an ideal, feasible or practical model in theory or practice …

The international regime of human rights is a construct of the post-World War II international framework. However, as this study indicated above, the notions of human dignity that the regime enshrines are common to all civilizational histories from time immemorial. It is this aspect of human dignity that the international regime of human rights seeks to protect on the basis of universal validity. The respect for human dignity is also affirmed by the peremptory norms of international law or *jus cogens* which all states regard as universally binding. The non-derogable principles of international law include the right to life, freedom from slavery, torture, prohibition of genocide and racial discrimination[323] rights that are replicated in the Universal Declaration of Human Rights creating a normative framework of human rights by which all states must abide. Relativism rejects this position, claiming instead that particular cultures can be exempted from this normative framework and external critique on the basis "each state should espouse its own conception of what human rights entail as a social institution based upon its cultural preferences and political ideology."[324]

Not all believe in the cultural and political distinctiveness of Asia that fails to accommodate the human rights standards set by the international human rights documents.[325] Yash Ghai refutes the various premises upon which the Asian governments refuse to acknowledge the standards imposed by the international human rights treaties.[326] He rejects the Asian political leaders' assertion that there is a distinct Asian approach to human rights and that it is based on perspectives that

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[323] Theodor Meron "On a Hierarchy of International Human Rights," (1991) 80 American Journal of International Law 11.

[324] Douglas Lee Donoho "Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards" (1991) 27 Stanford Journal of International Law 354.

[325] Yash Ghai "Human Rights and Governance: The Asian Debate" Occasional Paper Series No. 1, The Asian Foundation's Center for Asian Pacific Affairs November 1994; Michael C Davis, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (1998) 11 Harvard Human Rights Journal 109.

[326] Yash Ghai "Human Rights and Governance: The Asia Debate" (1994) 15 Austral. Y Bk Int L 1.15.

emerge from Asian culture, religion or Asian realities. Thakur, who supports Ghai's position, claims that, "…[r]elativism is often the first refuge of repressive governments. The false dichotomy between development and human rights is usually a smoke screen for corruption and cronyism."[327] In these circumstances cultural relativism is an instrument of political or economic manipulation not an aspiration of higher values or a quest to protect human rights.

Ghai sees no foundation to the contention that the individual bias in the international regime of human rights, the problems of fragmented nationalism and fragile statehood, and economic underdevelopment render the political and civil rights irrelevant to Asia. He claims that it is indeed almost impossible to discern one particular Asian perspective since neither Asian cultural professions nor cultural realities are homogenous throughout the continent. As the religions and political ideologies differ in the region, so too do the economic conditions; therefore he asserts:[328]

> perceptions of human rights are reflective of social and class positions in society. What conveys an apparent picture of a uniform Asian perspective on human rights is that it is the perspective of a particular group, that of the ruling elites, which gets international attention ... the political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify the authoritarianism and occasional repression.

Jack Donnelly endorses Ghai's view that cultural relativism is often used as a tool for political gain. "Arguments of cultural relativism are far too often made by economic and political elites that have long since left traditional culture behind …. Leaders sing the praises of traditional communities — while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks. Such cynical manipulation of tradition occurs everywhere."[329] Therefore,

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[327] Ramesh Thakur "Teaming Up to Make Human Rights a Universal Fact" *Special to The International Herald Tribune*, Thursday, 10 December, 1998
http://www.unu.edu/hq/ginfo/media/Thakur7.html (accessed 3 May 2006).
[328] Yash Ghai "Human Rights and Governance: The Asian Debate" Occasional Paper Series No. 1, The Asian Foundation's Center for Asian Pacific Affairs November 1994.
[329] See assertions of universalism of human rights in Jack Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 1989).

according to Donnelly, the claims of cultural relativism often themselves mask schemes of insidious governance that imperil the rights of its citizens.[330] The legitimacy of the narrow debate on "Asian values" per se remains questionable. Political leaders such as Mahatir Mohamed and Lee Kwan Yew, who began to command considerable power due to the success of the Asian Tiger economies in the 1980s and 1990s, were the chief proponents of this view. The credibility of their arguments dwindled rapidly with the Asian Financial Crisis of 1997 and the enormous socioeconomic burdens that ensued.

Despite the lack of legitimacy of the Asian Values discourse as expounded by the East Asian states, their discontent and skepticism highlights the fact that although there is universal validity for the value of human dignity, the means of expressing that value in rights terms and the structures and mechanisms that protect the rights do not have unquestioned universal validity.

Many states outside the Western world have included chapters of fundamental rights in their constitutions. Each of these states has diverse socio-cultural and political landscapes and they will not take on homogeneous means to resolve issues in relation to human rights. Many of these states utilized the language of rights as a weapon against colonialism and will rely upon it heavily to assert rights to development and a more equitable global financial order. The Asian debate on relativism highlights the inadequacy of the mainstream paradigm to accommodate concerns relating to social justice and an equitable global financial order, which compels the developing world to devise new strategies to maintain and expand human rights protection nationally.

The rationale for the notion of universal rights to prevail, and the need to work on the existing structures to improve and enhance them, are pointed out by Higgins: [331]

> It is sometimes suggested that there can be no fully universal concept of human rights, if it is necessary to take into account the diverse cultures and political systems

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[330] Jack Donnelly "Cultural Relativism and Universal Human Rights" (1984) 6 Human Rights Quarterly 412.
[331] Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1998) 97.

of the world. In my view this is a point advanced mostly by States, and by liberal scholars anxious not to impose the western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non universal, relativist view of human rights is in fact a very state centred view and loses sight of the fact that human rights are human rights and not dependent on states, or groupings of states… I believe, profoundly, in the universality of human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practice their own religion … to know that they would not be tortured, or detained without charge… . I believe that there is nothing in these aspirations that is dependent upon culture, or religion or stage of development. They are as keenly felt by the African tribesman as by the European city dweller, by the inhabitant of the Latin American shanty-town as by the resident of a Manhattan apartment.

The present study agrees with Higgins and asserts that the quest for qualifications on the application of the existing universal human rights standards on the basis of cultural relativism is, in the great majority of cases, unsubstantiated. The universal human rights culture that evolved through the Declaration and the two covenants not only is, but deserves to be, an integral part of the global sociocultural and economic mores. The greatest relevance of relativism to the present study, where such relativism is advanced in good faith and not used as a stalking horse, is to keep the language of rights living, breathing and adaptable, dynamic and dialectical, receptive and responsive to the genuine best of all cultures' contributions. At the same time, paradoxically, it also teaches us to remain realistic and to some extent pragmatic: it teaches us to use normative standards creatively to realize social justice, taking into account the genuine economic, social and political needs and limitations that presently exist in South Asia. This study endeavours to do exactly that.

1.10   Conclusion

This chapter first traced the trajectory of the concept of human rights from a "Western" perspective. Though ideas of natural law and natural rights, quintessential articulations of Western liberal political thought, significantly influenced the contemporary discourse on human rights, the idea of human rights nevertheless did not derive from a single cultural tradition. Notions of human dignity, tolerance, communal obligations, governmental responsibility and social justice were articulated

through the religious and philosophical history of South Asia before the advent of the colonial powers in the region. As the analysis indicated, the late 19th and early 20th century struggles of national liberation and social transformation in the subcontinent drew inspiration from the philosophical and political traditions of the West as well as from South Asia.

The discussion also traced the incorporation of human rights charters into the national constitutions of the South Asian states and the efficacy of those charters. The study identified specific issues relating to the state and individual that create difficulties for the effective implementation of human rights. Globalization and dysfunctional democracy are specific issues that hinder the efficacy of the human rights charters, as will be discussed further in ensuing chapters.

This chapter identified the debate on cultural relativism, as advanced for instance by certain voices from South East Asia, as a means of demonstrating that the dominant paradigm of human rights is certainly not without its critics. Perhaps the most defensible argument made in the name of relativism is that the mainstream rights discourse must of necessity take into account the concerns of the periphery if it is to be sustained. The need to accommodate issues such as group rights and the right to development, for instance, quite legitimately opens doors for a broad-based approach to the existing normative structure of human rights.

The relativist argument has value to the extent that it demonstrates the need for flexibility within the dominant discourse to accommodate the concerns of, in particular, the developing world, and at the same time the need for the developed world to examine both whether it is sincerely pursuing the concepts of rights it claims to put forward, and whether there is ever mere self-interest in those very choices of concept. Such flexibility will ensure the legitimacy of the universal paradigm of human rights within the developing world. The refusal to grant legitimacy to the voices from the Third World within the dominant ideology would imply that it is designed to serve the interests of a neo-liberal world order which contemporary economic globalization promotes as discussed in Chapter 2 below.

Kothari and Seth observe the universal paradigm remains as yet not a statement of reality, but "an ever expanding set of objectives waiting to be actualized. And their realization is possible only through a process of constant struggle."[332] The authors go on to say that such a struggle will lead to the evolution of a social praxis which will help realize the needs of the most oppressed communities by the rights guaranteed through the universal human rights regime. The present study endorses that viewpoint and acknowledges the need to use the established normative structures of the UN system and make the existing human rights network more meaningful to the people of South Asia.

Each culture or social system could claim a moral superiority as expressed by the states that endorse cultural relativism in human rights. This study asserts that the universal regime of human rights envisaged by the Declaration of 1948 advocates cultural egalitarianism and that this regime is no longer regarded by the community of states as a mere invitation to strive towards a common standard of achievement, but as a norm that each state must give priority to in the name of humanity. Unless human rights are regarded as a normative concept that overrides the cultural and ideological differences, the oppression that is created by their denial will continue.

The idea and the scope of human rights is subject to continuous metamorphosis as a result of diverse influences particularly globalization. To maintain its legitimacy and effectiveness new frameworks of thinking particularly in relation to human rights, poverty and development are emerging. The emerging paradigm of human rights is focusing on enhancing human capability, human-centred development and democratic governance, aspects that will be elaborated in later chapters of this study. South Asia's endeavour must be to take into consideration the anomalies in relation to human rights implementation in the region and create a system that will complement and enrich the universal regime.

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[332] Haresh Seth and Smithu Kothari *Rethinking Human Rights* (Lokayan, New Delhi, 1991) 27.

Andrey Sakharov once wrote from his internal exile in the Soviet Union:[333]

> The ideology of human rights is probably the only one which can be combined with such diverse ideologies as communism, social democracy, religion, technocracy and those ideologies which may be described as national and indigenous. It can also serve as a foothold for those . . . who have tired of the abundance of ideologies, none of which have brought . . . simple human happiness. The defense of human rights is a clear path toward the unification of people in our turbulent world, and a path toward the relief of suffering.

It is important to reiterate that there do exist different paths towards the relief of suffering and that South Asia does need to rely on the inspiration which the universal normative regime of human rights, and the sincere and serious relativists, provide in order to be creative in evolving new and living mechanisms to realize human rights. Other states have created effective systems of realizing and enhancing human rights through mechanisms founded on geographical proximity, as Chapter 5 of this study illustrates, and Chapter 6 will bring that same approach to bear on South Asia.

Moreover, as Maritain observed, "No declaration of human rights will ever be exhaustive and final. It will ever go hand in hand with the state of moral consciousness and civilization at a given moment in history. And it is for that reason that even after the major victory achieved at the end of the eighteenth century by the first written statement of those rights, it remained thereafter a principal interest of humanity that such declarations should be renewed from century to century."[334]

The next chapter will discuss the origins and history of the phenomenon of (largely economic) globalization and its relevance to South Asia. It will trace the evolution of the concept of globalization through colonial history, identify its salient characteristics in the colonial setting, and draw parallels with the phenomenon's contemporary manifestations. The chapter will discuss the impact of contemporary globalization on the notion of nation state and governance in South Asia.

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[333] Andrey Sakharov quoted in Burns H Weston **"**Human Rights" (1984) 6 Human Rights Quarterly 257, 281.
[334] Jaques Maritain "Towards a Universal Declaration of Human Rights" in *Human Rights Teachings* (UNESCO IVI 1958).

CHAPTER 2

SOUTH ASIA'S TRYSTS WITH GLOBALIZATION: HISTORICAL AND CONTEMPORARY

"Economic globalization has become a war against nature and the poor. But the rules of globalization are not god-given. They can be changed…..Since Seattle, a frequently used phrase has been the need for a rule-based system. Globalization is the rule of commerce and it has elevated Wall Street to be the only source of value, and as a result things that should have high worth — nature, culture, the future — are being devalued and destroyed. The rules of globalization are undermining the rules of justice and sustainability, of compassion and sharing."[1]

2.1   Introduction

The previous chapter traced the evolution of the idea of human rights in Western and South Asian history. The study indicated that in a broad sense the values which human rights are seeking to protect were present in both civilizational histories though they were articulated in different idioms. Human rights in a recognizably modern legal formulation were traced back to various national jurisdictions in the West beginning in the late 18th century. Their progressive articulation was tracked from there into the new universalist moral, political, and finally legal norms of international law after World War Two. In South Asia, legislated human rights norms followed the wave of independence from the British. The rights discourse was introduced into the political and social ethos of South Asia by the (often European-educated) political elite, as a means of fighting against colonialism. The idea of rights was also utilized to fight the repressive and iniquitous traits of the subcontinent's own sociopolitical culture.

Chapter 1 also traced the evolution of the rights mechanism within the constitutional structures of South Asia and the efficacy of the international human rights regime in South Asia. The discussion identified the greatest challenges to the contemporary safeguards of human rights as those which emanate from the sociopolitical ramifications of globalization.

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[1] Vandana Shiva "Globalization and Poverty" (2000) 202 Resurgence
<http://www.resurgence.org/resurgence/issues/shiva202.htm> (accessed 17 Dec 2007).

The often glorified, overused, abused and rightly contested phenomenon of globalization which impacts every aspect of contemporary society is the central focus of this chapter. However, this study is restricted to the specific research question relating to the quest, specifically in South Asia, for a trajectory of specifically human-centred development which above all honours human rights. Therefore the study concentrates on the implications for that quest which flow from globalization and its current ideological counterpart, neo-liberalism.[2] With this end in mind, Chapter 2 traces the progression of historical globalization and discusses the contemporary (post-World War II) theorization of the concept. The historical account of globalization will culminate in analysis of how international trade and colonial rule have affected the societal and economic arrangements of the South Asian subcontinent.

The study acknowledges that contemporary globalization has influenced the region's interdependent global, regional and local financial and trade relations and political structures. Perusal of the corollaries that emanate from the globalization process indicates that globalization unleashes forces that have immense potential to create environments for human growth and advancement if those forces are managed wisely. A paradox already becomes apparent between the hugely constructive (and literally reconstructive) global human rights regime set up after World War II as described in Chapter 1, and what have turned out to be increasingly destructive forces of more economically based and often self-interested globalization as will be described in the present chapter. In a theme that is to be developed and returned to, the latter is at odds with and undermines the former. The chapter will also focus on the impact of contemporary globalization on the structures of the nation state in South Asia. As the ensuing examination indicates, the potential benefits of integration into the world economy through trade liberalization and deregulation are compromised by globalization's neo-liberal thrust and the mismanagement of globalization by the South Asian states.

The chasm between the included and the excluded created during the decades of exposure to globalization in the subcontinent has resulted in two worlds — one of inclusion into the globalized world economy dominated by burgeoning trade

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[2] For sociological implications of globalization abuse see Malcolm Waters *Modern Sociological Theory* (Sage Publishers, London, 1994) and for impact of globalization on culture see Michael Featherstone (ed) *Global Culture* (Sage Publishers, London, 1990).

deals, transnational corporations, digital technology and improved standards of living; and the other a world of total exclusion dominated by poverty, deprivation and social outsiderness.[3] In this context the chapter will analyse the relevance of the burgeoning anti-globalization movement and its capacity to help evolve a praxis which would infuse a sense of equity and justice into the concept of globalization.

2.2   Tracing the Evolution of Contemporary Globalization through Some of its Historical Antecedents

Despite the intense focus on the concept of globalization over the past two decades, many analysts observe that it is a fallacy to claim that globalization is a peculiarly modern phenomenon of the last fifty years.[4] Instead, they agree to varying extents that the phenomenon has had a longer history, spanning many centuries.[5] Hopkins usefully argues that globalization can be seen as a continuing concept which historically has taken different forms that he calls, in order, "archaic, proto, modern and post colonial".[6] It is to be noted that the present thesis uses the term "contemporary globalization" to mean what Hopkins calls its "post-colonial" version.

As early as 300 BC people in the Asian continent had created links with disparate locations forming an extensive system of communication, migration, and trade.[7] This formation of interaction and interconnectedness between the global, the

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[3] Joseph E Stiglitz *Globalization and Its Discontents* (W.W. Norton, New York, 2002) (Stiglitz); *Human Development in South Asia 2001: Globalisation and Human Development: The Mahbub ul Haq Human Development Centre* (Oxford University Press, Oxford, 2002).

[4] Waters claims that the words globalisation, globalized and globalizing did not emerge into common usage until 1960. Malcolm Waters *Globalisation* (Routledge, London, 2000) 2. See also Roland Robertson *Globalization Social Theory and Global Cultur*e (Sage, London, 1994).

[5] Andre Gunder Frank and Barry K Gills (eds) *The World System: Five Hundred Years or Five Thousand*? (Routledge, London, New York, 1996).

[6] AG Hopkins (ed) *Globalization in World History* (Pimlico, London, 2002) 3 (Hopkins).

[7] See generally Chandra Mauli Mani *A Journey through India's Past: From Earliest Times to the Last Hindu Emperor* (Northern Book Centre, India, 2005); Marie-Françoise and Jean-François Salles *Athens, Aden, Arikamedu: Essays on the Interrelations between India, Arabia and the Eastern Mediterranean* (Manohar Publishers and Distributors, New Delhi, 2005); and Joginder K Chawla *India's Overland Trade with Central Asia and Persia During the Thirteenth and the Fourteenth Centuries* (Munshiram Manoharlal, New Delhi, 2006).

regional, and the local has been a crucial driving force in world history. As Sen comments, globalization:[8]

> … is, in fact, neither new nor necessarily Western; and it is not a curse. Over thousands of years, globalisation has contributed to the progress of the world through travel, trade, migration, spread of cultural influences, and dissemination of knowledge and understanding (including that of science and technology). These global interrelations have often been very productive in the advancement of different countries. They have not necessarily taken the form of increased Western influence. Indeed, the active agents of globalisation have often been located far from the West.

In 325 BC, Alexander the Great sued for peace with Chandragupta, the Mauryan Emperor, at Gerosia. This encounter marked the eastward link among overland routes between the Mediterranean, Persia, India, and Central Asia.[9] This is the first documented encounter whereby religion, trade, economy, and even imperial armies of the West and East began the long journey of global dissemination. The eastward expansion of this interconnectedness and associated diffusion of information and culture is marked with the reach of Buddhism as far as China in the 1st century AD with the conversion of the Han dynasty.[10] Although it had long existed, the Silk Road became significant from the 1st century when it was militarily protected under the Hans and as such opened up a region hitherto unfamiliar to Central Asia. Cultural links and trade flourished between the two civilizations, which previously had developed independently. The influences of that cultural exchange are still visible in Asia and China today. Much later, throughout the Song Dynasty in China (960–1279 AD), the exchange of trade, technologies, culture and religion continued between India, East Asia and China.[11] This exchange in turn created an impetus for the medieval world economy to flourish as India had by then linked Europe and China by land and sea across Central Asia and the Indian Ocean.[12]

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[8] Amartya Sen "How to Judge Globalism" (2002) 13 American Prospect 1–14.
<http://people.cis.ksu.edu/~ab/Miscellany/globalism.html> (accessed 18 Nov 2007).
[9] Burton Stein *History of India* (Blackwell Publishers, UK, © 1999).
[10] Richard C Foltz *Religions of the Silk Road: Overland Trade and Cultural Exchange from Antiquity to the Fifteenth Century* (St Martins Press, New York, 1999).
[11] Fa-Hsien *A Record of the Buddhist Kingdoms* (James Legge tr, Clarendon Press, Oxford, 1886) reprinted in Mark A Kishlansky (ed) *Sources of World History* vol 1 (Harper Collins College Publishers, New York, 1995) 154–158.
[12] F Hirth *China and the Roman Orient: Researches into their Ancient and Mediaeval Relations as Represented in Old Chinese Records* (Shanghai and Hong Kong, 1885) (scanned and edited by Jerome S Arkenberg, Department of History, California State University, Fullerton) 35–96.
<http://www.fordham.edu/halsall/eastasia/romchin1.html> (accessed 5 Nov 2005) (Hirth).

The expansion of Islam through the western Mediterranean, Central Asia, India and eastwards during 650–850 AD marks another milestone in the history of globalization.[13] Islam brought cultural rituals and ways of life alien to the peoples of Asia. The migration of people from the western Mediterranean region to parts of Asia particularly for trade was also a significant development of that era. Later, the establishment of the Ottoman Empire in 1300 AD, spanning Europe, North Africa, and the Middle East, facilitated this process. The Ottomans established political and commercial ties overland with Safavids and dynasties in Central Asia and India, creating a vast imperial network of integration that led to an immense expansion of trade with Europe.[14]

By 1450 AD, the trade networks involving movements of people, animals, precious minerals, goods and money extended from England to China. Most significant among them were the land route across Central Asia, and the sea route along the Red Sea across the Indian Ocean through the Straits of Malacca to the Chinese coast.[15] As early as 1500 AD the Mongols in Central Asia had established an efficient political framework for the overland trade network via the Silk Road, as recounted by both Ibn Battuta[16] and Marco Polo.[17] During the same period the spread of Islamic trading communities along the numerous ports of the Indian Ocean created a world of sea trade in the region parallel to the land routes.[18] This early exchange of ideas, knowledge and merchandise in the era before industrialization and the birth of the nation state is identified by Hopkins as archaic globalization,[19] which was powered "by great kings and warriors searching for wealth and honour in fabulous lands, by religious wanderers and

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[13] Andre Wink Al-Hind *The Making of the Indo-Islamic World, Early Medieval India and the Expansion of Islam, 7th–11th Centuries* vol 1 & II (Brill, the Netherlands, 2004).

[14] CA Bayly *The Birth of the Modern World 1780–1914. Global Connections and Comparisons* (Blackwell, Oxford, 2004).

[15] Ronald Findlay *Globalization and the European Economy: Medieval Origins to the Industrial Revolution* (Discussion Paper #:0102-28, Department of Economics, Columbia University, New York, 27 March 2002) <http://www.columbia.edu/cu/economics/discpapr/DP0102-28.pdf> (accessed 23 Jun 2006); Ronald Findlay and Kevin H O'Rourke *Commodity Market Integration, 1500–2000* (Discussion Paper #:0102-30, Department of Economics, Columbia University, New York, 27 March 2002) <http://www.columbia.edu/cu/economics/discpapr/DP0102-30.pdf >(accessed at 23 Jun 2006).

[16] Ross E Dunn *The adventures of Ibn Battuta*, *a Muslim traveller of the fourteenth century* (Croom Helm, London, 1986).

[17] John Larner *Marco Polo and The Discovery of The World* (Yale University Press, New Haven, Connecticut, 1999).

[18] K Chaudhuri *Trade and Civilisation in the Indian Ocean: An Economic History from the Rise of Islam to 1750* (Cambridge University Press, Cambridge, 1985); Hirth, above n 12.

[19] Hopkins, above n 6, 4.

pilgrims seeking God in distant realms, and by merchant princes and venturers pursuing profit amidst risk across borders and continents."[20]

The internationalization of trade and the resultant political developments from circa 1600 to 1800 constituted a new phase which Hopkins calls proto-globalization and which "in structure, scale and geographical reach, […] was a departure from its archaic precursor."[21] This trading process, which placed reliance on the trading posts in the Mediterranean and Western Asia, created an intermediary between Europe and the Far East for trade, a kind of middleman raising the cost of trade in the Far East for Europeans. This in turn prompted the Europeans, especially the Spanish and the Portuguese, to seek an entirely seaborne route, whether westward or eastward, to the Indies and beyond. The result was of course the journeys of Columbus and da Gama, who travelled westwards and eastwards to the "Indies" in 1492 and 1498 respectively, laying the foundation for the European seaborne empires.[22] Trading between Asia, the Americas and Europe intensified and the Europeans not only bought commodities that were available for sale but commenced to commission specific types of goods more suitable to the European markets, perhaps creating the very first export processing zones in the regions. As trade expanded, banking systems and major trading companies became established in the region that were controlled by, or had direct links with, Europe.[23]

By 1700, several European trading companies travelled regularly to Asia on ships insured and protected by European companies and governments with goods produced for sale in the Asian markets, and generated substantial profits for investors in both the ships and their cargo. A century later, the Atlantic and Indian Ocean system were connected to one another via the flow of currencies and commodities and by the operations of the British, French, and Dutch overseas trading companies. The 17th and 18th centuries were classified as the age of mercantilism, in which state power in Europe depended directly on the sponsoring

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[20] Hopkins, above n 6, 4

[21] Hopkins, above n 6, 6.

[22] Oliver J Thatcher (ed) *The Library of Original Sources*: *9th to 16th Centuries* (University Research Extension Co., Milwaukee, 1907) vol. V, 26–40 (scanned by JS Arkenberg, Dept of History, California State University, Fullerton) <http://www.fordham.edu/halsall/mod/1497degama.html> (accessed 23 Jun 2006).

[23] Charles Tilly "The Europe of Columbus and Bayazid" (1992) 178 Middle East Report 2–5.

and control of merchant capital.[24] As the European imperial expansion shifted into Asia, the use of military power by European nation states for the protection of their international interests became a standard feature of trade.[25]

By the beginning of the 18th century the British East India Company monopolized all commodities imported into Britain from the what was called the East Indies — all land east of Lebanon.[26] The company epitomizes a very early version of a multi-national corporation. It had consolidated its position with the assistance of the British government and in fact, until reined in by legislation in the early 19th century, came to rival the British state as a power in itself. It did so much as modern multinationals have often done to their parent states, only in their case, as shall be shown, it has generally been *without* such a curtailment.[27]

The fundamental shift in terms of policy from trading to colonization had become established in the region east of Lebanon, including South Asia, under the British during this period. The British Empire, which expanded into Asia and then to Africa along with the French and Dutch, first evolved as a means of economic imperialism rather than territorial domination. This stage of the evolutionary process of globalization is termed "modern globalisation" by Hopkins and it is dominated by the "rise of the nation state and industrialisation".[28]

The political developments taking place in Europe in the 18th century further fuelled the expansion of the notion of establishing empires by the European nations. In particular, the French Revolution of 1789 eventually paved the way for the establishment of strong modern states throughout Europe where military and business concerns were now managed by governments elected through democratic representation (though democracy still fell far short of today's connotation of a universal franchise). The strong nationalist governments, elected or not, were eager to acquire and consolidate assets for economic growth. This in turn led to

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[24] David Ormrod *The Rise of Commercial Empires: England and the Netherlands in the Age of Mercantilism, 1650–1770* (Cambridge University Press, New York, 2003).
[25] Ashin Das Gupta and MN Pearson *India and the Indian Ocean 1500–1800* (Oxford University Press, Delhi, 1987).
[26] Nick Robins "Loot: In search of the East India Company, the world's first transnational corporation" (2002) 14 Environment and Urbanization 79 <http://eau.sagepub.com/cgi/content/abstract/14/1/79>(accessed 17 Feb 2006).
[27] George P Landow *The British East India Company — The Company that Owned a Nation (or Two)* <http://www.victorianweb.org/history/empire/eic.html> (accessed 4 Feb 2008).
[28] Hopkins, above n 6, 6.

more militarized British, Dutch, and French imperial growth in Asia and Africa. In the last decades of the 19th century, the colonial expansion of Asia and Africa was closely associated with the notion of the so-called white man's burden, which perceived colonialism as a noble enterprise.[29] This era of modern globalisation was signified by the colonial territories of Africa and Asia producing raw materials for Europe's centres of industry, trade, and finance. This era has remarkable similarities with what the present thesis calls contemporary globalization, which is termed "post colonial globalisation" by Hopkins and dates from the 1950s.[30] This brings in two vital new players: in the east, Japan, and in the west, the USA — the exception of a former colony that had broken off from the British Empire while the latter polity continued to grow elsewhere.

Contemporary or post-colonial globalization refers to the more major decolonialization of two hundred years after the American Revolution and is dominated by "new types of supra–territorial organization and new forms of regional integration".[31] It has both continued to build on the foundations of the nation state as the basic formal unit of political organization (though in reality the discreteness, integrity and sovereign power of such a unit in many ways have already been seen in Chapter 1 to be under strain) and added to the ranks of such states the newly independent ex-colonial nations. This phenomenon has been accompanied by the general consolidation in the older, parent states particularly but to some extent also in their newly independent offspring, of a liberal form of democracy which accommodates pluralism. As Cook and Kirkpatrick observe, international trade in the conventional form became less significant in this era and the USA, Europe and Japan established themselves as global economic superpowers:[32]

> The internationalization of economic activity is not a new phenomenon ...The recent growth in international integration is qualitatively different, however, from the earlier expansion of international trade, in that it has been characterized by the intensification of economic linkages that transcend national boundaries, often at the functional level.

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[29] Mick Hume "Does Africa need these crusaders bearing the White Man's burden?" *The Times* (London, England, 17 June 2005) <http://www.timesonline.co.uk/article> (accessed 17 Jun 2005).
[30] Hopkins, above n 6, 8.
[31] Hopkins, above n 6, 8.
[32] P Cook and C Kirkpatrick "Globalization, Regionalization and Third World Development" (1997) 31 Regional Studies 55 (Cook and Kirkpatrick).

Post-colonial globalization represents "a world order" that is in transition and where the "boundaries of the 'global village' are fluid; its inhabitants highly mobile."[33] Advocates of the post-colonial globalization seek to promote the virtues of its particular neo-liberal version as the only panacea for poverty and underdevelopment, while its critics "see it as a means of expropriating the resources of the poor countries by drawing them into debt, encouraging the use of sweated labour and accelerating environmental degradation."[34]

The analysis of contemporary globalization, its theoretical foundations and its manifestations is the main thrust of this chapter. This analysis will be resumed in section 2.4 of this chapter after analysing the impact of (prior) historical globalization on the socioeconomic and political structures of colonial South Asia.

2.3   Negative Impact of Historical Globalisation on Colonial South Asia

As discussed above, South Asia has been a major — though often passive — participant in international trade for many centuries.[35] Among their well-known interactions were with the Portuguese and then the Dutch who took over the ports and maritime areas exposing the people to European religions, customs and even legal systems.[36] However, the Portuguese and Dutch era had only a marginal impact on the domestic economic arrangements and society and had no political impact in the region. The self-sufficient economies of South Asia, their crucial methods of domestic production, and their patterns of consumption remained undisturbed until the region was drawn into the emerging global capitalist system as part of the British Empire in the early 19th century.

As much as the contemporary manifestation of globalization with its emphasis on economics has had a negative impact on South Asia, the earlier globalization

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[33] Hopkins, above n 6, 9.
[34] Cook and Kirkpatrick, above n 32, 64.
[35] D Philip Curtin *Cross-Cultural Trade in World History* (Cambridge University Press, 1984).
[36] The Portuguese were driven by the Dutch out of the Moluccas in the early decades of the 17th century; out of Malacca by 1641; and out of Sri Lanka by 1658. The Dutch also drove out the British East India company from the Spice Islands but in this sense "did them a favour" because the British East India company went on to concentrate on India very successfully. See "History of the Dutch Empire"
<http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=aa61> (accessed 21 Jan 2008).

process of the 19th century during the period of the expansion of the British Empire also resulted in negative repercussions for the region.[37] Military and political domination by the British, which was consolidated throughout the subcontinent, resulted in brutal repression and exploitation of the local society, culture and economy.[38] The administration, executed initially through the East India Company, exposed South Asia far more pervasively than before to the trading of goods and capital transfers with Britain. Before the subcontinent succumbed to British rule, the region had a thriving self-sufficient textile industry. The import of cheaper textiles from Lancashire and crippling tariffs ruined the self-sufficient cottage industry.[39] Robins observes that, "it was the Company's plunder that first de-industrialized [India] and then provided the finance that fuelled Britain's own industrial revolution. In essence, the Honourable East India Company found India rich and left it poor."[40] The British were also responsible for the deforestation and the compulsory acquisition of rural agricultural land for coffee and tea plantations, the yields of which were sold in the global commodity markets. The rural peasantry who had existed for centuries on subsistence agriculture were coerced into growing export crops, making them directly dependent on the fluctuating global markets. This transformation not only had profound immediate economic consequences but also created other social and political problems that South Asian states are still attempting to solve.[41]

The rural peasantry were plunged into a state of chronic poverty and exposed to famine conditions throughout the period of British rule. Davis claims that the colonial authorities aggravated the conditions of famine by denying access to

[37] Romesh Chunder Dutt *The Economic History of India* (Publications Division, Ministry of Information and Broadcasting, Govt. of India, 1970) and Sugata Bose and Ayesha Jalal *Modern South Asia: History, Culture, Political Economy* (Routledge, London and New York, 1998).
[38] The violence and the degradation suffered by the colonized is illustrated in Rudrangshu Mukherjee "Satan Let Loose Upon Earth: The Kanpur Massacres in India in the Revolt of 1857" (1990) 128 Past and Present 92–116. Stable URL: <http://links.jstor.org/sici?sici=0031-2746%2819900 8%2900%3A128%3C92%3A%22LLUET%3E2.0.CO%3B2-2> (accessed 16 Feb 2006).
[39] Irfan Habib "Studying a Colonial Economy without Perceiving Colonialism" (1984) 12 Social Scientist 3-27. Stable URL: <http://links.jstor.org/sici?sici=0970-0293%28198412%2912%3A12%3C3%3ASACEWP%3E2.0.CO%3B2-T> (accessed 16 Feb 2006); Amiya Kumar Bagchi *The Political Economy of Underdevelopment* (Cambridge University Press, 1982).
[40] Nick Robins "Loot: in search of the East India Company, the world's first transnational corporation" (2002) 14 Environment and Urbanization <http://eau.sagepub.com/cgi/content/14/1/79> (accessed 17 Feb 2006).
[41] For instance, export of cheap Indian labour to Sri Lanka to work on the plantations has resulted in the existence of a community of people amidst the plantations with no citizenship rights in Sri Lanka or India.

grain reserves for starvation as a useful weapon of asserting sovereignty over the people.[42] During the period 1876–1901, the Indian subcontinent experienced 18 major famines. Digby, the British economist and a member of the Famine Commission in India, estimated that over 30 million Indians, one out of every 10, died of starvation under British rule in the 19th century alone.[43] The collapse of domestic trade and rural industry had forced the migration of artisans into the rural economy and agriculture. The victims of the starvation deaths were these displaced people belonging to the poorest sections of the society, such as the low castes.[44]

After decolonization the moderate nationalists who came to power throughout the region inherited functioning capitalist market economies, though many of the market institutions were weak. South Asia had become unretractably a part of the global trading system. Many states in the region like Sri Lanka relied heavily on their commodity export economies.[45] However, by the 1960s, the negative impact of the unreliable global economy was felt within the countries. Many erected barriers to both international trade and investment and increasingly turned to state controls and centralized planning for industrialization and growth. Both balance of payments difficulties and ideological commitment to import substitution contributed to this policy shift.[46] By the mid-1970s, India's share of world trade, for instance, was half that of the 1950s.[47] South Asia thus became heavily protectionist with the state controlling every aspect of economic activity.

As we shall see, Sri Lanka was the first to undertake a decisive break with this protectionist paradigm, embracing liberalization in 1977–1978,[48] and the 1980s

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[42] Mike Davis *Late Victorian Holocausts: El Niño Famines and the Making of the Third World* (Verso, 2002).
[43] Appendix E
[44] BM Bhatia *Famines in India: A Study in Some Aspects of the Economic History of India with Special Reference to Food Problems* (Delhi, Konark Publishers Pvt Ltd, 1985).
[45] Henry M Oliver Jr *Economic Opinion and Policy in Ceylon* (Duke University Press, Durham 1957).
[46] Smita Mehrotra "Economic Performance of India and Pakistan: A Comparative Evaluation 1970–1993" in Mohan Lal Sharma et al. (eds) *Globalisation, Democracy and Governance in South Asia: Issues and Alternatives* (Kalinga, Delhi, 2003) 339–350.
[47] DBH Denoon "Cycles in Indian Economic Liberalisation, 1966–1996" (1998) 31 Comparative Politics 43–60.
[48] Premachandra Athukoralge and Sarath Rajapatirana *Liberalization and Industrial Transformation in Sri Lanka: Sri Lanka in International Perspective* (Oxford University Press, USA, 2000).

saw Nepal, Maldives and Pakistan move towards more liberal policies.[49] Bangladesh's economic policies were exceptional: they had never reflected the *dirigisme* of its neighbour India. Rather, since its creation in 1971, Bangladesh had placed heavy reliance on the IFIs for formulation of policy on development and aid. India, confronted with a major balance of payments crisis in 1991, finally joined the reform process in the early 1990s. Though initially there were vehement criticisms about the desirability and consequences of such a drastic change in policy, subsequently the dialogue has focussed on the pace and scope of reforms rather than their basic direction. Thus the present economic liberalization in South Asia at least *seems* irreversible.

The experience of colonization, or what Hopkins refers to as modern globalization, was of political and military domination.[50] Yet, this experience continues to affect the South Asian psyche even today, as the region wrestles with the new wave of contemporary globalization. Some take the view that the opening up of the national economies of South Asia to the world economy will once again be an opportunity for the West to subjugate and exploit as in the colonial era.[51] This scepticism is a result of the impact of the British rule, which was oppressive as it destroyed the pre-existing, prosperously self-sufficient social order, creating in its place an economy that was dependent on the global markets, which benefited only a small elite segment of the societies.

2.4   Contemporary Globalization: A General overview

As mentioned, in this thesis contemporary globalization refers to the world after World War II and coincides with what Hopkins calls post-colonial globalization. Though contemporary globalization has its roots in the immediate post World War II era, we can say that the concept was rejuvenated 40 years later by the end of the Cold War. This next geopolitical shift has been claimed by many as

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[49] Mustapha Kamal Pasha "Liberalization, State Patronage and the 'New Inequality' in South Asia" in Melinda J Seid and Richard L Harris (eds) *Critical Perspectives on Globalization and Neoliberalism* in *The Developing Countries Series: International Studies in Sociology and Social Anthropology* (Brill Academic Publishers, USA, 2000) 71–79.

[50] Hopkins, above n 6, 8-9.

[51] Mustapha Kamal Pasha "Neo-liberal Recipe and Pakistan" (2004) South Asian Journal. <http://www.southasianmedia.net/Magazine/Journal/neoliberal_pakistan.htm> (accessed 6 Feb 2008).

marking the commencement of a new world order. The shift heralded the triumph of Western liberal democracy over Communism as what Francis Fukuyama, at first questioningly and later more assertively, called the "final form of human government";[52] and the capitalist ideals promoted by the winners were going to be the foundations of the fresh world order.

Capitalism in its current, neo-liberal form, which includes the radical — but still selective and unequal — promotion of free markets on a global scale, was hailed as the greatest achievement of socioeconomic evolution and a panacea for all economic and social ills, and globalization became the medium that promoted neo-liberal capitalism worldwide.[53] The pro-globalization economists who subscribed to this theory claimed that liberalization and integration into global markets and privatization of state assets would create an environment that would foster economic growth.[54] The same philosophy with the added attraction of seemingly endless foreign direct investment, rapid industrialization and transfers of technology was advocated for the developing countries.[55] In theory at least, such integration would result in industrial growth and employment opportunities for the millions who were unemployed and living in conditions of absolute poverty in the Third World. According to Fukuyama, one of the greatest advocates of this position, global political and economic homogenization is inevitable and liberal democracy and the (supposedly) unregulated market economy coupled with globalization is the only option available for global prosperity.[56] The conceptual explanations of contemporary globalization are so

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[52] "What we may be witnessing in not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government." Francis Fukuyama "The End of History?" (1989) 16 The National Interest 4. Later Fukuyama wrote more confidently of the same concept in his book *The End of History and the Last Man* (Free Press, New York, 1993).

[53] Thomas J Biersteker "The 'Triumph' of Liberal Economic Ideas in the Developing World" in Barbara Stallings (ed) *Global Change, Regional Response: The New International Context of Development* (Cambridge University Press, Cambridge, 1995) 174–198

[54] J Bhagwati "Free Trade: Old and New Challenges" (1994) The Economic Journal 104; Paul Krugman *Peddling Prosperity: Economic Sense and Non-sense in the Age of Diminished Expectations* (W.W. Norton, New York, 1994); Ishrat Hussain "Globalization and Liberalization: An Opportunity to Reduce Poverty" in UNCTAD *Globalization and Liberalization: Effects of International Economic Relations on Poverty* (United Nations, New York and Geneva, 1996).

[55] TN Srinivasan "The Costs of Hesitant and Reluctant Globalization: India" VK Ramaswami Memorial Lecture, delivered at the Delhi School of Economics on 21 March 2003 <http://www.econ.yale.edu/~srinivas/> (accessed 26 Nov 2006).

[56] Francis Fukuyama, *The End of History and the Last Man* (Free Press, New York, 1993). See also Samuel Huntington *Clash of the Civilizations* (1993) 72/3 Foreign Affairs, and Simon and Schuster *Remaking of the World Order* (New York, 1996).

intermingled with neo-liberal economic terminology that globalization is often defined in terms of the key principles of economic liberalization.[57] Analysts nevertheless concede that as globalization and liberalization are open to such wide interpretation, disagreement about precisely when countries may be said to have globalized or liberalized is unsurprising.[58] In fact, the modern manifestation of the idea of globalization is perceived to be a part of the neo-liberal economic agenda. Tabb succinctly explains the contemporary articulation of globalization with its neo-liberal leanings when he observes that in the era of contemporary globalization, "[t]he ideologically hegemonic position has been the neo-liberal agenda (widely called the Washington Consensus). It calls for trade and financial liberalization, privatization and deregulation, openness to foreign direct investment, a competitive exchange rate, fiscal discipline, lower taxes and small government."[59]

2.5   Conceptualizing Contemporary Globalization

An in-depth theoretical analysis of the concept of globalization is beyond the scope of this study. The purpose of the ensuing discussion is nevertheless to highlight what this thesis argues to be a crucial "hijacking" of the concept that has then been passed off as a necessary and inevitable corollary of it. That is, although globalization as a concept is ideologically neutral and capable of taking on different contents, the contemporary trajectory of globalization has assumed a particular character because the proponents of the concept within academia and policy formulation have relied on the propagation of a particular genre of theoretical reasoning for the concept of globalization. This ideological bias in the guise of an inherent attribute to which "There Is No Alternative" has been the fundamental basis upon which the contemporary theorization of globalization has been constructed.

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[57] Adamantia Pollis also concedes the essential character of contemporary globalization to be "a multi-levelled phenomenon, currently underpinned by the ideology of neoliberalism". A Pollis "Human Rights and Globalization" (2004) 3 Journal of Human Rights 343.

[58] Jeffery Round and John Whalley **"**Globalization and Poverty: Implications of South Asian Experience for the Wider Debate" in Maurizio Bussolo and Jeffery I. Round (eds) *Globalisation and Poverty: Channels and Policy Responses* (Routledge Warwick Studies in Globalisation, 2006) 76.

[59] William K Tabb *Economic Governance in the Age of Globalization* (Columbia University Press, New York, 2005) 3.

A perusal of the mainstream conceptual inquiries indicates that globalization eludes precise definition. Academic attempts at theorizing the concept have resulted in various descriptions.[60] Manders compares the contemporary theorization of globalization to the ancient Buddhist parable of six blind scholars' description of an elephant and observes that there exists no general definition of the term except broad generalizations such as "increasing global interconnectedness", the "rapid intensification of world wide social relations" or "the compression of time and space".[61] Some assert that globalization is an all-encompassing term utilized to describe the progression of national states into an integrated global arena, propelled by transnational actors such as the international financial institutions and multinational corporations with the latter taking on varying degrees of power, orientations, identities and networks. Others assert that modern manifestations of the globalization concept indicate a stretching of social, political and economic activities beyond political frontiers, regions and continents.[62] The idea of contemporary globalization is closely associated with deterritorialization and shrinking to the effect that in the globalized world social and economic activities take place irrespective of the geographical location of the actors.[63] For instance, Giddens observes: [64]

> Globalization can … be defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa. This is a dialectical process because such local happenings may move in an obverse direction from the very distanciated [*sic*] relations that shape them. Local transformation is as much a part of globalisation as the lateral extension of social connection across time and space.

[60] U Beck *What is Globalization?* (Polity Press, Cambridge, 2000) 11.

[61] Manfred B Steger *Globalism The New Market Ideology* (Rowman and Littlefield Publishers Inc, USA, 2001) 1719.

[62] An array of definitions of globalization(s) can be gained through a perusal of Frank J Lechner and John Boli (eds) *The Globalization Reader* (Blackwell Publishers Oxford, 2000), and also James Millelman "Globalization: An Ascendant Paradigm?" <http://www.colorado.edu/ibs/pec/gadconf/papers/mittelman.html> (accessed 3 Jun 2006); Ronald Robertson *Globalization: Social Theory and Global Culture* (Sage, London, 1992); Anthony Giddens *The Third Way: The Renewal of Social Democracy* (Cambridge Polity Press, 1998).

[63] Malcom Waters *Globalization* (Routledge, New York, 1995) (Waters).

[64] Anthony Giddens *The Consequences of Modernity* (Stanford University Press, Stanford, 1990) 64.

It is the "intensification of global consciousness which is a relatively new phenomenon" that delineates the contemporary and sets it apart from previous manifestations of globalization.[65]

Sholtes observes that as a manifestation of the notion of global compression, "global events can — via telecommunication, digital computers, audiovisual media, rocketry and the like — occur almost simultaneously anywhere and everywhere in the world."[66] Exposure to contemporary globalization has resulted in a metamorphosis of civic life unparalleled in human history for it creates a sense of social interconnectedness through amalgamation of trade, investment, finance, migration, culture or any other type of human interaction. The "intensification of economic, political and cultural relations across borders" which we are witnessing today is considered by some to transcend the political organization of the world which is made up of sovereign and independent, self-determining "nation states" — a form of organization prevailing since the Peace of Westphalia in 1648.[67] Just as the medieval order gave away to the nation states system after 1648, it is evident that the states-system is likely to be eclipsed in our times by the forces of globalization. In this sense, globalization transforms "the organisation of human affairs by linking together and expanding human activity across regions and continents"[68] as cultures and societies have become intimately bound through political, financial and technological forces in a hitherto unprecedented manner.

The increasing intensity of global intimacy results in a concentrated velocity of global interactions and processes, which directly influences the evolution of world-wide systems including transport and communication, and results in a rapid dispersal of ideas, goods, information, capital, and people.[69] In this context, globalization is regarded not as an end point, but rather as the beginning for an enlarged and protracted process. Giddens, among others, seems to reiterate the position that globalization is a constitutive feature of the modern world and that

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[65] Waters above n 63, 4.

[66] Jan Aart Scholte "Beyond the Buzzword: Towards a critical theory of Globalization" in E Kofman and G Young (eds) *Globalisation Theory and Practice* (Pinter, London, 1996) 45.

[67] Charles W Kegley Jr. and Eugene R Wittkopf *World Politics* (6th ed, St Martins Press, New York, 1997) 249.

[68] David Held et al. *Global Transformations* (Stanford University Press, 1999) 15 (Held et al.).

[69] Ibid, 2-6.

modern history can trace its gradual evolution[70] Contemporary globalization is also projected as a multidimensional process since it manifests itself in a diverse range of areas of social activity such as the economic, the political and the cultural.[71]

Held et al. have analysed the diverse accounts of globalization found in both public and academic discourse and discerned three broad accounts of the nature and meaning of contemporary globalization. They refer to these as accounts by the hyperglobalists, the sceptics, and the transformationalists.[72]

Hyperglobalists, according to Held et al., argue that contemporary lives are led in an increasingly global world in which states are experiencing incalculable economic and political processes of change. These changes are eroding and fragmenting nation states and diminishing the political power of the governments.[73] In these circumstances, by analogy to the economic terms of passive price-takers and active price-makers, states are increasingly the decision-takers and not the decision-makers. The capacity to govern in the Westphalian style is diminishing, resulting in challenges within and beyond the state. The very legitimacy of the state is increasingly questioned through globalization. Thomas Friedman is an ardent promoter of this view and his theorization of globalization holds accordingly that it is the:[74]

> inexorable integration of markets, nation-states and technologies to a degree never witnessed before — in a way that is enabling individuals, corporations and nation-states to reach round the world farther, faster, deeper and cheaper than ever before.

The sceptics strongly oppose this stand-point and assert, firstly, that current global conditions are not unparalleled in the history of civilization. Secondly and concomitantly, in their perception, while there has been an intensification of international and social activity in recent times, this process has toughened and enhanced the role of the state, making it a key player and, in the terms used above, a decision-maker in the process rather than mere decision-taker.

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[70] Anthony Giddens *The Consequences of Modernity* (Stanford University Press, 1990).
[71] Held et al., above n 68, 2–6.
[72] Held et al., above n 68, 2–6.
[73] Kenichi Ohmae *The Borderless World: Power and Strategy in the Interlinked Economy* (Ballinger Pub Co, New York, 1990) (Ohmae).
[74] T Friedman *The Lexus and the Olive Tree* (Farrar, Straus and Giroux, New York, 1999).

Immanuel Wallerstein's theorization of globalization places him within the sceptical school. He contends that the present phase is one point of a historical process whereby the capitalist world-system extended across the globe — globalization is its culmination,[75] and he acknowledges that ideological celebration of so-called globalization is in reality the swan song of our historical system.[76] He traces the modern world system as a continuum from circa 1500 through feudalism, industrialization, colonial trading systems and the growth of the market institutions. Wallerstein's rationalization of globalization is essentially Eurocentric in the sense that his theory is based on an analysis of core and peripheral states in terms of skilled/unskilled labour, capital-intensive/labour-intensive production methods, and greater/lesser military strength.[77] His analysis of globalization therefore peripheralizes the alternative historical trajectory that can be traced from the developing world's perspective. Sceptics also appear to subscribe to the position that globalization is not an inevitable process but a deliberately engineered ideological project of economic liberalization that forces states, systems and individuals into the free market process.[78]

The transformationalists contend the whole process has constructed a novel political, social and economic ethos, which diaphanously transforms the nature and the function of the state within its own geographical boundaries as much as it interrelates with other entities in the global arena. There is no certain outcome at the culmination of the process but transformationalists claim that the state can no longer go back to the pre-globalization era when state sovereignty was regarded as sacrosanct and the foundation of all transactions in the global arena.[79]

From the above brief discussion it is evident that the theorization of globalization accepts that the globalization concept marks a complex juncture in the evolution of the history of mankind. It concedes that individual, institutional and state transactions are undergoing convoluted alterations and profound transformations

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[75] I Wallerstein *Utopistics: Or, Historical Choices of the Twenty-First Century* (The New Press, New York, 1998).
[76] Ibid, 32.
[77] I Wallerstein "The Rise and Future Demise of the World-Capitalist System: Concepts for Comparative Analysis" (1974) 16 Comparative Studies in Society and History 387–415.
[78] P McMichael *Development and Social Change: A Global Perspective* (3rd ed, Pine Forge Press, 2003); P Hirst and G Thompson, "Globalization: A Necessary Myth?" in Hirst and Thompson (eds) *Globalization in Question* (Polity Press, Cambridge, 1996) 1–17 (Hirst and Thompson).
[79] James N Rossneau *Turbulence in World Politics* (Princeton University Press, 1990); Anthony Giddens *Consequence of Modernity* (Polity Press, Cambridge, 1990).

in the light of globalization. It also concedes that the culmination of the process of globalization is still not evident for the process possesses a self-evolving quality. However, at this point [not the same juncture just referred to?] it is vital to note that regardless of the direction globalization is heading, and what form the process may take at its end point, its current practice excludes other rationalizations of globalization than the articulation of the mainstream, dominant neo-liberal paradigm.

The multi-dimensional quality of globalization is widely acknowledged and its conceptualization is undertaken within several disciplines of the social sciences such as economics, sociology, psychology, history, politics and cultural studies. However, this conceptualizing of globalization within the context of social science paradigms appears faulty, as the conceptualisation is distant from the contemporary world reality. Like many other dominant theories of the social sciences — such as colonialism, modernism, multiculturalism and liberalism — globalisation also suffers from a theoretical rationalisation that takes on a distinct Western (northern) perspective while nevertheless claiming universality. The major rationalisations of globalization, whether explored in terms of a world-systems theory, political theory or a cultural perspective, share this defective analysis.

This study is of the view that contemporary theoretical constructions of globalization primarily ignore the rudimentary principle that globalization by definition should be a diffusion of ideas and other influences from any point of the globe to another and not from a core centre to the peripheries. In fact, a major theoretical rationalization of globalization recounts the narrative of globalization from a Western perspective. Despite the acknowledgement that Globalization is not a spread of diffusion of ideas from the West to the rest,[80] theories of contemporary globalization source the idea of globalization to a series of events, including the Enlightenment, the Peace of Westphalia, the Industrial Revolution, colonial trading networks, the two World Wars and the creation of the supranational institutions that share common Western European genealogical roots. These highlights in the mainstream sociopolitical discourse are seen through a particular Western perspective that not only ignores but rejects the

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[80] see Sen above n 8.

civilizational accounts of the rest of the world. Such an account's inevitable destination if it is allowed uncontrolled is a concept which celebrates liberalism, the "free" market (often subtly rigged for the benefit of the wealthiest players, as will be shown in Chapter 3) epitomized by the flow of capital and privatization, which has little political, cultural or social resonance outside the Western world.[81]

Furthermore, the theoretical analysis of contemporary globalization also presupposes that its present trajectory from the West to the rest is a natural evolution, which precisely is inevitable and cannot be resisted.[82] This perspective creates the illusion that an alternate trajectory is not possible and cannot be conceived within the contemporary global political, social and economic dynamics.

2.5.1 South Asia Encounters Contemporary Globalization

South Asia has not been insulated from the new wave of contemporary globalization, which emerged fully as a recognizable new transnational regime in the early years of the 1980s. Its influence has reached every aspect of human existence from science and technology to culture and the environment. However, the impact of globalization and the reaction to it in South Asia have not been uniform. Some have actively promoted the idea of globalization in South Asia[83] and others have viewed it with a range of emotions from a deep sense of scepticism to absolute resentment.[84]

The term globalization is often used in two different contexts particularly in relation to the developing world. The term is utilized in a *positive* sense to

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[81] Friedman's assertion that "globalization emerges from below … from people's very souls and from their deepest aspirations" is not given expression in the mainstream definition of globalization. Thomas L Friedman *The Lexus and the Olive Tree: Understanding Globalization* (Anchor Books, USA, 2000) 338.

[82] Hirst and Thompson, above n 78.

[83] TN Srinivasan *Globalization: Is It Good or Bad?* (Stanford Institute for Economic Policy Research – Policy Brief, December, 2002); Jagdish N Bhagwati *In Defense of Globalization* (Oxford University Press, USA, 2004).

[84] Vandana Shiva "Globalization and Poverty" (2000) 202 Resurgence <http://www.resurgence.org/contents/202.htm> (accessed 20 Feb 2005); Asha Kaushik *Globalization, Democracy and Culture: Situating Gandhian Alternatives* (Pointer, Jaipur, 2002); Rajni Kothari *Rethinking Development: In Search of Humane Alternatives* (Manohar Publishers, India, 1990).

describe the process of increased integration into the world economy, and in a *normative* sense to *prescribe* a strategy for development on the basis of intensified global integration.[85] The socioeconomic reality of South Asia, as much as elsewhere in the developing world, tends to equate the discourse on globalization to the intensified global economic relations, greater liberalization, few or no boundaries to the power of the IFIs and TNCs and their state sponsors, denationalization, and the free transfer of capital and finances, which are the fundamental tenets of the neo-liberal economic discourse.[86]

As stated before in this study, out of the states in South Asia, Sri Lanka embarked on a path of liberalization and privatization in 1977 becoming subject to a new wave of contemporary globalization. The change of trajectory from a previous *dirigiste* economic policy was prompted by economic expediency and global political influences as well as a profound change in political ideology. Bangladesh and Maldives have had a longer history of open economic policies. Bangladesh, in particular, has been reliant on external financial assistance for most of its short existence since 1971. This dependence has allowed Bangladesh's policy formulation to be heavily influenced by international financial institutions and international NGOs upon whom Bangladesh has become heavily reliant. Pakistan's exposure to the globalization process in the form of external trade and financial relations and the migration of workers to West Asia occurred in the mid 1980s, predating the exposure to contemporary globalization of India, which commenced in earnest as late as 1991.

The Indian experience of the new wave of contemporary globalization thus has a shorter history than the rest of South Asia, and the porous border between Nepal and India has meant that the liberalization of the Indian economy automatically led to the liberalization of the Nepali economy simultaneously.[87] Therefore, remembering Sri Lanka, Bangladesh, Bhutan, Maldives, Pakistan, India and

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[85] Deepak Nayar "Globalisation: What does it mean for Development?" in Shyamala Nagaraj and KS Jomo (eds) *Globalization Versus Development* (Palgrave MacMillan, UK, 2001) 1–23.
[86] These are policies which focus on liberalization, privatization, and stabilization which are referred to collectively as the "Washington Consensus" policies — further elaborated in Chapter 3 of this study.
[87] For a detailed account of the exposure of South Asia to contemporary globalization see Achin Vanaik (ed) *Globalization and South Asia: Multidimensional Perspectives (*Manohar Publications, New Delhi, 2004); Dilip Dutta (ed) *Economic Liberalisation and Institutional Reforms in South Asia : Recent Experiences and Future Prospects* (Atlantic, Delhi, 2000).

Nepal as being the thesis's definition of South Asia (but noting that Bhutan, the exception, remains economically and politically isolated), South Asia encountered the new wave of contemporary globalization gradually. Though the trajectory into global integration was broadly similar the impact of globalization was uneven, as the following paragraphs of this chapter, and Chapter 3 of this study, will indicate.

There is ardent support for globalization and economic liberalization within academic policy circles in the South Asian subcontinent. Most significant among the supporters are Jagdish N Bhagwati and TN Srinivasan. Bhagwati has long maintained that economic liberalization, global trade and a transfer of resources from the developed world to the under-developed world, in the form of capital flows through state-to-state grants and private investments, would enhance the process of development.[88] He has always argued that, "economic globalisation, which offers economic prosperity to those who embrace it for the opportunity it presents instead of renouncing it due to the peril they fear it poses, is also generally speaking a force for advancing several social agendas."[89]

Bhagwati's earlier works, such as *India: Planning for Industrialization*[90] and *Foreign Trade Regimes and Economic Development: India*,[91] have provided both the foundation and the intellectual stimulus to embrace the process of globalization that India embarked on in the early 1990s. Convinced of the inherent goodness of the globalization process as an apt vehicle and a "force for advancing several social agendas", Bhagwati has continued to argue for the relaxation of trade barriers, the liberalization of the economy and the privatization of state-owned enterprises.[92] Despite globalization being attacked from many quarters, Bhagwati has maintained that it is a positive force that has a "human face" and he rejects the allegation that globalization contributes negatively to global poverty

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[88] Jagdish N Bhagwati *The Economics of Underdeveloped Countries* (McGraw-Hill Book Co., New York, 1966) 206.

[89] Jagdish N Bhagwati *In Defense of Globalizatio*n (Oxford University Press, Incorporated, Cary, North Carolina, USA, 2004) 221.

[90] Jagdish N Bhagwati and Padma Desai *India: Planning for Industrialization: Industrialization and Trade Policies Since 1951* (Oxford University Press, Oxford, 1970).

[91] Jagdish N Bhagwati and TN Sirinivasan *Foreign Trade Regimes and Economic Development: India* (Columbia University Press, New York, 1975).

[92] Jagdish N Bhagawati *India in Transition: Freeing the Economy* (Clarendon Press, Oxford, 1993).

eradication.[93] In Stiglitz style he observes that globalization has an enormous capacity to be a positive force but its potential as a means of contributing to human development has been prevented through poor management of the concept by the developing world.

TN Srinivasan is another prominent voice in the South Asian academic circle who has relentlessly advocated for greater global integration. He continues to focus on the positive nexus between globalization and poverty reduction, asserting that pro-poor policies will become redundant if the state ensures greater access to markets, financial deregulation and more market-friendly insurance.[94] Srinivasan also identifies the greatest obstacle to smoother global integration and globalization to be the states themselves:[95]

> Globalisation is, in essence, a process that creates opportunities for faster growth and more rapid poverty reduction in those poor countries in which the domestic economic and political environment is conducive. Countries in which corruption is endemic, the legal system is not effective or is corrupt, the financial system discourages risktaking, and civil strife and conflicts with neighbors are pervasive surely are not fertile grounds for globalisation to yield its fruits. The primary challenge for the developing countries who have been left out of the globalization process is domestic: how to transform the domestic environment into one that is conducive to globalization.

Even Amartya Sen has no qualms with the idea of globalization per se:[96]

> Globalization has much to offer; but even as we defend it, we must also, without any contradiction, see the legitimacy of many questions that the anti-globalization protesters ask. There may be a misdiagnosis about where the main problems lie (they do not lie in globalization, as such), but the ethical and human concerns that yield these questions call for serious reassessments of the adequacy of the national and global institutional arrangements that characterize the contemporary world and shape globalized economic and social relations.

Academic opinions like these served as catalysts for the liberalization policies that emanated out of India in the early 1990s. The current dominant political thought in South Asia is pro-globalization. Though during the first years (1980s) the new wave of contemporary globalization had tended to promote the neo-liberal version

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[93] Jagdish N Bhagwati *In Defense of Globalization* (Oxford University Press Incorporated, Cary, North Carolina USA, US, 2004) 265.

[94] TN Srinivasan and Jessica Seddon Wallack "Globalization, Growth, and the Poor" (2004) 152/2 De Economist, 251–272.

[95] TN Srinivasan *Globalization: Is It Good or Bad?* (Stanford Institute for Economic Policy Research – Policy Brief December, 2002) <siepr.stanford.edu/papers/briefs/policybrief_dec02.pdf> (accessed 25 Mar 2005).

[96] Amartya Sen "How to Judge Globalism" (2002) 13 The American Prospect <http://people.cis.ksu.edu/~ab/Miscellany/globalism.html> (accessed 18 Nov 2007).

of globalization, which advocates ideas of liberalization, privatization and deregulation, a quest for a gentler, more human-centred version has been articulated within the dominant paradigm in recent years. Despite Manmohan Singh being an ardent supporter of the Bhagwati/Srinivasan thesis regarding the benefits of intensified globalization, many believe that his tenure in office will act as a harbinger for the adoption of a more humane version of globalization.[97] Whether there will be political will and strength to advocate for a humane version of globalization is, however, yet to be seen.

2.5.2 A Critique of the Contemporary Manifestation of Globalization in South Asia

Held et al. concede that any comprehensive account of globalization must include a conceptualization of causation, periodization, impacts and the trajectories of globalization.[98] However, that analysis does not admit that the discussion should be broad-based or diverge from its conventional position within the dominant paradigm to encompass a more universal approach. As observed in the previous paragraphs of this chapter, globalization is recounted and conceptualized in quintessentially Western terms which ignore the possibility of it being recounted in a different theoretical context that may inject the concept with different values or dimensions.

There is a need to locate the theorization of globalization within the global, and not only Western, context to enhance its legitimacy beyond the Western world. As Stiglitz observes, "[g]lobalization has enhanced the opportunities for success, but it has also posed new risks to developing countries. The rules of the game have been designed for the most part by the advanced industrial countries, or more accurately, by special interests in those countries, for their own interests, and often do not serve well the interests of the developing world, and especially the poor."[99]

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[97] Pratap Bhanu Mehta "India's Kinder and Gentler Globalization" (2004) 3 Yale Global, <http://yaleglobal.yale.edu/display.article?id=4315> (accessed 20 Jun 2006).
[98] Held et al., above n 68, 4.
[99] Joseph E Stiglitz "Development Policies In A World Of Globalization" Paper presented at the seminar "New International Trends for Economic Development" on the occasion of the fiftieth anniversary of the Brazilian Economic and Social Development Bank (BNDES), Rio de Janeiro, 12-13 Sep 2002

The fundamental human problems witnessed in the contemporary formulation of globalization are not unique[100] but rather reflect a historical parallel in colonization.[101] This chapter has already traced how poverty and marginalization as by-products of globalization were experienced in the history of South Asia particularly during the time of British colonial occupation. However, new problems have added to the old, and thus social dislocation, deterioration of the self-determination of states, terrorism and environmental degradation are all repercussions of contemporary globalization. Globalization has impacted on both the states and individuals, and it has transformed the relations between the individual, society and state. The following section of this chapter concentrates on the impact of globalization on the South Asian state, nationhood, national identity and the idea of human rights.

2.5.3 The Impact of Globalization on the Idea of State – South Asia

A general definition of the nation state is that it is a political unit in which divergent groups of religious affiliation, ethnic groups, culture and nationalities have formed a cohesive political entity representing a common set of standards and values of governance.[102] The contemporary system of sovereign nation states has its origins in

the Peace of Westphalia (1648). The birth of the nation state saw the consequent development of international law and international relations based on the notion of sovereign equality of states. The current wave of globalization has been the single significant force that raised challenges to the Westphalian model and its sacrosanct notion of sovereignty in its entire history, rendering the concept "no

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<http://www3.gsb.columbia.edu/faculty/jstiglitz/download/DevelopmentGlobalization.pdf> (accessed 26 May 2006).
[100] "We must find new lands from which we can easily obtain raw materials and at the same time exploit cheap slave labor that is available from the natives of the colonies. The colonies would also provide a dumping ground for the surplus goods produced in our factories." Cecil Rhodes, English businessman, colonialist and "founder" of Rhodesia (Zimbabwe) who died in 1902, quoted in Lubna Nazir Chaudhry "From colonialism to the 'global village'" (2001) Resistance, Roots For Equity, Karachi, Pakistan.
[101] James Harold *The End of Globalization: Lessons from the Great Depression* (Harvard University Press, Harvard, 2002).
[102] See generally Christopher Pierson *The Modern State* (Routledge, London, 1996).

longer theoretically or empirically serviceable in the face of internationalization of economic and social activity."[103]

The notion of a nation state is a relatively new phenomenon to the Indian subcontinent, a legacy of colonialism with a history of less than 75 years.[104] Pre-colonial South Asia was largely divided into territorial units with traditional administrative systems ranging from feudal monarchies to tribal chiefdoms. These units were at times unified into a number of regional republics or hereditary monarchies.[105] Each territorial unit devised appropriate forms of governance, which were complex and drew substance from the unit's own civilizational past. The rulers sought to maintain legitimacy of their rule by relying on a multi-layered structure of authority that represented the various identities and interests of the governed society. As much as the ruler was perceived as the ultimate repository of power and authority, the legitimacy of the rule was sought and maintained through critical institutional linkages with traditional power bases such as village councils. Territorial units of governance often depended on the military strength of the ruler and were often delineated on the basis of ethnicity or race.[106]

The quest to carve out Westphalian-model nation states with a common national culture and political identity can be seen in the national freedom movements of South Asia. The impetus for suppressing the diverse affiliations for the common goal of political independence in the middle of the last century provided sufficient legitimacy for the creation of nation states.[107] In this sense the creation of states in the subcontinent was not a result of social contract, as it was in Europe, but an artificial creation of the region's colonial history. The project of nation-building after decolonization consisted of submerging a multitude of religious, ethnic and

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[103] Kanishka Jayasuriya "Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance" (1999) 6 Indiana Journal of Global Legal Studies 425–455 (Jayasuriya).

[104] See the discussion on "state" in Chapter 1 Section 1.8.2 of this study. Until the consolidation of the British colonial rule the territories of the Raj and the surrounding regions had never experienced statehood in the Westphalian sense.

[105] The Indian subcontinent was also the home to numerous empires commencing with the Mauryan Empire in 326 BC and culminating in the Mughal Empire circa 1550 a century before the arrival of the East India Company around 1664.

[106] See IW Mabbett (ed) *Patterns of Kingship and Authority in Traditional Asia* (Dover, New Hampshire, 1985).

[107] For an excellent account of the state-building project in the subcontinent, see Gyanendra Pandey *Remembering Partition: Violence, Nationalism and History in India* (Cambridge University Press, Cambridge and New York, 2001).

cultural identities to create a common nation with a single political and legal system.[108] Commenting on the creation of India in 1948, Sudip Kaviraj says, "[T]he nation, in India … is a thing without a past. It is radically modern. It can only look for subterfuges of antiquity. It fears to face and admit its own terrible modernity, because to admit modernity is to make itself vulnerable…"[109] Sri Lanka, as a unitary state, has an equally short history, since 1815, when the British gained control of the whole island. Pre-colonial Sri Lanka was also ruled as different territorial units which were unified from time to time under strong monarchs.[110]

The concept of sovereignty is intimately linked to the idea of the nation state. The fundamental idea of sovereignty is that a state has the exclusive right to control all affairs within its territory.[111] Marc Williams further elaborates the concept by noting that it contains two features: 1) internally the state has absolute control over its territory and subjects; and 2) externally the concept manifests as the sovereign equality of all states in that no state or entity is recognized as higher in authority than another.[112]

Within the past two decades the process of globalization has had impacts on the notions of both sovereign equality of nation states and internal sovereignty in ways that challenge the viability of the nation state paradoxically. On one hand globalization encourages global integration and interaction of nation states. On the other hand such integration curtails the assertion of sovereignty of individual states in both the developed and the developing world. This is particularly pertinent in the sphere of economic activities of the states. As Bonvin observes, "[t]he autonomy and effectiveness of national economic policy have decreased as a direct result of globalization of financial market and financial deregulation."[113]

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[108] Meghnad Desai *Development and Nationhood: Essays in the Political Economy of South Asia* (Oxford University Press, New Delhi, 2005).
[109] Sudip Kaviraj and Sunil Khilnani *Civil Society: History and Possibilities* (Cambridge University Press, Cambridge, 2001) 28.
[110] KM De Silva *A History of Sri Lanka* (C. Hurst & Co., London, 1981).
[111] Per Max Huber in *Island of Palmas Case* (*The United States of America v Netherlands*) Scott, Hague Court Reports 2d 83 (1932), (Perm Ct Arb 1928), 2 UN Rep Intl Arb Awards 829,839.
[112] Marc Williams "Rethinking Sovereignty" in Elenore Kafman and Gillian Youngs (eds) *Globalization: Theory and Practice* (Pinter, London, 1996) ch 8.
[113] J Bonvin "Globalization and Linkages: Challenges for Development Policy" (1997) 40 Development 39–42.

In relation to the developing states, the increased influence of the IFIs as global policymakers, and the operations of the TNCs that dominate world finance and trade,[114] have had a negative impact on the sovereignty of the state, for these entities have usurped the decision-making and policy-creating powers of the states in relation to national economies. From developed states' perspective, "offshoring creates a space economy that goes beyond the regulatory umbrella of the state" affecting the "territoriality and sovereignty in the context of a global economy".[115] In the context of both the developed and the developing world, it is largely true that "those tolling sovereignty's death knell have been unable to convince the world that the concept is now obsolete." Yet, globalization has impacted on the concepts of sovereignty in respects discussed above.[116]

Sassen's observations above support Held et al.'s thesis that globalization's primary actors challenge the sovereignty of nation states.[117] Held et al. assert that the primary threat to state sovereignty is posed by the global economy, especially the dominant role played by the multinational corporations and the global capital markets, followed by supranational entities, such as The World Bank, IMF, WTO and UN. The remaining forces that offer challenge are international laws and hegemonic powers.[118] Each of these entities or regimes prescribes and influences the manner in which the state conducts its business both internally and in relation to integration into the global economy.[119] Commenting on this scenario, Ohmae says that:[120]

> in recent decades we have watched the free flow of ideas, individuals, investments, and industries grow into an organic bond among developed economies. Not only are traditionally traded goods and securities freely exchanged in the interlinked economy, but so too are such crucial assets as land,

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[114] See Chapter 3 of this study and also see, for a detailed account of how the TNCs have acquired unprecedented power to determine the trajectory of economic globalization at enormous costs to human interests, D Korten *When Corporations Rule the World* (Kumarian Press, Bloomfield CT, 1996); Noreena Hertz *The Silent Takeover: Global Capitalism and the Death of Democracy* (Harper Collins, 2003)

[115] Saskia Sassen *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, Columbia, 1996) (Sassen).

[116] Michael Fowler and Julie Bunck *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (The Pennsylvania State University Press, New Jersey, 1995) 3.

[117] Sassen, above n 114.

[118] Robert J Holton *Globalization and the Nation-State* (MacMillan, London, 1998) 106 quoted in Held et al., above n 68; Susan Strange "The State of the State" in *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press, Cambridge, 1996) 66–87.

[119] See Chapter 3 of this study.

[120] Ohmae, above n 73, 216.

companies, software, commercial rights … and expertise. Inevitably, the emergence of the interlinked economy brings with it an erosion of national sovereignty as the power of information directly touches local communities; academic, professional, and social institutions, corporations, and individuals.

This transformation of the state, as Mann has analysed, is yet another stage of globalization's historical development.[121] In his study he traces the gradual expansion of the character and functions of the nation states through time. Mann asserts that prior to the 18th century the actual role of the state (though the concept and legal entity of nation states was well-established under the post-Westphalian world order) was indeed minimalist and extended little beyond conducting war and diplomacy, and internal repression. The state's role was expanded during the 19th and early 20th centuries with the introduction of citizenship rights and the concentration on the economic and social infrastructure. The 20th century witnessed the creation and expansion of the welfare state and the state was also involved in macro-economic planning activities (in particular the stabilization policies referred to in Chapters 3 and 4 of the present study). It was also bestowed with specific functions in relation to war and military affairs. Considering these historical dynamics, Mann argues that the state is in a sense maturing rather than nearing decrepitude. He goes on to assert that certain state functions may have grown or receded in significance but the institution itself is healthy. Globalization has transformed the character of the state rather than eradicated it. That transformation has been into a facilitator of the global trade and financial liberalization process. In this sense, if the institution of the state is malleable to serve a particular goal it can also be manipulated to serve the interests of the poor and marginalized — the primary victims of the globalization process, whose plight in South Asia largely motivated the present thesis.

This shift of decision-making power from the state to multilateral institutions, which are increasingly vociferous in shaping trade, investment and economic policy, is rationalized within the state on the basis of the "There Is No Alternative" syndrome (TINA).[122] The policy formulators who advocate the

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[121] Michael Mann *Has Globalisation Ended the Rise of the Nation State?* (1997) 4 Review of International Political Economy 472–496.

[122] Margaret Thatcher frequently used the phrase "there is no alternative" as Britain went through the neo-liberal structural reforms during her tenure as Britain's Prime Minister in the 1980s. Thatcher's sentence soon became known by its acronym, TINA, which is referred to as a syndrome because as the repercussions of neo-liberal globalisation have become a pervasive disorder. See also Chapter 3 of this study.

merits of global integration portray the neo-liberal economic ideology as the only viable option available.[123] Yielding to TINA, the South Asian states have continued to display an ideological aridity, which manifests itself in the form of the tacit embracing of the whims of the multilateral institutions and acquiescing to the pressures of transnational corporations at enormous human costs. With relentless external pressures contributing to the "erosion of the internal sovereignty of the state" there is an urgent need for a "fundamental reconstitution of the conventional Westphalian inspired ideas of statehood and sovereignty."[124] The present thesis advocates the idea of a strong regionalism for South Asia as an alternate paradigm in the context of the changing conceptualization of the state, to safeguard the sovereignty of the people of South Asia.[125]

2.5.4   The Threats Within the State

As empirical evidence indicates, the process of nation state building in South Asia is far from complete and remains fragile. Despite political drives towards democratic nation-building through centralized governance schemes and common legal systems, a common system of values, and national identity, such endeavours have proven to be largely futile with continued demands for self-determination and secession by ethnic and religious identities in South Asia.[126] Increasing poverty and deprivation are the by-products of economic liberalization policies and have added momentum to the burgeoning secessionist movements that have been increasingly militant during the past two decades.[127]

In fact, the fledgling nation state consolidation process has not benefited from a character change of the state that globalization initiated.[128] Increasingly,

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[123] Stiglitz, above n 3.
[124] Jayasuriya, above n 102.
[125] See Chapters 4 and 6 of this study.
[126] Greg Alling "Economic Liberalization and Separatist Nationalism: The Cases of Sri Lanka and Tibet" (1997) Journal of International Affairs 51; Ishtiaq Ahmed *State, Nation and Ethnicity in Contemporary South Asia* (Pinter, London, New York, 1996).
[127] Rajat Ganguly and Ian Macduff (eds) *Ethnic conflict and secessionism in South and Southeast Asia: causes, dynamics, solutions* (Sage Publications, New Delhi, 2003).
[128] The growing power of the IFIs which imposes restrictions on how the state functions is a manifestation of contemporary globalization. See Chapter 3 of this study and also K Ohmae *The End of the Nation State* (Free Press, New York, 1995) where he asserts that state boundaries are increasingly porous to the flow of communication, corporations, capital, and currencies, all of which affects the traditional notion of sovereignty.

governments' control over parts of their territory and the concept of a unitary state have become contested issues. Rajni Kothari, who is deeply apprehensive about the influence of globalization, with its homogenizing thrust, asserts that globalization will not only jeopardize the process of consolidating the nation state but will unleash the fragmentative tendencies that lay latent in the pluralistic society within the nation state.[129] He goes on to elaborate on his reservations about the transformation and comments in a subsequent study, saying that:[130]

> the autonomy of civil society too will decline and with it may also go down the modern search for democratic order. The homogenising thrust that is inherent in the process of modern globalisation … will only reinforce disintegrative tendencies that are already at work, quite opposite of the 'macro' integrative design of the proponents of the new world order.

In the face of the increasingly iniquitous globalization process, marginalized groups defined along the lines of ethnicity, regional or even political orientation as in the case of Maoist guerrillas in Nepal and the Tamil Tigers in Sri Lanka, have experienced a growing sense of disenfranchisement. Their insecurities and disenchantment previously lay latent, but these groups have now begun to question the mainstream governance process. Their attempts to undermine the legitimacy of the existing state structures and national governments often result in violent upsurges.[131] Punjab and Kashmir are home to rebellious factions that demand autonomy from the Indian state, and a quest for a separate homeland by the Tamil Tigers in northern Sri Lanka is not yet abandoned. Maoist guerrilla activism in Bangladesh is a reactionary manifestation of the ubiquitously and gruelling economic conditions that have been brought about by the neo-liberal economic policies. These fragmentative forces constantly challenge the idea of nation-building in the region, though paradoxically the nation-building process was consolidated by constitutional and legal structures within states when independence was gained from colonial rule. Presently the success of nation-

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[129] Rajni Kothari *Growing Amnesia: An Essay on Poverty and Human Consciousness* (Viking, New Delhi, 1993)14–16.

[130] Rajni Kothari "Will the nation state hold under globalisation?" (1995) 30 Economic and Political Weekly 26.

[131] Numerous movements such as the Jammu Kashmir Liberation Front (JKLF), Dalitstan Organization, Hezb-e-Mughalstan, United Liberation Front of Assam, National Socialist Council of Nagalim, and Revolutionary People's Front of Manipur (RPF) have begun actively threatening the unitary character of the state. The current crisis in Nepal between the monarch, the legislature and the Maoist guerrillas is another example. **"**Nepal: Electing Chaos" Asia Report Briefing N°111, 31 January 2006 < http://www.crisisgroup.org/home/index.cfm?id=2929&l=1#C1 > (accessed 7 Apr 2006).

building and the extent to which the concept is internalized by the people of the region remain uncertain, which makes the need to consolidate the nation-building process a priority in the region.

The state, incompetent to cope with these internal challenges to its authority, resorts to coercion and violence, which in turn results in the further erosion of its authority and legitimacy. Use of authoritarian power by the state in its turn consolidates and strengthens the marginalized groups, who thrive on the denial (real and perceived) of justice, resulting in a vicious spiral of contention for power and authority.[132] This scenario is significant for the challenges within the state to its authority in contemporary times because the process is either brought about or accentuated through globalization. This dynamic yet again reinforces the thesis that contemporary globalization unleashes paradoxical forces within everything that it comes into contact with. For globalization, despite its homogenizing thrust, has accentuated religious and ethnic cleavages within state structures and created avenues for the multiple identities within the state to demand autonomy from the unitary centre, often through violent means.

While the Westphalian state structure has thus been almost irretrievably altered, perhaps it is premature to announce the "end of the state."[133] As Ramesh Babu comments, while "the post Cold War world is certainly not state-centric, it is also not stateless or a state free dispensation … [the] state is being sucked in by forces of supra-national integration at one end and sub-national disintegration at the other end of the spectrum. Furthermore, this simultaneous dual transformation varies in extent and depth across issues, time, locale and space.[134] The state has experienced a transmutation of character in the contemporary globalization phase but remains crucial to the economic, political and cultural mores of the global arena. It is unlikely to be replaced by another entity or phenomenon in the

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[132] See KM de Silva (ed) *Conflict and Violence in South Asia* (ICES South Asia Study Series, Sri Lanka, 2000); Sasanka Perera *Living with Torturers and other essays of intervention: Sri Lankan Society, Culture and Politics in Perspective* (ICES, Colombo,1995); Joanna Pfaff-Czarnecka et al. *Ethnic Futures The State and the Identity Politics in Asia* (Sage, New Delhi, 1999); Kousar J Azam (ed) *Ethnicity, Identity and the State in South Asia* (International Academic Publishers, USA 2002) (Azam).

[133] Richard Falk *State of siege: Will globalisation win out?* (1997) 73/1 International Affairs 123–135.

[134] B Ramesh Babu *South Asia in a Globalizing World* (South Asian Publishers Pvt Ltd, India, 1998) 5.

foreseeable future and any alternate paradigm would still evolve with the state at its foundation.

The impact of secessionist movements on democratic governance in South Asia is further elaborated in Chapter 4 of this study. It is in this context of the dilution of the character of the state with the onslaught of globalization that Chapter 6 of this study advocates a regional praxis to govern globalization in South Asia.

2.5.6 Globalization Fuels Religious Fundamentalism

In South Asia the survival and the rejuvenation of state-centred politics has been sought through the insidious means of flirting with the resentments and insecurities of civil society.[135] There appears to be a perturbing trend of the state shedding its religious secularity at the political centre, which will have a negative impact on the fostering of religious equality and tolerance in South Asia.[136] As elaborated below, due to reasons of political survival and electoral gains, the governments appear to pander to majoritarian sentiments and embrace a populist stand on issues such as appeasing the tendencies of religious fundamentalism.

In relation to the issue of state patronage of religion in the subcontinent, all states in this study have had diverse and tumultuous histories mingled with an overarching ethos of general acceptance and tolerance of religious diversity.[137] Since decolonization India has constitutionally committed itself to a secular state, while such a commitment was withdrawn by Sri Lanka with its Republican Constitution in 1972.[138] Mahayana Buddhism is the state religion of Bhutan. The

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[135] Nikki R Keddie "The New Religious Politics: Where, When, and Why Do 'Fundamentalisms' Appear?" (1998) 40 Comparative Studies in Society and History 696–723.

[136] Statement on "Religious intolerance in South Asia" received by United Nations Commission on Human Rights (Geneva, 4 April 2004). The written statement of the Asian Legal Resource Centre (ALRC) on "Religious intolerance in South Asia" (E/CN.4/2004/NGO/48) was distributed on 31 March 2004 at the 60th Session of the United Nations Commission on Human Rights in Geneva. <http://www.alrc.net/pr/mainfile.php/2004pr/55/> (accessed 6 Apr 2006).

[137] "Religious Revivalism in South Asia" Editors' Note (2003) 2 South Asia Journal <http://www.southasianmedia.net/Magazine/Journal/previousissue2.htm> (accessed 24 Jul 2004).

[138] The 1978 Constitution of Sri Lanka by Article 9 strengthened the position of Buddhism by according it a special place and imposing a duty on the State to protect and foster Buddhism. However, Article 9 continues to guarantee other religions the rights guaranteed by Articles 10 and 14(1). Article 10 assures freedom of thought, conscience and religion, including the right to have or adopt a religion or a belief of one's choice. Article 14(1) guarantees public manifestation of that right either individually or in a group.

Constitutions of Pakistan, Maldives and Bangladesh have established Islam as the state religion while providing constitutional guarantees for other religions to be practised, albeit subject to law, public order and morality. The Constitution of Nepal describes it as a Hindu Kingdom but falls short of claiming Hinduism as the state's religion. Thus, in the South Asia region, most of the governments have until the past two decades appeared to cherish secular values in relation to religion but have been profoundly conscious of the powerful influence that religion can exert on domestic and regional politics and have too often yielded to that influence.[139]

In quite paradoxical terms, state patronage of religion, whether on a majoritarian basis or otherwise, is also ingrained into the political culture of the subcontinent.[140] In sociocultural terms the divorce of religion from the state would be perceived to be governance without moral or ethical values. It is on this fundamental basis that state benefaction of religion is regarded with a sense of tolerance, as it is perceived to be imbuing ethical values into governance. The term "secularism" therefore appears to have a specific South Asian meaning of tolerance of all religions rather than the Western construction of the term, which connotes absence of state sponsorship of all religions. So extensive was the intermingling of the state with religion that Mahatma Gandhi was prompted to retort, "those who say that religion has nothing to do with the state do not know what religion means."[141]

The onset of the renewed and ongoing waves of the overarching post-World War II contemporary globalization — first in the late 1980s, with the end of the Cold War — saw the relationship between religion and politics metamorphose into a sinister political force in South Asia. State patronage of religion, whether it was Hinduism in India, Islam in Pakistan and Bangladesh, or Buddhism in Sri Lanka, commenced to mean an inevitable undermining of the pluralistic basis of society. The secular worldview of tolerance extended by the state disappeared with the government seeking political power by patronizing the majority religion. The

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[139] Pfaff-Czarnecka et al.; Azam, above n 131.
[140] CR de Silva "State Support for Religion in Contemporary Sri Lanka" in Amita Shastri and AJ Wilson (eds) *The Post Colonial States of South Asia: Democracy, Development and Identity* (Palgrave, London, 2001).
[141] MK Gandhi *An Autobiography or the story of my experiments with the truth* (Navjivan, Ahmedabad, 1940) 383.

devastating effects of globalization on the culturally, ethnically and religiously divided societies of the subcontinent were both exploited and to some extent distracted from by cynically pandering to selected religious and cultural identities within the state. The politicians in power, and those elements aspiring to be in power, were acutely aware of the lack of legitimacy and support for their pro-globalization policies and therefore manipulated the insecurities in society by offering patronage to the majoritarian cultural and religious identities, thus fuelling fundamentalism.[142] These holders of power had no hesitancy in crafting and consolidating forces of religious fundamentalism in order to subvert the growing dissent of people against their policies. The state had realized that the people's discontent and insecurities could be funnelled into any space, including fundamentalism, in an atmosphere that offered little hope via the existing options.

The trend of religious fundamentalism emerging in India had the patronage of the then ruling coalition party — the Baratha Janatha Party (BJP) and its affiliated organizations such as the Rashtriya Swayamsevak Sangh (RSS)[143] ("Association of National Volunteers"), and the *Hindutva* movement (Hindu nationalist movement).[144] BJP rule initiated a process of transforming secular nationalism in India into Hindu nationalism, and its political importance was displayed by sporadic incidents of violence that erupted in various parts of India. The Gujarati massacres of 2002 were blatant displays of the nationalistic jingoism that took root during the BJP rule in India. During the Gujarati riots the Chief Minister of Gujarat, Narendra Modi, who is a member of the BJP, was accused of facilitating the massacres by his inaction during the riots. The aftermath of the riots has been grueling for the victims, with the courts unwilling to proceed with the cases and the witnesses systematically pressured by the extreme Hindu nationalists to refrain from giving evidence.[145]

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[142] Lancy Lobo *Globalisation, Hindu Nationalism and Christians in India* (Rawat, New Delhi, 2002); Ashoka Bandarage "Beyond Globalization and Ethno-religious Fundamentalism" (2004) 4 Development 35–41; Allen Douglas *Religion and Political Conflict in South Asia* (Greenwood Press, London, 2004); SN Eisenstadt "The Resurgence of Religious Movements in Processes of Globalisation — Beyond End of History or Clash of Civilisations. <http://unesdoc.unesco.org/images/0013/001388/138885e.pdf#page=6> (accessed 7 Mar 2005).
[143] A right wing political association that grew in prominence during the BJP rule.
[144] See generally (2004) 21 Frontline Magazine <http://www.frontlineonnet.com/fl2106/fl210600.htm> (accessed 7 Mar 2005).
[145] "The Rise of Hindu Extremism and the Repression of Christian and Muslim Minorities in India" <http://www.freedomhouse.org/religion/publications/pubrep.htm> (accessed 7 Mar 2005).

Confirming the emerging trends of ultra-nationalism, Modi, with explicit support from Prime Minister Vajpayee, went on to lead the party in the State of Gujarat elections the same year, which resulted in a victory both for him and for the BJP. The rising discord between ethnic and religious minorities in various parts of the subcontinent, such as Delhi, Rajasthan and Gujarat, and the direct nexus to economic policy formulation, raises disquieting questions about the future prospects of communal harmony within the subcontinent in the face of globalization.[146] The allegations that extreme right-wing Hindu groups with connections to the then ruling BJP were involved in the attacks on the minority community, especially in incidents such as the communal riots in Gujarat, raise the issue of governmental patronage of such activities, the human rights aspect and the very legitimacy of the elected governments.[147]

Kamal Mustapha Pasha, commenting on Pakistan's flirtation with religious extremism, writes, "[t]he appeal of Islamisation is closely linked to the disconcerting and mixed results of the expansion of capitalism as a social system and as a way of life; it is a particular expression of the strains and stresses of a society experiencing cultural haemorrhage in a time of structural change."[148] Religious fundamentalism and intolerance has become rampant in Pakistan, making the prospects of consolidation of democratic governance extremely slim in the near future.[149] The fundamentalist Islamic political parties are striving to enhance the already operational shari'a laws, and the effort by the Pakistani President Musharraf to curb the drive does not appear to have succeeded.[150]

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[146] BBC "Hindu nationalism: Harmony or discord?" 13 February 2004, 12:37 GMT
<http://news.bbc.co.uk/2/hi/south_asia/3478687.stm> (accessed 13 Mar 2005).
[147] Praveen Swami Saffron "Terror Political Direction And Police Support Enable The Death Squads Of The Hindu Right To Run Riot In Muslim Neighbourhoods" (2002) 19 FrontLine
<http://www.frontlineonnet.com/fl2106/fl210600.htm> (accessed 7 Mar 2005).
[148] Mustapha Kamal Pasha "Islamisation, Civil Society and Politics of Transition in Pakistan" in Douglas Allen (ed) *Religion and Political Conflict in South A*sia (Oxford University Press, New Delhi, 1993) 122.
[149] AFP / Mazhar Abbas "Fears of rise in religious intolerance in Pakistan" 14 Nov 2003
<http://quickstart.clari.net/qs_se/webnews/wed/dh/Qpakistan-religion.RCb1_DNE.html>
(accessed 4 Jun 2006).
[150] Stephen F Burgess "Struggle for the Control of Pakistan: Musharraf Takes On the Islamist Radicals" in Barry R Schneider and Jerrold M Post (eds) *Know Thy Enemy: Profiles of Adversary Leaders and Their Strategic Cultures* (USAF Counterproliferation Center, Alabama, 2003) <http://www.au.af.mil/au/awc/awcgate/cpc-pubs/know_thy_enemy/index.htm> (accessed 7 Nov 2007).

A similar, familiar trend is occurring in Sri Lanka.[151] The Buddhist monks' decision to contest the 2004 April parliamentary elections was a sinister development in the religious polarization process in Sri Lanka.[152] The monks' newly established political party, Jathika Hela Urumay (JHU),[153] claimed that Buddhism, despite state patronage and constitutional guarantees, is under threat through exposure to various forces brought about through the contemporary globalization ethos. The monks promised a righteous state (*dharmarajya*) if they assumed political power. The proportional representation system ensured the election of the nine JHU monks from its 260 candidates into Parliament and they emerged as the kingmakers of the new legislature. The JHU did not draw support from the rural areas, from which it claimed to have a solid vote base; rather it was the urban, middle-class voters, disenchanted with the mainstream Sinhalese political parties, who cast their vote in JHU's favour. The voting pattern of the 2004 elections highlighted a disturbing development, which is that any political party offering a militant version of Sinhalese nationalism along with a message of moral regeneration seems to have had more appeal to the electorate than the moderate mainstream political parties that represent modern secularism. The resounding election of the JHU monks from the capital city and the surrounding electoral districts is all the more disturbing as it reinforces the hypothesis that religious or nationalistic extremism in South Asia has a direct correlation to the existing economic conditions. A poll taken a few days before the Sri Lankan elections of 2004 indicated that 48.2 per cent of the people declared that the rising cost of living was the most important issue of the day, whereas only 18.8 per cent were perturbed by the existing civil war with the Tamil militants that had cost 65,000 lives within the past 20 years.[154]

The election of the JHU monks into Parliament was the culmination of a series of events that firmly established the emerging trend of religious nationalism in Sri Lanka. This development followed similar trends elsewhere in the subcontinent.

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[151] Mahinda Deegalle "Politics of the Jathika Hela Urumaya monks: Buddhism and ethnicity in contemporary Sri Lanka" (2004) 5 Contemporary Buddhism 83–103 (Deegalle).

[152] BBC "Buddhist Monks' Election Bid" News 2 March 2004 <http://news.bbc.co.uk/> (accessed 4 June 2004); see also William Mishlera, Steven Finkelb and Pradeep Peiris "The 2005 Presidential and 2004 Parliamentary Elections in Sri Lanka" (2007) 26 Electoral Studies 205–209.

[153] The name, roughly translated as "Sinhalese heritage", not only revived Buddhist religious sentiment but also connotes the idea of a single Sinhalese tradition or state.

[154] Feizal Samath "Politics — Sri Lanka: Economic Woes Higher Priority than Peace" 24 March 2003 <http://www.ipsnews.net/srilanka/note_24033.shtml> (accessed 20 Feb 2006).

Religious intolerance fuelled by economic considerations has created volatile situations in many parts of the subcontinent. State patronage of the campaign is sought through the demand for legislation against unethical conversions in Sri Lanka and elsewhere in the subcontinent.[155] Ironically, in Sri Lanka the demand is made not only by the majority Buddhist community but by the Hindus as well. In June 2004 the Supreme Court, hearing petitions against two bills presented to Parliament seeking legal status for two Christian organizations involved in charity work, held in two judgments that while the Sri Lankan Constitution upheld a citizen's right to worship and practice his or her religion (Article 9), it did not recognize a fundamental right to propagate a religion. Both Buddhist and Hindu organizations have long protested against Christian charities' and missionaries' activities in rural Sri Lanka, alleging that they lure poor people into Christianity by offering them food, money, medicine and dry rations. The JHU monks in Parliament reiterated that their support of the minority government in power is dependent on the enactment of the Prohibition of Forcible Conversion Bill, but, facing opposition from moderate political groups, as of this writing in Dec 2007 the enactment of the Bill appears to be abandoned by the Sri Lankan legislature.[156]

Such developments aptly confirm the argument that globalization, while threatening the existing foundations of the human rights discourse within the state, also, and in a more sinister vein, opens up new territories in the human rights field to be exploited by various forces. It also confirms the case that the nexus between economic conditions and human rights is not limited to economic and social rights alone but involves civil and political rights as well.

While the reality makes it impossible for national economies to survive in isolation from globalized markets, it is crucial to the present study to note that national governments are not yet impotent to intervene and create structures that would enhance the basic human rights of the people. However, the governments appear unable to extend the traditional human rights regimes to include protective

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[155] The Prohibition of Forcible Conversion of Religion Bill was passed by the Tamil Nadu State Assembly in October 2002. The Freedom of Religion Bill, in a similar vein, has already been enacted in both Orissa and Madhay Pradesh. In the Himalayan kingdom of Bhutan, Christians are forbidden to celebrate or pray in public and priests are denied visas to enter into the country as a measure to protect the country from Christian fundamentalists.

[156] Deegalle, above n 150.

mechanisms against the arbitrary actions of multinational corporations or the pressures of international financial institutions. This is because the new threats that emerge in the discourse of human rights cannot be regarded as violations of rights per se for they are not within the traditional rights matrix of state against the individual or group. In most instances the state is not directly involved but is a passive observer. The perpetrators are obviously liable under common law but the legal structures that are in place are inadequate to offer reasonable redress.[157] This highlights the need for the "rights contract" between the state and the individual or group to be renegotiated, with the ultimate onus placed on the state to protect basic human rights. This study asserts that the renegotiation of the "rights contact" can be best achieved at regional level with the co-operation all states in South Asia.

2.5.6   Contemporary Globalization: Impact on Human Rights in South Asia

As much as in other spheres of sociopolitical affairs, with human rights too, globalization has had a paradoxical impact. Its impact on individual human rights is discussed in detail in Chapters 3 and 4 of this study. The remaining discussion in the present chapter will focus on the general impact of globalization on the universal rights regime and the states. Contemporary globalization, with its influence on culture, media, the economy and technology, has contributed to the expansion of the idea of universal human rights while simultaneously creating a need to enhance protection mechanisms to safeguard the victims and the marginalized of the globalization process, given that the states themselves are most often not the direct violators.

The withdrawal of the state from regulating economic activities has created new freedoms in relation to the economic activities within and beyond the state, enhancing the rights of the people in terms of creating new business and trade opportunities, increasing the prospects of capital and resource transfer, and liberalizing the decision-making powers of the individuals in relation to economic activity. In this context, it appears that the content and the extent of human rights,

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[157] Maurizio Murru "Bhopal 20 Years On: Globalization and Corporate Responsibility" (2004) 2 Health Policy and Development 249–254.

too, is now determined by market forces, as globalization has restricted the state's role in determining economic policy. Yet again, the paradoxical effect of globalization comes into play whereby it reinforces and expands the rights of the inclusive or the privileged while the acknowledged human rights of the excluded segments of society remain threatened or are rendered impotent by the globalization process.

As several academic enquiries into the effects of globalization indicate, the phenomenon has had a devastating impact on economic, political and cultural rights of the peoples of, in particular, the poorest segments in the poorer states.[158] The most devastating challenge to the contemporary discourse of human rights is the endemic poverty that globalization appears to perpetuate.

As Khan and Larik reiterate:[159]

> South Asia is home to 1.4 billion people, about a quarter of the world population, but has 43% of the world's poor and only 2% of world's GDP… The region is characterized by poverty, illiteracy and low life expectancy. It is the most malnourished region of the world, with half of its children being under-weight, compared with 30% in Sub-Saharan Africa. It is the least gender-sensitive region and it has the highest human deprivation, in terms of access to health facilities, safe drinking water, sanitation facilities and opportunity for work and leisure.

Poverty by definition is the dearth of opportunity in every aspect of personal life, further exacerbated by chronic hunger, unemployment, illiteracy, lack of educational opportunities and poor access to healthcare and other basic necessities. The sense of social exclusion that is brought about by poverty includes the denial of mainstream benefits such as social and economic development, non-exposure to either indigenous and/or modern knowledge systems and the exclusion from influencing policy formulation.

Since decolonization, South Asian states have systematically failed to adhere to correct social engineering schemes that would eliminate inequalities in terms of resource and land distribution, infrastructure development, capital, market credit,

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[158] M Khor *Rethinking Globalization: Critical Issues and Policy Choices* (Zed Books, New York, 1999); Dani Rodrik *Has Globalization Gone Too Far?* (Institute for International Economics, Washington DC, 1997); Michel Chossudovsky *The Globalization Of Poverty: Impacts of IMF and World Bank Reforms* (Zed Books, 1997).
[159] Haider A Khan and Zulfiqar Larik *Globalization and Regional Co-operation in South Asia: A Political and Social Economy Approach* (CIRJE Discussion Papers, 2007) <http://www.e.u-tokyo.ac.jp/cirje/research/03research02dp.html> (accessed 5 Dec 2007).

and education and information and would thus have paved the way for a different outcome rather than the conditions of poverty that exist today. In human rights parlance this translates into systematic denial of basic human rights, such as education, health, and decent standards of living. Regarding this denial of human rights, the developing states have traditionally taken the view that these rights are unattainable given the prevailing economic conditions, to which the United Nations Human Rights Commission in its recent report has responded: "The negative impact on one dimension of human rights, e.g. economic rights, necessarily has a domino effect on other rights. This reality reinforces the principle enunciated in the Vienna Declaration and Programme of Action (1993) that human rights are 'universal, indivisible, interdependent and interrelated'."[160]

It is becoming increasingly clear that it is no longer tenable to draw a neat distinction between the nature of state obligations with regard to civil and political rights on the one hand, and economic, social and cultural rights on the other.[161] United Nations human rights mechanisms have debunked the traditional view that civil and political rights entail only negative obligations, while economic, social and cultural rights give rise to the more complex issue of positive state obligations, which require resources to be expended. Gauging development purely on the basis of economic indicia is increasingly viewed with scepticism, as it often does not reflect the ground realities, especially those relating to disparities in income distribution and living standards. Such a position ignores the human dimension of development and the important linkage between development, human rights and peace. It overlooks the violent social and political forces that invariably are unleashed by extreme poverty and the denial of other human rights. If the forces of globalization are allowed to operate freely — overlooking the central premise of human-centred development — the spectre of massive levels of human rights violations resulting in grave social and political upheavals becomes a reality.

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[160] "Globalization and Its Impact on the Full Enjoyment of Human Rights" Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session Item 4 of the provisional agenda. Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8 15 June 2000.
<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument> (accessed 17 Jul 2005).
[161] See the Vienna Declaration
<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En> (accessed 17 Dec 2007).

Globalization has affected the social and economic structures of communities in a manner that throws into question the legitimacy of the existing mechanisms and values relating to the contemporary form of governance and policy formulation. A good example of such a question is the case of the *Adivasi* (indigenous forest dwellers) in Madhya Pradesh.[162] They have continuously fought against the highly destructive, so-called "eco-development" policy programmes that were initiated under the aegis of the World Bank in their forests. These programmes invariably result in the forced eviction of *Adivasi* from their natural habitat and a prohibition of their activities such as rotation cultivation, fishing, extraction of forest produce and hunting. It is on these activities that the *Adivasi* have based their livelihoods since time immemorial. Prohibition of life-sustaining practices on the basis of their presumed threat to the environmental and ecological balance, combined with the idea of forestry conservation as a good business venture, has threatened the very existence of these forest people. Therefore, they vigorously demand that their rights in relation to their indigenous way of life be protected rather than be sacrificed in the cause of globalization and economic growth. The rights that are contested here are not limited to the *Adivasi* in India alone but also apply to several other indigenous peoples and rural communities in the region who seek to challenge the state in relation to the systematic obliteration of their traditional way of life, using the terms of the rights discourse.

Furthermore, this notion of competing rights in development discourse has another dimension. The scale to which global competitiveness has condensed the economic and political role of the state has directly influenced the government's image as protector of citizens' rights. The decreased role of the state has created an authority vacuum in which novel forces emerge in response to individuals' desire for security, welfare and power.[163] Sriskandarajah observes that there is a strong connection between economic marginalization and the ethnopolitical conflict in the context of Sri Lanka. The policy formulation process that has ignored minority concerns since Independence aggravated the real and perceived

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[162] A Gandhi "Developing compliance and resistance: the state, transnational social movements and tribal peoples" (2003) 3 Global Networks 481.
[163] Jonathan Spencer *Sri Lanka: History and the Roots of Conflict* (Routledge, London, 1990).

grievances that created the current ethnic conflict in Sri Lanka.[164] The state, overburdened with the complexities of global economic competition and the simultaneous political challenges by the numerous power groups, attempts to consolidate its threatened role in society through various insidious means including brutality and violence. Similarly, the newly threatened identities attempt to play their ethnic, nationalist or religious game depending on the circumstances to consolidate their position amongst real and imagined threats to their existence from various quarters. Such internal conflicts, whatever the extent, invariably result in compromising human rights.[165]

However, in order to assimilate into the world capitalist system under the aegis of the multilateral institutions, almost all the governments in South Asia have adopted the rhetoric of liberal democracy and universal human rights in the process of good governance along with economic liberalization policies. The reality is that the operation of the liberalization policies augurs well only for the markets and meanwhile undermines the social, economic and cultural rights of the people. In an atmosphere where the market is accorded preference over other considerations, it is impossible to ensure functional mechanisms for human rights protection, as is detailed by Chapter 3 of this study.

2.6 Significant Traits of the Renewed Waves of Contemporary Globalization Originating in the Late 1980s

The fundamental flaw of contemporary manifestations of globalization is its obsessive focus on economic globalization and its homogenizing thrust. The neo-liberal ideological thrust that underpins contemporary globalization is portrayed as the panacea for all that ails the developing world. It determines the normative nature of "development", international relations and trade. It is nonchalant to the possible existence of other systems of knowledge and other paradigms of progress. The promoters of this paradigm of globalization portray it to be

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[164] Dhananjayan Sriskandarajah "Socio-economic inequality and ethno-political conflict: some observations from Sri Lanka" September (2005) 14 Contemporary South Asia 341–356.
[165] Richard Pierre Claude and Burns H Weston (eds) *Human Rights in the World Community: Issues and Action* (University of Pennsylvania, Pennsylvania, 1992).

infallible and imply that all communities must be redesigned according to its dictates.

It is this portrayal of the neo-liberal economic ideology through globalization that has given the process a negative identity. Many critics have seen through the globalization of the neo-liberal political and economic ideology since the early 1980s and how it has consolidated the values and the interests of the West at the expense of the rest. Susan George,[166] among many others who passionately concur in this critique, claims that in its present manifestation globalization has become a "threat to the poor rather than an opportunity for global action to eradicate poverty."[167] Contemporary manifestations of globalization do not appear to refute its penchant to globalize neo-liberalism at the expense of other dimensions such as equitable global human development.[168]

There is increased empathy for the quest for more "controlled" globalization even from the more ardent supporters of the genre of globalization that is personified by the Washington Consensus.[169] For instance, Bhagwati acknowledges the need for appropriate management of globalization especially as to the speed at which nations embrace the globalization process, and he refers to the Russian and Asian financial crises, which he claims were triggered by "imprudent and hasty freeing of capital flows." Therefore, he asserts, "globalisation must be managed so that its fundamentally benign effects are assured and reinforced. Without this wise management, it is imperiled and at risk."[170] However, the adherents of the Washington Consensus, like Bhagwati, see no inherent fault in this particular ideological brand of globalization, which they still maintain contributes to

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[166] Susan George "A Short History of Neoliberalism" *Conference on Economic Sovereignty in a Globalising World* 24-26 March 1999 <http://www.globalpolicy.org/globaliz/econ/histneol.htm> (accessed 8 Feb 2008); B Ramesh Babu "Americanization of the World: Myth or Reality" (1994) 422 Freedom First (Bombay) 23–27; Vandana Shiva "Globalisation and Poverty" in Veronika Bennhodlt-Thomson, Nicholas Faraclas et al. *There is an Alternative* (Zed Books, London, 2001); William K Tabb., *The Amoral Elephant: Globalization and the Struggle for Social Justice in the Twenty-First Century* (Monthly Review Press, 2001); Dani Rodrik *Has Globalization Gone Too Far?* (Institute for International Economics, 1997).

[167] T Obadina "Globalisation, human rights and development" [1998] Africa Today 32–33.

[168] Anne O Krueger "Globalization: Preserving the benefits. While globalization has its critics, slipping back into protectionism is not the way forward." (2003) 240/241 OECD Observer <www.oecdobserver.org> (accessed 7 Feb 2008).

[169] See Chapter 3 text at n 47 for a definition and discussion of the Washington Consensus.

[170] Jagdish Bhagwati "Globalization and Appropriate Governance" (WIDER Annual Lectures vol 4, UNU World Institute for Development Economics Research (UNU/WIDER), Research and Training Centre of the United Nations University, 2002). See also Bhagwati *In Defense of Globalisation* (Oxford University Press Oxford, 2004).

economic growth — the benefits of which will "trickle down" to eliminate economic disparities amongst the world's poor.

Victims of globalization come from diverse walks of life. Poverty, both urban and rural, urbanization, deforestation, annihilation of indigenous cultures and ways of living, deterioration of democratic processes, increased fragmentation of society and the marginalization of the weak and minorities are some of the many sins further attributable to the process of globalization which contributes to the many poverties of South Asia:[171]

> Gross poverty and inequalities have worsened quite dramatically in the last two decades in South Asia. The multiple dimensions of poverty include unequal access to assets, markets, and infrastructure and an uneven distribution of skills. The disparities in health and education among and within countries, and the impediments created by social barriers and norms are also dimensions of ill-being. To these woes is added the vulnerability to adverse shocks, natural disasters, disease, and personal and political violence. Statistics obtained from the World Bank data sources indicate that despite recent growth and poverty reduction, South Asia still has nearly 400 million poor people (out of a population of 1.37 billion).

In fact, exposure to globalization has initiated a chain of events in the Third World that is poignantly compared by Pakenham to colonialism generally:[172]

> First came the foreign bankers eager to lend at extortionate rates; then financial controllers to see that the interest was paid; then the thousands of foreign advisers taking their cut. Finally when the country was bankrupt and helpless, it was time for the foreign troops to 'rescue' the ruler from his 'rebellious' people. One last gulp and the country had gone.

A cursory glance at the UNDP 2005 World Development Report illustrates the extent to which mass poverty and inequality have become entrenched globally:[173]

> Global integration is forging deeper interconnections between countries. In economic terms the space between people and countries is shrinking rapidly, as trade, technology and investment link all countries in a web of interdependence. In human development terms the space between countries is marked by deep and, in some cases, widening inequalities in income and life chances. One-fifth of

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[171] Shantayanan Devarajan and Ijaz Nabi "Economic Growth in South Asia: Promising, Un-equalizing,…Sustainable?" June, 2006. *World Bank Report Washington DC: South Asia Region*; see also Human Development Report 2005 "International cooperation at a crossroads: Aid, trade and security in an unequal world" <http://hdr.undp.org/reports/global/2005> 3 (at 6 Feb 2006).
[172] Thomas Pakenham *The scramble for Africa: White Man's conquest of the Dark Continent from 1876 to 1912* (Avon Books, New York, 1991) 57.
[173] Human Development Report 2005 "International cooperation at a crossroads: Aid, trade and security in an unequal world" <http://hdr.undp.org/reports/global/2005/> 3 (accessed 6 Feb 2006).

humanity live in countries where many people think nothing of spending $2 a day on a cappuccino. Another fifth of humanity survive on less than $1 a day and live in countries where children die for want of a simple anti-mosquito bed net.

Empirical evidence indicates that the assertion that the neo-liberal form of globalization is the only viable means of achieving economic growth and development is no longer tenable. Alternative visions of human development based on different global and regional structures are being articulated both within the developed and the developing world. As Cavanagh and Manders observe:[174]

[A]fter decades of Margaret Thatcher and other globalisation cheerleaders telling us there were no alternatives, that fiction has been exposed. There are alternatives. Tens of thousands of them. The failing legitimacy of the institutions of global corporate rule combined with the political force of an enlivened civil society have created an unprecedented moment of opportunity to rethink and transform the institutions of economic life, advance the democratic project, and realise the ageless human dream of liberty, justice, and prosperity for all.

2.7   The Anti-Globalization Movement

The contemporary globalization process claimed to have the potential to produce prosperity for all; the reality is its manifestations bring prosperity only to a select few, with penury, deprivation and misery for the rest.[175] If globalization is not a new phenomenon in the evolutionary process of civilizations and has the proven potential to unleash unlimited benefits, there is also a place for scepticism, defiance and alternative visions to contemporary globalization.[176]

Defiance to the dominant paradigm of globalization, and a demand for its better governance and alternative visions of globalization, are increasingly evident. This "[r]esistance is localized, regionalized, and globalized at the same time that economic globalisation slices across geopolitical borders."[177] While a single, monolithic theory of globalization is unlikely to emerge to displace the dominant

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[174] John Cavanagh and Jerry Mander (eds) *Alternatives to Economic Globalization: A Better World Is Possible* (2nd ed, Berrett-Koehler Publishers, 2004) ch 11.

[175] B Ramesh Babu *Globalization and the South Asian State* (Academic Books, Denver, Colorado, 1998).

[176] Gustavo Lins Ribeiro *Other Globalizations. Alter-Native Transnational Processes and Agents* Série Antropologia 389 <www.unb.br/ics/dan/Serie389empdf.pdf> (accessed 30 Jun 2006).

[177] James H Mittelman *Globalization Syndrome : Transformation & Resistance* (Princeton University Press, Ewing, NJ, USA, 2000) 177.

position enjoyed by its contemporary version, pockets of sporadic resistance in various forms nevertheless are emerging.

Central to the contemporary globalization paradigm is the process of exclusion. The process of global integration through liberalization and deregulation is determined by the IFIs and certain powerful states excluding the masses from the deliberation and negotiation process of economic reform, for "[g]lobalization ultimately fortifies those with privilege. Premised on a market-based order, the new global political economy is closed to those who cannot be valorized."[178] This process of exclusion of large segments of the society from the globalization process is encountering justifiable resistance.[179] Visible and violent protests against the contemporary trajectory of globalization are an all too familiar sight in the media today.[180] During the past few years there have been incidents of mass public protest against globalization, particularly in London,[181] Quebec,[182] Seattle,[183] Genoa,[184] and South Africa. The overwhelming public support for protesters at these events is an indication of the uniform attempt to reprise the forces of economic globalization from all quarters. The ferocity and the fervency of the protests and the obvious in-egalitarian manifestations of globalization, which are no longer denied, have resulted in the acquisition of a certain legitimacy by the anti-globalization discourse. However, this movement exclusively relates to political resistance to neo-liberal globalization and does not focus on alternative, more constructive visions.[185]

Amidst the anti-globalization protests in various locations around the globe, individual defiance at grass-roots level focusing on alternative paradigms is also

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[178] MK Pasha "Globalisation and Poverty in South Asia" (1996) 25 Millennium Journal of International Studies 635.

[179] Rajni Kothari *Poverty: Human Consciousness and the Amnesia of Development* (Zed Books, New Delhi,1995).

[180] BBC "Riots break out at German Rally" <http://news.bbc.co.uk/2/hi/europe/6714429.stm> (accessed 7 Nov 2007).

[181] In London, Eugene and Oregon 19 June 1999, Carnival against Capitalism.

[182] Summit of the Americas held in Quebec City, Quebec, Canada, on the weekend of 20 April 2001.

[183] The WTO Meeting in November 1999.

[184] Genoa Group of Eight Summit protest from 18 to 22 July 2001.

[185] Michael Edwards and John Gaventa (eds) *Global Citizen Action* (Lynne Rienner Publishers, Boulder, 2001); John Keane *Global Civil Society?* (Cambridge University Press, Cambridge and New York, 2003); Margaret E Keck and Kathryn Sikkink *Activist Beyond Borders* (Cornell University Ithaca Press, 1998); Eddie Yuen "Introduction" in Eddie Yuen et al. (eds) *The Battle of Seattle: the new challenge to capitalist globalization* (Soft Skull Press, New York, 2001) 3–20.

evident.[186] There is a plethora of academic and activists' opposition documented through books,[187] reports,[188] films[189] and street protests that have all contributed to the creation of a vast array of alternative thinking on globalization. Some, such as Shepard and Hayduk,[190] see the creation of a global coalition, a coalescing of alternative visions aimed at displacing the dominant world view of globalization based on neo-liberalism. Others, such as Held and McGrew,[191] analyse the contemporary character of globalization and highlight its negative aspects and advocate alternative visions, in this case proposing a potential future trajectory through cosmopolitan social democracy.

In a similar vein, the report *A Fair Globalisation Creating Opportunities for All*[192] seeks to alter the character of globalization by infusing a "strong social dimension based on universally shared values, and respect for human rights and individual dignity; one that is fair, inclusive, democratically governed and provides opportunities and tangible benefits for all countries and people." The report recommends that globalization should focus on people, facilitate the creation of

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[186] Veronika Bennhioldt-Thomson et al (eds)*There is an Alternative: Subsistence and Worldwide Resistance to Corporate Globalization* (Zed Books, London, 2001); Ponna Wignaraja *Pro-Poor Growth and Governance in South Asia — Decentralization and Participatory Development* (Sage Publications, New Delhi, 2004); Fred Dallmayr *Alternative Visions – Paths in the Global Village* (Rowman and Littlefield Publishers Inc, USA, 1998); John Cavanagh et al. *Alternatives to Economic Globalization: A Better World Is Possible* (Berrett-Koehler Publishers, San Francisco, 2002).

[187] Joseph E Stiglitz *Globalization and its Discontents* (W.W. Norton and Co, New York, June 2002);
Naomi Klein *Fences and Windows: Dispatches from the Front Lines of the Globalization Debate* (Picador, New York, 2002), Naomi Klein *No Logo: Taking Aim at the Brand Bullies* (Picador, New York, 2000); Anita Roddick *Take it personally* (Harper Collins Publishers, USA, 2001); Z Bauman *Globalization: the human consequences* (Polity Press, Cambridge, 1998).

[188] J. Oloka-Onyango and Deepika Udagama *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights* Progress Report, UN ESCOR, Comm'n on Hum Rts., 53rd Sess., Provisional Agenda Item 4, UN Doc. E/CN.4/sub.2/2001/10 (2 July 2001) available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.10.En> (accessed 17 July 2006); *A Fair Globalization Creating Opportunities For All* (World Commission on the Social Dimension of Globalization, April 2004) <http://www.ilo.org/public/english/fairglobalization/report/index.htm> (accessed at 17 Jul 2006). International Labor Organization: World Labour Report 2000 *Income security and social protection in a changing world)* <http://www.ilo.org/public/english/protection/socsec/wlrblurb.htm> (accessed 17 Jul 2006).

[189] Avi Lewis and Naomi Klein "The Take" Film <http://www.thetake.org/life.php> (accessed 6 Jun 2006).

[190] B Shepard and R Hayduk *From ACT Up to the WTO: urban protest and community building in the era of globalization* (Verso, London, 2002).

[191] David Held, Anthony McGrew *Globalization/Anti-Globalization* (Polity Press, Cambridge, 2002).

[192] *A Fair Globalization Creating Opportunities For All* (World Commission on the Social Dimension of Globalization, April 2004) <http://www.ilo.org/public/english/fairglobalization/report/index.htm> (accessed 17 May 2006).

democratic and effective states, foster sustainable development, encourage productive and equitable markets and promote fairer rules of engagement and the creation of a globalization that has greater accountability to people, which it seeks to bring about through the strengthening of the United Nations.

The main contention of the protest is that the current process of globalization has no room for participation, access, transparency, and accountability at the policy formulation stage, although these policies are ultimately prescribed to individual states to create iniquitous frameworks that violate not only socioeconomic but civil and political rights as well.[193] In fact, a positive consequence of globalization has been the coalescing of activists on issues as diverse as child labour, the environment, anti-capitalism, Third World debt, and human rights, creating an international grass-roots movement that strives towards a common agenda for the marginalized.[194] They have the added advantage of being able to add value to the existing debate by stressing issues such as democracy, equity and justice which, when articulated by the dominant discourse, are dismissed as mere rhetoric.

This activism, however ardently articulated, emerges from a wide range of affected interests, which are not necessarily harmonious or even coherently related. This incoherency in anti-globalization politics directly relates to the lack of a paradigmatic framework to address the concerns of an alternative paradigm. There is an urgent need to work out a pragmatic solution that addresses the diverse concerns at ground level. The image that the anti-globalization movement presents today appears to focus only on the short-term protest rather than seeking a long-term global policy framework through which tangible change could be achieved.[195] However, the movement has initiated a process in which the global

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[193] The best example of a solidarity economy is the 36 odd autonomous municipalities formed by Zapatista support communities in the highlands of Chiapas, Mexico. In defiance of the iniquitous and harsh treatment by the government of Mexico in 1994, the Zapatista communities founded their own education, health, governance and economic structures within an area that covers almost a third of the state. See Harry M Cleaver Jr "The 'Zapatista Effect': The Internet and the Rise of an Alternative Political Fabric" [1998] Journal of International Affairs 51 and Tom Hayden (ed) *Zapatista Reader* (Nation Books, 2001).

[194] "The large protests at the WTO meetings, at IMF, World Bank, G8 and other such summits that are seen today have typically been against the current forms of globalization and the marginalization it is causing, as well as the increasing disparities between the rich and the poor that it has predictably led to already" Anup Shah "Public Protests around the World" <www.globalissues.org/TradeRelated/ FreeTrade/Protests> (accessed 5 Mar 2005).

[195] Raimo Väyrynen *Anti-Globalization Movements at the Cross-Roads* (Kroc Institute Policy Brief #4, November 2000) <http://www.nd.edu/~krocinst/polbriefs/pbrief4.shtml> (accessed 20 Jun 2006).

discontent about the nature and content of contemporary globalization can be voiced. The inherent potential of the anti-globalization movement is explained by Sen:[196]

> The anti-globalisation protests can be productive not because globalisation is an evil in itself. Indeed, far from it. Even the anti-globalisation protests are part of the general process of globalisation, from which there is no escape and no great reason to seek escape. But there are critically important issues that need to be addressed in the mixed world of massive comfort and extreme misery in which we live — often far too peacefully and complacently. There is a need to reduce the contrast between our universe of remarkable possibilities and the stubborn prevalence of relentless deprivation.

At the moment numerous grass-roots movements carry out such work, albeit for a common cause. However, a sustained framework of action on a global scale would better respond to the adverse impact of policy formulation by multilateral institutions and help in the creation of common legal and constitutional structures and standards that would address the negative impact of the iniquitous and unjust manifestations of globalization.

There are numerous individual efforts by grass-roots movements that comprise victims, activists and bureaucrats who have successfully strived for a change in terms of policy formulation. The most successful of such endeavours in Sri Lanka was perhaps the sustained opposition by environmental activists and bureaucrats against the implementation of the US Government Tropical Forest Conservation Act of 1998 (TFCA).[197] In a measure that was portrayed as an answer to the country's unpaid debt problem and a means of preserving natural resources and bio-diversity, especially in the tropical forests, the US government introduced a new concept. A closer scrutiny of the measures suggested, however, indicated that it was a nature swap — in exchange for the debt owed by Sri Lanka to the US, Sri Lanka was to implement conservation mechanisms designed and monitored by the US to protect tropical forests of Sri Lanka including the Sinharaja forest which is declared a world heritage site by the UNICEF.

If the TFCA was implemented, Sri Lanka's most pristine forests — the Sinharaja rainforest, Peak Wilderness, Namunukula forest and the Knuckles forest range —

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[196] Amartya K Sen "Globalization, Inequality and Global Protest" (2002) 45 Development 11–16.
[197] <http://www.usaid.gov/our_work/environment/forestry/tfca.html> (accessed 8 Jun 2006).

would be managed under the aegis of the US.[198] The Act, according to a US Embassy press release, would allow developing countries to shed their debt burden, while helping them to preserve natural forests. In consultation with the US government the debtor country could set up a fund or board consisting of local NGO representatives to preserve tropical forests. The value of debt would be converted to local currency and programmes initiated by the board would be paid in local value. There was so much vehement opposition to this proposition by both the environmental NGOs and the state bureaucracy that plans to implement the TFCA were abandoned. The success of the All India Insurance Employees Association (AIIEA), which is the strongest workers' union in the financial sector and which represents the most unionized industry in India, prevents the insurance industry from being completely sold to private and foreign interests and is another example of popular resistance to economic globalization forces.[199]

The constantly vigilant and innovative judiciary of India also resisted the policy of privatization by issuing a stay order against the stake sale of Hindustan Petroleum Corporation Ltd (HPCL) and Bharat Petroleum Corporation Ltd (BPCL), two of the largest oil companies in India, creating a major setback to the disinvestment drive.[200] In its final verdict on a petition challenging the disinvestment of the two oil majors, the Supreme Court said that the central government should obtain Parliament's approval for selling its stake in the two state-run oil companies. The Court went on to elaborate by stating that the central government could not go ahead with the disinvestment of HPCL and BPCL without amending the Parliamentary Act through which the two companies were privatized in the 1970s. The decision indicated that the Supreme Court was wary that the government was not adhering to its own avowed policy on privatization, which was rationalized on the basis that the government will privatize inefficient public enterprises, not efficient ones.

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[198] "America's pound of tropical flesh" *Sunday Observer* 19 August 2001.
[199] <http://www.tribuneindia.com/1999/99mar03/biz.htm> (accessed at 8 June 2006) and for a second phase of resistance see (2001) 18 Frontline Magazine <http://www.frontlineonnet.com/fl2106/fl210600.htm> (accessed 7 Mar 2005).
[200] "The government had taken the advice of the Advocate General, who believed that the disinvestment of government equity in the two entities did not require parliamentary sanction. The government then proceeded to disinvest the two companies. However, this decision to sell the oil majors was challenged and Writ petitions were filed in public interest directly before the Supreme Court under Article 32 of the Constitution of India." Supreme Court of India [2003] AIR SC250. See also "A brake on sale of oil majors" (2003) 20 Frontline Magazine <http://www.frontlineonnet.com/fl2106/fl210600.htm> (accessed at 7 March 2005).

Perhaps one of the most resounding rejections of the neo-liberal globalization juggernaut occurred through democratic process in the 2004 General Election of India. The ruling nationalist BJP-led alliance dissolved Parliament and went for an early election, secure in the knowledge that amid an economic boom and promising attempts of peace between Pakistan and India it would be voted back into power. However, the election result was an unexpected yet resounding vote for the opposition Congress party. The BBC's Adam Mynott, analysing the outcome of the elections, observed that the masses ignored by the globalization process promoted by the governing BJP had spoken against the iniquitous process.[201] The results indicated that millions of rural poor marginalized by the rapid economic globalization process epitomized by the "India Shining" campaign used their democratic right to protest. The result is also seen as a rejection of the BJP's Hindus-first position in favour of the secularism of the Congress party.

2.8   Reconceptualizing Globalization

The contemporary South Asian state is being constricted between the twin pressures of globalization externally and political and economic challenges internally. On the external front the state is constantly urged by the multilateral institutions and donor agencies to conform to the neo-liberal model by further deregulation and greater integration. Resistance on an individual state basis appears to be impossible; at best the developing states can only exercise marginal influence over the forces that shape and determine global finance or markets. The states that sought integration into the global capitalist system through liberalization, financial aid, debt and structural adjustment policies have now become subservient to the global markets for their very existence.[202] However, an intriguing twist to the scenario is the formation of the G 22 –1 at the Cancun WTO Foreign Ministerial Summit in Mexico in September 2003. A group of developing states (the G-21) has been able to present a coherent stand against

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[201] Gandhi triumphs in Indian election <http://news.bbc.co.uk/1/hi/world/south_asia/3712201.stm> (at 12 Jan 2005).
[202] See Chapter 3 of this study.

unfair structures that discriminate against them in world trade.[203] It is as yet premature to judge the success of Cancun as the viability and the future of the coalition are uncertain. However, if effectively consolidated "the emergence of state-civil society coalitions, aided by the increasing power of middle-ranking countries, may mount a serious challenge to western hegemony over the long-term."[204] Palley agrees that such a coalition consolidated could be tantamount to a crucial challenge to Euro-American hegemony of the world economy and to the supremacy of the neo-liberal economic ideology.[205]

The triumph and the confidence with which the multilateral institutions and the proponents of economic globalization have exalted its virtues have waned as the gruelling evidence of abject poverty and marginalization, in direct consequence of the mismanagement of the globalization process, emerges. The World Bank itself has of late adopted a cautious approach whereby in a strategy paper it recommends the creation of social protection programmes (safety nets) for those rendered vulnerable from the economic development process and its downturns.[206] Similarly, in its annual World Development Report,[207] the World Bank acknowledges that it is imprudent to totally withdraw the state from all spheres of economic activity or abandon its regulatory function. In an ironic twist of positions the World Bank requests that the nation states play an interventionist role (actively discouraged in the past) and recreate the welfarist measures, nurture social safety nets and rekindle their regulatory functions to provide a bulwark against the economic downturns.

This implies that there is a need for a reconceptualization of the policies and instruments of international trade, investment and finance, the core ingredients of contemporary globalization. Such a reconceptualization must cease treating human rights issues as peripheral to the formulation and operation of globalization. Concentrating on human rights as the pivotal point in the new

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[203] Balakrishnan Rajagopal "A New Opportunity in Cancun's Failure Alliance of civil society and developing country governments could alter global trade rules" *Yale Global* 3 December 2003 <http://yaleglobal.yale.edu/display.article?id=2937> (accessed 23 Mar 2005).
[204] Ibid.
[205] Thomas I Palley "After Cancun: Possibilities for a New North-South Grand Bargain on Trade" *Foreign Policy In Focus* (NM: Inter-hemispheric Resource Center, Silver City, 2003).
[206] R Holzmann et al. *Social Protection Sector Strategy: From Safety Net to Springboard by World Bank* (World Bank Publication, 2003).
[207] The World Bank "Attacking Poverty" 2000/01 World Development Report <http://www.worldbank.org/annualreport/2001/overview.htm> (accessed at 3 Mar 2006).

reconceptualization process has the advantage of formulating a new regime that is not geographic, racial or historically specific. It can focus on humanity irrespective of political and economic power structures.

Reforms can include managing the process of globalization through the creation of a normative framework, which is equitable in operation. Targets, such as ensuring the benefits of international trade, technological and scientific advancements are shared equitably by all, are achievable ends in a world that is not segmented along economic, political or social lines. In so far as the traditional system of rights is inadequate to deal with the new demands made by the globalization process, mechanisms for the vindication and protection of human rights would have to be more broad-based and innovative. The reforms envisaged for a new globalization paradigm are neither unrealistic nor unachievable, for, as Shiva comments in the quotation that opened this chapter, "economic globalization has become a war against nature and the poor. But the rules of globalisation are not god-given [and] can be changed ...."[208]

The quintessential character of neutral phenomena is their pliancy. Therefore, the contemporary attributes that have been acquired by globalization are not inexorable or inevitable. As much as there is a Washington-Consensus or Anglo-American (or Euro-American, or Japanese-Euro-American, or Western) definition of globalization there is the potential to define the character of globalization taking into consideration the core values of whichever region is under consideration.

There exist other examples of different methods in which the states, particularly in East Asia, have handled globalization. From the onset, East Asian states attempted to control the terms on which they engaged with the global economy. Their growth was based on taking advantage of the global market for exports and on closing the technology gap with the developed world. Perceiving that it was not merely the disparities in capital and other resources that separated the developed from the less-developed countries, but also differences in technological knowledge, East Asia took advantage of the globalization process itself to reduce

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[208] Vandana Shiva "Globalisation and Poverty" in Veronika Bennhodlt-Thomson and Nicholas Faraclas *There is an Alternative* (Zed Books, London, 2001).

this disparity. While some of the countries in the region grew by opening themselves up to multinational companies, others, such as Korea and Taiwan, grew by creating their own enterprises. Another discerning element of the East Asian response to globalization is that the state remained active in the process of economic growth using industrial capitalism as a tool. The lack of regulation of investments, particularly financial markets, and the disastrous socioeconomic consequences, indicate that the terms of engagement relating to economic globalization by East Asia were deeply flawed[209] but it nevertheless remained a unique way of approaching globalization.

Other new approaches to handle and manage globalization are being experimented with elsewhere in the world.[210] The "Beijing Consensus", China's initiative towards better management of development, was prompted by the need for a more equitable, non-aggressive and more human-centred developmental process that questioned the legitimacy of the drives for liberalization, privatization and free trade in their contemporary form. Ramo, in his analysis of the initiative, hastens to say that it is not a particular doctrine, for the Beijing Consensus does not prescribe a solution to every crisis of globalization but projects it more in terms of a defensive or reactionary process to contemporary globalization.[211] The above examples indicate that there are diverse means of approaching globalization, determining the pace and content of change, rejecting the basic tenets of the Washington Consensus, which argues for a minimalist role for government and rapid privatization and liberalization.

2.9   Conclusion

The present chapter defined the contemporary articulations of globalization and observed that the concept enjoyed a long history dating back to the early civilizations. The study also analysed the impact of globalization on the nation

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[209] JE Stiglitz "The Insider-What I learned at the world economic crisis" (2000) New Republic <http://www.mindfully.org/WTO/Joseph-Stiglitz-IMF17apr00.htm> (accessed 12 Nov 2005).
[210] Joshua Cooper *The Beijing Consensus: Notes on the New Physics of Chinese Power* (Foreign Policy Centre, Great Britain, 2004).
[211] Joshua Cooper Ramo "The Beijing Consensus" <http://time.dufe.edu.cn/wencong/washingtonconsensus/beijingconsensusen.pdf> (accessed at 28 Mar 2006).

state and society. The discussion also considered the distinct neo-liberal bias of the contemporary globalization and the repercussions it has generated, particularly the anti-globalization movement.

This study observes that globalization is a neutral concept with the capacity to promote a variety of values and ideologies. To condemn globalization as Westernization or to equate the globalization paradigm with neo-liberalist capitalism is not only futile; it also precludes us from taking advantage of the positive benefits that lie latent within the concept. As Amartya Sen asserts:[212]

> … [t]he central issue of contention is not globalisation itself, nor is it the use of the market as an institution, but the inequity in the overall balance of institutional arrangements — which produces very unequal sharing of the benefits of globalisation. The question is not just whether the poor, too, gain something from globalisation, but whether they get a fair share and a fair opportunity. There is an urgent need for reforming institutional arrangements — in addition to national ones — in order to overcome both the errors of omission and those of commission that tend to give the poor across the world such limited opportunities. Globalisation deserves a reasoned defence, but it also needs reform.

Chapters 3 and 4 of this study will discuss the devastating manifestations of contemporary globalization with its neo-liberal bias in South Asia. The increased dissatisfaction with the contemporary globalization process and the backlash against the governmental liberalization and privatization policies, which progressively assume sinister forms, will be the focus of these chapters.

The Indian subcontinent has a long civilizational history founded on tolerance and a strong sense of humanism.[213] Its societies are founded on values such as equity, pluralism, self-reliance, and non-violence. The region has long cherished its subsistence economies and the consumerist culture that the West promotes is viewed with a degree of scepticism. The South Asian region with its unique and complex ethnic, religious and cultural dimensions cannot simply ape models and solutions formulated in other regions to manage globalization and envisage their successful implementation. The region has the capacity to design its own direction of economic and social development preserving its core values and its identity and

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[212] Amartya Sen "How to Judge Globalism" (2002) 13 The American Prospect 1–14.
<http://people.cis.ksu.edu/~ab/Miscellany/globalism.html> (accessed at 18 Nov 2007).
[213] See Chapter 1 of this study.

not be coerced to accept the iniquitous and the non-egalitarian facets of contemporary globalization.

The new regional praxis that is advocated in Chapter 6 of this study promotes a conceptual framework to manage globalization, according precedence to regional concerns that include the need for accountable governance, respect for human rights and human development rather than unmitigated global market demands.

CHAPTER 3

AGENTS AND INSTRUMENTS OF CONTEMPORARY GLOBALIZATION

"Those who eat their fill speak to the hungry of the wonderful times to come. Those who lead the country to the abyss call ruling too difficult for ordinary men."[1]

3.1   Introduction

The previous chapter traced the trajectory of globalization and South Asia's trysts with its various incarnations. It drew attention to what this study calls generically the "contemporary" phase of globalization — which coincides closely with Hopkins' "post-colonial" phase, and which took real shape after World War II. This whole contemporary phase spanning 60 years coincided not only with a new wave of independence struggles by the colonies as noted by Hopkins, but also with the very first truly global wave of human rights regimes, whose international agents (from the UN down) and international instruments (from the UDHR onwards) arose, like the seminal agents discussed in this chapter (the World Bank and IMF), out of the ashes of the same global conflagration: World War II. Thus, the trajectory of economic globalization traced in Chapter 2 can be seen to have run parallel to the trajectory of internationalized — one could say "globalized" — human rights regimes traced in Chapter 1. However, as the ensuing discussion illustrates, the relationship between these two phenomena is extremely unbalanced.

Chapter 2 also discussed the impact of contemporary globalization on the state, nationhood and human rights in South Asia. Of sharpest concern was the impact of the *neo-liberal* genus of the broader "contemporary" species of globalization, which has gained ascendancy in that species during the last 30 years. The chapter concluded that if South Asia is to avoid being a victim of, specifically, this neo-liberal version of contemporary globalization then the region must determine its own terms of engagement with the process.

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[1] Bertolt Brecht "From A German War Primer" in Poems *1913–1956* (Methuen Limited, Great Britain, 1976).

This chapter focuses on several related issues. Firstly, it traces the roots of the drive for development in the former colonies; it observes the varied forms "development" has adopted, and the role of the IFIs as the initiators and policy-setting, rule-making, *public agents* of contemporary globalization ever since Bretton Woods. The term IFIs is widely understood, and is used here, to mean the IMF and the World Bank. This chapter further identifies the TNCs as the *private agents* that have been the biggest commercial players and the primary beneficiaries of all contemporary globalization, but especially its neo-liberal form. The chapter traces the manner in which the TNCs consolidated their operations on a global scale and were assisted in doing so by the conducive economic environment and skewed rules of the economic game under-pinned by neo-liberalism promoted by the IFIs and also the WTO.

The present chapter describes the historical circumstances of the economic crisis that precipitated the rise of specifically neo-liberal development policies that is synonymous with that subset of contemporary globalization that predominated under the Washington Consensus from the late 1970s. The key *instruments* of that process will be identified as the Structural Adjustment Policies (SAPs) of that period, followed eventually by the Poverty Reduction Strategy Papers (PRSPs) that aimed to rectify the incongruity of the SAPs. The chapter considers the manner in which developmental policy formulation that was left in the hands of the IFIs has enhanced the agenda of the mainstream which, since the late 1970s, continues to be based on the ideals of neo-liberalism.[2] This acquired ideological bias of the World Bank and the IMF prescribes policies aimed at "reorienting the economic structures and policies of indebted and impoverished Third World societies, [but which,] far from being designed to make the world order equitable, are addressed to the overall good of the world's hegemonic economies, in all their complexity and contradiction" at the cost of the developing world.[3] The

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[2] Noam Chomsky *Profit Over People: Neoliberalism and Global Order* (Seven Stories Press, New York, 1998).
[3] Upendra Baxi "Voices of suffering and the future of Human Rights" (1988) 8 Transnational Law and Contemporary Problems 167.

socioeconomic costs of the neo-liberal policy formulations are discussed in the context of South Asia.[4]

Returning to the parallel but unbalanced trajectories identified in Chapters 1 and 2 of the internationalization human rights and economic globalization, this Chapter's analysis of the repercussions of SAPs and PRSPs will highlight how economic globalization has challenged the cocooned existences of both human rights and economic development regimes. The contemporary international economic and human rights regimes, two parallel post-World War II developments, have evolved to cater to the global requirements in their respective fields. These parallel developments have strived for efficient and optimal systems for the enhancement of international human rights and international economic development. International development was supposedly meant in a disingenuous aggregation, to benefit "the whole globe", as much as human rights also were. However, the rights regime and the economic development regime were not synthesized or given any kind of equal footing; rather, as has been seen, they were conveniently separated, causing a dysfunctional and highly asymmetric relationship between them.

Chapter 3, nevertheless, also underlines the positive outcomes of the donor-driven developmental process, particularly issues such as the capacity for mobilization of civil society and the articulation of good governance, both a by-product of the PRSPs. This chapter concludes with the observation that the present isolation of the human rights regime from the development regime adversely affects millions of people across, specifically, South Asia. The analysis emphasizes the need to focus on human-centred development and economic growth, separating them from neo-liberal ideological foundations, and to seek a just and workable rationalization between the two disciplines and trajectories of human rights and development.

3.2   Objects of Early Global Development Initiatives (1930s–1970s)

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[4] The discussion of the IFIs' policy formulation and their impact is limited to South Asia, though relevant research from other developing regions has been relied upon on occasion to enhance the discussion.

The idea of development and the need to provide assistance and aid to the "under-developed" former colonial territories gained global currency simultaneously with the initiatives to provide financial assistance and policy guidance to rehabilitate war-torn Europe in the early 1950s. The encouragement to pursue a particular trajectory of development was contained in the inaugural congressional speech of President Truman in January 1949.[5] Truman noted that the majority of the world still lived in "underdeveloped areas" and that a central mission of his presidency was to transform the world because "[t]heir poverty is a handicap and a threat both to them and to more prosperous areas."[6] Therefore Sachs observes that, "[c]lothing self-interest in generosity, Truman outlined a program of technical assistance designed to 'relieve the suffering of these peoples' through 'industrial activities' and promote 'a higher standard of living'."[7]

Truman's pledge in fact also ensured allegiance to the West and to capitalism, in the context of the Cold War.[8] Since then "development" has been both sought by the decolonized world and imposed on it by the United States of America and the UN, its allied agencies and other international developmental agencies, which form the core of the mainstream developmental drive. Since the Programme of Action of the first UN Developmental Decade of 1960–1970 pronounced that the "problem with the underdeveloped countries is not just growth, but development,"[9] various attempts were made to integrate economic growth with specific aspects of development, such as environmental concerns, rural development and gender issues. The development rhetoric expanded the conceptual analysis from "another development" as conceptualized by the Dag Hammarskjold Foundation in 1975[10] to a "basic needs approach" by the ILO in

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[5] David Simon and Klaus Dodds "Introduction: Rethinking Geographies of North-South Development" (1998) 19 Third World Quarterly 595–606; G John Ikenberry "The Myth of Post-Cold War Chaos" 1996 Foreign Affairs 71–96.

[6] <http://www.trumanlibrary.org/calendar/viewpapers.php?pid=1030> (accessed 13 Jan 2006)

[7] Wolfgang Sachs "Development: A guide to the ruins" [1992] New Internationalist 232.

[8] Wolfgang Sachs (ed) *Development Dictionary, A guide to Knowledge as Power* (Zed Books, London, 1997) 2–3.

[9] *UN Development Decade – Programme of Action* (UN Dept of Economics and Social Affairs, New York, 1962).

[10] "What now? Dag Hammarskjöld report on development and international cooperation Development and International Cooperation" (1975) 1/2 Development Dialogue 1–128.

1976[11] and then to "integrated development" from UNESCO in 1977.[12] Crucially, the IFIs' assumption of their role as chief protagonists of the development agenda was another natural milestone. The IFIs continued with the mainstream intellectual assumptions relating to development with greater emphasis on global financial streamlining and multilateral management.

3.3   The Genesis of Globalization's Key Public Agents, the International Financial Institutions

This section briefly surveys the genesis of the IFIs, the rationale for their establishment, and policy frameworks that are in place for the promotion of global economic growth.[13] Their contemporary role in the global economy will be discussed later in relation to the SAPs and PRSPs.[14]

The foundations of the contemporary global economic order pre-date the conclusion of World War II. The financial crisis of the 1930s highlighted the absence of a mechanism to monitor global financial relations, and the idea of a multilateral mechanism was mooted with vigour during the aftermath of the Great Depression.[15] World War II and the resultant economic devastation required a systematic restructuring of the Western European economic order. It is in this context that the Bretton Woods Conference of 1944 explored the idea of an international regulatory mechanism with limited supra-national authority to supervize and direct the global monetary regime and the economic reconstruction.

An institution for international monetary regulation (the IMF) and a multilateral entity for the channelling of capital for economic reconstruction (the World Bank) were conceptually innovative, as capital transfers had been the exclusive domain

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[11] Ajit Singh "The Basic Needs Approach to Development vs. The New International Economic Order: The Significance of Third World Industrialization" (1979) 7 World Development 586.
[12] Gustavo Esteva "Development" in Wolfgang Sachs (ed) *Development Dictionary, A guide to Knowledge as Power* (Zed Books, London, 1997) 10–18.
[13] The discussion will focus on the IMF and the World Bank, although identical policies were implemented by other multilateral development banks (MDBs), bilateral aid agencies and donor countries as loan and aid conditionalities.
[14] For the organizational structure of the IFIs and their main functions, refer Appendix D.
[15] Maurice Obstfeld and Alan M Taylor "The Great Depression as a Watershed: International Capital Mobility over the Long Run" (1997) NBER Working Paper No. W5960. <http://www.nber.org/papers/w5960.pdf> (accessed 27 Sep 2006).

of private markets or bilateral agreements.[16] The planning for post-war monetary reconstruction and the ideas for a global institutionalized financial regulatory mechanism came largely from the Treasuries of the UK and USA. Although 40 allied countries and one neutral member (Argentina) participated in the Bretton Woods Conference, its proceedings were dominated by Harry Dexter White from the USA and John Maynard Keynes from the UK. These two countries most shaped the new international economic order, though more so the USA[17], reflecting its greater economic power. [18]

The IMF and the World Bank were significant creations of the Bretton Woods Conference in three respects. The Conference created the first global financial regulatory mechanism that administered rules relating to currency values and conversions. Secondly, the system provided capital transfers for economic reconstruction and development, and assistance for countries with balance of payments issues, by injecting capital to manage such crises on a short-term basis. Thirdly, the system was a source of intellectual inspiration and institutional support on issues of monetary co-operation and capital liquidity, while respecting the principle of national sovereignty. The original proposal for the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), also dates to the Bretton Woods Conference.[19]

3.3.1   Key Private Agents: Transnational Corporations as Epiphytes of the International Financial Institutions

This section focuses on the nature and social impact of TNCs, which have benefited immensely from the IFIs' neo-liberal economic philosophy manifested in the form of the two main instruments to be discussed below: the SAPs and the

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[16] Michael Gavin and Dani Rodrik "The World Bank in Historical Perspective" (1995) 85 The American Economic Review 329–334.

[17] Richard N Gardner *Sterling-Dollar Diplomacy: the origins and prospects of our International Economic Order* (McGraw-Hill, USA, 1969) (Gardner).

[18] "In Washington Lord Halifax once whispered to Lord Keynes: / It's true *they* have the money bags /But we have all the brains." Quoted in Gardner above n 17, 21.

[19] Peter Van den Bossche *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, New York, 2005) 79–80.

subsequent PRSPs.[20] TNCs, opportunistic profit-seekers, flourished naturally on the back of the IFIs and in this sense can be called their epiphytes.

TNCs are "legally discrete entities (i.e. companies) established in several countries, forming a single economic unit (enterprise) which engages in operations transcending national borders under the direction of a sole decision-making centre."[21] The ten largest TNCs in the world have their headquarters in the USA and the UK and their shareholders are drawn from Europe and North America.[22] TNCs can relocate their operations anywhere to maximize profit. Thus fiscal incentives, cheap labour, flexible legal regimes, lax health and safety regulations and poor environmental protection conditionalities are corollaries through which countries in the developing world compete against each other to attract TNCs.[23]

The crucial role that the TNCs play in global finance is illustrated by the volume and diversity of their activities.[24] According to the World Investment Report of 2003, 7,000 TNCs in 1970 had multiplied into 64,000, with 870,000 global affiliates that controlled nearly 30 per cent of world GDP.[25] The World Development Report of the World Bank 2001 data indicate that less than 60 states have GNPs of US$ 20 billion in contrast to the estimation of Fortune Global 500 list of TNCs in 2001 which indicated that 245 of them had annual revenues of more than UD$ 20 billion.[26] Kinley and Tadaki call them the "driving agents of the global economy" with "considerable political leverage in both domestic and

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[20] Noreena Hertz The Silent Takeover: Global Capitalism and the Death of Democracy (Free Press, New York, 2002).

[21] A Fatouros "Transnational Enterprise in the Law of State Responsibility" in Richard B Lillich (ed) *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia, Charlottesville, 1983) 362.

[22] General Electric (US), Exxon Mobil (US), Microsoft (US), Pfizer (US), Citigroup (US), Wal-Mart Stores (US), BP (UK), American International Group (US), Bank of America (US), Royal Dutch/Shell (Netherlands/UK), The World's 100 Largest Public Companies, as determined by The Wall Street Journal Market Data Group 31 Aug 2004.

[23] Cristina Baez et al. "Multinational Enterprises and Human Right" (1999/2000) 8 University of Miami Int'l & Comp L Rev 244–246.

[24] Strachan claims that of the world's biggest 100 economies only 49 are countries and 51 are corporations: Graham Strachan 2001 "Stopping the rot about globalisation" <http://www.overflow.net.au/~bizbrief/article_1.htm> (accessed 17 May 2006).

[25] United Nations Conference on Trade and Development *World Investment Report 2003* (United Nations, New York and Geneva, 2003) 14.

[26] Leslie Sklair "Competing Conceptions of Globalization" in Christopher K Chase-Dunn and Salvatore J Babones (eds) Global Social Change: Historical and Comparative Perspectives (John Hopkins University Press, USA, 2006) 61.

international spheres."[27] The TNCs operate within national economies in several ways. They can directly invest and be in charge of the operations or conduct business through outsourcing. In the case of South Asia, many of the TNCs operate through outsourcing as this is the most profitable and least responsible way of operating.[28]

TNCs are a valued source of Foreign Direct Investment (FDI) for the developing world and their sphere of operations extends beyond the traditional Export-Processing Zone (EPZ). The deregularization process under SAPs has enabled the TNCs to penetrate into areas beyond industry and production.[29] TNCs are now involved as service providers in healthcare, education, infrastructure construction.[30] Not only do their activities transform the urban industrial sector, but their sphere of influence permeates into the rural society as they become active in domestic markets such as food, agricultural products, medicine and textiles. Operating under the neo-liberal economic agenda, TNCs are primarily motivated by profit. The wider issues of equitable economic growth, development and social justice have not entered into their realms of consideration until recently.[31] The concerns over the operations of the TNCs range from their global financial role to the impact on global environment, their accent on profits above social goals and individual states' impotency to regulate their activities.

3.3.2 New strategies of global development: restructuring the "Third World" from the late 1970s onward

Although the freedom of policy formulation for global economics was vested with the WB and the IMF at inception, neither institution did much to manipulate or

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[27] David Kinley and Junko Tadaki "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2003–2004) 44 Virginia Journal of International Law 931–1024.

[28] Jedrzej George Frynas "The Transnational Garment Industry in South and South East Asia: A Focus on Labour Rights" in Jedrzej George Frynas and Scott Pegg (eds) *Transnational Corporations and Human Rights* (Palgrave McMillan, Hampshire, New York, 2003).

[29] P Athukorala and S Rajapatirana *Liberalization and Industrial Transformation: Sri Lanka in International Perspective* (Oxford University Press, Oxford and New Delhi, 2000).

[30] Feyza Bhatti and Shazra Murad "Health Conditions and Service Delivery in South Asia" [2006] South Asian Journal 14. <http://www.southasianmedia.net/magazine/Journal/previousissues14.htm> (accessed 17 Jun 2007).

[31] This aspect of their operations is discussed later in this chapter.

reformulate the economic policies of individual states in the developing world until the late 1970s. Intervention became inevitable with the poor performance of the heavily debt-ridden economies and when debt repayment snowballed into a global financial crisis during that decade.

The shift of focus of the IFIs from being still partly on the European economies devastated during World War II to more exclusively the poverty-stricken and/or Communism-prone poor states, grew gradually from the global financial disasters between 1970 and 1980.[32] The USA, Western Europe and their dependent economies during the 1970s experienced two recessions largely due to rising oil prices that fuelled inflation and interest rises. The demand of these states for commodity exports from developing countries consequently fell, while the prices of goods manufactured in the industrial world conversely increased.[33]

The origin of the debt crisis, though commonly attributed to the above, was also the result of two further factors. The first is the poor financial policy formulation of the IMF and the lackadaisical monitoring of loan repayments by the World Bank in the 1970s. The transfer of what were known as petrodollars, in terms of loans from the oil producing countries to low/middle-income countries in Latin America, Asia and Africa, was perceived to be potentially lucrative. This scheme was initiated by Western commercial banks under the aegis of the World Bank. The transfer of funds was done with no risk assessments and the entire process was poorly managed.

The second cause for crisis is the financial mismanagement by the debtor states.[34] During the Cold War loan allocation was often based on political affiliation without prior risk assessments. Loans were rarely utilized for the intended purposes such as infrastructure development projects or income generating projects, but were often misused or misappropriated. The donors conditioned

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[32] Peter Korner et al. *The IMF and the Debt Crisis: A Guide to the Third World's Dilemma* (Zed Books Ltd, Atlantic Highlands, New Jersey, 1986) 5–73, 128–187.
[33] P Krugman "External shocks and domestic policy responses" in R Dornbusch and FLCH Helmers (eds) *The Open Economy: Tools for policy makers in developing economies* (Oxford University Press, New York, 1988) 54–108.
[34] Oluwole Akanle *Rescheduling of The External Debt* (London Club, Article Reference: Document No.1, Chapter 3, February 1992)
<http://www.unitar.org/dfm/Resource_Center/Document_Series/Document1/C_Akanle.htm>
(accessed 8 Feb 2008).

aid/financial assistance on establishing democratic governing processes, but these conditions were often ignored for political expediency.[35] As ideas such as transparency, accountability and good governance had not gained the political currency they have today, sporadic condemnation did not have a lasting impact or change governmental practice.[36]

At the initial stages the receiving countries were not perturbed by the prospect of repayment but welcomed the loans to settle immediate financial crises. With time, high rates of inflation and poor economic growth in the developing countries made interest payments impossible, for interest rates had risen from an average of 0.5 per cent to an average of 13.1 per cent.[37] This crisis initiated another round of borrowing for the purposes of refinancing the loans obtained previously.[38]

The escalating oil prices, interest rate rises and balance of payment and loan repayment issues emphasized the structural weaknesses and policy inadequacies of the Bretton Woods institutions to manage the global financial process satisfactorily. It had also become apparent that financial contributions alone could not resolve the financial troubles of the developing economies, and that correction of inappropriate financial and trade policies was also required.

The neo-liberal economic orthodoxy[39] came into operation when the crisis point was reached with the Mexican Finance Minister declaring that Mexico would withhold debt repayments for three months in August 1982.[40] The IMF and the World Bank, encouraged by the US Treasury, agreed to assist Mexico and reschedule the loans. However, conditions of such assistance included institutional and economic reforms termed Structural Adjustment Policies (SAPs),

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[35] JFJ Toye et al. *Aid and Power: The World Bank and Policy-based Lending* (Routledge, London, 1995).
[36] Patricia Adams *Odious Debts* (Earthscan, London, 1991); Devesh Kapur and Richard Webb *Governance-related Conditionalities of the International Financial Institutions* (UNCTAD/GDS/MDPB/G24/6 United Nations Publication, United Nations, © 2000).
[37] For background to debt issues see <http://www.debtireland.org/debt-issues/> (accessed 16 Jun 2006).
[38] By the early 1980s, Africa's debt crisis was so grave that the ratio of Africa's foreign debt to its export income grew to 500%. See Kevin Watkins et al. *The Oxfam Poverty Report* (Oxfam Publishing, Oxford, 1995) 74; see also Jan Vandermootele "Are MDGs Affordable?" [2003] Development Policy Journal 1–21.
[39] David Harvey *A Brief History of Neoliberalism* (Oxford University Press, Oxford, 2005) 29.
[40] Robert A Pastor (ed) *Latin American Debt Crisis: Adjusting for the Past or Planning for the Future?* (Lynne Rienner, Boulder, Colorado, 1987) 9.

which were privatization of state-owned enterprises, cuts in social welfare and governmental expenditure, the opening up of the economy and flexible labour laws. The prescriptions to Mexico were replicated globally. If the WB and the IMF now became more than ever pressed into service as the agents of neo-liberal economic globalization, the SAPs (and their successors) were the instruments.

3.4 Key instruments: The ideological base and main features of Structural Adjustment Policies

The "neo-liberal counter-revolution"[41] was supported by orthodox economists such as Mandel, Krugman and Bhagwati.[42] They all favoured the liberalization and integration of global markets as a means of promoting economic growth and eradicating poverty. It was also promoted with vigour by the right-wing leaders of the USA and the UK, Ronald Reagan and Margaret Thatcher, in the 1980s.[43] In contrast to the existing pessimism in the developing world relating to state-centric economic policies, the new paradigm which advocated market-driven economic growth for poverty eradication and development was burgeoning.[44]

The World Bank and the IMF epitomized the West's neo-liberalism[45] and maintained that financial assistance alone would not stimulate economic growth, whereas policies merging domestic and global markets would.[46] SAPs — the

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[41] JFJ Toye, *Dilemmas of Development: reflections on the counter-revolution in development economics* (Blackwell, Oxford, 1993).

[42] J Mandle "The Good Side of Going Global" [1997] Commonweal <http://www.encyclopedia.com/doc/1G1-58400692.html> (accessed 12 Jan 2007); Jagadish N Bhagwati "Free Trade: Old and New Challenges" [1994] The Economic Journal 104 ; Paul Krugman *Peddling Prosperity: Economic Sense and Non-sense in the Age of Diminished Expectations* (W. W. Norton, New York, 1994) and Ishrat Hussain "Globalization and Liberalization: An Opportunity to Reduce Poverty" in UNCTAD *Globalization and Liberalization: Effects of International Economic Relations on Poverty* (United Nations, New York and Geneva, 1996).

[43] Walden Bello *Dark Victory: US and Global Poverty* (Institute for Food and Development Policy, Oakland, 1994).

[44] J Bhagwati and A Krueger Foreign Trade Regimes and Economic Development: Liberalization Attempts and Consequences (Ballinger, Cambridge, 1978).

[45] Peter Korner et al. *The IMF and the Debt Crisis: A Guide to the Third World's Dilemma* (Zed Books, Atlantic Highlands, New Jersey, 1986) 5–73 and 128–187.

[46] Vittorio Corbo et al (eds) *Adjustment Lending Revisited: Policies to Restore Growth* (World Bank Publication, 1992).

"basic policy instrument of the neo-liberal resurgence"[47] and supported by the "Washington Consensus"[48] of Washington DC based institutions precisely the IMF World Bank and the US Treasury Department— catalysed that change and were justified by the failures of previous developmental efforts and the alleged prodigality of the developing world.[49] The IFIs made loans and aid conditional upon the successful implementation of the SAPs and encouraged competition, price deregulation, and removal of subsidies and devaluations to correct imbalances of trade. Recipient countries had to establish monitoring regimes and safeguards conducive to foreign and private investment. Legislation promoting foreign investment, favourable taxation and labour market deregulation was also integral, as was a reduction in governmental size and expenditure — including on welfare — to decrease budget deficits and inflation,[50] and privatization.[51]

3.4.1   The Impact of Structural Adjustment Policies

SAPs differed radically from previous developmental theories in two aspects. Firstly, SAPs ensured the transformation of the state from an active participant in developmental processes to a passive facilitator of the neo-liberal market ideology. Secondly, SAPs were the catalyst that displaced the sacrosanct position held by the concept of non-interference in internal affairs of individual countries, hitherto strongly supported by the United Nations.

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[47] Karen Brock, Andrea Cornwall and John Gaventa "Power, Knowledge and Political Spaces in the Framing of Poverty Policy" (Working Paper No 143 Institute of Development Studies (IDS), Brighton, October 2001) 13.

[48] The Washington Consensus was synonymous with stabilization, liberalization and deregulation policies advocated by the IFIs. See J Williamson "What should the World Bank think about the Washington Consensus?" (2000) 15 The World Bank Research Observer 2.

[49] Thandika Mkandawire and Charles C. Soludo (eds) *Our Continent Our Future. African Perspectives on Structural Adjustment* (Africa World Press, 2001); Frances Steward *Adjustment and Poverty: Options and Choices* (Routledge, New York, 1995).

[50] Bella Balassa *Structural adjustment policies in developing economies* (Working Paper no. SWP 464 1, World Bank Staff, 1981) and J.F.J. Toye *Structural Adjustment & Employment Policy: Issues & Experience* (International Labour Organization, 1995).

[51] Anna Gueorguieva and Katharine Bolt *A Critical Review of the Literature on Structural Adjustment and the Environment: The International Bank for Reconstruction and Development* (Environmental Economics Series Research Paper No. 90, The World Bank, 2003). . <http://lnweb18.worldbank.org/essd/envext.nsf/44ByDocName/ACriticalReviewoftheLit> (accessed 16 Jun 2006); Vittorio Corbo and Stanley Fuscher "Structural Adjustment, Stabilization and Policy Reform Domestic and International Finance Development Economics" in J Behrman and TN Srinivasan (eds) *Handbook of Development Economics* Vol III (Elsevier, Amsterdam, 1995).

The influence of the SAPs permeated every layer of the national economies, yet ignored the human dimension of growth and development.[52] The IFIs manipulated domestic financial policy formulation and controlled public expenditure through the "Public Expenditure Reviews" (PERs).[53] The PERs promoted cost-recovery on all public expenditure, causing deliberate extraction of payment for several essential public services such as healthcare, education, transport and public housing. These "austerity measures in the social sectors …have largely being responsible for the collapse of schools, health clinics and hospitals" in the developing world consolidating the cycle of poverty and marginalization.[54]

The SAPs' authoritarian implementation by the IFIs and their devastating social, political and economic impact initiated debates across international fora[55], academia[56] and the developing world. Criticisms focussed on their moral legitimacy and the impact on the universal human rights regime and whether the IFIs had an obligation to abide by the international human rights treaties. Globally, SAPs transferred resources from the South to the North. Loans continued to be serviced from funds that the countries could have utilized for development work.[57] During the period from 1982 to 1989 total debt repayment amounted to $615 billion in interest and amortization, while debt to commercial banks soared from $493 to $629 billion .[58] A great proportion of the loans obtained from the WB-IMF were utilized in debt servicing to banks on the basis

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[52] Paul Streeten "Structural Adjustment: A Survey of the Issues and Opinions" (1987) 15 World Development 1462–1482.
[53] S Pradhan *A framework for evaluating the level and composition of public expenditures* (Operations Evaluations Division (OED), World Bank, 1996).
[54] This aspect is discussed in section 3.7.5 of this chapter. See also Michael Chossudovsky "Structural Adjustment" (1995) 24/25 Notebooks for Study and Research 59; Giles Mohan *Structural Adjustment: Theory, Practice and Impacts* (Routledge, London, 2000).
[55] J. Oloka-Onyango and Deepika Udagama The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights Preliminary report submitted by in accordance with Sub-Commission resolution 1999/8 E/CN.4/Sub.2/2000/13 <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument> (accessed 15 Jun 2006);
[56] William Easterly "What did structural adjustment adjust? The association of policies and growth with repeated IMF and World Bank adjustment loans" (2005) 76 Journal of Development Economics 1–22.
[57] Michel Chossudovsky *The Globalization of Poverty: Impacts of IMF and World Bank Reforms* (Third World Network, Penang, 1997) 51.
[58] UNDP *Human Development Report 1999* (Oxford University Press, New York, 1999).

of structural adjustment lending.[59] Toussaint and Comanne identify the true benefactors of the SAPs and quote President Mitterand, who observed, "[d]espite the considerable sums spent on bilateral and multilateral aid, the flow of capital from Africa toward the industrial countries is greater than the flow of capital from the industrial countries to the developing countries."[60] An in-depth evaluation of these aspects and of the human dimension of IFIs' policies relating to SAPs follows the discussion of SAPs in South Asia later in this chapter.

3.4.2 End of the era of Structural Adjustment Policies

As empirical evidence[61] of the disastrous consequences of too much emphasis on economic growth emerged critics sought a synergy between human development and economic growth. Such a synergy has been called for repeatedly by the UNDP, which denied the efficacy of the trickle down theory let alone its equity.[62] The obvious question as to why those at the bottom deserve only the benefits that trickle down from the neo-liberal adjustment policies was also raised. This position is contrary to that of Dollar and Kraay, who argue that the emphasis on growth and exposure to global trade has no substantial adverse impact on the poor and that policy-induced growth is beneficial to the overall economy as it is to the poor.[63] Therefore, even though the Bank and the Fund appear to have taken cognizance of the human dimension in the developmental paradigm, issues such as the eradication of poverty and human development are largely seen through the prism of market efficiency rather than through an equitable allocation of resources.

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[59] P Krugman & M Obstfed *International Economics: Theory and Policy* (2nd ed, Harper Collins, New York, 1991) 662.

[60] E Toussaint and D Comanne "Globalization and Debt" (1995) 24/25 Notebooks for Study and Research 10–12. The social cost of the transfer of capital to the developed world will be analysed in the section relating to the social effects of SAPs in South Asia.

[61] Poverty in South Asia 2006: Civil Society Concerns. <http://www.saape.org.np/resources/publications/poverty_report06/poverty_report06.htm > (accessed 5 March 2007); Human Development in South Asia 2005 - Human Security in South Asia (Oxford University Press, Oxford 2006) 51–65.

[62] UNDP *Human Development Report 1996 – Trends in growth and human development* (Oxford University Pres, Oxford, 1996) 11.

[63] David Dollar and Aart Kraay *Growth Is Good for the Poor* (Development Research Group, The World Bank, March 2000) <http://www.worldbank.org/html/prddr/trans/marapr00/pgs15-16.htm> (accessed 25 Mar 2005).

Many observers have queried whether the IFIs are bound by moral responsibilities.[64] Others ask why the IFIs are immune from obligations of international human rights law.[65] Despite these legitimate queries IFIs have continued economic policy formulation which creates dysfunctional sovereignty within states[66] which are unable to formulate and implement strategies of development in the interests of the people they govern. For SAPs to succeed, concerns such as poverty eradication, responsible governance and human development needed to be "internalised into the policies of economic development".[67] In reality, years of adjustments dictated by the World Bank and IMF[68] neither consolidated states' economic capacity nor ensured acceptable standards of living and human development.

3.5 The Search for a New Instrument: the Poverty Reduction Strategy Papers (PRSPs)

The failure of the SAPs reinforced the message that any developmental strategy that ignores the human dimension cannot be considered successful. As Cornia, Jolly and Stewart point out, "the call for a more people-sensitive approach to adjustment is more than a matter of economic good sense and political expediency. It rests on the ethic of human solidarity, of concern for others, of human response to human suffering."[69]

The growing civil society movement coalescing around issues of international debt, inequitable development and poverty began to challenge the supposed beneficial role of the IFIs in the global community. Forced to defend their

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[64] Toni Erskine *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Palgrave Macmillan, New York and Basingstoke, 2003).
[65] Joel E Oestreich "The Human Rights Responsibilities of the World Bank: A Business Paradigm" (2004) 4 Social Policy 55–76.
[66] Paul Collier "Learning from failure: the international financial institutions as agencies of restraint in Africa" in Andreas Schedler et al. (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, Boulder, Colorado and London, 1999) 319–320.
[67] CS Abeysekara et al. (eds) *Structural Adjustment Policies in Sri Lanka: A Study for the NGO-WB Group* (Social Scientists' Association, Colombo, 1993).
[68] Ann-Louise Colgan *Hazardous to Health: The World Bank and IMF in Africa* (Africa Action Position Paper, USA, 2002).
[69] GA Cornia, R Jolly and F Stewart (eds) *Adjustment with a Human Face: Protecting the vulnerable and promoting growth* (Clarendon Press, Oxford, 1987) 3.

unimpressive track record, the World Bank and IMF have tried to allay criticisms of the SAPs. In a number of studies spanning the 1990s the World Bank and the IMF have acknowledged the burgeoning issue of world poverty.[70] The relentless dissent from all quarters and a measure of self-realization provided the momentum to seek alternative avenues to consolidate the neo-liberal project. The evolution of Poverty Reduction Strategy Papers (PRSPs) was the result of that impetus.

The new development paradigm was unveiled by the Senior Vice-President and Chief Economist of the World Bank, Joseph Stiglitz, in 1998.[71] Stiglitz acknowledged the failures of the previous strategies that had assumed a technical approach to development and concluded that *participation* and *ownership* are essential ingredients of any development strategy. The exclusion of states from formulation of development policy was identified as among fundamental reasons for the failure of SAPs. As research concluded by the World Bank supported Stiglitz's position, at the Annual General Meetings of the IMF and World Bank in 1999, the member states decided to adopt the Poverty Reduction Strategy approach.[72] The PRSPs were designed to be consensus-building and inclusive of all the stakeholders of the development process, thus minimizing the risk of engendering resistance or a lack of commitment to the development initiative.[73] The PRSPs were to expand consideration to embrace issues relating to governance and human development.

PRSPs are designed country-specifically, applying the observation of the Comprehensive Development Framework (CDF) of the World Bank[74] that the financial, economic, social, environmental and structural issues of a country must

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[70] *Globalization, Growth and Poverty: Building an Inclusive World Economy* (A co-publication of the World Bank and Oxford University Press, Oxford, 2002).

[71] Joseph Stiglitz "Towards a New Paradigm for Development: Strategies, Policies and Processes" (9th Raul Prebisch Lecture delivered at the Palais des Nations, UNCTAD, Geneva, 19 October 1998); Ha-Joon Chang (ed) *The Rebel Within* (Wimbledon Publishing Company, London, 2001) 57–93.

[72] Carl Jayarajah and William H Branson *World Bank Structural and Sectoral Adjustment – World Bank Experience 1980–92* (World Bank Operations Evaluation Study, World Bank, Washington, D.C., 1995).

[73] IMF Independent Evaluation Office *Evaluation of Poverty Reduction Strategy Papers and the Poverty Reduction and Growth Facility* (Issues Paper/Terms of Reference, 31 Jan 2003) <http://www.imf.org/External/NP/ieo/2004/prspprgf/eng/report.pdf> (accessed 26 Apr 2006).

[74] The CDF brings together four principles: a long-term, holistic framework; results orientation; country ownership; and country-led partnership. <http://www.worldbank.org/evaluation/cdf/ > (accessed 3 Mar 2006).

be dealt with in an integrative approach and that each country must be responsible for the successful implementation of its own PRSP. A PRSP is thus designed to be a collective, country-driven, long-term endeavour that considers the viewpoints of stakeholders such as the elected entities, civil society including the poor, and NGOs and involves the coordinated participation of development partners bilateral, multilateral, and non-governmental, while trying to remain fiscally and institutionally feasible.[75] The PRSPs prescribed by the IFIs were soon adopted by other multilateral and bilateral donor agencies. The UK Department for International Development (DFID) identifies six characteristics needed by a PRSP: to be a country-driven process, indicating there was broad-based participation by civil society and the private sector in all operational steps; to be results oriented**,** and focused on outcomes that would benefit the poor; to be comprehensive in recognizing the multidimensional nature of poverty, but also to be a process that prioritizes concerns so that implementation is feasible, in both fiscal and institutional terms; to be partnership-oriented, involving the coordinated participation of development partners bilateral, multilateral, and non-governmental; and to be viewed from a long-term perspective to reduce poverty.[76]

In 2000, states began preparing PRSPs as a prerequisite for World Bank/IMF adjustment loans. Each PRSP outlined, after a broad consultative process, a state's poverty-reduction priorities and the economic policies needed to achieve them. The PRSPs were to be the base document for all IFI and bilateral donor lending, based on five fundamental principles determined by the World Bank: a description of the country's participatory process in the PRSP, identification of the poverty areas and achievable goals, indicators and monitoring systems, and a definition of priority public actions.[77]

The PRSP has created a system whereby the responsibility and the obligations of successful implementation of development and poverty eradication goals rests with individual countries. The previous SAPs were criticized for being forced

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[75] PRSP Policy paper (UK Department for International Development, Africa Policy Department, February 2002).) <www.dfid.gov.uk/pubs/files/cspcameroon.pdf> (accessed 17 Dec 2007).

[76] Ibid.

[77] *Review of the Poverty Reduction Strategy Papers (PRSP) Approach: Early Experience with Interim PRSPs and Full PRSPs* (World Bank, April 2002) <http://www.imf.org/external/np/ieo/2002/prsp/index.htm> (accessed 17 Dec 2007).

upon unwilling yet helpless states. Failure of the PRSPs can now be attributed to a particular state for failure to recognize its own limitations, poor design and ineffective implementation.

The World Bank claims that the PRSPs' increased sense of ownership of the government's poverty alleviation strategies and created avenues for dialogue between civil society, governments and the IFIs. Furthermore the Bank claims that the PRSPs have made poverty a priority of development policies and programmes. The PRSPs have also contributed to the evolving governance culture based on transparency, accountability, participation and the rule of law. PRSPs can also include human rights targets in their strategies for poverty eradication.[78] The PRSP – I of Bangladesh included strategies such as "pro-poor economic growth for increasing income and employment of the poor, human development of the poor for raising their capability through education, health, nutrition and social interventions, women's advancement and closing of gender gaps in development, [and] social safety nets for the poor against anticipated and unanticipated income/consumption shocks".[79]

Despite the adoption of a new development paradigm by both the World Bank and the IMF, allegations abound that the PRSPs are following the same trajectory as the SAPs. The limitations of the process, the extent in which they imitate the SAPs and the negative repercussions of their application are discussed in 3.7 of this chapter.

3.6   South Asian economic development in the post colonial era- A brief overview

The focus of this chapter is the impact of globalization in South Asia. The ensuing overview highlights how different economic circumstances have resulted in a similar set of symptoms which compelled South Asia to join the reform wave advocated by the IFIs in the early 1980s. The following paragraphs evaluate the respective economies of South Asia prior to the wave of contemporary globalization and its repercussions.

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[78] Sergio Pereira Leite "Human Rights and the IMF" (2001) 38 Finance and Development 4.
[79] *National Strategy for Economic Growth and Poverty Reduction I PRS* (Draft for Discussion, Bangladesh Economic Relations Division, Ministry of Finance, Government of the People's Republic of Bangladesh, 2002).

Evaluation of the ramification of both SAPs and PRSPs in South Asia confirms that they neither contributed to equitable economic growth nor reduced external debt.[80] However, the new policy formulations compelled interaction with the global market economy, reformulated the role of the state, and introduced new regimes of taxation and labour. The initiatives created similar adverse repercussions within each state in South Asia.[81]

3.6.1   The post-independence economic trajectory of South Asia

The relationship between the IFIs and South Asia has a long history.[82] India participated at Bretton Woods. In 1949, India sought World Bank assistance for a railway reconstruction and development project.[83] Both Pakistan and Sri Lanka have approached the Bank with specific requests for infrastructure development projects.[84] In keeping with the Bank's mandate and philosophy the Bank in these early years was providing funding through loans or grants for specific projects such as transportation, power generation and industry.[85] However, the Bank's involvement in South Asia was not limited to sporadic loans for infrastructure development. The Bank initiated the First Aid Consortium in August 1958 for India, on which the foundation for the first five-year plan for India was laid. The Aid Consortium was a result of the deteriorating balance of payments, the need

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[80] William Easterly "What did structural adjustment adjust? The association of policies and growth with repeated IMF and World Bank adjustment loans" (2005) 76 Journal of Development Economics 1–22.

[81] Achin Vanaik (ed) *Globalization and South Asia: Multidimensional Perspectives* (Manohar Publications, New Delhi, 2004).

[82] Dilip Dutta (ed) *Economic Liberalisation and Institutional Reforms in South Asia: Recent Experiences and Future Prospects* (Atlantic, Delhi, 2000); Rehman Sobhan "Aid, Governance and Ownership" (2004) 4 South Asian Journal <http://www.southasianmedia.net/magazine/Journal/previousissues14.htm> (accessed 18 Jun 2006).

[83] World Bank operations in India began in 1949 with a loan of US$34 million for an Indian Railways. project<http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/I NDIAEXTN/0,,contentMDK:20158985~pagePK:141137~piPK:217854~theSitePK:295584,00.ht ml > (accessed 24 Jul 2006).

[84] The Laxapana power generating project in Sri Lanka in 1954 was funded by a World Bank grant.

[85] In the region 40% of the assistance was for power generation, with 25% going to transportation and industry. Agriculture was accorded a low priority, receiving only 8% of the overall assistance <http://web.worldbank.org > (accessed 24 Jul 2006).

for infrastructure and industrial development and poor economic growth in India. A similar consortium was followed for Pakistan in 1960.[86]

At the time of decolonization the economies of the region portrayed similar characteristics with liberalized export markets closely linked and dependent on the global markets and a self-sufficient rural economy that appeared unhindered by the turbulences of the global markets. Since independence they have followed different trajectories due to political and ideological differences of the political leaders at the time of independence.[87] Post-independent economic planning was influenced by colonial experiences, such as the disastrous famine in the subcontinent in 1943, the partition of India and Pakistan at independence and the dependency on external markets.

The South Asian economy since its different states gained independence has been dominated by sluggish growth[88] referred to in the Indian context disparagingly as the "Hindu rate of growth".[89] This sluggishness was directly attributed to the *dirigiste* economic policies[90] in place from the time of decolonization. South Asian economies during the pre-liberalization era were generally characterized by import substitution, protection for domestic industries, large scale state-owned operations, bureaucratic inefficiency and lethargy, mismanagement, and corruption.

3.6.2 "Hindu rate of growth" - India

Pursuing the dream of self-sufficiency, India attempted to rectify all the injustices of colonial rule through its economic policy. Based on the ideals of socialism,

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[86] Anne CM Salda *Historical Dictionary of the World Bank* (Scarecrow Publishers, USA, 1996) 57–58.
[87] Sisira Jayasuriya "Globalisation, Equity and Poverty: The South Asian Experience" (Paper prepared for the 4th Annual Global Development Conference of the Global Development Network on Globalization and Equity. Cairo, Egypt, 19-21 January 2002).
[88] Appendix E
[89] Hindu rate of growth – the sluggish rate of economic growth which was around 3.5% of the post independent era until the onset of the liberalization phase of the 1980s. The term was coined by the economist Raj Krishna and was often repeated disparagingly. See also Vijay Joshi and IMD Little (eds) *India: Macroeconomics and political economy 1964-1991* (World Bank, Washington, DC, 1994).
[90] Jalan Biman *India's Economic Policy: Preparing for the Twenty-first Century* (Penguin Books, New Delhi, 1996).

India, after independence, opted for a system of economic governance that was essentially protective of domestic industries and that was state regulated. The first Prime Minister, Nehru, supported policies that enhanced poverty eradication, domestic industrial growth and food self-sufficiency.[91] However, the system became characterized by inefficient government bureaucracy, over-regulation, and deep scepticism of external trade and foreign investment, and widespread corruption.[92] The five-year economic development plans formulated in conjunction with the IFIs were soon stymied by droughts, war, poor resource allocation (often from agriculture to inefficient industry), population growth and adverse global economic conditions, such as the escalation of the oil prices.[93] Industry and production stifled with the operation of the *License Raj*.

Tentative attempts at economic liberalization commenced during the last tenure of Indira Gandhi.[94] Under Rajiv Gandhi, India's liberalization process became selective and cautious.[95] The policies during this time concentrated on selected changes such as the elimination of price controls, the revision of taxation policies, and the relaxation of subsidies and quotas.[96] A wholesale liberalization process was not undertaken until 1991.[97] Recurrent balance of payment problems, the economic success of liberal policies particularly in South East Asia, political pressure for reforms and the ideological leanings of Prime Minister Manmohan Singh contributed largely to the shift away from the existing paradigm of closed door policies.

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[91] Stanley Wolpert *India* (University of California Press, Berkeley, 1991).

[92] David H. Bayley **"The Effects of Corruption in a Developing Nation"** (1966) 19 The Western Political Quarterly 719–732.

[93] Francine Frankel *India's Political Economy, 1947–1977: The Gradual Revolution* (Princeton University Press, Princeton, N.J, 1978); Baldev Raj Nayar *India's Mixed Economy: The Role of Ideology and Interest in its Development* (Popular Publishers, Bombay, 1989).

[94] Indira Gandhi's last premiership was 1980–1984.

[95] Attempts at greater liberalization were pursued by Rajiv Gandhi in 1984, but internal political turmoil highlighted by corruption scandals slowed the liberalization process during his tenure. Gandhi was wary of liberalizing the Indian economy on a large scale, aware of the resulting socioeconomic backlash which would cost him politically. On the Bofors scandal, see <http://www.dnaindia.com/report.asp?NewsID=108226> (accessed 26 Jun 2006); David BH Denoon **"Cycles in Indian Economic Liberalization, 1966–1996"** (1998) 31 Comparative Politics 43–60, R Jenkins "Civil Society Versus Corruption" (2007) 18 Journal of Democracy 55–69.

[96] Atul Kohli *Democracy and Discontent: India's Growing Crisis of Governability* (Cambridge University Press, Cambridge, New York, 1989); Bimal Jalan (ed) *The Indian Economy Problems and Prospects* (Penguin Books, India, 2004).

[97] Dani Rodrik and Arvind Subramanian *From "Hindu Growth" to Productivity Surge: The Mystery of the Indian Growth Transition* (Working Paper WP/04/77, IMF Research Department, May 2004).

3.6.3 Emphasis on Social Welfare — Sri Lanka

At independence, the Sri Lankan economy was primarily a commodity export market heavily reliant on global markets. Domestic industrial capacity was poor and the country was not self-sufficient in food production. British rule had left behind a mature administrative system, a multi-party democracy and a healthy trade union system,[98] which facilitated independent Sri Lanka to implement successfully a robust social welfare system with free healthcare, education and pension schemes; living standards in the early post-independence era were the best in the region.[99] The economic strategies of the Indian subcontinent heavily influenced the post-independent policy makers of Sri Lanka who opted to pursue the socialist ideals, resulting in heavy state regulation.[100]

State-regulated economic policies, falling prices in the commodity markets, and the stagnation of the domestic economy began to take a toll and by 1975–1976 Sri Lanka was faced with rising inflation and balance of payments problems. Overwhelming state intervention and inefficient bureaucracy had created an ethos of corrupt, rent-seeking, inept, unproductive economic governance. The government's response to the growing dissatisfaction of the people was the brutal use of state authority and severe austerity measures.[101] A stringent rationing system of essential items such as bread, rice and clothing was introduced and the protests against the escalating cost of living and general political dissent were violently suppressed. The social and political crisis created by the stagnant economy was evident everywhere and the people were ready to dispense with the government that espoused the socialist ideology. At the 1977 General Elections, the United National Party (UNP), seeking a mandate to introduce fundamental changes in the economic sphere through liberalization, deregulation and privatization, as well as a new system of constitutional governance, was elected

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[98] H Wriggins *Dilemmas of a New Nation* (Princeton University Press, Princeton, 1960).
[99] A Sen "Sri Lanka's Achievements: How and When?" in TN Srinivasan and PK Bardhan (eds) *Rural Poverty in South Asia* (Columbia University Press, New York, 1988) 549–556.
[100] Saman Kelegama and Gamani Corea (eds) *Economic Policy In Sri Lanka: Issues and Debates* (Sage Publications, London, 2004).
[101] Alfred Jeyaratnam Wilson *Politics in Sri Lanka, 1947–1979* (Palgrave Macmillan, USA, 1979).

into office with a landslide majority, making Sri Lanka the first country to liberalize its economy in the region.[102]

The decision to abandon the inward-oriented economic policies was due to an ideological commitment to neo-liberalism as a panacea, and to appease international economic and political influences. Sri Lanka under the aegis of the IMF and the World Bank followed the familiar trajectory of privatization, devaluation of the rupee, reform in taxation policy and the creation of EPZs.[103] The immediate economic benefits of deregulation, privatization and liberalization were quickly visible — the stagnant economy revived with inward capital transfers into the EPZs, and new infrastructure projects generated employment opportunities. The new culture epitomized development through economic growth and the benefits were to trickle down to the lower segments of society where poverty was "treated as a residual element, i.e., as [being reduced by] the acceleration of growth."[104] The policy makers had no qualms about the potential hazards of "increased financial volatility, inequality in income distribution, decline in commodity prices, growing job and income opportunities, and threat to indigenous culture,"[105] issues that would cause enormous social and political turmoil in later years.

3.6.4   Culture of aid dependence — Bangladesh

Bangladesh, the youngest state in the region, has been dependent on IFI assistance from the day of its creation. Bangladesh's economic policies were an exception in

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[102] Saman Kelegama. "Liberalization and Industrialization: The Sri Lankan Experience of the 1980s" (Industrialization Series No. 2, Institute of Policy Studies, Colombo,1992); Mick Moore, "Economic Liberalization versus Political Pluralism in Sri Lanka?" (1990) 24 Modern Asian Studies 345–382; KM de Silva and Howard Wriggins *J. R. Jayewardene of Sri Lanka: A Political Biography* (University of Hawaii Press, Hawaii, 1988); CS Abeysekara et al. *Structural Adjustment Policies in Sri Lanka: A Study for the NGO-WB Group* (Social Scientists Association, Colombo, 1993).

[103] A Anand and A Sen *The Macro economy of Sri Lanka after Liberalisation* (St. Catherine's College, Oxford, and University of Essex, Colchester, 1984); Premachandra Athukoralge and Sarath Rajapatirana *Liberalization and Industrial Transformation in Sri Lanka: Sri Lanka in International Perspective* (Oxford University Press, USA, 2000).

[104] WD Lakshman and RHS Samaratunge "Structural Adjustment Policies in Sri Lanka: Implications for the Macro Economy and Vulnerable Groups in Society" in *Structural Adjustment, Gender and Employment: The Sri Lankan Experience* (International Labour Office, Geneva, 2000).

[105] Achin Vanaik (ed) *Globalization and South Asia: Multidimensional Perspectives* (Manohar Publications, New Delhi, 2004).

the region: they had never reflected the *dirigisme* of its neighbour India. An early embracing of adjustment programmes is an indication of the country's heavy dependence on external financial assistance.[106] Bangladesh has not followed systematic global economic integration but accession to the neo-liberal ideology has been a means of last resort to resolve internal economic debacles.[107] The ad hoc adoption of the liberalization ideology has created internal financial instability, balance of payment problems, external debt and economic recession. Poor policy formulation and weak institutional structures have been the major cause of Bangladesh's economic woes.[108]

3.6.5   Indian economic influence — Nepal

Indian influence contributed to Nepal's liberalization process, which commenced in 1986 with a structural adjustment credit by the World Bank.[109] The fundamental change in its economy was to end its dependence on India as an export market and allow it to venture into global markets. Nepal, with its political instability and small industrial sector, has been slow to attract capital-intensive foreign investment. There has been sporadic private investment in power generation, the construction industry and the finance sector, but lack of industrialization, a dearth of skilled labour, poor infrastructure, and political turmoil have not been conducive to economic growth.[110] Therefore, the liberalization process, or the attempts at global integration, have not yielded effective outcomes.

3.6.6   Early neo-liberal leanings — Pakistan

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[106] Mustapha Kamal Pasha "Liberalization, State Patronage and the 'New Inequality' in South Asia" (2000) 16 Perspectives on Global Development and Technology 71–85.
[107] Rehman Sobhan "South Asia's Weak Development"
<http://www.eias.org/publications/briefing/1999/weakdev.pdf.pdf> (accessed 19 Dec 2005).
[108] Muhammed Muqtada et al. (eds) *Bangladesh: Economic And Social Challenges Of Globalisation* (The University Press, Dhaka, 2002).
[109] Structural Adjustment in Nepal
<http://lnweb18.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/5992D15BFBBC B41E852567F5005D8D57> (accessed 13 Mar 2006).
[110] Premachandra Athukorala and Kishor Sharma **"**Foreign investment in a Least Developed Country: the Nepalese experience" (2006) 15 Transnational Corporations 2.

Pakistan's relationship with the IFIs has been long-standing and the country's commitment to neo-liberal ideology was visible from the time of the creation of the state in 1947.[111] With continuous political turmoil and intermittent military rule, Pakistan's economic woes were no better than its regional neighbours.[112] Pakistan's economy remained open and it continued in the import/export tradition that the British left behind. The chief contributors to the economic grievances of Pakistan have been its rulers, both military and the democratically elected. Foreign capital borrowings from the IFIs and private banks continued in Pakistan throughout its existence since Independence due to high defence spending. The five year development plans formulated through the World Bank have never succeeded owing to poor governance. Structural Adjustment policies have not brought the anticipated economic growth but exacerbated poverty and marginalization.[113]

3.6.7 Small economies in South Asia – The Maldives and Bhutan

The Maldives has maintained a liberalized economy that is heavily reliant on the service industry. Despite a healthy economic growth, concerns have been expressed with regard to the equitable distribution of wealth and democratic governance.[114] Bhutan's deliberate policy of economic isolation and its emphasis on the "cultural dimension of development" means it is shielded from the vagaries of global markets and their ramifications.[115]

The panacea advocated by the IFIs for the economic malaise in South Asia was identical though the root causes for varied degrees of political stability, economic advancement and sociocultural development in each state were vastly different.

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[111] Hassan N Gardezi "Globalization and Pakistan's Dilemma of Development" (A distinguished lecture delivered at the 20th annual meeting of the Pakistan Society of Development Economists, held in Islamabad 10-12 January 2005) <http://www.sacw.net/pakistan/Gardezi06022005.html> 6 February 2005 (accessed 20 Dec 2005).

[112] J Sohail Safiya Aftab Malik and Sultana Nargis *Pakistan's Economic Performance 1947 to 1993: A Descriptive Analysis* (Sure Publishers, Lahore, 1994).

[113] Tilat Anwar "Structural Adjustment and Poverty: The Case of Pakistan" (1996) 35 The Pakistan Development Review 911–926.

[114] Ashvin Faiza Yahya and Rodney Sebastian "Tourism and the South Asia Littoral: Voices from the Maldives" (2005) 28 Journal of South Asian Studies 457–480.

[115] Mahendra P Lama "Bhutan: a changing development paradigm" in Ramesh Ramakant and Misra Chandra *Bhutan: Society and Polity* (South Asia Studies Centre, University of Rajasthan, 1996) 156–165; T Devin Hagerty *South Asia in World Politics* (Rowman and Littlefield Inc, USA, 2005) 89–113.

The only common feature was that all states experienced sluggish economic growth, balance of payments problems, a dearth of capital investment, poor global market integration and inadequate human development.[116] These factors were blatantly ignored when introducing the standard adjustment policies, and many share Easterly's view that "[i]f the original objective was 'adjustment with growth', there is not much evidence that structural adjustment lending generated either adjustment or growth."[117]

3.7   A Critique of the Ideological Leanings of the IFIs and their Impact on Policy Formulation in South Asia

This section of the study evaluates the social cost of IFI policy formulation relating to SAPs and PRSPs based on the ideals of neo-liberal capitalism in South Asia. The speciousness, limitations and the social cost of neo-liberal capitalism were revealed by Polanyi in his book *The Great Transformation* 40 years before the first SAP.[118] He argued that to promote a market economy excluding other organizing principles of the society is to invite economic and social destabilization.[119] The global financial policy makers ignored his warnings and the neo-liberal market fundamentalism predictably resulted in economic and social chaos in the developing world at enormous human cost.

The IFIs' simulacrum of development was globalization based on neo-liberal capitalism.[120] The ensuing paragraphs illustrate that the institutional structures of the IFIs and their ideological standpoints that seek to eradicate poverty and foster human development are untenable as they were created to cater for a vastly

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[116] Aghevli B Bijan in Su Kim and H Neiss "Growth and Adjustment in South Asia: Experiences of Bangladesh, India, Pakistan and Sri Lanka in Implementing Adjustment Programs Supported by the IMF's Extended Fund Facility" (1988) Economic Review (People's Bank Publication, Colombo).

[117] William Easterly "What did structural adjustment adjust? The association of policies and growth with repeated IMF and World Bank adjustment loans" (2005) 76 Journal of Development Economics 1– 22, 18.

[118] Karl Polanyi *The Great Transformation* (Beacon Press Books, USA, 1944); see also Richard H Robbins *Global Problems and the Culture of Capitalism* (Allyn and Bacon, Boston, 1999) 11–12 (Polanyi).

[119] Polanyi, ibid 71.

[120] G Rist *The History of Development: From Western Origins to Global Faith* (Zed Books, 1997). See also Thomas, "International and Financial Institutions and Social and Economic Human Rights: An Exploration", in Evans (ed.) *Human Rights Fifty Years On: A Reappraisal* (Manchester University Press, Manchester, 1998) 166.

different circumstance that demanded the fulfilment of distinct objectives: first to rehabilitate war-torn Europe and subsequently to facilitate, enhance and consolidate international trade and global financial markets. These policies and structures founded upon the ideals of neo-liberal capitalism were designed to facilitate economic globalization and growth of the developed world precisely at the cost of the developing world.

Although the IFIs have developed a persona within the past two decades which appears to be sensitive to poverty alleviation and human development, their ideological commitment to neo-liberal capitalism is, if anything, renewed:[121]

> …[o]ne major change that has affected the World Bank over its 50 years has been the shift to a more 'pure' neo-liberal system, advocated by Hayek and Friedman among others. Hayek's *The Road to Serfdom*, protesting against government intervention in the market, was published in 1944, the same year as Bretton Woods; but was not fully taken up until the late 1970s and early 1980s both internationally and most particularly nationally by the governments of U.S.A and U.K under Ronald Reagan and Margaret Thatcher.

The revival of capitalism termed the "neo-liberal revolution" by Harvey occurred in the early 1980s in the West through democratic means, but through undemocratic means and often with brutal force elsewhere.[122] It is inevitable that an ideology that champions the free market sees the end result in terms of profit. Such policies are inherently iniquitous and cannot be expected to contribute towards eradicating poverty or promoting human development. The following analysis on South Asia illustrates this through empirical examples of the iniquitous manifestations of these policies.

The advocates of neo-liberal economic globalization often provide philosophical justifications that call for the acceptance of the economic strategy as an inevitable process that it must be yielded to with grace because "There Is No Alternative" – or the TINA syndrome already discussed.[123] The developing states are compelled

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[121] Jean Hardy "The history and changing objectives of the World Bank" <http://www.greenspirit.org.uk/resources/WorldBank.htm> (accessed 16 Jun 2006).
[122] Harvey above n 35, 39.
[123] A phrase coined by British Prime Minister Margaret Thatcher in the 1980s. For a discussion on TINA see T Krishna Kumar *Management of Development in the newly emerging Global Economic Environment* (1996) 31 Economic and Political Weekly 1598; for its disastrous effects see Mustapha Kamal Pasha "Globalisation and Poverty in South Asia" (1996) 25 Millennium Journal of International Studies 3.

to feel that they are left with no option but to accept the market-oriented policy reforms under which production tends to be export-oriented, rendering the basic needs of the people less significant. Both the Bank and the Fund refuse to acknowledge that a system founded on the ideals of the free market is inherently flawed and does not cater for the needs of the developing world that require a different approach.[124]

3.7.1   Human Rights Obligations of the IFIs

The former UN High Commissioner for Human Rights, Mary Robinson, identified poverty as the worst form of human rights abuse and observed that if "human rights were respected, conflict, terrorism and war could be prevented."[125] Criticism regarding the IFIs' impact on human rights is demonstrated by the massive protests each year at the World Bank Headquarters and WTO Ministerial meetings.[126] The core argument of protestors is that the IFI activities go beyond financial regulation and undermine the interests of the poor compromizing norms of international human rights law. The central problem between IFI policy formulation and human rights is the lack of an independent arbiter or a mechanism to determine whether the policies of the IFIs violate human rights law. The presence of an apolitical international mechanism to scrutinize policy formulation is urgently needed.

The Universal Declaration of Human Rights envisages the promotion and protection of human rights to be the collective responsibility of both society and the state, and asserts that "everyone has duties to the community in which alone the free and full development of his personality is possible."[127] Article 29, liberally construed, would oblige entities created by states to honour the UDHR. But neither the IMF nor the World Bank has been inclined to adopt such a construction.

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[124] Martin Khor *A Critique Of The IMF's Role & Policy Conditionality* Global Economic Series No. 4 *http://www.twnside.org.sg/title/geseries4.htm* (accessed 20 Feb 2006).
[125] An interview at the launching of Poverty Report 2003 South Asia Alliance on Poverty Eradication (SAAPE) <www.saape.org.np> (accessed 17 May 2006).
[126] Discussed in Chapter 2 subsection 6 of this study.
[127] UDHR Article 29.1 <http://www.udhr.org/UDHR/default.htm> (accessed 12 Feb 2008).

As discussed earlier, at their creation the IMF and the World Bank had specific mandates related to financial stability and economic growth. Therefore the Articles of Agreement of the IMF, and the Bank's constitution documents have no reference to human development or human rights. However, through a variety of theses, many have claimed that IFIs come within the purview of international human rights law and therefore the IMF and the World Bank have an obligation to respect human rights.[128] The rationalization of these authors regarding the legal obligations of the IFIs to respect human rights is diametrically opposed to that of the IFIs.

The IFIs, particularly the World Bank, have from time to time adopted policies, internal rules and strategies that touch upon human rights issues; on the other hand, the Bank refuses, at the same time, to recognize that it is bound by a formal obligation to respect human rights. The Bank maintains that the final responsibility for the protection of human rights rests with states and claims that its development work overtly promotes human rights. Therefore the Bank has maintained that human rights play no part in its operational schemes:[129]

> [E]xcept in situations where the violation of human rights has created conditions hostile to effective implementation of projects or has other adverse economic consequences, or where there are international obligations relevant to the Bank, such as those mandated by binding decisions of the U.N. Security Council, the World Bank does not take into account the political dimensions of human rights in its lending decisions….. .

[128] Mac Darrow *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Hart Publishing, USA, 2003) (Darrow); George Kent "The Roles of International Organizations in Advancing Nutrition Rights" (1994) 19 Food Policy 357–366; Frédéric Mégret and Florien Hoffman "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities" (2003) 25 Human Rights Quarterly 314–342; Sigrun Skogly *The Human Rights Obligations of the World Bank and the IMF* (Cavendish Publishing, London, 2001) (Skogly); Dana L Clark "The World Bank and Human Rights: The Need for Greater Accountability" (2002) 15 Harvard Human Rights Journal <http://www.law.harvard.edu/students/orgs/hrj/iss15/clark.shtml> (accessed 8 Feb 2008).
[129] *Governance: The World Bank's Experience* (World Bank, 1994) 53. The relevant section of the Articles of Agreement reads: l "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I." World Bank Articles of Agreement, art. IV, sec. 10 (as amended 16 Feb 1989), available at htttp://www.worldbank.org/html/extdr/backgrd/ibrd/art4.htm#I11. "Development and Human Rights: The Role of the World Bank"< http://www.worldbank.org/html/extdr/rights/ > (accessed 7 Nov 2007).

Though the Bank acknowledges that economic development endeavours promote human rights, it has "never accepted any legal obligations in this sphere."[130]

The Bank's Articles of Agreement set out its broad scope of activity in economic and social development and its limits. In particular, the Articles state that, in all its decisions, "only economic considerations shall be relevant."[131] Looking at the existing internal rules (Operational Policies or OPs) of the World Bank, de Feyter observes that the OPs obligate the Bank to support projects that do not violate state obligations on international environmental treaties and "the failure to adopt parallel human rights preconditions for the Bank's financing of projects seems to be the outcome, not of legal constraints, but of a simple policy choice."[132] Amidst numerous calls to address concerns of social responsibility and accountability of World Bank operations, a quasi-independent Inspection Panel to investigate claims against the Bank was instituted as per the Wapenhans report.[133]

While the Fund has also adopted policies and strategies that are pro-human rights, and articulated the significance of the human dimension in the development process, it continues to reject the proposition that the IMF should come within the purview of the international human rights regime. Commenting on the applicability of ICECSR, the General Counsel for the IMF observes: [134]

> for its part, the Covenant is a treaty among States which contains obligations addressed to States. Neither by its terms, nor by the terms of the Fund's relationship agreement with the United Nations, is it possible to conclude that the Covenant is applicable to the Fund. Moreover, the norms contained in the Covenant have not attained a status under general international law that would make them applicable to the Fund independently of the Covenant.

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[130] Sigrun Skogly "Inspecting the World Bank's Responsibilities" (2000) 18 Hungry for What is Right 405.

[131] *Development and Human Rights: The Role of the World Bank* "The World Bank Group joins the international community in commemorating the 50th Anniversary of the Universal Declaration of Human Rights" (World Bank, 1998) http://www.worldbank.org/html/extdr/rights/ (accessed 7 Nov 2007).

[132] Koen de Feyter quoted in Christina Gille and Stefanie Ricarda Roos *World Bank, IMF and Human Rights: Conference held at Tilburg University* (2001) 3 Legal Culture German Law Journal 2.

[133] <http://worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,content MDK:20053333~menuPK:63762~pagePK:36726~piPK:36092~theSitePK:29506,00.html_> (accessed 17 May 2006).

[134] François Gianviti *Economic, Social and Cultural Human Rights and the International Monetary Fund* (Working Paper E/C.12/2001/WP.5., Economic and Social Council: Committee on Economic, Social and Cultural Rights, Office of the High Commissioner for Human Rights, Geneva, 2001)para 56. <http://www.unhchr.ch/tbs/doc.nsf/(SymbolSearch)/58deddfb286fe96cc1256a8b00519f56.html > (accessed 7 Nov 2007).

In reality, neither the Bank's nor the Fund's activities are confined to the creating Articles of Agreement. For instance, the World Bank on its website provides information on the Bank's activities in relation to anti-corruption, poverty eradication and disabilities, issues beyond the scope of the original mandate.[135] If global political and social exigencies demanded this additional focus that are beyond the scope of its original mandate, adopting a rights-focussed approach to development and incurring obligations under international human rights law can also be justified on similar grounds.

The central argument in Darrow's thesis is that the World Bank and the IMF must be subjected to a similar regime as states, in that they must also follow the rules of accountability and transparency.[136] He also contends that if the IFIs are regarded as entities under public international law they must be independently held accountable for transgressions of international law, including international human rights. He also asserts that it is vital to provide a flexible and dynamic interpretation of the IFIs' Articles of Agreement so as to take on board the issues relating to human rights law.

Comparing the Bank and the Fund, Darrow concedes that the Bank is more inclined to embroil itself in social development issues as well as explore the development agenda through rights discourse. With the IMF's narrower operational parameters, and a special focus on multilateral financial regulation, Darrow estimates that the Fund is less likely to integrate human rights issues within its agenda. In this light, Darrow admits that "it is difficult to imagine human rights penetrating beyond very superficial levels . . . in the short term."[137] Darrow's optimism regarding the Bank's commitment towards human rights is not shared by Sigrun Skogly, who asserts that "although willing to take part in a dialogue about human rights, the Bank has never accepted any legal obligations in this sphere."[138]

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[135] < http://worldbank.org > (accessed 7 Nov 2007).
[136] Darrow above n 122.
[137] Darrow above n 122, 201–202.
[138] Skogly above n 122, 34.

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3.7.2 The Weaknesses of IFI Policy Formulation

The unilateral, authoritarian imposition of the SAPs by the IFIs completely overhauled macroeconomic policies, resulting in an erosion of legitimacy in the governing structures of the developing world.[139] This overhaul was particularly significant in states that had cherished a strong culture of social democracy or socialism.[140] Reductions in social welfare and public expenditure, privatization of public amenities and labour reforms resulted in increased privation for the poor, raising discontentment that paved the way for civil conflict.[141] The anti-government protests, such as those experienced in Sri Lanka 1988–1993 in response to the growing discontentment of the people, due to rising living costs, and to curtailment of social and workers' rights, became a common occurrence in many developing countries that experienced SAPs.

Another fundamental flaw of the formulation of SAPs was their "one size fits all" nature.[142] The strengths and weaknesses of individual countries, such as the successful welfare programmes in Sri Lanka or Pakistan's long tradition of liberal economic policy being coupled with poor management and corruption, were ignored. The need for Nepal to establish a viable local economy before attempting to integrate into the global economy was not considered by the World Bank before liberalization measures were introduced. No policy directives were issued to India, to consider its massive social problems of illiteracy, infant mortality and child labour, which are the direct result of under-investment in human capital.

The lack of an investigative study prior to the policy implementation stage saw identical policy directives issued by the IFIs to countries in diverse stages of development and economic growth. Two decades elapsed before the World Bank

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[139] "In theory, the Fund supports democratic institutions in the nations it assists. In practice, it undermines the democratic process by imposing policies [without] consultations with either parliaments or civil society. Sometimes the IMF dispenses with the pretence of openness altogether and negotiates secret covenants." Joseph Stiglitz*.,* "The Insider - What I learned at the world economic crisis" *The New Republic* (17 April, 2000) http://www.tnr.com/ (accessed 8 Feb 2008).
[140] S George "World Bank and IMF at century's end" (1995) 24/25 Notebooks for Study and Research 21.
[141] See Mohan Lal Sharma Olive Peacock and Krishan Gopal (eds) *Globalisation, Democracy and Governance in South Asia: Issues and Alternatives* (Kalinga, Delhi, 2003). This aspect is further elaborated in Chapter 4 of this study.
[142] Joseph Stiglitz *Globalization and its Discontents* (London, Penguin Books, 2002) 47.

admitted the inadequacy of its appraisal process and acknowledged in its 2003 Annual Review of Development Effectiveness that development was "hampered in some cases by inadequate country knowledge, in others by inadequate sensitivity to country policy making styles, and in still others by attempts to transplant policies and institutions — some of which 'travel' more readily than others … — without adequate analysis of the context." [143]

After decades of inward-oriented policies, and despite the eagerness to liberalize the economy, global integration remains sporadic and partial in South Asia. Successful global economic integration requires considerable planning and a build-up of institutional, legal and resources infrastructure. The need for protracted planning was ignored because the liberalization process was conceived and promoted to be a solution to the immediate economic woes. Liberalization in Sri Lanka was a political reaction to the previous socialist governing ideology. In Pakistan it was a desperate measure to keep the existing economic system that had been devastated by decades of poor management floating and in India the shift was made as the previous inward-oriented governance was no longer tenable, as it was not sufficiently productive to cater to the economic exigencies of India. In each economy, despite the policymakers' decision to integrate into the global market, significant imperfections in relation to the infrastructure remained. Rather than falling into the dangers of lackadaisical market integration, "it is time for a different approach to global integration, whereby living standards of the world's poor are raised rather than jeopardised ."[144]

3.7.3   Reinforcement of Structures of Poverty

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[143] *2003 Annual Review of Development Effectiveness The Effectiveness of Bank Support for Policy Reform* (The World Bank, Washington, D.C., 2004) < http://www.worldbank.org/oed > (accessed at 17 May 2006).
[144] Christian E Weller, Robert E Scott and Adam S Hersh *The unremarkable record of liberalized trade*. "After 20 years of global economic deregulation, poverty and inequality are as pervasive as ever" (EPI Briefing Paper, Economic Policy Institute, October 2001). http://www.epinet.org/content.cfm/briefingpapers_sept01inequality (accessed 17 May 2006).

Empirical evidence of how SAPs entrenched endemic poverty and were in fact a disincentive for economic growth is readily available.[145] At the end of the experience with the SAPs, the South Asian region has been described as "[a] region divided — divided between the hopes of the rich and the despair of the poor," and where the ramifications of SAPs are still very much evident even today.[146] On average 433 million people in South Asia (37.7 per cent of the total population) live in abject poverty, reinforcing the claim that SAPs contributed to the system of apartheid created by capital liberalism.[147] Refuting the claims that the benefits of economic growth trickle down to reach every echelon of society, the SAARC Poverty Profile shows that the richest 10 percent of South Asia earns 80 percent more than the poorest 10 percent of the population.[148] Issues such as social justice and equity are not factored into the adjustment policies that focus on economic growth, and this contributes to the growing demography of destitute and marginalized people.[149] The following scenario from India is common to other parts of the region:[150]

> Expenditure cuts in the post SAP period have been a reality, which has adversely affected the living conditions of a large section of the poor and marginalised people of India. Both direct withdrawal of consumption supports to the poor and indirect withdrawals through overall cuts in public expenditure on social sectors have been quite disturbing in this regard … the rise in prices of essential commodities over the period of structural adjustment has been enormous, and price increase had, ironically enough, been more for the poor than for the well-off. Withdrawal of subsidies had been an important reason for the increase in prices of essential food items. But no less important has been the role of other policies which have made basic needs fulfilment even more difficult for many.

The realization that the adjustment programmes were having a devastating social impact was documented by UNICEF as early as 1984 in its *State of the World's Children* Report.[151] A subsequent study titled *Adjustment with a Human Face*,[152]

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[145] *Poverty in South Asia 2006* available at <http://www.saape.org.np/resources/publications/poverty_report06/poverty_report06.htm > (accessed 7 Nov 2007).

[146] *UNDP South Asia Human Development Report* (Oxford University Press, Oxford, 1997).

[147] *SAARC Regional Poverty Profile 2003* (SAARC Secretariat, Kathmandu, Nepal).

[148] UNDP <http://www.asiapropoor.net/RPP-03.php > (accessed 17 May 2006).

[149] Poverty in South Asia 2006 available at <http://www.saape.org.np/resources/publications/poverty_report06/poverty_report06.htm > (accessed 7 Nov 2007).

[150] Arora Dooly **"**Structural adjustment program and gender concerns in India" (1999) 29 Journal of Contemporary Asia 328.

[151] The study suggested more equitable measures to be included in macroeconomic policy formulation such as targeted nutritional interventions, and monitoring of the well-being, living standards, health and nutrition of populations UNICEF *State of the World's Children* (Oxford University Press, London, 1984).

which drew upon empirical evidence from 10 country studies, declared that the 1980s were a "lost decade" for developing countries. The study elaborated the means to avoid the negative impacts of SAPs on vulnerable groups, emphasizing that strategies that generate employment, maintain basic health and education opportunities and support nutrition among children must be integrated into national planning when economic restructuring is envisaged.

3.7.4   The Cost to Social, Economic and Cultural Welfare

Though overall literacy levels have increased in South Asia within the last decade it still remains the most illiterate region in the world, at 55 per cent.[153] Implementation of SAPS resulted in increased inequality in the standard of education between poor and rich communities. As a region, South Asia spends the least on education and has marked gender disparities in relation to primary school enrolment.[154] Education cuts increased student-teacher ratios and school fees and reduced the number of teachers (due to wage freezes) and teaching standards (due to deteriorating facilities).[155] Liberalization increased the choice of private schools for the wealthy but decreased public enrolments, as the poor chose between feeding their children and paying for school uniforms, stationery and school fees.[156]

Due to the cultural bias against a girl child in the region, females are frequently denied educational opportunities. The impact of SAPs on women and girls is particularly harsh and iniquitous for "[t]he increasing burden of poverty itself pushes women and children to find work to sustain them."[157] Decreased government subsidies — a hallmark of SAPs — reduced the health and welfare services available to the poor. The conditions attached to loans obtained for

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[152] Cornia above n 63.
[153] *Working for results in South Asia* <http://www.worldbank.org> (accessed 16 Feb 2006).
[154] *World Development Report 2004: Making Services Work for Poor People* <http://www.worldbank.org> (accessed 16 Feb 2006).
[155] Martin Carnoy "Structural Adjustment and the Changing Face of Education" (1995) International Labour Review 134.
[156] Poverty Assessment Document of the World Bank (2002) "Poverty in Pakistan: Vulnerabilities, Social Gaps, and Rural Dynamics" Poverty Reduction and Economic Management Sector Unit South Asia Region Report No. 24296-PAK Pakistan. 28 Oct 2002.
[157] Dooly Arora **"**Structural adjustment program and gender concerns in India" (1999) 29 Journal of Contemporary Asia 328.

infrastructure and essential services development often stipulated user fees payable to the government for services such as schools, health clinics, electricity and clean drinking water. For very poor people, even modest charges for these services resulted in the denial of access to life-sustaining services, contributing to the decrease in quality of life.[158]

Typically for the region, Nepal does not provide a systematic social security system for the unemployed.[159] The peasantry often lack skills and education. Their only known means of survival remains subsistence farming on lands for which they cannot show legal title. Increasingly, this land is appropriated for agribusinesses or for industrial use without prior public consultation and deliberation, and the state can ill deal with resulting social and economic problems of particularly the displaced rural peasantry.[160] Issues such as violations of the right to information, the right to welfare and employment were never considered at the policy formulation stage. The displacement and the ensuing marginalization of people is an indication of poor policy formulation which has been reliant on instead "market magic".

Unemployment, especially in small businesses, stemmed from interest hikes, cheap imported competition and inability to access credit. In fact, the transformations in relation to credit facilities, mortgages and complex patent regimes are poignantly described in the SAAPE India Poverty Report thus:[161]

> The International Banias [traders and money lenders] are no better than our old pot belly fellows who used to take away our means of production: land on mortgage which never came back, selling us rotten grain that will make us sick is no different from selling us BT crops which will make us sick. The level of vigilance needed to deal with these international rules, regulations, technologies are [sic] new – but the issues are the same.

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[158] Infant mortality is 84 per 1000 births in Pakistan, 74 in Bhutan and 67 in India: *UNDP Human Development Report 2002* (University of Oxford Press, New York, 2003). Only Bhutan spends over 2% of GDP on public health. The Report criticized the governments in the region for disregarding the need to increase investment in "human development" and labelled their fiscal and financial policies as "obstacles to the creation of a proper social environment for a civilized life".
[159] Patricia Justino Social Security In Developing Countries: Myth Or Necessity? Evidence From India (PRUS Working Paper No. 20, Poverty Research Unit at Sussex, Sept 2003). <www.sussex.ac.uk/Units/PRU/wps/wp20.pdf >(accessed 7 Nov, 2007).
[160] Sushma Joshi "Nepal in the WTO" *Nepal Nation Weekly* (10 June 2004).
[161] *SAAPE Poverty Report – Sri Lanka 2003* <http://www.saape.org.np/resources/documents/index.htm>(accessed 7 Nov, 2007).

The IMF and World Bank's core beliefs, such as that elimination of protective tariffs would force domestic industries to become more competitive, rarely materialized in South Asia. As a consequence of SAPs, domestic manufacturing collapsed and imported consumer goods replaced domestic production.[162]

The disastrous consequences of implementing policies of privatization uniformly, even in situations where an injection of private capital was not warranted, saw the transfer of several state-owned enterprises into private sector ownership with the resulting social issues of high rates of redundancy and an increase in prices for goods and services.[163] Most state-owned enterprises were heavily overstaffed as state sector employment was often based on nepotism and political patronage. Privatization caused 40–50 per cent of redundancies, amounting to 120,000 workers being made redundant in 1991 alone, in Sri Lanka.[164] In certain situations the capital gained by privatization had to be utilized for payouts for employees who were made redundant through restructuring leaving the enterprises with cashflow problems like those they experienced before privatization.[165] The combined effect of the reduction of employment as a result of public sector "restructuring", the withdrawal of governmental subsidies, and cuts to healthcare, education and welfare expenditure was severe hardship for the poorest, impacting on workers' rights and socioeconomic and cultural rights.[166]

There was an expectation mismatch between the people who experienced the operations of the neo-liberal policy overhaul in expectation of "development" and the IFIs who spearheaded the programmes that aimed at macroeconomic stability and growth. The World Bank applauded Sri Lanka's performance for "good macroeconomic management and progress in trade liberalization, privatisation,

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[162] Ibid.

[163] Malathy Knight-John "Distributional Impact of Privatization: The Sri Lankan Experience" Paper presented at Institute for Policy Studies, Colombo, Sri Lanka, December 2002.

[164] A Fiszbein *Labour Retrenchment and Redundancy Compensation in State Owned Enterprises: The Case of Sri Lanka* (World Bank, Washington D.C., 1992).

[165] AR Kemal, "Privatization in Pakistan: Social Effects and Restructuring" Paper presented at Sub-regional Meeting on Privatization in South Asia, Kathmandu, 24-26 November, 1999.

[166] Kartik C Roy, Clem Tisdell and Mohammad Alauddin "Rural-urban migration and poverty in South Asia" (1992) 22 Journal of Contemporary Asia 57–72; S Kelegama *Poverty Situation and Policy in Sri Lanka* www.adb.org (accessed 27 Jan 2006); David Dunham and Sisira Jayasuriya "Equity, Growth and Insurrection: Liberalization and the Welfare Debate in Contemporary Sri Lanka" (1997) 28 Oxford Development Studies 97–110; G Saibaba and K. Sreenivasa Rao (eds) *Structural Adjustment and Implication of Human Rights* (Serials, New Delhi, 2003); Malathy Knight-John "Distributional Impact of Privatization: The Sri Lankan Experience" Paper presented at Institute for Policy Studies, Colombo, Sri Lanka, December 2002).
<http://www.cgdev.org/content/calendar/detail/3254> (accessed 8 Jan 2008).

and financial sector reform",[167] when the reality was a catastrophe of rising living costs, the withdrawal of subsidies for agriculture and domestic industry, a scarcity of secure employment, a general decrease in the quality of life and an escalation of poverty for the people who were subjected to SAPs. The emphasis on economic growth as the end result of the liberalization process had shifted the focus from issues of poverty alleviation and human development. During the early era of adjustment SAPs were never articulated as a method of poverty eradication or human development, such ends being regarded as beneficial by-products of economic growth, trickling down to the poor.[168]

Susan George has accurately summed up the results of the SAPs and globalization when she wrote about the "global apartheid economy". According to George, [169]

> [t]he Bretton Woods twins have become the managers of a global apartheid economy in which the transnational elite from both 'North' and 'South' play the role of the 'whites'; a shrinking and anxious middle class, the role of the 'coloureds'; and finally, at the bottom, the vast sea of wretchedness made up of 'blacks', whatever their literal skin colour.

Nonetheless, South Asia still relies on the IFIs for policy direction, creating a culture of dependence on donor-driven policy formulation. No innovative policy alternatives have been explored at national level nor were grass-roots level alternative strategies ever fostered. The psychology of dependence on donors has become ingrained in the psyche of political and bureaucratic decision-makers and they remain convinced that without the support of the donor institutes their political survival is at stake. For example, President Kumaranatunga's praise of the World Bank's relationship with Sri Lanka ignores the reality of ill-considered policy choices.[170] The reverence extended to the IFIs is indicated by the International Financial Organization Order (Amendment) Act 2004 of

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[167] World Bank *Sri Lanka: Recapturing Missed Opportunities* (World Bank Country Report, World Bank, Washington D.C. 2000).

[168] See World Bank. *Implementing the World Bank's strategy to reduce poverty. Progress and challenges* (World Bank, Washington, D.C., 1993) 8; Joseph E. Stiglitz "Democratizing the International Monetary Fund and the World Bank" (2003) 16 Governance and Accountability Governance 1; S Akbar Zaidi "Globalisation in Pakistan: The Impact on the Economy and on Labour" A (2003) 1 Quarterly Newsletter of South Asia Alliance For Poverty Eradication January; Mustapha Kamal Pasha "Globalisation and Poverty in South Asia" (1996) 25 Millennium Journal of International Studies 3.

[169] Susan George "World Bank and IMF at century's end" (1995) 24/25 Notebooks for Study and Research.

[170] Shirajiv Sirimane "50 year association with World Bank will grow from strength to strength – President" *Daily News* (Sri Lanka, 16 July 2004).

Bangladesh, which has accorded absolute immunity from prosecution to the World Bank, IMF and their operations in Bangladesh.[171]

3.8. Familiar Trajectory of Failure: the Poverty Reduction Strategy Papers

The PRSPs were designed to conflate two contradictory aims: the need for creating a more efficient system that contributed genuinely to economic growth and human development and the desire to have development policies that were autochthonous and therefore more acceptable to the people. However, the PRSPs have failed to achieve either objective.[172] A closer scrutiny would confirm that in fact the SAPs, which were based on macroeconomic policy overhauls, contributed to the greater indebtedness of the developing countries in terms of resources as well as ideas. The previous adjustment programmes failed to address the structural sources of poverty and yet the PRSPs once again place heavy reliance on the macroeconomic policy model of the SAPs, which the IFIs claim to have been internalized by the recipient countries through the PRSPs.

3.8.1   Lack of a Meaningful Contribution from Stakeholders

Under the tutelage of the World Bank, the larger borrowers of South Asia — Bangladesh, Nepal, Pakistan and Sri Lanka — have submitted their PRSPs to the IMF, World Bank and the general donor community.[173] Despite the rhetoric of country ownership and civil society contributions, the countries submitting the PRSPs had little to do with the actual conceptualization or drafting of the

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[171] Anu Muhammad "Crime and Reward: Immunity To The World Bank" Countercurrents.org 6 November, 2004 <http://www.countercurrents.org/gl-muhammad061104.htm> (accessed 7 Nov 2007).
[172] Geske Dijkstra "The PRSP Approach and the Illusion of Improved Aid Effectiveness: Lessons from Bolivia, Honduras and Nicaragua" (2005) 23/4 Development Policy Review 443–464; H. Ade Freeman, Frank Ellis *Rural Livelihoods And Poverty Reduction Policies* (Routledge, 2005); Alastair Fraser "Poverty reduction strategy papers: Now who calls the shots?" (2005) 32 Review of African Political Economy 104–105.
[173] <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,contentMDK:20200608~pagePK:210058~piPK:210062~theSitePK:384201,00.html> (accessed 23 April 2006).

documents or the policy statements,[174] and therefore they still bear the design flaws of the previous process, i.e., weak ownership, and emphasis on economic growth over and above poverty eradication and other social concerns. The alienation of the people from policy design in the era of the SAPs echoes in the new mechanism despite the assertion of endogenous strategies of development, especially in the respect that there is no visible ideological shift from market liberalization.

The ground realities in the countries that prepared PRSPs do not change overnight. In South Asia, in the absence of meaningful dialogue between the policy framers and civil society, the strength of the civil society to influence policy formulation is in its infancy. As Grusky observes,[175]

> [f]irst of all civil society in the borrowing countries needs information and transparency about the new process … . Secondly, consultation with civil society must go beyond information dissemination, to a genuinely participatory process in which recommendations of non-governmental actors can influence policy.

NGOs and other stakeholders from the South Asian region have unanimously criticized the process in which the World Bank-initiated PRSP documents have been prepared in the region.[176] Many claim that the PRSP process has little public acceptance and essentially incorporates World Bank-propagated structural adjustment policies such as liberalization of tariff regimes and cutbacks in state expenditure.[177] Critiquing the PRSPs, Tahsin, a Pakistani activist, claims that, "[t]hese reforms have no established link with poverty reduction and are nothing more than a new manifestation of the Bank-propagated disastrous Structural Adjustment Policies."[178] He pointed out that the PRSP, which is defined by the World Bank as a country-owned strategy, has hardly come into the public domain

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[174] Masood Ahmed "Bridging Research and Policy" Paper presented at the Development Studies Association Annual Conference 2004: Bridging Research and Policy, London, 6 November 2004; Karin Christiansen and Ingie Hovland *The PRSP Initiative: Multilateral Policy Change and the Role of Research* (Overseas Development Institute (ODI) Working Paper 216, London: ODI, August 2003).
[175] S Grusky "The World Bank and IMF initiate a new reform package" Bread For the World (Bread for the World Institute, Washington, D.C., 2000) <http://www.bread.org/index.html> (accessed 24 April 2005).
[176] Shafqat Munir "Pakistan's budget 2003-04 The economics of hypocrisy" Himal South Asian <http://www.himalmag.com/2003/july/report_3.htm> (accessed 8 Feb 2008).
[177] Conference on Regional consultations on Monterrey Consensus - South Asia <http://www.commonwealthfoundation.com/news/news351.html 02 October 2002> (accessed 24 April 2005).
[178] Mohammed Tahsin represents SAP-PK an NGO in Pakistan quoted in Mahtab Haider "Regional policy experts slam PRSP process" HolidayInternet edition 20 Dec 2002.

for discussion in Pakistan and has been prepared unilaterally by the government without public consultation or debate. A closer scrutiny of the PSRPs indicates that the documents prepared by each state are generic and fail to address the state's unique problems.

By contrast, in Bangladesh there have been extensive consultative processes, yet these have had little impact on the ultimate contents of the PRSP. Bangladesh completed drafting an interim PRSP "*A National Strategy for Economic Growth, Poverty Reduction and Social Development*" in 2003, which has been presented to the donor community. In this interim paper lofty aspirations of removing "the ugly faces of poverty" by eradicating hunger, chronic food- insecurity and extreme destitution, reduce the number of people living blow the poverty line by 50 percent, provision of universal primary education, reduction of infant mortality and reduction of maternal mortality by 75 percent was envisaged.[179] Meanwhile, the People's Empowerment Trust (PET), a private think-tank, concluded that the government's PRSP would ultimately turn into a donor-driven strategy. The PET Chairman, M. M. Akash, said the government's position on the PRSP was positive and focussed on human centred development "[b]ut I doubt whether the donors will agree with many of those issues. So ultimately, I fear, we have to accept a totally changed strategy."[180] Therefore the required public consultation initiatives and the identification of country specific developmental goals are regarded empty gestures as the prevalent civil societal perception is that the ultimate power to determine the content of the PRSPs would rest with the IFIs.

Although the PRSP process is advocated as a bottom-up solution to development and poverty eradication, in reality it is still very much a top-down approach comprising a selective group of individuals and NGOs that share similar ideological beliefs. For instance, Syed Mohammad Ali reiterates the absence of a consultative process in Pakistan.[181] The reforms contained in the Sri Lankan PRSP imitate the common macroeconomic measures propagated as the panacea

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[179] Economic Relations Department, Ministry of Finance, Government of the Peoples Republic of Bangladesh March 2003.
[180] Saleem Samad "Bangladesh-donors dialogue on poverty elimination Think-tank sees 'totally' changed PRSP" *Bangladesh Daily Times* (Bangladesh, 20 October 2004).
[181] Syed Mohammad Ali "PRSP rhetoric and reality' *"Pakistan Daily Times* (Pakistan, 10 August 2004)**.**

for economic growth by the World Bank for at least two decades[182]. There is widespread scepticism about the consultation process that led to the finalization of the PRSP by the Sri Lankan government, and more importantly, the ramifications of the PRSP have not been widely discussed or understood among the general public.[183] An analysis of the content of the PRSP for Sri Lanka reveals that its relationship to poverty alleviation is rather problematic.[184] In terms of policy, the PRSP still appears to be engrossed with economic growth with little or no credible methodology outlined to redistribute this growth to the poor.[185] In this sense, the PRSP process appears not so much a poverty reduction strategy as a growth strategy and the link between economic growth and the resultant poverty reduction is rather tenuous. For instance, the proposals to construct a modern expressway with the introduction of mechanized road toll systems to lower the transport and marketing costs faced by the poor highlight the dire need to prioritize and rationalize poverty eradication goals with available, yet limited, resources.

The lack of political space to discuss concerns relating to policy formulation on developmental issues and a sense of alienation and detachment by the people from the policy making process and its repercussions, is brought out by Whaites's observation:[186]

> Without genuine democratic participation by ordinary people in the development of economic policy, no economic policy can be made to stick … no economy can be autonomous of the people. It is this ridiculously utopian approach of much economic theory that makes it so difficult for IMF economists to come down to earth and to integrate civil society participation and poverty reduction into their economic templates. Only if economic policies once again become embedded in societies and are subordinated to democratic institutions and social relations can we expect genuine participation in the development of economic programmes. And only then can we hope for economic programmes that will genuinely reduce poverty.

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[182] <http://poverty.worldbank.org/files/Sri_Lanka_PRSP.pdf > (accessed 24 May 2006).
[183] < http://www.50years.org/cms/updates/story/20 >(accessed 7 Nov 2007).
[184] *Sri Lanka: Poverty Reduction Strategy Paper* (PRSP).
<http://poverty.worldbank.org/prsp/country/160/ > (accessed 7 Nov 2007).
[185] *The Poverty Reduction Strategy paper – Regaining Sri Lanka – Vision for Growth* 1
<http://www.erd.gov.lk/ >(accessed 26 May 2006).
[186] Alan Whaites (ed) *Masters of Their Own Development? PRSPs and the Prospects for the Poor* (World Vision International, 2002) 6–7.

3.8.2   PRSPs Continue the Ideological Bias towards Neo-liberalism

The ideological bias towards the market-driven mechanisms for development which blatantly disregards the social and political consequences is still clearly visible in the PRSPs. It is plain that the World Bank and the IMF are yet to evolve a development model that synthesizes economic growth, poverty eradication and human development. The failure of the Bank and the Fund to think of an alternative paradigm for poverty alleviation is once again reinforced through the PRSPs. The core of a PRSP still follows the SAP's mainstream ideology of exposure to international trade, and domestic liberalization continues to have little impact on economic growth, let alone shared growth with corresponding benefits for the poverty-stricken.

Pro-poor strategies of "promoting opportunity, facilitating empowerment, and enhancing security"[187] are evoked, but these strategies are peripheral to fostering economic growth, greater integration with global market forces by encouraging foreign direct investment, and extended liberalization and privatization schemes. Despite claims that pro-poor and human-centred strategies are integral to the PRSPs, they echo the economic growth strategies of SAPs. In the course of drafting PRSPs, for instance, Sri Lanka amended the strong worker-biased labour laws, ostensibly so as to maintain flexible labour markets that attracted foreign investment.[188] The Minister of Labour justified the amendment to the Factories Act on the basis that a large number of countries had similar practices and that the TNC in the garment trade had requested the change in the law.[189]

The *Report on the Evaluation of Poverty Reduction Strategy Papers (PRSPs) and the Poverty Reduction and Growth Facility (PRGF)* by the Independent

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[187] *World Development Report 2000-2001 Attacking Poverty* (Oxford University Press, World Bank, Washington DC, New York, 2000).
[188] In July 2000 the government of Sri Lanka sought to raise the legislated ceiling on overtime to 100 hours *per month*, allegedly so that Sri Lanka would remain internationally competitive, especially after the removal of quotas under the Multifibre Agreement (MFA) in 2005,and to conform to the codes of conduct of major brand labels, despite the fact that most codes of conduct recognise that labour law or 14 hours per week overtime should prevail, whichever is better). Asian Labour Update <http://www.amrc.org.hk/Arch/3804.html> (accessed 7 Nov 2007).
[189] "Privatisation Articles Sri Lanka's dogmatic development" <www.waronwant.org> (accessed 5 Aug 2005); Saman Gunadasa "Sri Lankan government imposes longer hours on female workers" 4 September 2002 <http://www.wsws.org/articles/2002/sep2002/sril-s04.shtml>(accessed 27 May 2006).

Evaluation Office of the IMF acknowledges several limitations of the whole process, such as that, "participatory processes were typically not designed to strengthen existing domestic institutional processes for policy formulation and accountability (e.g., through Parliament)" and that, "the PRS process has had limited impact in generating meaningful discussions, outside the narrow official circle".[190] The most substantial criticism is that the PRSP approach is ineffective in identifying constraints on accelerating growth and making it more pro-poor. The approach has so far not contributed significantly to understanding the linkages between growth, poverty incidence, and macroeconomic policies nationally. These issues present analytical challenges that are not necessarily resolved through participation alone.[191]

The PRSPs have proven that strategies for poverty eradication must look beyond the neo-liberal framework. The requirement is not a redefinition of the strategies of poverty eradication based on the existing ideological paradigm but an alternative vision that controls the neo-liberal quest for economic growth at the cost of human development. Development-focussed multilateral agencies must overcome the IFIs' ideological aridity and unwillingness to evolve new pragmatic strategies.

State ownership of policy formulation, civil societal participation and new dialogue have changed the status quo little. Responsibility, participation, civil society, inclusiveness are new terms for the concept of Cabinet responsibility to the Parliament, a legacy of the Westminster constitutional tradition which had taken root in South Asia, but has lately which has been hijacked by the IFIs in the name of economic growth. The contemporary problem is that despite having functioning democracies their use has been relegated to the background of periodic, flawed elections.[192] However, despite the dysfunction, the ideology of democracy and representative governance is embedded in the psyche of the people of South Asia. If functional democracy is restored it can be an effective mechanism to scrutinize developmental policies by the electorate.

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[190] *Report on the Evaluation of Poverty Reduction Strategy Papers (PRSPs) and The Poverty Reduction and Growth Facility (PRGF)* (Independent Evaluation Office of the IMF, 6 July 2004) <http://www.imf.org/external/np/ieo/2004/prspprgf/eng/index.htm > (accessed 27 May 2006).
[191] Ibid <http://www.imf.org/External/NP/ieo/2004/prspprgf/eng/#ft1>(accessed 27 May 2006).
[192] See Chapter 4 of this study.

3.8.3 International Financial Institutions taking hostage the future of South Asia

Stephen Gill observes intriguingly that globalization has in fact resulted in the:

> "redefinition of the political in the emerging world order. Part of this redefinition involves emergence of a new constitutionalism. New constitutionalism limits democratic control over central elements of economic policy and regulation by locking in future governments to liberal frameworks of accumulation premised on freedom of enterprise."[193]

The new constitutionalism therefore redefines the relationship between the "political" and the "economic" and creates constitutional structures to prevent future governments from retreating from the commitments made to the economy.

The PRSP of the Sri Lankan government put before the IMF and the World Bank in June 2002 is an excellent example of "new constitutionalism" in operation. It contained the policy proposals of the government in relation to development strategies that it would undertake in the ensuing three years. The policy document was formulated secretly without other stakeholders in the process such as local NGOs, opposition political parties or civil society.[194] The PRSP mirrored much of the IMF/WB policy recommendations for Sri Lanka. Pursuing the policy recommendations the government initiated a substantial revision of the legislation relating to land, labour and taxation in July 2002. Subsequent civil societal protests against the PRSPs compelled the government to stall the law reform.[195] Labour union pressure obtained an assurance from the government that the new laws would not be implemented until an adequate social safety net existed for those who lost jobs.[196]

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[193] Stephen Gill "Constitutionalising Inequality and the Clash of Globalisation" (2002) 4 International Studies Review 47–65.

[194] *PRSP as Theatre — backstage policy-making and the future of the PRSP approach* (Background Paper, CIDSE — Caritas Internationalis, September 2004) http://www.cidse.org/docs/200409271723027101.pdf. (accessed 13 March 2007).

[195] <http://www.geocities.com/monlarslk/news/oldnews/alliancemeetingwithwb26022003.htm> (accessed 15 March 2007).

[196] *Sri Lanka: Action Against PRSP* Alliance for the Protection of Natural Resources and Human Rights in Sri Lanka <http://www.50years.org/cms/updates/story/20 (accessed 5 March 2004).

In fact the commitment to the "new constitutionalism" was made almost two decades ago when the process of liberalization, the fundamental tenet of contemporary globalization, was entrenched into the system with the state voluntarily reducing its role in the domestic economy.[197] Granting corporations total freedom of operation and creating favourable fiscal frameworks for the foreign investments were some of the ways in which the entrenchment was achieved. Such freedoms were ensured through the Constitutional mechanisms as evidenced by Article 157 of the 1978 Constitution of Sri Lanka which states that:[198]

> "…any Treaty or Agreement between the Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka…

This mechanism shifted the power from the state to the markets, making state regulation of the market activities almost non-existent.

Another disquieting trend closely associated with the "new constitutionalism" is the gradual reduction of the welfare system through legal mechanisms. The tradition of governance in the subcontinental region has included at least a modicum of welfare support to its people. The strong welfare system in Sri Lanka, which includes free education and healthcare, has been pivotal in controlling the downward spiral of the living condition of its people. However, when the provision of welfare and food subsidies and the state-run, people-centred economic ventures prima facie conflicted with market-led globalization, the government retreated from these commitments.[199] The state is no longer considered the benevolent protector of the people.

These transformations, utterly alien to the centralized state structures of the previous decades, were portrayed as justifiable and inevitable as globalization

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[197] The 1978 2nd Republican Constitution of Sri Lanka which created a strong executive departing from the previous Westminster style of Constitution is an indication of the new constitutionalism. See AJ Wilson *The Gaullist System in Asia: The Constitution of Sri Lanka (1978)* (Macmillan, London, 1980).

[198] 1978 Sri Lankan Constitution article157. <http://www.priu.gov.lk/Cons/1978Constitution/Chapter_20_Amd.html> (accessed 17 Nov 2007).

[199] David Dunham & Sisira Jayasuriya "Equity, Growth and Insurrection: Liberalization and the Welfare Debate in Contemporary Sri Lanka" (2000) 28 Oxford Development Studies 97–110.

took its contemporary form. Politicians, technocrats, academics and policy formulators who contribute to the mainstream globalizing ideology exalt its virtues of rapid economic growth intermingled with the rhetoric of democracy, transparency, and good governance. It is easy to subvert potential remonstrations regarding the increasing social polarization by people who query the rationality for denationalization, deregulation and devaluation while the memories of the dysfunctional, unproductive governmental enterprises of the pre-liberalization period that were riddled with poor management, lethargy, kleptocracy, unaccountability and corruption are still fresh in their minds. The reality is that the abdication by Government the of the role of provider in terms of welfare to the people has exacerbated poverty in the region and resulted in further deterioration of education, healthcare and living standards. The ensuing frustration of the deprived has evolved into a powerful political force creating new and ominous crises within the democratic governing structures in the region.

3.9   Transnational Corporation operation in South Asia

The following paragraphs will focus on TNCs and their impact on individual and community economic/cultural sustainability, their actions that lead to the compromise of traditional human rights, particularly labour rights, and the TNCs' disregard for social or environmental considerations.[200] The impact of the involvement of TNCs in the national economies of South Asia is manifold and some of the operations violate international human rights.[201] Also disquietingly, the activities infringe upon traditional ways of life, destroying indigenous knowledge bases and life patterns.[202] This destruction cannot be described in terms of a breach of a generic paradigm of rights; however, such intrusions violate cultural identity and the unique relationships within the region, which the communities have maintained over generations with the subsistence agricultural patterns and the land. TNCs, more than any other entity involved in the economic

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[200] John Madeley *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (Zed Books Ltd, London, 1999).
[201] For corporate human rights violations see Business and Human Rights Resource Centre website at <http://www.business-humanrights.org> (accessed 20 Feb 2007).
[202] David N Fagan "Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations" (2001) 76 New York University Law Rev 626, 631–640.

globalization process, can annihilate cultures, obliterate the distinct character of a locality, trade or resource and engulf it in the global market where the only criterion for existence is profit.

In the overwhelming rush to liberalize, privatization was undiscriminating and some profitable public enterprises were privatized.[203] Under foreign, often monopolistic, control, price increases invariably burdened local consumers. Restructurings of the newly privatized state enterprises often cut jobs to raise profitability, creating increased economy-wide unemployment and labour market insecurity.[204] Under relaxed employment regimes companies can make employees redundant without adequate compensation. Strict regulations curtail unionization of workers' rights and bargaining powers.[205] Unemployment of often unskilled labour, without welfare, increases poverty, with gross denial of economic and social rights.[206]

The havoc created through myopic policy formulation without systematic appraisal of social and economic repercussions is amply demonstrated by the impact of TNC activity on subsistence agriculture. The mass-scale style of the TNCs threatens small-scale subsistence farming and cottage industries, especially through limiting land access:[207]

> Large tracts of land have been bought up by so called agriculture based businesses and Multinational Corporations, e.g. one company is said to have acquired over 8,850 acres to plant teak trees as a long term investment. Earlier agricultural land ceiling law prohibited any person from owning more than 15 acres. What would have happened to all the small farmers' families displaced by this company? Even more important, what has happened to all the landless labourers who would have been employed on this land, which is now covered with a plantation which needs a very small workforce.

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[203] RK Mishra and B Navin *Restructuring Public Enterprises in India : Privatisation and Disinvestment* (Mittal Pub, New Delhi, 2002).
[204] Burra Srinivas "Labour Issues in Privatisation of Public Enterprises in India," (2002) South Asian Journal of Management 91.
[205] Anton Marcus "FTZ: Transnationalisation of National Economy and Misery of Women Workers in Sri Lanka" <http://www.ilo.org/actrav/> (accessed 15 Sept 2005).
[206] Umesh Upadhyay "Impact of Globalization in the Formal & Informal Sector: Responses & Resistance" SAAPE Seminar, during Asian Social Forum, Hyderabad, India, 2–7 January 2002.
[207] Andal Damodaran "The Asian Economic Crisis and its Social Impacts on Working Children in India" (1998/1999) 14 CWA Newsletter <http://www.cwa.tnet.co.th/Publications/Newsletters/vol14_3-vol15_1/v14_3-v15_1_damodaran.html> (accessed 15 Sep 2005).

Similarly, in 1998, India conformed to the conditionalities of the World Bank and lifted its restrictions on TNCs, such as Monsanto and Cargill, from entering agriculture markets.[208] Complex new patent laws prevented the traditional usage of seedlings from previous crops. The new seedlings required pesticides and fertilizers unaffordable to small farmers. Policies based on global trade interests and ignoring national interests thus fundamentally altered the life of the peasantry farmer across South Asia, as epitomized by the dramatic number of farmer suicides.[209] Shiva describes the human costs: [210]

> 1997 witnessed the first emergence of farm suicides in India. A rapid increase in indebtedness, was at the root of farmers taking their lives. Debt is a reflection of a negative economy, a losing economy. Two factors have transformed the positive economy of agriculture into a negative economy for peasants - the rising costs of production and the falling prices of farm commodities. Both these factors are rooted in the policies of trade liberalisation and corporate globalisation … as farming is delinked from the earth, the soil, the biodiversity, and the climate, and linked to global corporations and global markets, and the generosity of the earth is replaced by the greed of corporations, the viability of small farmers and small farms is destroyed. Farmers' suicides are the most tragic and dramatic symptom of the crisis of survival faced by Indian peasants.

The increased convergence amongst national governments, TNCs and IFIs in terms of policy to promote the ideals of the liberal market economy is a regrettable outcome of the contemporary globalization paradigm.

India's permission of field trials of the controversial genetically-engineered (GE) cotton has raised similar social turmoil. Lack of public information and inadequate risk assessment appear to be the greatest concerns among activists. There is widespread criticism that Monsanto-Mahyco's Bt-Cotton import process bypassed public scrutiny and debate, particularly since the European Union and several other countries have banned the planting or import of Bt-Cotton.[211] Shiva asserts that this is another attempt to introduce monoculture farming in the country that has already proven disastrous for tens of thousands of small farmers. She maintains that the strength of Indian agriculture lies in its myriad

[208] V Shiva "Globalisation and Growing Food Insecurity" 1998 Forests Trees And People Newsletter 36/37.
[209] SH Ahmed, H Jamil "Changing pattern of suicide and parasuicide in Karachi" (1981) 31 J Pak Med Assoc 76–78; BB Mohanty "We are Like the Living Dead: Farmer Suicides in Maharashtra, Western India" (2005) 32 Journal of Peasant Studies 243–276.
[210] Vandana Shiva "The Suicide Economy of Corporate Globalisation" ZNET Commentary, 19 Feb 2004. <Http://www.zmag.org/bios/homepage.cfm?authorID=90 > (accessed 20 March 2005).
[211] Suman Sahai "BT Cotton Confusion Prevails" (2002) 37 Economic And Political Weekly 1973-1974.

smallholdings and its biodiversity, which will be destroyed through the introduction of monolithic farming as a result of acceding to IFI conditionalities.[212]

Upheaval from TNC activity pervades South Asia, for instance in milk prices in Sri Lanka. Before economic liberalization the 400gr milk packet was SLRs 6.00 (US$ 0.07) but has now risen to more than SLRs.100 (US$1.11), beyond the reach of a majority of Sri Lankans.[213] A written statement submitted by the Asian Legal Resource Centre (ALRC) to the UN Economic and Social Council detailed the inimical effect of unrestricted TNC activities within the developing world: [214]

> …about 20 years ago fresh, inexpensive milk was widely available. However, in 1981 the government — under a policy of liberalisation and privatisation — closed the National Milk Board and signed an agreement with Nestlé to develop the dairy industry. The dairy industry was consolidated under four companies — Nestlé, Anchor, Laksprey and Maliban — all of whom show little sympathy for the plight of millions of families who cannot afford their milk products.

The chairman of Nestlé Lanka has gone so far as to assert that it is improper to ask for a reduction in milk prices or bring the issue to the attention of foreign diplomats in Sri Lanka, for he argued that the application of pressure to reduce milk prices is a violation of free market principles.[215] Meanwhile, domestic dairy producers able to provide milk for the country prior to 1981 are no longer able to do so, and Sri Lanka has become dependent on foreign producers of milk.

Privatization measures and the unregulated entry of TNCs into milk production in Sri Lanka have not only obliterated the small scale domestic producers who could not compete with the industry giants but created a price monopoly which the

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[212] Ranjit Devraj "India: Flak For Nod To TNC Genetic Cotton Trial"
<http://www.twnside.org.sg/title/flak.htm (accessed 7 Nov 2007).
[213] "Powder Keg — Sri Lanka bracing for milk powder price burst" 20 March 2007
http://www.lankabusinessonline.com/fullstory.php?newsID=68511188&no_view=1&SEARCH_T
ERM=10 (accessed 12 Nov 2007).
[214] Commission On Human Rights, Fifty-eighth session Item 10 of the provisional agenda
Economic, Social And Cultural Rights Written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization in general consultative status. The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31. Distr. GENERAL E/CN.4/2002/NGO/6731 January 2002
<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/1e6512d38381d7c1c1256b6400377c41?Opend
ocument > (accessed 7 Nov 2007).
[215] Ibid n 206.

government cannot control. The social cost of the whole operation is a generation of malnourished children in Sri Lanka.[216]

3.9.1   Increased Civic Dissent Against Transnational Corporation Cctivities

Governments welcoming TNCs rarely stipulate adequate environmental impact assessments relating to their operations, and despite the Bhopal tragedy, examples of environmental disasters continue[217] such as the incident where a license was issued to draw water for a Coca-Cola plant in Plachimada, Palghat, Kerala in 2000. The company electrically extracted ground water in excess of the licence, and ground water levels depleted and the residue from the manufacturing process began to pollute the soil of surrounding paddy fields, canals and wells. The *adivasi* women in Plachimada commenced a *dharna* (sit-in) outside the Coca-Cola factory. The local *panchayat* filed public interest litigation in the Kerala High Court against Coca-Cola. The Court supported the demands of the women and Justice Balakrishnana Nair ordered Coca-Cola to stop pirating Plachimada's water, stating: [218]

> The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purpose …
>
> Our legal system — based on English common law — includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership ...

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[216] 60% of the children under the age of 5 are suffering from malnutrition <unpan1.un.org/intradoc/groups/ public/documents/APCITY/UNPAN002364.pdf> (accessed 17 May 2005).

[217] <www.bhopal.com.> (accessed 7 Nov 2007).

[218] *Perumatty Grama Panchayat vs State of Kerala* [2004] (1) KLT 731. Also see Vandana Shiva "India: Soft Drinks, Hard Cases" *Le Monde diplomatique* (4 Mar 2005) <http://www.mindfully.org/Water/2005/India-Coca-Cola-Pepsi14mar05.htm> (accessed 15 Sept 2005); Ananthakrishnan Aiyer "The Allure of The Transnational: Notes on Some Aspects of the Political Economy of Water in India" (2007) 22 Cultural Anthropology 640–658.

This judgment indicates that the ownership of underground water rests with the public, and the state as trustee has a duty to safeguard natural resources. Failure to do so would be tantamount to a violation of Article 21 of the Indian Constitution, guaranteeing the right to life.[219] Such extreme action as a *dharna* from civil society indicates that the community is aware of its rights and the corresponding responsibilities of the TNCs.

Similar civic protest is taking place against the plans for the Eppawala phosphate mining project by a multinational corporation, IMC Agrico. If the project is granted approval not only will there be environmental devastation but a flourishing village consisting of 30,000 mainly small scale farmers, paddy fields that produce the highest yields of rice in the country, and an ancient but still operational irrigation system will be destroyed together with the region's ecology, not to mention heritage areas, including significant archaeological sites which will also be destroyed or rendered unapproachable.[220]

Such civil mobilization now transforms itself into systematic yet informal regulatory authority relating to TNC ventures in the region.[221] While this process highlights governmental impotency to provide adequate supervision of such ventures, as well as the incapacity to formulate suitable policy relating to FDIs, it also emphasizes the expectation mismatch in relation to developmental issues between civil society and the governments.

The effect of global market pressure to provide preferential treatment to TNCs over and above human rights considerations is best demonstrated through the operations of the Export Processing Zones. Hazardous and often arduous working conditions, lack of legal protection in terms of work conditions and minimum wages within EPZs is common in South Asia. Amendment of labour laws to permit compulsory overtime at the request of garment manufactures has been

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[219] *MC Mehta v Kamalnath and others* (1997) 1 SCC 388.
[220] "S.C. Judgment Vindicates Eppawala Objectors" Sri Lanka
Sunday Island, 11 June 2000 <http://www.pugwash.org/reports/pim/pim12.htm > (accessed 7 Nov 2007); see also Mallika Wanigasundara "Resistance grows to Sri Lanka/TNCs mining deal"
<http://www.twnside.org.sg/title/deal-cn.htm> (accessed 7 Nov 2007).
[221] See the civil organizations that have arisen in the region to mobilize people against the inequitable operations of TNCs <http://www.bhopal.net> (accessed 7 Nov 2007).

justified by the Labour Minister of Sri Lanka[222] and the Chairman of the Board of Investment as imperative for Sri Lanka to remain competitive, especially after the removal of quotas under the Multifibre Agreement (MFA) of 2005.[223] Similar scenes abound across the region.[224]

The evidence shows increased Foreign Direct Investments (FDIs) and presence of TNCs have harmed, not benefited, the developmental process and human welfare.[225] Host countries must stringently control the content of FDIs and the manner in which FDIs are introduced. Rules must include issues of technology transfers, which consolidate domestic manufacturing capabilities, training of skilled labour, infrastructure development and environmental concerns. Policy formulation relating to FDIs should also necessarily take into consideration the protection of indigenous life systems, knowledge bases and subsistence rural agriculture, which is an integral part of any developing nation. The activities of the TNCs and their detrimental effects cannot be combated by one country alone. It demands a regional effort so that the burdens and benefits of regulation can be shared by all.

3.9.2   Transnational Corporations and Respect for Human Rights

TNCs, traditionally, have not been recognized as subjects of international law and therefore exist beyond the legal parameters of the conventional international human rights regime.[226] The impact of their operations, including human rights violations, is ignored by national governments reliant on their financial

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[222] Saman Gunadasa *"Sri Lankan government imposes longer hours on female workers"* 4 September 2002 < http://www.wsws.org/articles/2002/sep2002/sril-s04.shtml> (accessed 7 Nov 2007).
[223] The Dabindu Collective "Problems Faced By Women Working In Sri Lanka's Export Processing Zones" (January – March 2001) 38 Asian Labour Update <http://www.amrc.org.hk/alu_article/export_processing_zones/problems_faced_by_women_working_in_sri_lankas_export_processing_. See also Dinah Spritzer "Whose job to mind the multinationals"(Interview with Deborah Doane) *The Prague Post* (Austria, 23 Oct 2003) <http://www.praguepost.com/P03/2003/Art/1023/news6.php> (accessed 17 May 2005).
[224] Bangladesh: National Garment Workers' Federation <http://www.waronwant.org/?lid=1722> (accessed 7 Nov 2007).
[225] D Rodrik "The Global Governance of Trade as if Development Really Mattered" (UNDP Background Paper, U.S.A., 2001).
226 Nicola Jägers "The Legal Status of the Multinational Corporation Under International Law" in Michael K Addo (ed) *Human Rights Standards And The Responsibility Of Transnational Corporations* (Kluwer Law International, 1999) 259, 262; Raymond J Michalowski and Ronald C Kramer **"**The Space between Laws: The Problem of Corporate Crime in a Transnational Context" (1987) 34 Social Problems 34–53; Silvia Danailov "The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations" (Geneva, 1998) <www.humanrights.ch/home/upload/pdf/000303_danailov_studie.pdf> (accessed 7 Nov 2007).

benevolence. The atrocities the TNCs commit often include complicity in the violent suppression of civil dissent against neo-liberal policies, violations of labour rights, child labour, suppression of trade union rights, violation of property rights that extend to intellectual property rights and infringement of environmental rights.[227]

Numerous attempts have failed to compel the TNCs to abide by international human rights obligations. Attempts through labour and environmental protection laws fail due to the legal nature of the entity. Often the TNCs are more powerful economically than the host country and wield considerable political clout within it. However, economically powerful countries, such as the US, have created legal regimes that enable non-nationals to seek remedies in the US courts for breaches of human rights both within and outside America.[228] Yet, practical limitations, such as poor access to legal representation and an inability to travel to the US, render such avenues nugatory.

Quasi-legal regulatory regimes, such as the UN Code of Conduct for Transnational Corporations,[229] the EU Parliament Resolution on Codes of Conduct for Transnational Corporations,[230] the International Labour Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises[231] and OECD Guidelines for Multinational Enterprises[232] and Global Compact, initiated under the aegis of Secretary General Kofi Annan at the Annual Meeting of the World Economic Forum in 1999[233], have all had a limited impact on convincing the TNCs of their human rights responsibilities. The latest initiative to compel the TNCs to honour their human

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[227] David Kinley and Sarah Joseph "Multinational corporations and human rights Questions About Their Relationship" (2002) 27 Alternative Law Journal 1.

[228] "Developments in the Law - International Criminal Law: v. Corporate Liability for Violations of International Human Rights Law" (2001) 114 HLR 2025.

[229] United Nations Draft International Code of Conduct on Transnational Corporations (1984) 23 ILM 626.

[230] Menno Kamminga "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC" in Philip Alston (ed) *The EU and Human Rights* (Oxford University Press, Oxford, 2000) 565–577.

[231] < http://www.ilo.org/public/english/employment/multi/download/english.pdf. > (accessed 5 Nov 2006).

[232] <http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html > (accessed 5 Nov 2006); Ans Kolk, Rob van Tulder and Carlijn Welters International codes of conduct and corporate social responsibility: can transnational corporations regulate themselves? (1999) 8 Transnational Corporations pp 143-180.

[233] Kofi Annan "The Global Compact" (Address at the World Economic Forum, Davos, UN Doc. SG/SM/6448 (1999), 31 Jan 1999; <http://www.unglobalcompact.org/Portal/> (accessed 7 Nov 2007).

rights obligations has been promoted by the UN Sub-Commission for the Promotion and Protection of Human Rights.[234] Widely regarded as a comprehensive guide to corporate social responsibility, the Code of Conduct focuses on issues of labour rights, corruption, consumer protection and environmental safety.[235]

TNCs circumvent even efficient regulatory regimes, particularly in the developing world. The only visible mechanism of control which is partially successful is civil society vigilance and activism. The activism that followed the Bhopal disaster, and Apparel Industry Partnership, which is a result of child labour and the sweatshop industry, are examples of such civil mobilization. It is important that such activism is channelled and supported through a regional mechanism which prescribes normative standards of behaviour to ensure that the TNCs' operations are conducted in a way that they respect human rights and take into consideration environmental concerns.

3.10   Good Governance

By the late 1990s, after two successive waves of SAPs, many contended that the Bank and the Fund's aggressive yet inept dealings with developing nations, which were often ruled by dictatorial regimes, exacerbated the burgeoning economic crisis, devastating local ecologies and indigenous communities. The "good governance" as an aid conditionality emerged largely due to the need to allay

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[234] Human Rights Commission Sub-Commission on the Promotion and Protection of Human Rights *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (Fifty-fifth session, , E/CN.4/Sub.2/2003/12/Rev.2 26 August 2003 <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/64155e7e8141b38cc1256d63002c55e 8?> Open document (accessed 7 Nov 2007).
[235] Carolin Hillemanns "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (2003) 4 German Law Journal - European & International Law <http://www.germanlawjournal.com/article.php?id=330> (accessed 7 Nov 2007).

these accusations.[236] The purpose of good governance from an IMF perspective was elaborated in Michael Camdessus' address to the UN in 1996:[237]

> Good governance is important for countries at all stages of development. . . . Our approach is to concentrate on those aspects of good governance that are most closely related to our surveillance over macroeconomic policies —namely, the transparency of government accounts, the effectiveness of public resource management, and the stability and transparency of the economic and regulatory environment for private sector activity.

Similarly, Paolo Mauro claims to trace the roots of corruption to the pre-liberalized, state-centred economies, and says policies of liberalization, stabilization, deregulation, and privatization can bring about a marked reduction in corruption and rent seeking behaviour. Therefore, to him, liberalization of the economy is a means of weeding out "policy related sources" of corruption.[238] In essence, the governance agenda for the IFIs was a means of reinforcing the status quo of growth through macroeconomic policies. The governance-related conditionalities were also a part of the evolution of the institutions themselves and the changes that were taking place within the institutions.[239] They were promoted to protect the integrity of the IFIs themselves.[240]

During their initial stages, IMF Governance Related Conditionalities (GRCs) centred on monetary and fiscal issues while the World Bank's conditionalities also had a similar narrow focus, concentrating on micro, sector-specific financial issues such as structural adjustment lending. In the late 1980s the scope of the GRCs widened embracing the liberalization agenda encapsulated in the Washington Consensus. By the end of the 1980s, with increased demands on IFI lending and the risks of non-payment escalating, the conditionalities attached to loans began to widen.

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[236] Adrian Leftwich "Governance, the State and the politics of development" (1994) 25 Development and Change 363–386 provides a detailed account of factors influencing the emergence of governance in the development agenda.

[237] Michel Camdessus IMF Managing Director Address to the United Nations Economic and Social Council 2 July 1997 <http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm> (accessed 7 Nov 2007).

[238] Paolo Mauro "Why Worry About Corruption?" 1997 International Monetary Fund Economic Issues 6 <http://www.imf.org/external/pubs/ft/issues6/issue6.pdf. >(accessed 7 Nov 2007).

[239] J Boughton "Silent Revolution: The International Monetary Fund, 1979–1989" (IMF, Washington DC, 1999).

[240] Devesh Kapur and Richard Webb "Governance-Related Conditionalities of the IFIs". This is a revised version of the paper prepared for the XII Technical Group Meeting of the Intergovernmental Group of 24 for International Monetary Affairs held in Lima, Peru, on 1-3 March 2000.

3.10.1 Assertion of Liberal Democracy and Anti-corruption as Conditionalities

Governance based on the liberal democratic model was being thrust into prominence with the end of the Cold War and the ensuing need to establish democracy within former communist states.[241] The promotion of GRCs by IFIs, which prior to this were confined to economic issues, thus was considered timely. The economic boom of East Asia, where governance had a particular strong and interventionist nuance, was asserted by the World Bank to mean governance had a particular role to play in economic growth.[242]

More significantly, the notion of state sovereignty was fast losing its sacrosanct position within the international discourse. Globalization had refashioned the notion of state sovereignty through subtle changes in international rules and norms. The establishment of the International Criminal Court and international conventions that allowed crimes against humanity to be tried extra-territorially symbolized fundamental change.[243] These changes created a conducive environment for the IFIs to introduce GRCs as an integral part of wider macroeconomic policy formulation.

The prelude to the contemporary GRCs was the policy statement of the Bank in September of 1997 that "corruption should be explicitly taken into account in country risk analysis, lending decisions and portfolio supervision if it affects

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[241] Mette Kjoer and Klava Kinnerup "Good Governance: How does it relate to Human Rights?" in Hans Otto Sano and Gudmundur Alfredsson (eds) *Human Rights and Good Governance — Building Bridges* (Martinus Nijhoff Publishers, The Hague, 2002) 1–18.

[242] World Bank *The East Asian Miracle: Economic Growth and Public Policy* (Oxford University Press, New York, 1993).

[243] The notion that state sovereignty is inviolable was dealt severe blows with the indictments of both Pinochet in Spain and the UK, and the former Chadian dictator, Hissène Habré in a Senegalese court in 2000 for "torture and barbarity". Encapsulating the mood of the moment the United Nations Secretary-General, Kofi Annan, declared that it is clear that UN member states can no longer hide behind protestations of national sovereignty when they flagrantly violate the rights of citizens. He reiterated his point by saying that "nothing in the [United Nations] Charter precludes a recognition that there are rights beyond borders" *New York Times* (New York, 21 Sep 1999).

project or country performance."[244] The Twelfth Replenishment of the International Development Association (IDA), negotiated in 1998, stated: "good governance is *critical* to the development process and to the effectiveness of development assistance; this is a *key* concern of the IDA."[245] The exact nature and the scope of the GRCs remained ill-defined at this point.

The IMF also issued a rather tenuously drafted document on Good Governance in 1997.[246] The Fund focused on reiterating that good governance was a necessary precondition to infuse and maintain the confidence of the financial sector. In keeping with the mandate of the IMF its *Good Governance* definition included[247]

> "issues such as institutional reforms of the treasury, budget preparation and approval procedures, tax administration, accounting and audit mechanisms, Central Bank operations, and the official statistics function, ...reforms of market mechanisms would focus primarily on the exchange, trade, and price systems, and aspects of the financial system. In the regulatory and legal areas, IMF advice would focus on taxation, banking sector laws and regulations, and the establishment of free and fair market entry."

The changing reality was quickly felt within the community of states that heavily relied on donor assistance. In a meeting of African Ministers of Finance, the President of Botswana, Festus Mogae, declared that: [248]

> "in the face of declining official development assistance, there is a realization and acceptance among African countries that individual countries will have to justify their case for additional assistance. This must be on the basis of high performance on the issues of good governance, observance of the rule of law and zero tolerance for corruption."

This view was further reinforced by the fact that the East Asian financial crisis in the late 1990s was largely blamed on corruption, lack of accountability, supervision and poor regulation among governments of the region.[249]

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[244] Helping Countries Combat Corruption:The Role of the World Bank Poverty Reduction and Economic Management The World Bank September 1997
<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/coridx.htm >(accessed 8 Feb 2008).
[245] *Additions to IDA Resources: Twelfth Replenishment* IDA 12 (1998) (International Development Association, World Bank, Washington DC)..
[246] *Good Governance: The IMF's Role* (International Monetary Fund, 2 July 1997)
<http://www.imf.htm> (accessed 17 May 2006).
[247] Ibid paragraph 6.
[248] *Development News* 1 Sep 1999.
[249] Greg Mills "The Future of Globalization" (1998) 6 South African Journal of International Affairs 1, 83.

From the perspective of the IMF and the World Bank it was vital that the new genre of conditionalities were more effective than the previous ones. In the Fund's case, the new conditionalities were supposed to induce confidence not only in the IMF but in allied private creditors as well. To maintain the continuous flow of private capital, countries urgently needed to establish credibility in the form of acceptable political behaviour that was predictable and legitimate. In defence of political conditionality, the insistence on democratic reforms is premised on three essential, interdependent elements: 1) the presence of institutions and procedures through which citizens can express effective preferences about alternative policies and leaders; 2) the existence of institutionalized constraints on the exercise of power by the executive; and 3) the guarantee of civil liberties to all citizens in their daily lives and in acts of political participation.[250]

Since the early 1990s, Good Governance has been incorporated as a conditionality in all of the IFIs' financial and technical assistance programmes. However, the term has not been clearly defined nor specified by the IFIs. Frequently, reliance is placed on the IDA 12th Replenishment 1998, which describes the "four pillars" of good governance as accountability, transparency, the rule of law, and participation. This rather vague definition has great potential. As a principle there has been widespread acceptance of the good governance concept within the donor communities, the NGOs and the civil society of the borrower countries. It has also touched a chord with the deep discontentment and disillusionment within the civil societies of developing countries concerning governance, corruption and mismanagement of development programmes and external aid and loan assistance.

The culture of pervasive corruption and the lack of accountability in governance in South Asia, which until now, were never addressed by other stakeholders, apart from the oppressed civil society whose only available recourse had been sporadic incidents of violence or civic uprising that were in the most part unsuccessful. Raising the issue of governance, the IFIs have given voice to a concern that was deep-rooted yet rarely articulated — and often in fact denied — by the developing

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[250] WH Moore and JR Scarritt "IMF Conditionality and Polity Characteristics in Black Africa: An Exploratory Analysis" [1990] Africa Today 37, 49.

nations themselves. However, reservation and scepticism about the implementation of good governance and IFIs' mandate to implement and monitor GRCs have been raised. The present study advocates for a regional framework that will also be mandated to deal with issues of governance and corruption.[251]

3.10.2 Practical Limitations of Implementing Governance-Related conditionalities

In practical terms a government may be requested to implement anti-corruption laws as part of donor driven conditionalities but questions of compliance and policing the legal regime rarely emerge. Policy formulation through consultation and participation remain difficult within immature civil societies such as those in South Asia. Transforming good governance from a mere banality into an effective conditionality continues to remain a problem that the IFIs are grappling with even today. Joseph Stiglitz, the former Chief Economist of the World Bank, recently argued that, "There is increasing evidence that [conditionality] was not [effective] — good policies cannot be bought, at least in a sustainable way. Equally critically, there is a concern that the way the changes were effected undermined democratic processes."[252]

T.N. Srinivasan, like many others, does not appear to be impressed by the sudden infatuation of the IFIs with governance. He comments that the IFI policy makers suddenly declared that: [253]

> "we now see the centrality of issues of governance, both in the public and private sector. Pray, what took so long to see this? 'Governance', to use the buzz-word, is not a new issue — one already knows that rampant corruption is deleterious, or for that matter that openness to foreign trade and technology, macro-economic stability, investment, etc., are all important!

Quite apart from the GRCs serving the interests of the IFIs, good governance has also had a positive effect on the political culture of the developing nations. Good

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[251] See Chapter 6 of this study.
[252] Joseph Stiglitz "World Bank at the Millennium" (1999) 109 The Economic Journal 591.
[253] TN Srinivasan Letters to the editor, *Financial Times* (London, 24 Sep 1999).

governance created an environment where issues of corruption, whether it was unaccountability, bribery, money laundering or misuse of public resources for private benefit, could be discussed openly within civil society. Media and the NGOs that had been hesitant to address issues of corruption began to voice their concerns with greater conviction, secure in the knowledge that the issue had a resonance within the international community. This open discussion of good governance has helped to move the issue away from the prescriptions of the World Bank or the IMF and make it a domestic issue like human rights or the rule of law.

3.10.3 Good Governance comes to South Asia

The evolution of GRCs has certainly helped create a focus on the complex relationship that exists in South Asia between corruption, terrorism, money laundering and political decay. South Asia's experience of corruption is well documented by Transparency International (TI).[254] In TI's Corruption Perception Index[255] measuring transparency in about 90 to 100 countries, India ranked 71st equal in 2001 and 2002, and 83rd in 2003 in the countries listed where corruption was rife.[256] In fact, all countries in South Asia rank poorly. Disturbingly, in 2002 and 2003, Bangladesh was ranked the most corrupt country in the world and, in 2006, it just managed to creep up a few places past Haiti and Iraq. External findings of surveys by the likes of TI are also confirmed by public opinion, media and research within South Asian states.[257]

There is considerable academic analysis on corruption and its impact on poverty and development.[258] While Guhan and Paul reiterate that the endemic culture of

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[254] Gurharpal Singh "South Asia" in Robin Hodess et al. (eds) *Global Corruption Report 2003* (Profile Books, London, 2003).

[255] <http://www.transparency.org/policy_research/surveys_indices/cpi/2001> (accessed 12 Feb 2008).

[256] Robin Hodess et al. (eds) *Global Corruption Report 2001* (Transparency International, Berlin).

[257] B Jalan *The Future of India: Politics, Economics, and Governance* (Penguin, Viking, 2005); Bertrand, Marianne, Simeon Djankov, Rema Hanna and Sendhil Mullainathan "Obtaining a Driving License in India: An Experimental Approach to Studying Corruption" (2007) 122 The Quarterly Journal of Economics 1639–1676; N Momen and M Begum "Good governance in Bangladesh: Present situation and future challenges" (2005) 57 Međunarodni problemi 159–176.

[258] KM De Silva, GH Peiris and SWR de A Samarasinghe (eds) *Corruption in South Asia* (ICES Kandy Publication, 2002); see also for history of corruption in the subcontinent Shiv Visyanathan

corruption permeates into every aspect of life exacerbating conditions of poverty and social marginalization from which there appears little escape, they further contend that it has a negative impact on development initiatives, for:[259]

> [t]he adverse effects of corruption on the economy and on public administration are manifold. Government expenditures are inflated and wasteful projects and programmes are taken up in order to obtain kickbacks. Standards get diluted in investments (e.g. dams, roads, bridges and buildings), goods (e.g. drugs) and services (e.g. quality of doctors, engineers and teachers) causing hazards to safety, life and health. Government revenues get reduced on account of tax evasion. Subsidies and incentives are abused. The poor are the worst affected since they cannot pay bribes in order to obtain benefits to which they are legitimately entitled. Worse, they are denied basic justice in the hands of corrupt officials, such as the police and village officials. Corruption aggravates inequality in an already unequal society.

South Asia's high levels of corruption in public life and the private commercial sector co-exist with equally high levels of mass poverty, illiteracy, underdevelopment and the increasing criminalization of politics. It is public knowledge that "corruption is severely undermining development objectives in South Asian countries by hindering economic growth, reducing efficiency, acting as a disincentive to potential investors, and above all, diverting critical resources meant for poverty alleviation,"[260] yet the absence of effective mechanisms has been the greatest obstacle to elimination.

The general perception that corruption is part and parcel of public office is reinforced when it is commonplace to find news items such as: "Public servants to take 'country forward' in comfort",[261] an account of the officials of an Asian Development Bank (ADB) -sponsored development who ordered a fleet of luxury cars for their use with the funds, and a report that "corruption in public life is one of the most daunting issues facing the country. Things have come to such a pass that *all* politicians evoke public ridicule."[262] On a more pragmatic note, the results

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and Harsh Sethi *Foul play: chronicles of corruption 1947–97* (Banyon Books, New Delhi, 1998) and O Azfar, Y Lee and A Swamy "The Causes and Consequences of Corruption" (2001) 573 The Annals of the American Academy of Political and Social Science 42–56.

[259] S Guhan and P Samuel *Corruption in India: Agenda for Action* (Vision Books, New Delhi, 1997) 13.

[260] *Corruption in South Asia, Insights & Benchmarks from Citizen Feedback Surveys in Five Countries* (Transparency International, December 2002) <http://www.transparency.org/pressreleases_archive/2002/dnld/south_asia_report.pdf > (accessed 17 May 2005).

[261] *The Island* 29 Jul 2004.

[262] *The Tribune* (Chandigarh, 25 Nov 2003).

of bad governance are documented in the *Human Development Reports* because poor governance and poverty have a direct correlation.[263]

Although the World Bank, the IMF, the Asian Development Bank and other national development agencies have contributed immensely to highlighting the issue of corruption and contributed to the open discussion of the subject nationally, effective regimes of anti-corruption are a long way from evolving both domestically and regionally.

In a positive development in November 2001, India signed up to the ADB-OECD Anti-Corruption initiative for Asia-Pacific.[264] There has been considerable internal pressure from an increasingly vocal civil society to establish effective mechanisms to curb corruption in all of the South Asian countries. These societies persistently agitate for more access to information, particularly relating to policy formulation (e.g., preparation of PRSPs), accountability audits,[265] and more significantly for effective implementation of the existing mechanisms to curb corruption.

Despite these concerns the anti-corruption drive has created an atmosphere whereby stakeholders are able to demand standards of good governance from the power holders and have also been able to initiate measures that would provide positive results once the processes are more established. Chief among these developments is the growth of civil society networks engaged in anti-corruption work. The rise of civil activism has witnessed a corresponding demand for greater transparency within government and the structures of power that basically translates into agitation for freedom of information legislation. The quest for such

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[263] *Human Development Report 2003* (Oxford University Press, New York, 2003).
[264] The initiative commits each signatory to the development of an anti-corruption action plan which requires them to address three pillars of anti-corruption activity: civil service reform, reduction of bribery, and the closer involvement of civil society. Donor agencies, moreover, have been more insistent that programme funding is tied more specifically to anti-corruption policies and procedures. Gurharpal Singh *Corruption, Transparency and the Good Governance Agenda in India*
EU-India: Beyond the New Delhi Summit (European Institute for Asian Studies, Brussels, 4 Dec 2003).
[265] Gurharpal Singh "Understanding Political Corruption in Contemporary Indian Politics" (1997) 45 Political Studies 626–638.

legislation has escalated during the past few years with the expansion of investigative journalism.[266]

Good governance has also rekindled concerns relating to election procedures and particularly issues related to the funding of political parties. Legal regimes to supervize such activities are poorly formulated and implemented in many of the South Asian states.[267] An outright ban on corporate funding implemented in 1970 in India merely aggravated the problem as moneys still changed hands on the black market.[268]

The strong nexus between corruption and the collapse of democracy in the region is obvious. The intermittent military rule in both Pakistan and Bangladesh has its roots in poor governance, allegations of political corruption and economic mismanagement. In the indictment of former premier Nawaz Sharif, after the military coup of 1999, General Pervez Musharraf pointed specifically to Mr Sharif's record of economic misgovernance as a justification for military rule. Therefore "bad governance" not only weakens economic performance but also affects the region's political stability.

Partha Ghosh's analysis of corruption in India and her suggested remedies take a multidimensional approach and are relevant to all South Asia. According to Ghosh:[269]

> To deal with the malaise of corruption there is a need for a mass movement attacking all kinds of evil like the caste system, dowry system, communalism, criminalization of politics and so on. Mere legal efforts to deal with the proven corrupt is not sufficient. It can cure the symptoms from time to time but not the disease. Much more investment is needed in India's human capital than is the case now. … .There is no escape from our going back to the Mahatma's dictum that politics and morality are inseparable and that end and means are one and the same thing.

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[266] Dilip D'Souza "Investigative Journalism: Those who Expose Us" in Nalini Rajan (ed) *Practising Journalism: Values, Constraints, Implications* (Sage Publications , New Delhi, 2005) discusses the role of Tehelka.com, a website that exposes news relating to corruption in India. For the devastating impact of investigative journalism, see <www.Tehelka.com>.

[267] There is clear evidence that there is a nexus between corruption and funding of political parties. See N Vittal *Corruption in India* (Academic Foundation, 2003).

[268] Ibid.

[269] Partha Ghosh "Corruption in India: a holistic approach to Corruption in South India'' in K M de Silva, G H Peiris and S W R de A Samarasinghe *Corruption in South Asia: India, Pakistan and Sri Lanka* (International Centre for Ethnic Studies, Kandy, Sri Lanka, 2002).

Good governance cannot be achieved by the efforts of individual states alone but demands international and regional cooperation. The laws on banking secrecy combined with increasingly integrated financial markets have inadvertently created a safe haven for many people to launder their swindled wealth without fear of prosecution. Even in highly publicized instances, such as that of Mobutu or of Marcos, the countries have been unable to recover their looted wealth.[270] The importance of protection for those who collaborate to wipe out corruption in the domestic context is underscored by the death of 30-year-old engineer Satyendra Kumar Dubey, in Bihar, India in November 2005, which has been linked to exposure of corruption in the construction of the giant Golden Quadrilateral road project. His death emphasizes the urgent need to enact whistle-blowers laws similar to those of the UK, New Zealand and South Africa.[271]

3.10.4   UN Convention Against Corruption

The fight against corruption in the region received another boost with the adoption of the UN Convention Against Corruption by the General Assembly on 31 October, 2003.[272] Article 13(1) of the Convention states that each:

> State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.

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[270] "A recent report by the US Senate Permanent Investigations Subcommittee charged that foreigners, with Citibank's help, used deliberately opaque networks of shell corporations, offshore trusts and other instruments to shield their identities as they secretly transferred money out of their own countries. The cases reviewed by the Congressional investigations involving Citibank, included: tens of millions of dollars transferred by Raul Salinas de Gortari out of Mexico and into overseas accounts in 1993 and 1994 during the presidency of his brother, Carlos Salinas de Gortari; more than $40 million moved through accounts controlled by Asif Ali . Zardari, husband of Benazir Bhutto, late Prime Minister of Pakistan; more than $130 million moved through accounts controlled by El Hadj Omar Bongo, President of Gabon since 1967; more than $110 million moved through accounts connected to Mohammed, Ibrahim and Abba Abacha, sons of the late General Sani Abacha, former military leader of Nigeria." *Governance-related Conditionalities of the International Financial Institutions* UNCTAD/GDS/MDPB/G24/6 (United Nations Publication, 2000).
[271] Rashmeez Ahmed "Dubey Gets Whistleblower Award" *Times of India* (Monday 22 March 2004).
[272] GA Res. 58/4 (31 Oct, 2003).

Chapter 3 of the Convention calls upon parties to "consider adopting" laws to establish other actions as criminal offences, including trading in influence, abuse of functions, illicit enrichment, and bribery in the private sector. The chapter contains a series of articles on measures for promoting adherence to such criminal laws — for example, measures for freezing and confiscating the proceeds of a crime, overcoming bank secrecy laws, and cooperation among law enforcement authorities of the parties.[273] The swift adoption of the Convention indicates the great enthusiasm with which the community of states are subscribing to a regime against corruption, bribery and money laundering by both state and private sectors.[274]

Governance related conditionalities initiated by the World Bank and the IMF ensuring transparency and accountability within the structures of governance were aimed at further consolidating the chain of accountability running upwards from national governments to the IFIs. However, the positive ramification of the GRCs was that civil societal activism and the media seized the opportunity to create a dialogue between national governments and civil society on issues relating to GRCs. The insistence by the IFIs on honouring the GRCs provided the necessary impetus for the media to expose incidents of corruption and misuse of power by the national governments and contributed to the consolidation of investigative journalism in the region.

3.11   Conclusion

This chapter traced the impetus to generate a culture of development assistance to the inaugural speech of Truman in 1949. The genesis of the international financial institutions was rooted in the economic downturn of the 1930s and the need to create a vibrant yet systematic financial regulatory framework in the aftermath of the World War II. The chapter analysed the ideological affiliations of the IFIs

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[273] Sean D Murphy **"Adoption of UN Convention Against Corruption"** (2004) 98 The American Journal of International Law 182.

[274] As of Dec 2007 Sri Lanka, Pakistan, Bangladesh, and the Maldives have accepted the treaty but not India, Bhutan and Nepal. <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (accessed 12 Feb 2008).

based on neo-liberalism upon which multilateral financial policies are determined. Sections 3.3 and 3.3.1 of this chapter elaborated the symbiotic relationship between the key public and private agents of neo-liberal globalization, the IFIs and the TNCs respectively; whose operations have a fundamental impact on the economies of the developing world.

The analysis also focussed on the historical antecedents of the 1970s debt crisis and the circumstances that compelled the IFIs to advocate policy changes in relation to global financial markets. In this context section 3.6 of this chapter discussed the national economic policies of South Asia until the period of economic liberalisation and their particular strengths and weaknesses. The reasons for the embracing IFI-propelled economic restructuring programmes through the SAPs were discussed. The ideological leanings of the IFIs which emphasize economic growth with particular disregard for the human dimension of development werew analysed. The social and human costs of these policy changes, in relation to South Asia, discussed. The study highlighted the parallel existence of the human rights regime and the development regime and the reluctance of the IFIs to seek an amalgamation of the two.

A significant observation of this chapter is that the neo-liberal market-based globalization process aggravates conditions of poverty and intensifies democratic dysfunction within the structures of government. The implementation of the SAPs and the PRSPs, which this study identifies as the instruments of contemporary globalization, diminishes the significance of the concept of state sovereignty and creates a structure of accountability that places the IFIs at the apex.

The role of the TNCs in the economic activities of the developing world, particularly South Asia, was analysed in section 3.9 of this chapter. The study discussed the exploitative tendencies of the TNCs which were abetted by the conducive fiscal and regulatory regime created by the host countries competing with each other for the much-craved FDI. The need for stronger international regime monitoring of transnational corporations was emphasized in this chapter.

Further analysis of the ramifications of the IFI policy overhauls in this chapter identified the mobilization of civil society and the articulation of "good

governance" as positive outcomes of that process. Civil society mobilization and good governance are both concepts which have great potential and have not been explored sufficiently in the South Asia context. This chapter concludes with two general observations: the first, that developmental and economic growth concepts must be extricated from their contemporary ideological base in neo-liberalism. Secondly, there must be a tangible rationalization between the human rights regime and the developmental regime so that the benefits of development are shared equitably between all people.

The following chapter is presented in two distinct sections. The chapter first considers the impact of neo-liberal policy formulation on democratic governance in South Asia. As reiterated in the Introduction to this thesis, human rights, development and democracy form a symbiotic relationship which mutually supports the success of each other in their sphere of operations. The neo-liberal economic policies that compelled fundamental alterations in the operation of national economies had the effect of refocusing the centre of accountability of the national governments from the people to the IFIs. The need to placate the IFIs resulted in creating situations of civic dissent, undermining the functioning of democracy, will be analysed in Chapter 4 of this study.

Secondly, Chapter 4 explores the South Asian Association of Regional Coorpeation (SAARC) that has been established as a mechanism to coordinate the regional effort to secure human rights and social development. The discussion will focus of the goals of the SAARC and its inherent limitations that is reflective of the regional political insecurities. It will analyse the efficacy and viability of existing regional mechanisms in the context of contemporary globalization and whether the SAARC has fulfilled the expectations since its inauguration two decades ago.

CHAPTER 4

A POVERTY OF DEMOCRACY IN SOUTH ASIA AND THE INADEQUATE RESPONSE TO THE REGION'S NEEDS THAT IS THE SAARC

"While generating a proliferation of electoral regimes and celebrating "democracy" in the abstract, neo-liberal globalization has undermined the possibility of democratic control over state policies and insulated the most fundamental policy decisions from even the fiction of democratic control. It has had pervasively corrosive effects on any sense of self-worth that is based on local culture, difference and identity. Finally, it is now associated with a return to military adventurism whose potential future destructive effects are frightening to contemplate."[1]

4.1   Introduction

As Chapter 3 indicated, globalization has demanded transformations in areas such as trade, investment, technology, communication and state sovereignty. It has offered opportunities to re-evaluate the global relationships between states, international organizations, transnational corporations and individuals. The contemporary wave of globalization has also compelled a rethinking about several issues: about the capacities and the obligations of the agents of globalization; about the meaning of poverty (or poverties); and also about the relationship between material poverty, economic development and the full panoply of human rights. It has also created opportunities for discussion relating to regionalization as a crucial means of both insulating states and individuals from the adverse effects of globalization and harnessing and channelling its positive effects: in short, better, conscious, active regional governance of globalization.

As reiterated at the conclusion of Chapter 3, formulation of effective strategies to combat all species of poverty required firstly the identification of the primary perpetrators. Chapter 3 identified the first source of problems as lying at the supranational level. At that level the "perpetrators" were shown to be the IFIs and TNCs, being the key public and private agents, respectively, of neo-liberal economic globalization. Chapter 3 illustrated how inopportune and imprudent

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[1] Peter Evans "Counter-hegemonic Globalization: Transnational Social Movements in the Contemporary Global Political Economy" in Thomas Janoski, Alexander M Hicks and Mildred Schwartz (eds) *Handbook of Political Sociology* (Cambridge University Press, New York, 2005) 422.

policy formulation by IFIs in the last 30 years, through the instrument of the SAPs in particular but also PRSPs, added to the endemic material poverty that denied the people their economic, social and cultural rights within the region. It also illustrated how the TNCs exploited the weak economic climate and poor governance of the region for profit, further exacerbating conditions of poverty and social exclusion. That discussion in Chapter 3 also touched on a second source of problems, namely the inadequate responses of individual states in both to rampant neo-liberal economic globalization and their mismanagement or abdication of management of their own economies and domestic affairs.

It is natural that thinkers have drawn the link between, on the one hand, the policies and actions of the global actors; and, on the other hand, the domestic responses to those policies and actions. These responses could be viewed as non-management, successful management and mismanagement. In this respect, Chapter 3 recognized the single most significant *positive* outcome of the IFI policy formulation was the Governance Related Conditionalities (GRCs). Though the GRCs are a furtive mechanism to ensure that the IFI policies have a conducive environment in which to flourish, they created opportunities in South Asia for public debate and discussion on issues such as corruption, democratic deficits and public accountability. Chapter 3 concluded with the observation that need-based policy formulation, democratic governance and control of the IFIs' and TNCs' activities should be the foundation of an effective mechanism that would eradicate poverty and foster human-centred development in South Asia.

In this transition between Chapters 3 and 4, it is timely to tie together several threads of argument that have now been individually teased out, just as the introduction to Chapter 3 wove together explicitly two threads of globalization: essentially *economic* globalization from Chapter 2 and the internationalization — one might equally say "globalization" — of *human rights* from Chapter 1. Taking this further, the three threads to be woven together in this chapter are human rights, development, and democracy. It has been adumbrated that there exists a nexus between these and indeed, effectively, they plait into a single cable, each gaining strength from the others. That cable will now be analysed.

Human rights are in many ways the most basic element of the cable. Not surprisingly, Chapter 1 identified them as the dominant and most powerful response to the universal quest to promote human dignity and solve the problem of poverty in its widest senses. Yet *development*, too, aims to remedy poverty and bring prosperity, and it, too, is surely a necessary condition for overall progress. Development connotes not only such *spontaneous* economic progress as simply happens to occurs via market mechanisms, but also the deliberate and wise *management*, channeling, stimulating, checking and co-ordination of economic interactions specifically aimed at fostering such economic progress, in particular by poorer states. This thesis observes that the ideal paradigm of development that should be strived for is not just the somewhat miserly and resigned hope of a (possibly non-existent) trickle-down to the poor that (allegedly) happens as a beneficial by-product of market forces, but the rosier picture and altogether bolder aspiration of the rising tide that lifts all boats. As such, development can be seen as a necessary means for, and a complement to, satisfying human rights. For development both answers basic material needs and offers new opportunities for ways to flourish and to express freedoms.[2]

Development is nevertheless not a *sufficient* condition for progress, because crude aggregates such as GDP growth risk mistaking greater expenditure or higher technology for ends in themselves, rather than means. They also risk ignoring both the issue of damaging and unsustainable growth (consider unsustainable environmental degradation) and the problem of growth whose fruits are inequitably distributed. Respect for rights (such as rights to equality of process and to some extent of outcome, and rights of future generations) serve at once to curb, channel and define development which otherwise might well become indiscriminate or inequitable, and which might all too easily leave the poor behind. Another way of saying this is that development must be "human-centred". In short, economic growth must serve people, not vice versa.

The third strand of this trio, intertwining with human rights and development, will be shown in the present chapter to be democracy. That word will be shorthand for,

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[2] Kofi Annan famously described the joint aspiration as that towards "larger freedom" and added another value, that of peaceful security. See Report of the Secretary-General In larger freedom: towards development, security and human rights for all.
<http://www.un.org/largerfreedom/contents.htm> (accessed 12 Feb 2008).

more specifically, a plural, tolerant, welfarist democracy, with regular elections from a universal franchise. In addition, it must operate under a thoroughly internalized and honoured rule of law, and be equipped with a strong, independent judiciary. Such specifications are necessary to distinguish the ideal conception of the term from usages of it that are really mis-usages. For instance, Pakistan's use of the term democracy is in reality a militarized executive, despite the existence of multiple political parties.[3] Sri Lanka and Bangladesh allow opposition parties to function in principle but in practice disable them by intimidation and accusations of corruption.[4] For instance after the Fourth Constitutional Amendment to extend the life of the Parliament, the President of Sri Lanka stated blatantly his aim to "demolish and completely destroy the opposition politically. After that I say to you, roll up the electoral map of Sri Lanka. You will not need it for another ten years."[5]

Once again, the three strands — human rights, development and democracy — reinforce and depend on each other. Democracy that disregards civil and political rights negates the very fundamental role of the concept, as much as democracy that ignores economic rights is of little benefit to the materially marginalized; and that which would deny social and cultural rights will ill adapt to groups' idiosyncratic needs and will stifle cultural expression. The right to self-determination is an implicit premise of a democratic state, as well as being a force in tension with splintering into smaller units that the state must negotiate and manage. As to the relationship between democracy and development, a democratic state benefits from development insofar as development multiplies the realizable freedoms and the well-being of people.

Three other strands of another whole category also need to be woven together at this pivotal point in the study. These strands are the national, regional and international/global responses to the problems of how to achieve the three aims just described: human rights, development and democracy. The "top" or global tier, includes attempts to render the structures, powers and actions of both IFIs

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[3] Aqil Shah "Democracy on Hold in Pakistan" (2002) 13 Journal of Democracy 67–75.
[4] Douglas Allen *Religion and Political Conflict in South Asia: India, Pakistan, and Sri Lanka* (Greenwood Publishing, Westport, USA, 1992).
[5] Priya Samarakone "The Conduct of the Referendum," in James Manor (ed.) *Sri Lanka in Change and Crisis* (Croom Helm, London, 1984) 86.

and TNCs answerable for violations of widely defined human rights. In the case of IFIs at least, the top tier also includes further infusing sincere rights consciousness into their mission and their policy formulation.

Considering the "bottom" tier next, this study reiterates the significance of the states themselves, who will remain key actors in creating, constituting, voting on and opting into both regional and global mechanisms. It will further be argued that states will remain the first — though not the only — repository of duties corresponding to human rights. Despite being weakened by the supranational and subnational forces mentioned in Chapter 1 and 2, and despite the redefinition of abridging of Westphalian sovereignty, it is only *all the more* necessary for states to effectuate plural, rights-based democracy and development inside their own borders through setting their own terms of engagement with globalizing forces.

Finally, the "middle" tier remains to be discussed — that of the region. The present study argues that regional integration of organizations to supervise human rights, democracy and development offers much unrealized potential. Too often overlooked, regionalism can rightly be seen as the pivot and potentially the place of most purchase over human rights and functional democracy. Regional organizations are more responsive to particular needs of culture and stage of development than are the global power bases. For the same reason, albeit put more pragmatically, the guidance, supervision and greater interventions by a regional body of states that come together in free association and on their own terms, are less easily rejected as inappropriate, ignorant or imperialist. Regionalism mediates between impossible and suffocating isolationism on one side (consider North Korea), implosion on another (consider the former Yugoslavia) and total submergence and defeatism in the face of global brute forces on another, as neo-liberalism, at its worst, claims is not only inevitable but desirable.

Chapter 4 thus picks up strands from above and focuses on two distinct but related aspects of the predicament of South Asia today. Firstly, picking up the strand of democracy from the trio of values discussed above (along with human rights and development), the chapter assesses the current health and functioning of the democratic apparatus in each of South Asia's states. The author discusses the

democratic deficit and poor governance in South Asia that exacerbates marginalization and endemic poverty in the region.[6] This chapter will focus on the nature of the democratic deficit in South Asia and its impact on the legitimacy of governance. It will analyse the legitimacy challenges that are faced by national governments across the region as they fail to deliver on the minimum expectations of the people they seek to govern. It will discuss the civil dissatisfaction that has taken on militant overtones and analyze this as a natural corollary to the contemporary IFI policy formulation and the impact of policy formulation on human rights. The study will focus on the necessity to create a normative stand on democracy and governance at a regional level as accepted norms of democratic governance are subverted nationally in South Asia.

Secondly, picking up on the third tier between globalism and nationalism, this chapter will also evaluate the efficacy of existing regional mechanisms in synthesizing the development efforts with strategies to realize human rights anddemocracy. In this context this chapter will analyse the inauguration, work and the impact of the South Asian Association for Regional Cooperation (SAARC), which is by far the most significant regional mechanism in the subcontinent. This study argues that the SAARC is ineffective and cannot deal with contemporary global exigencies that have a negative impact on South Asia. The present chapter concludes with the observation that an effective regime of human rights protection is dependent on mechanisms that ensure democracy and on sagacious policy formulation that addresses issues of human development.

4.2 Manifestations of democratic deficit in South Asia at the level of the state

The impact of globalization on South Asian states and the issues relating to diminished sovereignty were discussed in Chapter 2 of this study. The discussion also mentioned issues relating to Governance Related Conditionalities (GRCs),

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[6] See Chapter 3 of this study. See also HL Root *Small Countries, Big Lessons: Governance and the Rise of East Asia* (Oxford University Press, 1996) and Peter Larmour "Making Sense of Good Governance" Discussion Paper No. 98/5 Paper presented to staff and students State, Society and Governance in Melanesia Project, University of Papua New Guinea Council Room, Australian National University, Canberra, June 1998.

which were elaborated in Chapter 3 as a positive ramification of the globalization process. The relevance of good governance to development is highlighted by several international policy statements. These include the Millennium Declaration, which states, "Success in meeting these objectives [of poverty reduction] depends, *inter alia*, on good governance within each country."[7]

This section analyses the impact of globalization on democracy and democratic processes in South Asia. As Held et al. observed, "[g]lobalization is not an end state, or a single thing, any more than is democracy or industrialization. These are processes involving changing relations of human affairs."[8] In a similar vein this study observes that the role and function of democracy has changed in the face of neo-liberal globalization, creating a democratic deficit in South Asia at the level of the state.

The democratic deficit[9] challenges the legitimacy of the established governing structures and leads to civic dissent and militancy, which in turn create a sense of insecurity among political power holders. Ironically, in states which are currently in large part not receptive to the good ideas of the GRCs, that insecurity is simply compounded by the concepts of good governance imposed by the IFIs to enhance governments' political legitimacy, responsible governance and social equity.[10] The concept of good governance demands transparency, accountability and responsibility in governance and policy formulation, aspects which are currently non-functional in South Asian regimes. This study observes that governance procedures of South Asia at the state level are dominated by "[u]nsophisticated political institutions and procedures, weak governmental capacity, a strict

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[7] <http://www.un.org/millennium/declaration/ares552e.htm> (accessed 3 Mar 2006).
[8] David Held and Paul Hirst "Globalization after 11 September: The argument of our time" (2002) 22 Open Democracy (online) <www.globalenvision.org/library/66/528> (accessed 7 Nov 2007).
[9] The term "Democratic Deficit" was first coined by Bill Newton Dunn to indicate the lack of democracy within the institutional mechanisms of the European Union. See MR Dimitris and N Chryssochoou *Democracy in the European Union* 2000 (IB Tauris and Company, London, New York, 2000) 22–172 for a discussion of democratic deficit in relation to the EU. Chryssochoou explores the origin and nature of democratic deficit and identifies two parallel explanatory theses. The first is the declining significance of the parliamentary legislatures in the national governing processes, whose functions were being transferred to the structures of government in the EU. Second is the thesis that argues that the democratic deficit of the EU is endogenous due to the absence of a constitutional mechanism that answers issues of human rights, legislative representation and political responsibility. See also Christophe Crombez "The Democratic Deficit in the European Union: Much Ado about Nothing?" (2003) 4 European Union Politics 101–120.
[10] See Chapter 3 of this study and also Jean Grugel *Democratization: A Critical Introduction* (Palgrave Macmillan, London, 2001).

hierarchical relationship between the state and citizens/civil society, and especially the propensity of ruling parties in these countries to crave popular support without unsettling the *status quo…*" and that these are all impediments to effective implementation of good governance.[11] The inability of the rulers to disassociate themselves from illiberal governing practices compounds the democratic deficit in the region and undermines development and the realization of human rights. The democratic deficit manifests itself in several ways and the following paragraphs trace some of its manifestations in South Asia.

4.2.1 Disenchantment with the Offerings of Democracy in the Hunger for the Good Life

The post-independence political leaders of South Asia had a clear vision of the core and the content of development. Their idea of development was to create a people-centred concept, which aimed at ending the many impediments people were compelled to endure as a consequence of colonial occupation. Nehru's articulation of development at independence was a common aspiration of almost all the political leaders of the region:[12]

> "What is the Development of a Nation? You can use it in the limited but important sense of raising the standards of the people, better living conditions, the necessaries of life, etc., being provided for all the people … Obviously we want to develop on the material plane; we want to build up a society where it is open to every person to lead what might be called the Good Life."

As this study identifies, four decades later poor policy choices by national governments, reacting to global forces over which individual countries at least seemed to have little control, have exacerbated the pervasive poverty in South Asia and resulted in a denial of economic, social and cultural rights for people.[13] In fact, the search for Nehru's "good life" has gone awry and as a result:[14]

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[11] Habib Zafarullah "Globalization, state and politics in Bangladesh: Implications for democratic governance" (2003) 26 Journal of South Asian Studies 283–296.
[12] Excerpts from a speech delivered by Pandit Jawaharlal Nehru, Prime Minister of India, to the Ceylon Association for the Advancement of Science, 15 Oct 1962 <http://www.nsf.ac.lk/slaas/publications/Science June2001.pdf> (accessed 16 Sep 2005).
[13] "Poverty in South Asia 2006: Civil Society Concerns" <http://www.saape.org.np/resources/publications/poverty_report06/poverty_report06.htm> (accessed 5 Dec 2006).
[14] MN Venkatachaliah "There are some things of eternal verity" (2000) 17 Frontline <http://www.flonnet.com/fl1704/17040300.htm> (accessed 10 Feb 2008).

> Today we have the dismal situation of a social infrastructure where 670 million people in this country don't have basic sanitary facilities, and 260 million don't have potable water. Forty per cent of the world's tuberculosis patients are in India, 25 per cent of the world's blind are in India. Fifty per cent of the world's illiterates are in India. Fifty per cent of the world's leprosy afflicted are in India. …Then there is the issue of the enormous corruption in public life, electoral malpractices, the tyranny of wealth, and the insolence of authority. They have all made the life of the common man one of disenchantment with the institutions of democracy.

These conditions are mirrored in other parts of the subcontinent as well.

The inevitable corollary of neo-liberal globalization was the reduction in the role of the state in economic governance, creating a greater dependency on market forces to regulate the economy[15] This development resulted in a system of economic discrimination particularly in respect of land, employment and capital, and aroused discontentment among the economically marginalized segments of society. As reiterated in Chapter 3, there is a steady decline of delivery of public services throughout the region. Poor resource allocation for health and education by the government accentuates social fragmentation. Incidents of violence against women and children, such as dowry deaths, female infanticide, foeticide and the selling of children have intensified and are largely caused by economic deprivation.[16] The situation implies that the South Asian Parliaments and the executive organs have abdicated the constitutionally defined and allocated responsibilities of addressing issues of public welfare and at the same time overstepped constitutional limits on their proper powers. The result is not only the breakdown of constitutional governance but the denial of human rights often guaranteed through the Constitutions.

The absence of proper fora and means to address governmental inaction contributes to the discontentment of the people, prompting them to resort to extra-legal means to voice their concerns and challenge the governmental apathy and abuse. There is also a disturbing trend of people seeking redress through militancy, which creates enormous social and political repercussions including violent reaction by the governments, exacerbating the crisis of legitimacy of

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[15] This aspect has been elaborated in Chapter 3 of this study.
[16] V Shiva *Water War: Privatization, Pollution, and Profit* (South End Press, 2002) and Jayanti Patel "India: Gujarat riots - communalization of state and civic society" <http://www.mukto-mona.com/human_rights/gujarat/gujrat_riot_patel.htm> (accessed 25 Jun 2006).

governance in the region.[17] South Asia has seen many conflicts arising through people's sense of desperation and insecurity and these have expanded into conflicts of caste, religion, race and region, all of which are rooted in poverty and destitution.[18] State response to civil dissent is often brutal, and legal measures—such as India's Prevention of Terrorism Ordinance (POTO) 2002,[19] apparently inspired by the anti-terrorism laws of the USA and Britain;[20] the much earlier Sri Lankan Prevention of Terrorism Act 1979; Bangladesh's Suppression of Terrorist Offences Act 1992; Nepal's Terrorism Ordinance of November 2001; and Pakistan's Anti-terrorism (Amendment) Ordinance, 2002[21] — permit the concentration of power in the hands of the executive, rendering civil and political rights vulnerable to abuse by the state.[22] Such legislation also curtails the transparency and the accountability of the government regarding issues relating to terrorism and national security, which are traditionally regarded as secretive.

4.2.2   A History of Dysfunctional Organs and Failing States

Colonization brought the Western structures of governance to South Asia replacing what were the feudal structures of monarchical rule. Despite South Asia being home to the world's largest democracy (India) and having two of the developing world's oldest democracies (India and Sri Lanka), the region's general commitment to democratic governance is low.[23] The governing structures of the South Asian countries are a curious blend of democracy founded on federalism,

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[17] See Richard Falk "Responding to Severe Violations" in Jorge I. Dominguez et al. (eds) *Enhancing Global Human Rights* (McGraw-Hill, New York, 1979) 205, 226.

[18] Stanley Jeyaraja Tambiah *Levelling Crowds: Ethnonationalist Conflicts and Collective Violence in South Asia* (University of California Press, California, 1996); N Arunatilake, S Jayasuriya and S Kelegama "The Economic Cost of the War in Sri Lanka" (2001) 29 World Development 1483–1500.

[19] http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm (accessed 9 Feb 2008).

[20] Bjorn Hettene "South Asia and the War against terrorism" in Ravinder Kaur (ed) *Religion, Violence and Political Mobilisation in South Asia* (Sage Publications, India, 2005).

[21] <http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention_of_t errorism.htm> (accessed 9 Feb 2007).

[22] Radhika Coomaraswamy and Charmaine de los Reyes "Rule by emergency: Sri Lanka's postcolonial constitutional experience" (2004) 2 International Journal of Constitutional Law 272–295.

[23] India, Sri Lanka, Pakistan and Bangladesh have structures of formal democratic governance but with different degrees of political conflict. Nepal and Maldives have authoritarian regimes respectively where there is ongoing civil society agitation for democracy. Bhutan, a formal monarchy, is gradually absorbing features of democracy. Freedom in the World 2007. <http://www.freedomhouse.org/template.cfm?page=363&year=2007> (accessed 12 Feb 2008).

secularism and socialism, coupled with authoritarian rule, military dictatorships and monarchical rule that indicates strong leanings towards religious governance based on Islam, Hinduism and Buddhism.[24] In a region where cultural, religious, caste and race specificities play a pivotal role in politics, Western democracy and its accompanying political institutions have been synthesized with the sociocultural idiosyncrasies with a peculiar sense of functionalism.

Political rulers are traditionally regarded with awe and reverence in the subcontinent.[25] The prevalent political culture seemingly bestows upon the leaders an undisputed authority to rule. The ideas of limited and responsible government have neither penetrated sufficiently into the political fabric of these societies nor have they been internalized by the people they govern. Therefore, abuse of power in whatever form is the norm rather than the exception. "People may grumble in private about autocratic leaders but they still defer to them and often vote them back into power or acquiesce in their perpetuity."[26] In this context, an attempt to apply a Lockian articulation of the role and the purpose of government that gains legitimacy through the consent of the people in order to protect the rights of the people and promote the public good is essentially inapplicable.

The governments in South Asia are highly centralized, despite the federal structures within some states. Appurtenances of democracy — notably universal franchise and periodic elections, which were part and parcel of the colonial legacy, play a large yet empty part in civic life. Though principles of democracy and democratic institutions are enshrined prominently in the constitutions of all

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[24] Pakistan, Maldives and Bangladesh are Islamic states that tend to manipulate religious fervour for political advantage. Nepal is a Hindu state and Burma and Sri Lanka's Buddhist majority wield political influence. Issues related to religious intolerance were discussed in Chapter 2 of this study. See also Ayesha Jalal *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge University, 1995).

[25] See Paul Harrison *Inside the Third World: The Anatomy of Poverty* (Viking Press, 1993). Political dynasties in the region are a common phenomenon. Successive members in the same family such as Pakistan's Bhutto family, the Nehru-Gandhi family in India, and the Bandararanikes of Sri Lanka have been elected to power. Despite their political philosophies based on liberal democracy the members of the prominent political families appear to imagine that they have an inherited legitimate right in the governance process. Benazir Bhutto's will appointing her son as Chairman of Pakistan Peoples' Party is a manifestation of that belief: <http://news.bbc.co.uk/2/hi/south_asia/7164968.stm> (accessed 10 Feb 2008.) Similarly Rahul Gandhi is the fourth generation to enter into Indian politics. Rajiv Desai, the former Media Adviser of Indira Gandhi, commented, "There has been no [other] single family that has lived their lives for this abstract thing called the nation ……I think what they represent is sacrifice. That's their charisma and their enigma." <http://cnews.canoe.ca/CNEWS/World/2004/05/15/461134-ap.html> (accessed 2 Feb 2005).

[26] K Christie "Regime Security and Human Rights in South Asia" (1995) 43 Political Studies (Special Issue).

South Asian states, functional democracy is absent in the region. The facade of democracy is maintained through intervallic elections where people exercise their voting rights but have little influence on direction and formulation of policy, nor have any power to initiate proactive reforms. Despite claims of multiparty democracy, political parties rarely contest elections on genuine policy issues as votes are often cast on the basis of religion, caste and ethnicity. Elections are usually based on political rhetoric such as the creation of unattainable utopias like J.R. Jayawardene's quest to create a *dharmishta samajaya* ("just society") in 1977 in Sri Lanka, Indira Gandhi's *gharibo hato* ("remove poverty") in the 1976 general election, or Vijaypayee's "India shining" campaign in 2003, rather than comprehensive policy formulation.

The function and the role of the legislature as an organ of democratic government is also dysfunctional and perverted.[27] There exists a disturbing culture of an absence of political party loyalty and a lack of conviction of principles within elected Members of Parliament, which create potential defectors who contribute adversely to the insecurity of the governments in South Asia. In many countries the Cabinet is oversized, as the Cabinet office is created not on a needs basis but as a reward for political support.[28] This political culture, deriving from a lack of vision and commitment within political parties and the opportunistic way in which Members of Parliament design their agendas, undermines functional democracy. Kamal draws a realistic picture of the legislative incapacity of the Parliaments in South Asia when he says, "parliaments in reality are much less powerful than other organs of the government. People often take it as a 'house of controversy and irrelevant speeches'."[29] There is little confidence in the elected organ of the government to influence policy decisions or represent civil society's will.

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[27] Sumit Ganguly "India's Multiple Revolutions", Aqil Shah "Democracy on Hold in Pakistan", Howard B Schaffer "Back and Forth in Bangladesh" and Neil DeVotta "Illiberalism and Ethnic Conflict in Sri Lanka", all in the study "South Asia Faces the Future" (2002) 13 Journal of Democracy; S Kamal "Democratization and poverty alleviation in South Asia" Paper Presented at South Asian Regional Workshop on Democracy and Poverty: A Missing Link? Kathmandu, Nepal, 10-11 April 2000.

[28] JC Weliamuna Position paper on mega Cabinets, Transparency International Sri Lanka. < http://www.tisrilanka.org/e-library/papers/position-paper-on-mega-cabinets-in-sri-lanka> (30 Jan 2007).

[29] Ahmed Kamal Accountable Governance Democracy Forum 2000. South Asia Chapter 2 The Workshop was held in Kathmandu, Nepal 10, 11 April, 2000 (Centre for Studies on Democracy and Good Governance) see also Rehman Sobhan "South Asia's crisis in governance: Avoiding false solutions" in Khadija Haq (ed) *The South Asian Challenge* (Oxford University Press, Oxford, 2002).

As Ghai observes, "[t]he inherent tendency of economic globalization is to diminish democracy and to privilege market-oriented rights, reducing the importance and feasibility of social and solidarity rights."[30] Therefore, with the consolidation of economic globalization in the region and the IFIs undermining internal sovereignty, representative institutions in South Asia have gradually transformed into empty shells that exist for political convenience rather than for responsible governance.[31] The illiberal democracy, ineffectual representation, weak central governments and ineffective federalism which have dominated the political landscape since independence have succeeded in alienating the mechanisms of constitutional governance from the people.[32] The adoption of elaborate constitutional structures, but the total rejection of "the classical notion of constitutionalism", which Oketh-Ogendo describes in the African perspective, is also relevant in a South Asian context.[33]

Internalization of democracy in the region is uneven. Bhutan's historical isolation and the resulting lack of influence by Western liberal political ideology meant that political power was vested in the traditional monarchy, which has overwhelming public support within the kingdom. The governing structure in Bhutan consists of the *Tshogdu* National Assembly, which is regarded as the antecedent to an elected legislative body.[34] The ruling monarch, Jigme Singye Wangchuck, who is regarded as a political reformer, has completed a draft Constitution.[35] However, political change is slow in a nation where Rutland, commenting on the efficacy of swift political changes, observes: "[t]he grass-roots rural society is profoundly traditional, and religion too is deep-seated in the minds of the people. It is not

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[30] Yash Ghai "Human Rights and Social Development Toward Democratization and Social Justice" UN Democracy, Governance and Human Rights Programme Paper Number 5 October 2001; see also , Yash Ghai "Rights, social justice and globalization in East Asia" in J Bauer and D Bell (eds) *The East Asian Challenge for Human Rights* (Cambridge University Press, Cambridge, 1999).

[31] Rehman Sobhan "How Bad Governance Impedes Poverty Alleviation in Bangladesh" (OECD Development Centre Working Papers 143, OECD Development Centre, 1998).

[32] Neil DeVotta "Sri Lanka's political decay: Analysing the October 2000 and December 2001 parliamentary elections" (2003) 41Commonwealth and Comparative Politics 115–142.

[33] HWO Oketh-Ogendo "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in Issa G Shivji (ed) State and Constitutionalism: An African Debate on democracy. *South Africa Political Economy Series* (Southern Africa Printing & Publ. House 1991) 65–82.

[34] Thierry Mathou "Political Reform in Bhutan: Change in a Buddhist Monarchy" (1999) 39 Asian Survey 613–632.

[35] "Bhutan holds second 'fake' poll"<http://news.bbc.co.uk/2/hi/south_asia/6697309.stm> (accessed 7 Nov 2007).

surprising that development creates tensions between innovation and tradition …".[36] In this context, many analysts believe that the slow but steady transformation to democratic governance will be beneficial to Bhutan. If a consensus on democracy is reached within the regional association, as advocated in Chapter 6 of this study, it is unlikely that Bhutan will attempt to sabotage such a development.

The political experience of Sri Lanka provides an excellent example of continued ostensible commitment to structures of democratic governance which does not ensure peace and stability. Apart from the Westminster-styled constitutional structure that Sri Lanka inherited as a colonial legacy, Sri Lanka experimented with two other Constitutions, the last being a Gaullist-styled Presidential Constitution in 1978[37] which was designed to consolidate executive power. Liberal constitutionalism, which supposedly was expressed through each of the Constitutions of Sri Lanka, is designed to safeguard the interests of the multi-ethnic state. However, the actual manifestation of the Constitution is the consolidation of ethnic-based politics to the extent that the mainstream has criminalized the articulation of political rights based on ethnicity, which resulted in the further alienation of the ethnic minorities, who resorted to violence in order the obtain political power.[38] Subsequent attempts to introduce federalism through the constitutional structure did not resolve the political and economic insecurities of the minorities but in fact accentuated them.[39] Today, Sri Lanka has an elaborate constitutional mechanism that holds together a malfunctioning system of democratic governance. Unprecedented corruption is rampant in all spheres of political life and governance is increasingly violent.[40] Despite the

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[36] M Rutland "Bhutan: from the mediaeval to the millennium" 1999 Asian Affairs 284–294.
[37] AJ Wilson *The Gaullist System in Asia: The Constitution of Sri Lanka 1978* (Macmillan, London, 1980).
[38] A Jeyaratnam Wilson *The Break-up of Sri Lanka: Tamil-Sinhalese Conflict* (C. Hurst & Co, London 1988); A. Jeyaratnam Wilson *Sri Lankan Tamil Nationalism* (C. Hurst & Co. Publishers, London,1999); N Devotta Control Democracy, Institutional Decay, and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka (2000) 73 Pacific Affairs55–76.
[39] Frances Stewart & Meghan O'Sullivan "Democracy, Conflict and Development - Three Cases" (Working Papers qehwps15, Queen Elizabeth House, University of Oxford). <http://www3.qeh.ox.ac.uk/RePEc/qeh/qehwps/qehwps15.pdf> (accessed 12 Feb 2008).
[40] A Jeyaratnam Wilson *The Break-up of Sri Lanka: Tamil-Sinhalese Conflict* (C. Hurst & Co, London 1988); Radhika Coomaraswamy and Charmaine de los Reyes "Rule by emergency: Sri Lanka's postcolonial constitutional experience", (2004) International Journal of Constitutional Law 272–295; Neil DeVotta,. "Illiberalism and Ethnic Conflict in Sri Lanka" in the study "South Asia Faces the Future" (2002) 13 Journal of Democracy 84–98.

dysfunctionalism that is inherent in the constitutional apparatus, Sri Lanka has, however, indicated an enduring commitment to the processes of democracy.

Both Pakistan and Bangladesh[41] have had a tenuous relationship with democracy since independence.[42] Periodic intervention by the military in democratic governance has not assisted the consolidation of democratic values within the civil society. Ethnic violence, which negatively impacts on democratic governance, has become common in Bangladesh in recent years and most commentators agree that such violence is carried out with the tacit consent of the ruling party. During the 2001 communal riots against Hindus, "[t]he deliberate inaction of the state, and in some instances, active connivance with the attackers, also [made] it an instance of state sponsored violence".[43]

The sporadic interruptions of the democratic order by the military have contributed to the institutionalization of violence within the structures of the governments of both Pakistan and Bangladesh. The last military coup in Pakistan was justified as putting an end to the corrupt and non-effective government of Navaz Sharrif. As Mallik observes, "[t]his was rooted in a pervasive abhorrence for Sharif's second administration itself established in February 1997 following a massive electoral mandate. The optimistic view of the military takeover was premised on the drifting nature of Sharif's administration, lacking political stability, contrasted with unlimited desire to amass power and wealth".[44] When the Supreme Court validated the coup on the premise of "necessity", it created a precedent whereby legitimately elected governments can be replaced through unconstitutional means if they subvert democracy and the rule of law. Though Musharaff's promise to reintroduce legitimacy in governance and consolidate a constitutionally accepted system of government which is accountable and transparent appears to have provided sufficient legitimacy for the Supreme Court to uphold the legality of the coup, such precedents will undoubtedly create problems for democratic governance in the region, for they legitimize the

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[41] Bangladesh has had democratically elected governments since early 1991. See Habib Zafarullah "Globalization, state and politics in Bangladesh: Implications for democratic governance" (2003) 26 Journal of South Asian Studies 283–296.
[42] A Shah "Democracy on Hold in Pakistan" 2002 13 Journal Of Democracy 67–75.
[43] Ali Riaz *God Willing: The Politics of Islam in Bangladesh* (Rowman & Littlefield, Lanham, Maryland, 2004).
[44] Iftikhar H. Malik Military "Coup In Pakistan: Business As Usual Or Democracy On Hold?" (2001) 360 The Round Table 357–377.

unconstitutional gain of political power. Moreover, despite parliamentary elections in 2002, which reinitiated the democratic process, the army still continues to be the dominant influence on Pakistan's political sphere, an influence which, according to Ziring, will be an enduring feature of Pakistani politics despite the setback suffered by Musharaff in the recent elections.[45]

Furthermore, the situation in Pakistan has become more complex since 9/11/2001, where radical Islam has become a political force that challenges the fragile mainstream liberal ethos of South Asian governance. The overwhelming support of the USA towards Musharaff's government as a means of quelling radical Islamic activism in the region is viewed with scepticism by many who opine that the USA should do the opposite and pressurize Musharaff to consolidate and expand democracy, as "[d]emocratic reform that allows secular politicians to compete freely for power is more likely to reduce the influence of radical Islamists."[46]

Nepal's democratic structures of governance have been experiencing a legitimacy crisis for the past decade as the country grapples with the Maoist rebels, who are waging a "People's War";[47] an array of ineffectual political parties; and a monarch who has become increasingly authoritarian as a result of his impotency to deal effectively with the crisis of governance.[48] King Gyanendra has declared a state of emergency twice since he assumed the throne in 2001 and there have been severe restrictions placed on civil and political rights.[49] The popular uprisings against the monarch in April 2006, in Kathmandu and in other main cities, resulted in his reinstating the House of Representatives in Nepal, who have drafted a constitution heralding the end of monarchical rule and control in

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[45] Lawrence Ziring *Pakistan: At the Crosscurrent of History* (One World, Oxford, 2003). See also "Pakistan political turmoil mounts" <http://edition.cnn.com/2007/WORLD/asiapcf/09/17/ pakistan.petitions.ap/index.html> 17 Sep 2007 (accessed 20 Nov 2007); Farhana Ali "A Post-Musharraf Pakistan Policy" Washington Post March 7, 2008 <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/07/AR2008030702732.html> (accessed 8 Mar 2008).
[46] Hussain Haqqani *Pakistan: Between Mosque and Military* (Carnegie Endowment for International Peace, Washington, 2005); see also Stephen Philip Cohen *The Idea of Pakistan* (Brookings Institution Press, Washington, 2004).
[47] John Whelpton *A History of Nepal* (Cambridge University Press, Cambridge, 2005).
[48] Ibid.
[49] Marty Logan "Nepal: Day Curfew Follows Political Arrests" <http://www.ipsnews.net/news.asp?idnews=31845> (accessed 12 Dec 2006)

Nepal.[50]

Against this background of political turmoil and democratic dysfunction, 2005 saw a curious development with regard to India's view on democracy. India, which by far has the most stable democracy, appears to be taking on a lead role to foster democracy in the region. It increasingly appears that India is conscious of the lack of democracy in South Asia and the political and security implications of being surrounded by failed states. It is with an ambitious agenda that India's Foreign Secretary, Shyam Saran, declared that: [51]

> India would like the whole of South Asia to emerge as a community of flourishing democracies. We believe that democracy would provide a more enduring and broad-based foundation for an edifice of peace and cooperation in our sub-continent," but he added that democracy is "something that we may encourage and promote; it is not something that we can impose upon others.

These sentiments of democratic consolidation were again reiterated by the Indian Prime Minister when he addressed the UN General Assembly in September 2004. He was disdainful of the US policy on South Asia, particularly the political alliance with Pakistan's military government, and observed, "[w]e choose to overlook the absence of democracy in too many cases for reasons of political expediency."[52] India's stance on regional democracy was further highlighted when India decided not to attend the SAARC summit scheduled for February 2005, in Dhaka, due to the political situation in Nepal, and repeatedly requested the King of Nepal not to assume absolute powers, postpone elections nor sideline the political parties that demanded a return to democratic pluralism.[53] It was deemed by the Indian government that India's participation at the summit meeting with King Gyanendra would imply that India condoned the political situation in Nepal. The King, in turn, was keen to represent Nepal at the regional summit for it would have enhanced his legitimacy as the ruler of the mountain kingdom. While the media criticized India's decision to withdraw from the summit, the

[50] Michael Hutt "A Nepalese Triangle: Monarchy, Maoists And Political Parties" (2007) 38 Asian Affairs 12–22

[51] Foreign Secretary Mr. Shyam Saran's speech on "India and its Neighbours" at the India International Centre (IIC) New Delhi 14 February, 2005 <http://www.indianembassy.org/press_release/2005/Feb/3.htm.>(accessed 12 Dec 2006).

[52] Address by Dr. Manmohan Singh, Prime Minister of India, at the 59th Session of the United Nations General Assembly, 23 September, New York. http://www.indianembassy.org/pm/pm_un_sep_23_04.htm (accessed 12 Dec 2006).

[53] John Cherian "A summit in trouble" 2005 22 Frontline 12–25. http://www.frontlineonnet.com/fl2204/stories/20050225006113000.htm (accessed 6 Nov 2006)

decision indicated that India was reluctant to be identified as a passive observer of the political situation in Nepal. India's role as the democratic "watchdog" of South Asia was confirmed when the King assured Prime Minister Singh during during the SAARC Summit in November 2005, that he would hold elections in Nepal by April 2007.[54] He repeated this undertaking to the plenary session.[55]

As the above analysis indicates, the operation of democracy and its effects are not uniform in the region. The countries appear to be incapable of adhering to standards of democracy, yet the governing machinery continues to be manipulated for political expediency rather than being abandoned altogether. As much as the rapid phase of contemporary globalization has underlined the need for a viable mechanism to address and adjudicate violations or threatened violations of rights that occur as a direct consequence of the globalization process, a common standard of democratic governance and means to deal with democratic lapses on a regional scale is urgently required. The absence of such mechanisms has enabled national governments in the region to ignore the insecurities of the people, and by turns exploit the governing machinery for personal aggrandizement and/or cave in to global forces by imposing neo-liberal policy changes that intensify social and political discontent.

4.2.3   Political Insecurity of a Heterogeneous People

The contribution of the political map of South Asia — consisting of territorial units that were carved out of the *British Raj* in the middle of the last century — to the present political volatility of South Asia has been discussed before.[56] Along with practical problems of state demarcation, the ideological barriers resulting from the colonization era and the elitist sociopolitical dynamics, South Asia also inherited an extreme sensitivity to issues such as "unity", "security" and

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[54] "Singh tells Nepal king to restore democracy" Sujoy Dhar (IANS)
Dhaka, 13 November 2005
<http://www.hindustantimes.com/news/181_1544819,001301990000.htm.> (accessed 12 Nov 2006). These elections were postponed and are scheduled to be held in early 2008.
[55] Address from His Majesty Gyanendra Bir Bikram Shah Dev, King of Nepal, at the Thirteenth Summit of the Heads of State or Government of the South Asian Association for Regional Cooperation (SAARC)
Dhaka People's Republic of Bangladesh 12 November, 2005 <http://www.saarc-sec.org/main.php?id=168&t=7.1> (accessed 12 Dec 2006).
[56] See Chapter 2 and Urmila Phadnis and Rajat Ganguly *Ethnicity and Nation-Building in South Asia* (Sage Publications, London, 2001).

"territorial integrity".[57] The extreme preoccupation with these concepts by majority and minority communities in South Asia is regarded as a natural corollary of colonization according to Rajan Phillips, who observes: "[i]deas of nationalism and nationalist ideologies implanted during the colonial encounter have sunk roots in South Asia … generating, if not ersatz, certainly hybrid versions of nationalism."[58]

It is claimed that "South Asia presents as different political order and power structures as one seldom finds in any other geo-political region of the world".[59] This uniqueness stems from the region's religious, lingual, caste and ethnic heterogeneity, which was never formally accommodated within the governing structures of South Asia.[60] The sense of dislocation and the alienation felt by different ethnic groups through the failure to accommodate the diverse identities within the state structures has contributed to violent uprisings against the state in India, Sri Lanka, Bhutan and Nepal.[61] Saravanamuttu observes that the "problems of governance in South Asia stem in large measure from the failure to acknowledge the pluralism inherent in society through political and constitutional structures and the propagation of this value in the political culture. This gives rise to and sustains a crisis of legitimacy of the state."[62] Issues of ethnicity dominate the national political discourse in India, Sri Lanka, Pakistan and Bangladesh, but nowhere is the state presented as a neutral entity that addresses the grievances of the plural society it seeks to govern. Manipulation of the ethnic diversity for political gain is common.[63] There is evidence of tacit complicity by the

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[57] P Sahadevan "Ethnic Conflict And Militarism In South Asia" Kroc Institute Occasional Paper #16:OP:4 (Joan B. Kroc Institute for International Peace Studies, University of Notre Dame, June 1999).

[58] Rajan Phillips "Nationalism, Self Determination and Sri Lankan Ethnic Groups in Sri Lanka: Global Challenges and National Crisis" Rajan Phillips (ed) (Ecumenical Institute for Study and Dialogue and Social Scientists Association of Sri Lanka, Colombo 2001).

[59] Rajan Mahan "The Nature of South Asian Region: Assonant Affinities, Dissonant Diversities" in
Kaushik Mahan and Rampant (eds) *India and South Asia* (South Asian Publishers, New Delhi, 1991) 24-25.

[60] Maya Chadda *Building Democracy in South Asia: India, Nepal, Pakistan* (Lynne Rienner Publishers, London2000).

[61] See Chapter 2 above and also Stanley J. Tambiah "Presidential Address: Reflections on Communal Violence in South Asia" (1990) 49 The Journal of Asian Studies 741–760.

[62] Pakiyasothy Saravanamuttu "Pluralism, Democracy and Governance in South Asia: The case of Sri Lanka" in Ramesh Thakur and Oddny Wiggen (eds) South Asia in the World (UNU Press, Tokyo, 2004), see also Swarna Rajagopalan *State and Nation in South Asia* (London, Lynne Rienner, Bolder, Colorado, 2001).

[63] SWRD Bandaranaike's Sinhalese-only policy in 1956 and Indira Gandhi's political stance in Punjab, Assam and Kashmir in the 1970s are examples.

governments, in situations such as the incidents relating to ethnic genocide in Sri Lanka in 1983 and the Gujarati riots of 2003.[64]

The result of this legacy of political cataclysm is a culture of loose constitutional governance often by the political elite with intermittent exceptions of military rule or civilian dictatorships.[65] The political elite's allegiance in the past to the colonial rulers and now to the neo-liberal ideology espoused by the West and the IFIs is evident through the region. The manifestation of such allegiance is the wariness of the politicians of civil and political rights, such as freedom of expression, thought and assembly. The manipulation of national security laws to render the exercise of these rights meaningless, the detention of political dissidents without trial and the subversion of the rule of law are common in South Asia despite constitutional provisions guaranteeing human rights.[66]

The essential character of a democratic state is that it represents the majority view of its people, though safeguards exist against the abuse of power from a majoritarian thrust. However, in the context of heterogeneous South Asia, often the exercise of democracy results precisely in a tyranny by an ethnic or religious-based majority.[67] Recent elections in the region give evidence of this dangerous development of a tyranny by a majority. With the new threats and insecurities created by economic globalization, the ethnic and religious-based majority in the electorate responds to the new threats through circumventing the existing traditional safeguards for the protection of human rights of the minorities.[68] The enactment of legislation that circumscribes religious rights, the provision of state patronage to a particular religious/ethnic sector, the resolution of issues not through unbiased constitutional terms but through taking on board the concerns of

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[64] Neelan Thiruchelvam "Devolution and Ilusive Quest for Peace in Sri Lanka in Aaron Tsado Gana, Samuel G. Egwu (eds). *Federalism in Africa Framing the Question Vol 1* (Africa World Press Inc, Asmara, Eritirea 2003) 297-309; Upendra Baxi, "The Second Gujarat Catastrophe" (2002) Economic and Political Weekly, 3519–3531,< http://www.sacw.net/Gujarat2002/index.html> (accessed 10 Feb 2008).

[65] Sugata Bose and Ayesha Jalal *Modern South Asia: History, Culture, Political Economy* (Routledge, London 2003).

[66] Vitit Muntabhor "Asia Human Rights and the New Millennium Time for a Regional Human Rights Charter" 1998 Transnational Law and Contemporary Problems 8 411.

[67] Majoritarian politics in Sri Lanka has contributed to the creation of one of the most enduring armed insurgencies in South Asia. See A Jeyaratnam Wilson *The Break-up of Sri Lanka: Tamil-Sinhalese Conflict* (C. Hurst & Co, 1988); A Jeyaratnam Wilson *Sri Lankan Tamil Nationalism* (C. Hurst & Co. Publishers, 1999).

[68] Maya Chadda *Building Democracy in South Asia: India, Nepal, Pakistan* (Lynne Rienner Publisher, Bolder, Colorado, 2000).

the majority, and policy formulation that is biased towards the majorities are the manifestation of these insecurities.[69]

4.2.4   Challenges to the Legitimacy to Govern

It is easy to draw a comparison between the sociopolitical repercussions of neo-liberal globalization in South Asia today and Dani Rodrik's analysis of the financial crisis encountered by the developing world in the 1970s. Rodrik argues that the 1970s crisis was precipitated by the weak abilities of the domestic structures to weather the cataclysms of the world markets in the era of import substitution industrialization. It is Rodrik's diagnosis that the absence of "complementary institutions at home — in areas of governance, judiciary, civil and political liberties, social insurance, and … education" exacerbated the social cost of the economic downturn.[70]

The inhabitants of every state have minimum expectations of their state and government. These are legitimate expectations, which constitute "the irreducible duties of any ruling apparatus to its subjects, such that a failure to discharge these duties vitiates the legitimacy of the regime's assertion of authority."[71] In South Asia globalization and its many demands have rendered the governmental apparatus dysfunctional by failing to realise the minimal expectations of its people. As Jack Donnelly observes, "[t]he link between a regime's ability to foster development (prosperity) and the public's perception of the regime's legitimacy is close to a universal, cross-cultural political law. Whatever a ruling regime's sociological and ideological bases, its sustained or severe inability to deliver prosperity, however that may be understood locally, typically leads to a serious political challenge."[72] Across South Asia governments have fallen victim to this dilemma.

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[69] Rita Manchanda "Crisis of Minority Rights in South Asia" (2006) South Asian Journal <http://www.southasianmedia.net/magazine/journal/13_crisis-of-minority.htm > (accessed 10 Jan 2007).

[70] Dani Rodrik "Globalization, Social Conflict and Economic Growth" (1998) 21 The World Economy 43–158.

[71] Brad R Roth *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, New York, 2000) 21.

[72] Jack Donnelly "Human Rights, Democracy and Development" (1999) 21 Human Rights Quarterly 608–632, 609.

In South Asia, the political processes, electoral mechanisms, adjudication procedures and the welfare systems have not matured with the speed of the liberalization of the economy, the repercussion being that the benefits of liberalization have not percolated to the people. Implementation of SAPs resulted in the creation of a chain of accountability extending upwards from government upwards towards the IFIs resulting in a dysfunctional relationship between the state and society. Policy formulation is based on the will of the IFIs and TNCs rather than on the needs of the people. The consequence of this dynamic was a breakdown of the democratic process and the alienation of the people from the government's policy formulation, which contributed to a loss of legitimacy in the governing process.

The inadequate structures of governance have also failed to locate an economic growth agenda within the desired human-centred context. A lack of a policy formulation capacity and the absence of public-conscious policies indicate that the national policy makers are hostages of the IFIs' conditionalities. The result has been an "erosion of national sovereignty and [the contraction of] the ability of governments and people to make choices from options in economic, social and cultural policies."[73] For example, despite the obvious disadvantages and the financial hardships to the poor, the World Bank's Water and Sanitation Programme South Asia is continuing its schemes of privatizing water provision to the region.[74] "The proposal is to replace community rights and the common good with individual rights and the private interest. Under conditions of inequality, this implies that powerful individuals get exclusive access to the water commons through[the] water market. In effect, the Bank would like water monopolies instead of water democracy. In the case of irrigation, the World Bank report states, 'Here an approach which begins with acknowledgement of and respect for the private interests of individual farmers will be far more successful than approaches which resort to command and control, or ones based on a communitarian ideal.'"[75]

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[73] Martin Khor "Globalization and the South: Some Critical Issues" Discussion Paper No. 147 (United Nations Conference on Trade and Development, Geneva, 2000) 4.
[74] Lalitha Sridhar "Water: the Privatisation Debate" in India Together.org November 2003. <http://www.indiatogether.org/2003/nov/env-wtrdebate.htm> (accessed 17 Nov 2007).
[75] Vandana Shiva "India's Water Future" Z Net Daily Commentaries 3 November 2005. <http://www.zmag.org/sustainers/content/2005-11/03shiva.cfm.> (accessed 17 Nov 2007).

A further example of the Indian government's failure to formulate social policy to reflect grass-roots needs, which undermines the government's legitimacy to govern, is their failure to allocate sufficient funds for elementary education.[76] The result is that only 61 per cent of adults in India are literate compared with Sri Lanka's 90.4 per cent.[77] In line with Sen's[78] articulation of the capabilities approach to human development, Dreze and Sen identify education as a fundamental means of enhancing development, which has retarded in India due to injudicious policy formulation.[79] A series of public interest litigation cases, mass protests and an eventual Constitutional amendment that spanned almost a decade finally saw Constitutional recognition of compulsory free education at primary level.

The misplaced allegiance to the international donor community by South Asian governments and the reliance on IFIs for policy agendas has reduced the governments to stooges of the multilateral and bilateral donors. One commentator observes:

> "[i]n Nepal, one of the poorest countries of the world, development policy making is thus governed by two contradictory processes, the democratic process and the imperatives of foreign aid. The first requires development policies to be mandated by the people of Nepal; this is what the constitution of the land says. The latter is governed by the demands of the aid system as it operates domestically and internationally. The two processes are in conflict, causing many other contradictions and incongruities to emerge in the host country and aggravating progress in development management. In short, policies and programs are not implemented in a sustained manner, resources are not used effectively and efficiently, and corruption spreads."[80]

As much as there is a dependency upon external intellectual inspiration, within the government structures there is a dearth of sociopolitical aspirations, as genuine democratic representation has been stifled by the prevailing political culture.

According to the UNDP Human Development Report on South Asia for 2002, more than 515 million people, 40 per cent of South Asians, have experienced a

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[76] *Primary Education in India - Report* (Washington, World Bank, 1997) and JGB Tilak "Public Subsidies in Education in India" (2004) 39/4 Economic and Political Weekly 343–359.
[77] <http://hdr.undp.org/statistics/data/cty/cty_f_IND.html.> (accessed 5 May 2006).
[78] Amartya Sen *Development as Freedom* (Anchor Press, 2000).
[79] J Dreze and A Sen *India: Economic Development and Social Opportunity* (Oxford University Press, New Delhi, 1996).
[80] Devendra Raj Panday "Matching Democracy And Development Policymaking in an Aid-Dependent Country: An Illustration From Nepal" (2000) 4 Harvard Asia Quarterly 1–6.(Panday)

decline in their incomes over the last few years. The Report identifies that this decline is rooted in the "dislocation between Government and people."[81] The governments without exception have been unable to locate a development model that is both growth-oriented and human-centred. This scenario prompted commentators to dub the region "the most poorly governed region" in the world. [82]

A manifestation of the democratic deficit in South Asia is the inability to formulate regional/country-specific economic development strategies that reflect the needs of the people. "This democratic deficit is widespread in local, national and global economic policy-making — reflected in slum clearances that wantonly deprive people of housing, dams that flood houses and farms, budget allocations that favour water for middle-class suburbs rather than slums, logging that destroys the environment, oil wells that pollute fields and rivers from which people draw livelihoods."[83]

That lacuna of inspiration and drive for policy formulation and implementation is provided by the IFIs compelling the South Asian governments to function through policy agendas that are created by the IFI officials who have little knowledge of, or sensitivity to, local issues. The dilemma created by this ignorance is elaborated by Panday: [84]

> Ostensibly, governance agenda incorporates issues and programmes for enabling the state as well as selected civil society actors. However, the legitimacy of the state as an embodiment of representative institutions in charge of the country's constitutional mandate suffers on both counts. First, for the state, donors are now more than mere providers of aid. They are 'partners', who can autonomously take initiatives for reforming the host institutions within the recipient society. The institutions to be reformed may include anything from the parliament, the judiciary, and the political parties at the centre to the elected local bodies in the districts and villages. On policies, the tendency of major donors to promote homogenised thinking and standard practices, irrespective of the stage of development of a country, makes this situation more critical for the host institutions.

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[81] Mahbubul Haq Human Development Centre *Human Development in South Asia 2002: Agriculture and Rural Development* ((Oxford University Press, Oxford, New York, 2003).
[82] Mahbubul Haq Human Development Centre *Human Development in South Asia 2000*; Rehman Sobhan "South Asia's Weak Development: The Role Of Governance" <http://www.eias.org/publications/briefing/1999/weakdev.pdf.pdf.> (accessed 23 Jun 2006).
[83] UNDP *Human Development Report 2000* (Oxford University Press, Oxford, New York, 2000) 8.
[84] Panday, above n 80, 1.

Historical reasons also play a vital role in the developing countries being subservient to the prescriptions of a dominant paradigm. As has been discussed in Chapter 1, the generation of politicians who took over political power from the colonial rulers were all educated in, and had close links to, colonial Britain. They were a generation of local elites who emulated the colonial political, economic and value systems. Kothari observes that these ruling political elites and their political and ideological links to the colonial rulers have also contributed largely to the failure to formulate a viable alternative paradigm of development.[85]

As the above analysis indicates, South Asia's political situation is at a critical juncture, which is exacerbated by the economic and social dilemmas that face the region. South Asia is unable to grapple with the challenges of population explosion, poverty and deprivation, social exclusion, rapid urbanization and environmental degradation caused by ill-conceived development ideology. With more than one fifth of the globe's population concentrated in the subcontinent, the issue of effective governance is both a challenge and a necessity. The impact of abysmal governance is borne by the chronically poor, marginalized people who face hardships due to anti-poor policies, market-located priorities and inadequate institutions. In fact, the region can be characterized in terms of ineffective political parties, ineffectual national governments, alienated national parliaments with an impotent civil society who are unable to counteract the abhorrent policy formulation of the IFIs.

4.2.5 Inadequate Public Consultation in Policy Formulation Resulting in a Mismatch of Expectations.

The principle of public participation directly or through representative democracy is an integral aspect of the Western liberal democratic tradition. With the global expansion and consolidation of liberal democracy this principle has been accepted as a prerequisite of national policy formulation and the decision-making process, for it is a true indication of the efficiency of representative democracy.[86] The

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[85] Rajni Kothari *Poverty: Human Consciousness and the Amnesia of Development* (Zed Books Ltd, London and New Jersey, 1995).
[86] The principle has been discussed as an imperative of human development in the UN's

following analysis illustrates the stalling of the operation of this principle in South Asia.

There was no formal consultation between the people of South Asia and the policy makers about the introduction of the neo-liberal economic policy replacing the previous political dogma of import substitution industrialization. Perhaps the nearest political consultation in the context of South Asia was the Sri Lankan Elections in 1977 where the United National Party (UNP) election manifesto, *A Programme of Action to Create a Just and Free Society,* included a pledge to end the economic stagnation of the previous rule.[87] However, the post-election open economic policies failed to deliver the prosperity they promised and in turn contributed towards irresponsible governance. The dictates of the World Bank and the IMF were such that the government's "own" policy choices undermined the government's legitimacy in the eyes of the electorate. The SAPs also stole the bargaining power people had gained through the people-based movements, such as unions and cooperatives, while consolidating the corresponding power of foreign investors and international institutions.[88] Dunham and Jayasuriya provide a succinct account of the transformation: [89]

> In the 1970s, Sri Lanka was widely considered a peaceful and stable democracy with an impressive record of human development by developing country standards. Today, it is a country plagued by violent social and ethnic conflicts, massive and pervasive corruption, weak and ineffective government, and widespread civil and human rights abuses. Despite a promising start, even the economic performance has fallen well below expectations. Civil war and military expenditures have escalated. Public support for the government has waned; there is growing disillusionment with political leadership across the whole political spectrum and a perception of increasing social exclusion and inequality.

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discourse on development; see United Nations Development Programme *Human Development Report 2002,* "Deepening democracy in a fragmented world" (Oxford University Press, Oxford, New York, 2003) 51–61.

[87] John Martin Richardson, Paradise Poisoned: Learning about Conflict, Terrorism, and Development from Sri Lanka's Civil Wars (International Centre for Ethnic Studies, Kandy, Sri Lanka 2005) 341.

[88] David Dunham and Sisira Jayasuriya "Liberalisation and Political Decay: Sri Lanka's Journey From Welfare State to a Brutalised Society" (Working Paper 352, ORPAS - Institute of Social Studies - P.O. Box 29776 2502LT The Hague - The Netherlands, October 2001).

[89] David Dunham and Sisira Jayasuriya "Economic Liberalisation and Socio-Political Decay: A Case Study of Sri Lanka" <http://www.devstud.org.uk/publications/papers/conf01/conf01dunham.doc.> (accessed 16 Aug 2005).

As a result, a vital part of national decision-making on social and economic policies had been transferred to multilateral aid organizations and foreign policy institutions, which created policy without taking into account the local reality or exigencies.[90] Therefore the Washington Consensus had severe implications beyond the economic realm. In so far as that dynamic alienated the people within the state from the governing process, the effects of the policies that were implemented caused severe hardship to the common people. The government failed to realize that the requirement was for an effective state and not a minimalist state as the IFIs desired. Due to the minimalist approach to governance, democracy as a governing mechanism soon became dysfunctional and the survival strategies of the vulnerable began to include ethnic and religious mutinies and crime, which soon transformed into violent militancy against the state.[91] As observed by Thede, "[w]e know that even in established democracies globalization is leading to the development and aggravation of a democratic deficit, characterised amongst other things by the erosion of legislative oversight of policy decisions at the national level … ."[92] Therefore it is vital that public consultation processes remain active through the democratic process in the developing economies where fundamental policy changes that affect the social, political and cultural life of the people are initiated and implemented.

Furthermore, the initiation of policy is often devoid of a sense of equity or fairness, which creates mistrust and resentment towards the democratic governance process. The power retained by governments for policy implementation is exercized arbitrarily and discriminatorily politicizing the liberalization measures as well as the free market ideology. In particular, policy development in relation to trade, privatization and tariffs often appeared to be arbitrary and, in the words of Cuthbertson and Athukorala, "[t]he greatest policy failure was not to apply a policy of gradual (even very gradual) overall reductions to this new set of tariff-only barriers. Instead, the government fine-tuned the

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[90] See generally R van der Hoeven and L Taylor "Structural adjustment, labour markets and employment: Some considerations for sensible people" (2000) 36 Journal of Development Studies 4.

[91] The issue is discussed in greater detail in Chapter 3 above but also see D Ghai (ed) *The IMF and the South: The Social Impact of Crisis and Adjustment* (Zed Books, London, 1991).

[92] Nancy Thede *Democratic Development 1990–2000: An Overview* (International Centre for Human Rights and Democratic Development, 2002)<http://www.ichrdd.ca/english/commdoc/publications/demDev/ddOverview10Years.html> (accessed 8 Feb 2008).

tariffs on a discriminatory basis. It would have been much better to have taken further across-the-board measures. This was apparently judged to be politically impossible."[93] The same authors also argue that, in the case of Sri Lanka: [94]

> much of the fine tuning … was aimed at saving the monopoly position of certain public corporations, for example, tyres, chemicals, paper, and pharmaceuticals … Imports of grapes, chillies and onions grown in the Jaffna peninsular by Tamil farmers were liberalised, while paddy and potatoes grown predominantly by Sinhalese farmers remained protected. Favored state enterprises (that provided 'jobs for the boys') were also kept outside the liberalisation effort, running bloated wage bills and attracting large fiscal transfers."

The diminishing of governmental responsibility in relation to economic policy formulation has also affected areas such as infrastructure development and ecological planning. These reform policies have worsened interregional disparities,[95] eroded the ecological environment[96] and created a situation where previously self-sufficient economic systems have collapsed and are now dependent on external aid or debt.[97]

Similarly, privatization of state-owned enterprises and other publicly owned assets, such as land and housing, which has been an integral component of neo-liberal economic reforms, has been done haphazardly. The justification for privatization has been that public ownership of assets is inefficient because it distorts incentives, hampers resource allocation and impedes innovation. In addition, it is alleged that state-owned enterprises are a drain on public resources and a source of rent-seeking and corruption. However, the evidence on the impact of privatization on efficiency has been generally unconvincing.[98] In some cases,

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[93] Andrew G Cuthbertson and Premachandra Athukorala, "Liberalizing Foreign Trade: the Experience of Sri Lanka" in AM Choksi, M Michaely and D Papageorgious D (eds) *Liberalizing Foreign Trade: The Experience of Indonesia, Pakistan and Sri Lanka* (Basil Blackwell, Oxford, 1990) 287–428.
[94] Ibid.
[95] R Nayyar *Rural Poverty in India: an analysis of inter-state differences* (Oxford University Press, Bombay, New York, 1991).
[96] An example is that at Eppawala in October 2000.
<www.himalmag.com/oct2000/features.html#The%20Eppawal%20example> (accessed 23 June 2005);
see John Cavanah and Jerry Mander (eds) *Alternatives to Globalization* (Berret-Kehler Publishers Inc., San Francisco, 2004) 112; Pranay Lal and Veena Jha Judicial Activism and the Environment in India Implications of Transnational Corporations (Occasional Papers 6 UNCTAD/CBS Project).
<www.cbs.dk/departments/ikl/cbem> (accessed 2 Nov 2005).
[97] Shiva, above n 16.
[98] See Chapter 3 of this study.

efficiencies can be improved without changing ownership of assets.[99] The exclusion of civil society from the decision-making process in such critical situations as disposal of public assets increases the alienation between governments and civil society, aggravating the dysfunctionality of the conventional democratic mechanisms.

The above analysis highlights several manifestations of democratic deficit in South Asia. Individual countries have not been successful in overcoming the defects of the democratic processes or reinstating functional democracy. There are no swift methods of dealing with democratic lapses, as evidenced by Pakistan and Nepal. Restoration of democracy is always time-consuming and has a significant social cost. Concepts of sovereignty and territorial integrity, which are ardently defended by all countries in the region, and endorsed by Article 2.1 of the SAARC constituting document,[100] have prevented ad hoc assistance in instances of interruptions to democracy by other countries in the region. It is in this context that this study reiterates the significance of creating a permanent mechanism that addresses issues of democratic lapses at a regional level.

4.2.6   The Embryonic Civil Society

Civil society is a term that is increasingly gaining significance in relation to human rights, development and democracy both nationally and at global level. Its historical roots are attributed to Hegel's theorizations of the concept.[101] The notion of civil society presupposes that the society is capable of organizing itself to promote its interests and aspirations through legitimate constitutional means. Varshney locates the definition of civil society "to that space which (1) exists between the family, on the one hand, and the state, on the other, (2) makes interconnections between individuals or families possible, and (3) is independent

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[99] Hulya Dagdeviren and Ben Fine "Privatization in the Asia-Pacific" Draft thematic summary on privatization for the Asia-Pacific Regional Programme on the Macroeconomics of Poverty Reduction, 2004.
[100] Charter of the South Asian Association for Regional Cooperation <http://www.saarc-sec.org/main.php?id=10&t=4>(accessed 17 Nov 2007).
[101] For a historical account see Adam Seligman,The Idea of Civil Society (Princeton University Press, Princeton, 1992).

of the state."[102] He further qualifies the notion with the observation that "the civic space be organized in associations that attend to the cultural, social, economic, and political needs of the citizens; and that the associations be modern and voluntaristic, not ascriptive."[103] The effectiveness of civil society is conditional upon the political environment, for "[c]ivil society means democratic culture, which is based on equality, justice, tolerance and pluralism and the willingness of the individual to accept divergent views. On the one hand, civil society stands for the established rule of law, on the other hand it means the broad development of autonomous institutions, i.e. institutions which are not run by the state, vested interests or by donors, but which act as agents of the will of the people."[104]

The civil activism of the people in South Asia, stemming from the desperate need to garner a better deal through governance, has a long history dating back to the British Raj when Gandhi mobilized civil society in his quest for *swaraj* (self rule).[105] Since then peasant, tribal, Dalit, backward castes, women, students, workers' movement and many others have mobilized themselves to express dissent against the status quo. These groups have entered the political arena transcending orthodox societal distinctions and influencing the political process.

Opinion is divided on the success of civil societal activism. Some claim it appears vibrant and a potent force that harbours the potential to contribute positively to socioeconomic and political transformation. In the context of India, despite the high levels of illiteracy and poverty, Sarkar observes that "India still retains a capacity to surprise external observers: the enthusiastic participation in elections even (and often particularly) by many of the poorest, for instance, or the quality of roadside conversations about politics."[106] There is also evidence of sustained social activism in particular areas, such as public interest litigation, and local non-governmental organizations, but South Asia is still behind the point at which such activism is likely to transform into a sustained force that impacts on political

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[102] Ashutosh Varshney "Ethnic Conflict and Civil Society: India and Beyond" (2001) 53 World Politics, 362–398, 366.
[103] Ibid. 366.
[104] Simi Kamal "Democracy and Poverty: A Missing Link? Democratisation and poverty alleviation in South Asia" Paper presented at the Democracy forum, 2000, South Asian Regional Workshop, Kathmandu, Nepal 10, 11 Apr 2000.
[105] JPS Uberoi, "On Civil Society" in N Jayaram *On Civil Society: Issues And Perspectives* (Sage Publications, New Delhi, London, 2005) 67–89.
[106] Summit Sarkar "Indian Democracy the Historical Inheritance" in Atul Kohli (ed) *The Success of India's Democracy* (Cambridge University Press, Cambridge, 2001) 30.

outcomes, as the civil society in the classic sense is still at an embryonic stage in the region.[107]

Others also observe that civil societal activism is still in varying embryonic stages and in itself is a privileged method of expressing concern and dissent in South Asia, for "civil society [is] bourgeois society … restricted to a small section of culturally equipped citizens [it] represents."[108] Chaterjee views India to be an "exclusive" state that does not regard all of its people as "citizens", for; "Most of the inhabitants of India are only tenuously, and even then ambiguously and contextually, rights-bearing citizens … They are not, therefore, proper members of civil society and are not regarded as such by the institutions of the state."[109] To the critics such as Chaterjee, therefore, the civil society in South Asia by definition is not an inclusive entity representing all of its people.

Civil societal activism is not always directed against the governments alone, and South Asia has many examples of social mobilization against the discriminatory and inequitable features of the society as well as against specific ideologies.[110] Presently the civil societal involvement in influencing the process of governance or policy formulation in South Asia remains marginal largely due to the absence of specific fora to express civil societal concerns. In the context of contemporary globalization, where the strength and capacity of the state has diminished, civil society has the capacity to act as a critic especially in the context of challenging policy formulations relating to development. Mobilization of civil society to implement evidence-based advocacy in relation to developmental projects that have an impact on traditional livelihoods, ecology and rural agriculture will be a valuable force in transforming the trajectory of contemporary development drives.

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[107] Ponna Wignaraja and Akmal Hussain *The Challenges in South Asia Development, Democracy and Regional Cooperation* (Sage Publications, New Delhi, 1989); Rehman Sobhan and M Rahmatullah Role of Civil Society Organizations in Influencing The Policy Discourse in Bangladesh EGM on Engaged Governance for Pro-Poor Policies — South–South Cooperation Colombo, Sri Lanka, 9–11 Dec 2003. <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN013182.pdf> (accessed 27 Mar 2006).
[108] Partha Chaterjee "Democracy and the Violence of the State: A Political Negotiation of Death" (2001) 2 Inter-Asia Cultural Studies 8–10.
[109] Ibid 8–10.
[110] Ghanshyam Shah *Social Movements in India a Review of the Literature* (Sage Publications, New Delhi, 1990).

Quadir traces the newly emerging trend of "regionalism from below" in South Asia which he describes as a coalescing of a plethora of civil societal organizations from the South Asian region on issues that have a particular relevance to the region, particularly alternative agendas for development and security. Quadir specifically explores the viability of establishing a "new social order" through "regionalism from below".[111] However, he concedes that despite widespread support for the civil society groups in South Asia it is unlikely that they would emerge as the creators of an "alternative form of human society in the region".[112]

The regional praxis advocated in Chapter 6 of this study details specific means of harnessing civil societal concerns and views. The new regional praxis can be an effective forum to highlight regional civil societal concerns which would strengthen the "new concept of citizenship in South Asia that transcends existing ethnic, religious, political and cultural divides".[113]

This thesis maintains that human rights, democracy and development maintains a symbiotic relationship and the above analysis indicated that poor governance and absence of a culture of democracy has contributed significantly to the entrenchment of the structures of poverty in South Asia. The lack of legitimacy in the governments and the disillusionment of the people in the procedures of democracy have resulted in fostering militant tendencies within society. As much as there is a need for the creation of a normative supra national structure that honours the commitments towards human rights and equitable development strategies, there is also a call for the establishment of normative standards on democratic governance at regional level which will ensure the democratic functions are maintained nationally without jeopardizing the rights of the people.

4.3   The Opportunity for a Regional Mechanism

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[111] Fahimul Quadir "Civil Society and Informal Regionalism in South Asia: The Prospects for Peace and Human Security in the Twenty First Century" in James J Hentz, Morten Bøås (eds) *New and Critical Security and Regionalism: Beyond the Nation State* (Ashgate Publishing Ltd., UK, 2005) 113 –126.
[112] Ibid 125.
[113] Ibid 125.

As evidenced in the previous discussion, South Asian governments are largely ineffective and lack the capacity to make appropriate, viable development policy choices. There are no feasible mechanisms available either nationally or within the region to challenge poor, unviable policy decisions that are made by national governments, and very limited judicial fora are available to challenge such choices. There is no impetus nationally or regionally to promote economic policy that fosters social integration and that advocates emancipation for the millions who are trapped in the cycle of poverty.[114] There is no demand for democratic structures to be reformulated so that they not only foster market integration and the promotion of the economy but create an environment that would integrate the marginalized segments of society into the mainstream developmental process. Experience has shown that none of the countries in the region can realistically advocate for a fundamental change to the contemporary trajectory of globalization in isolation, even though collective efforts to challenge the course of globalization have also been only partially successful elsewhere in the world.[115]

Integration into global markets necessarily implies the end of isolationism for the countries in South Asia and it is this momentum that led to the creation of the South Asian Association for Regional Cooperation (SAARC). Regionalization has provided effective means of promoting trade and economic cooperation between countries in Europe, Asia and in the Americas. Regional cooperation on issues such as security, peace and human rights is also increasing.[116] The next few paragraphs will consider the efficacy of the SAARC as a regional mechanism and whether it can deal with the exigencies that have arisen as a corollary of economic globalization.

4.3.1   South Asian Association for Regional Cooperation — an *In*opportune Response

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[114] Oliver Mendelsohn, Marika Vicziany *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge University Press, Cambridge,1998).

[115] The more successful examples of defining their own terms of engagement with economic globalization are the EU and the ASEAN. These and less successful counterparts are discussed in detail in Chapter 5 of this study.

[116] Chapter 5 of this study will analyse the success of regional mechanisms other than SAARC, particularly in creating common standards in relation to democracy, political accountability, human rights and development.

Despite the civilizational similarities of the polities in the region, and in spite of being a geopolitical entity which shares many problems stemming both from a common colonial past and from adverse global economic conditions, South Asia's constituent parts avoided moves towards regional integration until the beginning of the 1980s. The SAARC was established when its Charter was formally adopted on 8 December 1985 by the Heads of States or Government of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.[117] Although the organization was created two decades ago, if one makes a quick appraisal of the SAARC against the objectives listed in its Charter, the regional arrangement has been a resounding failure.[118] Its most significant accomplishment is its nonchalant survival, for the mechanism united seven countries with apparent civilizational similarities yet deeply entrenched divisions in terms of religion, ethnicity, political affiliations and a variety of bilateral issues.[119] Therefore, although the SAARC has failed in terms of achieving its Charter objectives, it has succeeded in creating an overarching institution that has brought together a diverse group of countries and fostered a common relationship that has endured for two decades, proving that there is at least some fertile ground for a more effective regional alliance as will be advocated later in this thesis.

4.3.2   Historical evolution of SAARC

The idea of a regional unit, especially in terms of economic and political concerns, is not a concept that is alien to the region of South Asia, which emerged from British colonial rule less than six decades ago.[120] The effort to restore the economic union, which had functioned in the India-Pakistan subcontinent before it achieved independence in 1947, had been advocated by some at the time of

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[117] <http://www.saarc-sec.org/main.php?id=76&t=1 > (accessed 2 Feb 2006). Afghanistan became the 8th member of SAARC on the 13 Nov 2005. See note 2 of the Introduction to this study as to the exclusion of Afghanistan from this study.

[118] Article I of the SAARC Charter <http://www.saarc-sec.org/data/docs/charter.pdf> (accessed 2 Feb 2006).

[119] Lowell Dittmer ME Sharpe (eds) *South Asia's Nuclear Security Dilemma: India, Pakistan, and China* (2005); Stephen P Cohen *India: Emerging Power* (Brookings Institution Press, 2001); Strobe Talbott "Dealing with the Bomb in South Asia" [March/April 1999] Foreign Affairs; Craig Baxter et al. *Government and Politics in South Asia* (Westview Press, USA, 2002) (Baxter et al.).

[120] Haider A Khan and Zulfiqar Larik "Globalization and Regional Co-operation in South Asia: A Political and Social Economy Approach" (CIRJE F-Series CIRJE-F-480, CIRJE, Faculty of Economics, University of Tokyo, 2007).

independence or soon thereafter.[121] However, the bitter aftermath of the partition between India and Pakistan and the ensuing mutual distrust, the overt political domination of Nepal by India and other bilateral yet contentious issues between Bangladesh, Pakistan and India stalled any sort of a regional union for a long time.[122]

The contemporary global economic climate that is dominated by balance of payments issues, protectionist measures, growing debt and stagnant development — issues that concern the poorer regions of the world — have in fact been accentuated by the creation of regional blocs elsewhere in the world.[123] The impetus to integrate regionally is fuelled by the dominant paradigm's preoccupation with the notion that "[e]conomic regionalisation is the key to economic success in the next century and beyond."[124] The tendency to "integrate", a term that broadly encompasses a variety of sociopolitical, economic and cultural issues through the common bond of geographical proximity, is a growing phenomenon,[125] and the success of regional organizations based on particularly economic considerations is self-evident, considering for instance the North Atlantic Free Trade Agreement (NAFTA), the European Union (EU) and the Association of Southeast Asian Nations (ASEAN). However, the composition and the degree of the regional unions can differ from organization to organization ranging from economic unions to customs unions or to a lesser degree of multilateral preferential trade agreements.

The quest for regionalism is part emulative, part defensive, and it maybe also be pre-emptive of other areas forming their own blocs. The SAARC is only too aware of the significance of regional co-operation in the face of globalization.

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[121] See SA Reza, A Wadhwa et al. *Regional Economic Cooperation in Asia: Bangladesh, India, Pakistan, Sri Lanka* (Allied Publishers Private Limited, New Delhi, India, 1984).
[122] For a historical account see Sundeep Waslekar "Track-Two Diplomacy in South Asia" ACDIS Occasional Paper International Center for Peace Initiatives Bombay, India, Research of the Program in Arms Control, Disarmament, and International Security, University of Illinois at Urbana-Champaign Second Edition October 1995 and Eric Gonsalves and Nancy Jetly (eds) *The Dynamics of South Asia: Regional Cooperation and SAARC* (Sage Publishers, New Delhi, 1999).
[123] Kanhiya Lal Chawla *Economic Cooperation among developing countries (with special reference to SAARC)* (RSBA Publishers, Jaipur, 1991).
[124] M Dutta *Economic Regionalization in the Asia-Pacific: Challenges to Economic Cooperation* (Edward Elgar Publishing Ltd, London UK, 1999).
[125] Moazzen Hussain, Iyanlur Islam, Reza Kibra *South Asian Economic Development: Transformation opportunities and challenges* (Rutledge, London, New York, 1999) 145.

Noting the primacy of poverty reduction/elimination in SAARC, the Secretary General has reiterated that:[126]

> "In this increasingly globalizing world, I believe the relevance of regional groupings is ever important. The challenges emanating from globalization can be overwhelming for smaller and less equipped countries. They are often unable to take advantage of the opportunities afforded by globalization. Therefore, regional cooperation remains the mainstay of their response mechanism to globalization. In this context, both SAARC and ASEAN are striving hard to face the new economic and political realities."

Globally the changes in political dynamics of the past 20 years, particularly the collapse of the Soviet Union, the reunification of Germany and the parallel democratization of other European states from the former communist Eastern Bloc, have obliterated the need to create sub-global unions based on political convictions, yet have highlighted the need for regional arrangements for the surveillance and reinforcement of democratic governance. The recent developments in Europe, the Americas and Africa support this position.[127]

In the South Asian context, the idea of a regional mechanism was most ardently advocated in the early 1980s by the late President of Bangladesh, Ziaur Rahman, who was a zealous believer in the value of regional cooperation in dealing with issues of international relations, economy and security. The regional political climate at that time, particularly the combination of personalities forming the heads of states in the region, the rather unstable security situation such as the aftermath of the Soviet invasion of Afghanistan in 1979, the assurance of economic assistance for multilateral cooperative projects such as the sharing of waters of the Ganges and Brahmaputra by both the USA and the UK, and the intellectual inclination to believe that regional corporation would enhance development in the region were some of the reasons for Rahman's urging for a regional cooperation.[128]

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[126] "Recent Developments in SAARC and Future of SAARC-ASEAN Cooperation" Statement of the Secretary-General of SAARC Mr. Q.A.M.A. Rahim at the ASEAN Secretariat 20 January 2004 <http://www.aseansec.org/saarc_speech_printable.htm>(accessed 10 Feb 2008).
[127] See Chapter 5 of this study.
[128] Kishore C Dash "The Political economy of Regional Cooperation in South Asia" (1996) 69 Pacific Affairs <http://www.mtholyoke.edu/acad/intrel/dash.htm > (accessed 5 Jun 2005).

Therefore, the evolution of the SAARC was primarily a response to the domestic political, security and economic exigencies of the South Asian countries.[129] Cheema in his analysis for the raison d'être of SAARC observes that: [130]

> [u]nlike North Atlantic Treaty Organization (NATO), Warsaw Pact, South East Asian Treaty Organization (SEATO), and Central Treaty Organization (CENTO), which were products of a desire for collective efforts against perceived threats, SAARC was born as a collective response to a desire for a regional organization that could facilitate cooperation and promote economic interaction among the regional countries.

Rather than security concerns SAARC concentrated more on co-operation relating to socioeconomic and cultural development of the South Asian people.[131] The SAARC creators also harboured long-term ideas of creating a tariff free region for the movement of capital, people, goods and services,[132] emulating the EU.

When the SAARC was formally established in 1985, the regional initiative was regarded as an opportune response to the common economic, social and political problems that were besetting the region at the time and a mechanism also for capturing positive synergies.[133] This was acknowledged in the Dhaka inaugural summit [134] when the:

> … Heads of State or Governments acknowledged that the countries of South Asia, who constituted one-fifth of humanity, were faced with the formidable challenges posed by poverty, underdevelopment, low levels of production, unemployment and pressure of population compounded by exploitation of the past and other adverse legacies. They felt that, bound as their countries were by many common values rooted in their social, ethnic, cultural and historical traditions, regional cooperation provided a logical response to these problems. They were conscious of their individual and regional strengths, their potential as a huge market, their substantial human and natural resources and the complementarities of their economies. They were confident that with effective regional cooperation, they could make optimum use of these capacities for the

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[129] SD Muni and Anuradha Muni *Regional Cooperation in South Asia* (National Publishing House, New Delhi, 1984).

[130] Pervaiz Iqbal Cheema "SAARC Needs Revamping" in Eric Gonsalves and Nancy Jetly (eds) *The Dynamics of South Asia: Regional Cooperation and SAARC* (Sage Publications, New Delhi 1999) 93.

[131] M Iqbal "SAARC – problems and prospects" (1992) 11 Regional Studies 35–62.

[132] MJ Vinod "Regional organizations for trade and security: SAARC, ASEAN, APEC" in CS La Rue, LI Rudolph, SH Rudolph and P Oldenburg (eds) *The India Handbook* (Fitzroy Dearborn, Chicago, 1997) 242–252.

[133] For an historical account see Pran Chopra "SAARC and Asymmetry Issue" in Ponna Wignaraja and Akmal Hussain (eds) *The Challenge in South Asia: Development, Democracy and Regional Cooperation* (Sage, New Delhi, 1989) 326–343.

[134] First SAARC Summit Dhaka Declaration paragraph 7. <http://www.mofa.gov.bd/13saarcsummit/1stummitdeclaration.html>(accessed 2 Feb 2006).

benefit of their peoples, accelerate the pace of their economic development and enhance their national and collective self-reliance. They were convinced that their countries, which had made important contributions to the enrichment of human civilization, could together play their due role in international relations and influence decisions which affected them.

The structure and the ideological outlook of the SAARC were essentially based on the ASEAN. However, drawing inspiration from other regional mechanisms would have been more pertinent to the SAARC in terms of the issues that came within its purview. When tracing the history of the creation of the SAARC, Khatri observes that "[t]he propensity of South Asian bureaucrats to draw largely from the ASEAN example may be due partly to the convenience and partly to the failure to scrutinize the experiences of other third world regional organizations which may be more relevant for the subcontinent."[135] Khatri goes on to assert that functionalism was not a consideration at the stage of creation for multilateral political agendas played a more predominant role in the establishment of the SAARC. He acknowledges that there are limitations in following that path for even " …ASEAN as a regional organization has yet to epitomize the success of regionalism worthy of emulation. ASEAN shows some lustre today not because it has succeeded in contributing to the development of its member countries, but because the growing prosperity of the South-East Asian region in general has sustained its image ...". The preoccupation with the notions of achieving economic prosperity through regionalism convinced the SAARC to focus on the ASEAN as a model although it would have been more rewarding to emulate other regional institutions that focussed on human development and common problems of the region rather than aim for a "more grandiose goal of an economic or political union."[136] Two decades after the creation of the SAARC a successful economic union is as yet an unattainable utopia for South Asia as experience shows that economic prosperity forms a critical pre-condition for such success.[137]

4.3.3   The SAARC and Democracy

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[135] Sridhar Khatri "A decade of South Asian regionalism: Retrospect and prospect" (1992) 1 Contemporary South Asia 5–9.

[136] Ibid.

[137] Ibid. To Khathri this is the reason for the failure of some other regional experiments in the developing countries such as the Latin American Free Trade Association (LAFTA) and the East African Common Market (EACM).

The SAARC's attitude towards democracy, which is apathetic, is symptomatic of the region's dilemma in relation to democracy. The SAARC Charter, which highlights the principles of "sovereign equality, territorial integrity, national independence, non-use of force, non-interference in internal affairs of other states and peaceful settlement of all disputes", is resolutely silent on the issue of democracy.[138] At the inception of the organization the inclusion of the above principles into the Charter defined the extent of the cooperation which was regarded as crucial to the viability of the organization. The formulators of the SAARC Charter stipulated that the member states were to adhere strictly to the notions of "non-interference in internal affairs of other states", which precluded member states from making queries as to the state of human rights or democracy, which undermine the government's legitimacy at national level.[139] Yet the precise issues of human rights and democracy have been identified earlier in the present chapter as two of three central strands (along with development) which this study aims to plait into a strong metaphorical cable for their mutually beneficial and necessary achievement. The exclusion of democracy from the SAARC Charter indicates the lack of significance attached to the concept regionally and the reluctance of the member states to take a collective stance on an issue which is relegated into the realm of "internal affairs" of individual states.

Crucially, within the last two decades, the global perception of democracy has changed, altering the principle of non-intervention according to the former Secretary General of the UN:[140]

> [t]he principle of democracy is now universally recognized. The right of all people to take part in the government of their country through free and regular elections, enshrined in Article 21 of the Universal Declaration of Human Rights, is not peculiar to any culture … . Certainly, the record shows that democratically governed states rarely if ever make war on one another. But even more important, in this era of intra-state wars, is the fact that democratic governance — by protecting minorities, encouraging political pluralism, and upholding the rule of law — can channel internal dissent peacefully, and thus help avert civil wars … . Thus democracy offers us a double promise — as an agent of peace as well as liberation.

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[138] SAARC Charter <http://www.saarc-sec.org/data/docs/charter.pdf> (accessed 2 Feb 2006.)
[139] Padmaja Murthy "Role of Smaller Members in the SAARC Forum" (1998) 22 Strategic Analysis: A Monthly Journal of the IDSA 8.
[140] UN Secretary-General Kofi Annan (Untitled speech to the Community of Democracies, Warsaw, 27 June 2000)
<http://www.un.org/News/Press/docs/2000/sgsm7467.htm> (accessed 3 Nov 2005).

The discussion of the interdependence of plural, tolerant democracy, human rights and development preceding the body of the present chapter sketched the same capacity of plural democracy under the rule of law as a force of both liberation and facilitation of human rights. Kofi Annan's words just quoted add a fourth virtue to the trio of democracy, human rights and development: namely, peace, both intra-nationally and internationally. Peace synergizes with the other three qualities, and is often invoked as a parallel aspiration.[141] Elsewhere Annan himself has also described how human rights as encapsulated in the UDHR have been linked to democracy, when he reiterated the UN position on democracy and the evolving global norm of democratic governance, asserting that:[142]

> The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, enunciated the essentials of democracy. Ever since its adoption, it has inspired constitution-making in every corner of the world, and it has contributed greatly to the eventual global acceptance of democracy as a universal value. The right to choose how they are ruled, and who rules them, must be the birthright of all people, and its universal achievement must be a central objective of an Organization devoted to the cause of larger freedom.

As foreshadowed by that earlier discussion in this study, democracy as a form of governance indeed has a universal appeal for its inherent capacity for the promotion of rights and freedoms, human development — and peace.[143] Taking the link between human rights and democracy one step further, there are many authoritative assertions of a "right to democracy"[144] and through sustained state practice and universal acceptance it is fast becoming a "normative rule of the international system".[145] Although, from the stand-point of Sen, the universal legal norm asserting a right to democracy is unclear, he nevertheless argues that during the twentieth century, "democracy became established as the 'normal'

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[141] One is reminded that essentially the same authors of the UDHR also expressed at the very opening of the Preamble to the Charter of the United Nations their determination to "save succeeding generations from the scourge of war"; a pledge followed in the immediate next breath by their equal determination to "reaffirm faith in fundamental human rights" <http://www.un.org/aboutun/charter/> (accessed 10 Feb 2008).

[142] Kofi Annan "In larger freedom: towards development, security and human rights for all" (*Report of the Secretary*-Genera,l United Nations General Assembly Fifty-ninth Session, A/59/2005, 21 Mar 2005) <http://www.un.org/largerfreedom/contents.htm> (accessed 8 Feb 2006) 38.

[143] Robert Dahl *On Democracy* (Yale University Press, New Haven, Conn, 1999).

[144] James Crawford "Democracy and International Law" (1993) 64 Brit YB Int'l L 113; Larry Diamond, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press, Baltimore, Md., 1999); Roland Rich "Bringing Democracy Into International Law" (2001) 12 Journal of Democracy 20–34.

[145] Thomas M. Franck "The Emerging Right To Democratic Governance" (1992) 86 The American Journal of International Law 46–91 (Franck).

form of government to which any nation is entitled — whether in Europe, America, Asia or Africa … in the general climate of world opinion, democratic governance has now achieved the status of being taken to be generally right." [146] According to Frank, democracy has also become a rule of legitimacy in two respects, in that "governments recognise that their legitimacy depends on meeting the normative expectation of the community of states", and that the international community's expectation is that "those who seek validation of their empowerment patently govern with the consent of the governed."[147]

Michael McFaul is more confident in acknowledging the existence of a democratic norm in international law but is less sure about the norm of promoting democracy, though he concedes that there is widespread support for such practice, which is spearheaded by the USA. "The legitimacy and practice of external actors promoting democracy has grown … The community of democratic states has accepted the legitimacy of [democracy] promotion. In fact, within this community, the normative burden has shifted to those not interested in advocating democracy promotion; they are the state leaders who must explain why they are not doing more to advance democracy's cause worldwide."[148]

It is by drawing strength from this international political climate that there is increased emphasis placed on democracy by the other regional mechanisms whose positions on democracy will be elaborated in Chapter 5 of this study. For instance, the European Union is "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."[149] Entry into the European Union is conditional upon establishing democratic governing structures at national level.[150] Therefore, both the old established states and the new states of Eastern Europe have attempted to consolidate both constitutional and institutional

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[146] Amartya Sen "Democracy as a Universal Value" (1990) 10 Journal of Democracy 3. <http://www.journalofdemocracy.org> (accessed 17 Oct 2007).

[147] Franck, above n 145. For the articulation of the contractarian theory of government starting in Enlightenment European thought, see Chapter 1 of this study where it discusses Hobbes and, more especially, Locke and Rousseau.

[148] Michael McFaul "Democracy Promotion as a World Value" (2004) 28 The Washington Quarterly 147–163 <http://pages.zdnet.com/plm/id154.html> (accessed 5 Mar 2006).

[149] Article 6 of the EU Treaty <www.eurotreaties.com/amsterdamtable.pdf> (accessed 8 Feb 2007).

[150] Article 49 of the EU Treaty; see also Frank Schimmelfenning "The Community Trap: Liberal Norms, Rhetorical Action and the Eastern Enlargement of the EU" (2001) 55 International Organization 47–80.

structures to strengthen democracy in order to gain membership of the EU. Traditionally, states seeking membership of the EU gain admission to the Council of Europe (CoE), which is an intergovernmental organization distinct from the EU. As will be elaborated in Chapter 5, the entry into the Council of Europe is dependent on establishing democratic governance at national level.

As the discussion in Chapter 5 will also elaborate, the Organization of American States (OAS) has been remarkable in asserting the obligation to promote democratic governance in that region.[151] In fact, the OAS has played a pivotal role in persuading authoritarian governments in the region to adopt a democratic approach to governance. The OAS Charter was the first of its kind to proclaim a right and duty of the following type: "the people of the Americas have a right to democracy and their governments have an obligation to promote and defend it." The OAS Charter further states in its preamble that "representative democracy is indispensable for the stability, peace and development of the region" and that one of the essential purposes of the OAS is to "promote and consolidate representative democracy, with due respect for the principle of non intervention."[152] The Washington Protocol to the OAS Charter stipulates that a state's membership of the OAS is conditional upon its democratic governance. Further, Article 9 of the Protocol enables the OAS to suspend the membership of a state which has reverted back to authoritarian rule and thus violated the principles of democracy.[153] Fostering of democratic governance and the protection of internalized democratic ethos in emerging democracies is now regarded as an obligation of the OAS.[154] Therefore in the Americas the principle of "non intervention" has been modified to impose democracy, albeit overtly.

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[151] See Chapter 5 of this study.
[152] Charter of the Organization of American States Article 2(b).
<http://www.oas.org/juridico/English/charter.html> (accessed 8 Feb 2007).
[153] Washington Protocol Article 9 "A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established. The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful."
<www.oas.org/juridico/english/Sigs/b-46.html> (accessed 5 Mar 2006).
[154] Juan Mendez "The Inter-American System of Protection: Its Contributions to the International Law of Human Rights" in Samantha Power and Graham Allison (eds) *Realizing Human Rights: Moving From Inspiration to Impact* (St. Martin's Press, New York, 2000) 111–142.

As detailed in Chapter 5, the (British) Commonwealth Association, of which five members of the SAARC are also members, has a strong commitment to democracy and good governance. During the past decade the Commonwealth has devised unique mechanisms to maintain democracy within the member states and any violation of the Harare Declaration of Democracy is met with strong disapproval of the Commonwealth Ministerial Action Group on the Hararer Declaration (CMAG), as General Musharaff of Pakistan has realized several times in recent years.[155]

Despite the acclaimed positive nexus between democracy and development[156] and the developing international normative standards regarding democracy, the SAARC Charter, unlike the constituting documents of the EU, OAS or the African Union (AU), is silent on the issue of democracy. The SAARC's collective position on democratic governance is dubious despite individual assertions of commitment by Heads of States or through state practice.[157] Of the SAARC member states, India and Sri Lanka have had a continued history of constitutional governance since independence. Pakistan[158] and Bangladesh both have had sporadic interruptions of military governments with Bangladesh presently ruled by a "democratically" elected government in name only. Nepal's political landscape is dominated by an authoritarian monarch, a Maoist guerrilla movement, ineffective political parties and a helpless yet deeply disgruntled civil society. Bhutan's government, which is a traditional Buddhist monarchy, has been making tentative overtures towards constitutional democracy only in the past

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[155] Commonwealth Ministerial Action Group Statement on Pakistan (Foreign and Commonwealth Office, London, 13 Nov 2007) <http://www.britainusa.com/sections/articles_show_nt1.asp?d=0&i=60063&L1=0&L2=0&a=473 13> (accessed 5 Jan 2008); Ian Talbot "General Pervez Musharraf: saviour or destroyer of Pakistan's democracy?" (2002) 11 Contemporary South Asia 311–328.

[156] Joseph Siegle "Developing Democracy Democratizers' Surprisingly Bright Development Record" (2004) 26 International Trade <http://hir.harvard.edu/articles/1236/1/> (accessed 25 Feb 2006); and see Jean Dreeze and Amartya K Sen *India: Development and Participation* (Oxford University Press, Oxford 2002).

[157] Baxter et al., above n 111; Richard C Crook and James Manor *Democracy and Decentralisation in South Asia and West Africa: Participation, Accountability* (Cambridge University Press, Canbridge 1998); Ayesha Jalal *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge University Press, New York, 1995); Atul Kohli, Jan Breman, GP Hawthorn, Ayesha Jalal, Patricia Jeffery, Dharma Kumar (eds) *The Success of India's Democracy* (Cambridge University Press, Cambridge, 2001).

[158] Larry Jay Diamond "Is Pakistan the (Reverse) Wave of the Future?" (2000) 11 Journal of Democracy 91–106.

three years.[159] The Maldives' facade of democratic political governance conceals an authoritarian regime that severely curtails the civil and political rights of the people.[160]

While internal and bilateral issues have been strictly outside the agenda of SAARC meetings, Nepal's unilateral assurance of a commitment to democracy has added a new dimension to the role and purpose of the SAARC in the region.[161] As a prelude to this development both Pakistan and India were not opposed to engaging in informal bilateral discussions outside SAARC meetings at the 12th SAARC Summit at Pakistan in 2004. These developments, though minor, are significant for they indicate the way the SAARC is heading. Despite General Musharaff's questionable democratic credentials, he has reiterated the need for an amendment of the SAARC Charter, for "[w]ithout desirable peace there could be little progress in the region. Bilateral differences must be resolved in the SAARC on the basis of justice and fair play."[162] He repeated at the 12th SAARC Meeting that "we must expand the SAARC Charter to discuss bilateral issues at regional level. If we fail, cynicism will take over."[163]

The SAARC Charter envisions the goals of the organization to be the acceleration of economic growth and the promotion of social and cultural development through collaborative efforts in various fields of activity across the region and through collective self-reliance of the region,[164] while reiterating South Asia's commitment to respect "the principles of sovereign equality, territorial integrity, national independence, non-use of force and non-interference in the internal affairs of other states and peaceful settlement of all disputes."[165]

As successive Summit Declarations have reiterated, the enhancement and consolidation of socioeconomic development is the fundamental purpose of the

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[159] Harald Nestroy "Bhutan: The Himalayan Buddhist Kingdom" (2004) 38 Asian Affairs 338–352.
[160] Freedomhouse Country Report Maldives.
<http://www.freedomhouse.org/template.cfm?page=251&year=2007> (accessed 5 Jan 2008).
[161] See text at note 55.
[162] Sultan Shahin "… As Well As Something Concrete" *Asia Times* (Hong Kong, 8 Jan 2002)
<http://atimes.com/ind-pak/DA08Df02.html> (accessed 5 Oct 2005)
[163] "Stage set for better relations" *The Tribune* (Chandigarh, India, Monday, 5 Jan 2004)
<http://www.tribuneindia.com/2004/20040105/main2.htm> (accessed 5 Oct 2005).
[164] Appendix F
[165] Appendix F

SAARC. It is with this view that the inaugural summit at Dhaka in 1985 approved the Integrated Programme of Action (IPA) that was formulated during the first Foreign Ministers' Meeting of the SAARC in August 1983, two years before the formal establishment of the body. The IPA created Technical Committees in nine areas, which were intended to coordinate activities of the specific areas within the region in the spirit of regional cooperation.[166]

4.3.4   SAARC and Human Rights

In relation to the commitment towards human development, the SAARC has identified several areas for cooperation and initiated several treaties related to the areas above.[167] Member countries have already signed several conventions on narcotics,[168] combating trafficking in women and children for prostitution, and the promotion of child welfare and poverty alleviation. Several agreements have also been signed on Food Security.[169] In this sense the SAARC has reached a general consensus on a variety of issues that has enormous potential to evolve into an effective scheme for human development. However, these schemes are yet to move on from a norm-creating stage to the next stage of binding obligations and implementation.

As regards poverty, the SAARC created the independent South Asian Commission on Poverty Alleviation, which is mandated to evolve policies and strategies of implementation on poverty eradication, social mobilization, rural

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[166] The areas were agriculture, rural development, meteorology, telecommunications, scientific and technical co-operation, heath and population, transport, and sports, arts, culture.

[167] SAARC Regional Convention on Suppression of Terrorism (signed in Kathmandu on 4 Nov 1987) and Additional Protocol (signed in Islamabad on 6 Jan 2004); SAARC Convention on Narcotic Drugs and Psychotropic Substances (signed in Male on 3 Nov 1990); SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution. (signed in Kathmandu on 5 Jan 2002); SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia (signed in Kathmandu on 5 Jan 2002); SAARC Plan of Action on Poverty Alleviation. The Plan of Action on Poverty Alleviation was recommended by the Third Meeting of the SAARC Finance/Planning Ministers on Poverty Alleviation (Islamabad, 8–9 Apr 2002) and was approved by the Twelfth SAARC Summit (Islamabad, 4–6 Jan 2005).

[168] Arabinda Acharya and Amitav Acharya "Human Security in Asia: Conceptual Ambiguities and Common Understandings" <http://www.yorku.ca/robarts/archives/chandigarth/pdf/acharya_delhi.pdf> (accessed 17 May 2005).

[169] The Food Security arrangement came into force in 1988 and since then a food reserve has been accumulated for emergencies. The Food Security Reserve Board to administer the reserve has been a failure and now at the 12th SAARC Summit a concept paper to establish a Food Bank had been proposed. <http://www.saarc-sec.org/main.php?t=2.13.2.> (accessed 20 Apr 2006).

agriculture and human development.[170] The Commission on Poverty Alleviation is also entrusted with the responsibility of evaluating the impact of the open economy and structural adjustment strategies pursued by the SAARC member countries. Unfortunately, like most initiatives of the SAARC, the work of the Commission has failed to have a positive impact on reducing regional poverty.[171] South Asian human rights activists are increasingly realizing the great truth in Falk's assertion that "[available] research strongly suggests that most Third World countries possess the resources to eliminate poverty and satisfy basic human needs if their policy makers were so inclined."[172] This sits well with Kothari's analysis of the poverty in India that it is a "poverty among plenty",[173] and therefore implicitly remediable by wiser and fairer stewarding of available resources. There is also a general consciousness and growing resentment that avenues available for meaningful regional collaboration on human development are disabled by poor and unaccountable governance at national level.[174] Individual governments are increasingly pressurized by activists to put aside bilateral resentments and insecurities and to move forward towards a regional initiative for the protection of human rights.[175]

The impetus and the need for a regional mechanism on human rights has been expressed in the various human rights fora in South Asia for the past twenty years. Despite the existence of the capacity to create a regional human rights mechanism through the SAARC, the lack of political consensus and regional insecurities that hampered the successful implementation of the SAARC manifesto have also hampered a regional initiative on human rights. The SAARC has not adopted a human rights charter, nor has it envisaged, let alone realized, the creation of an institution or mechanism to monitor effectively the adherence to and the

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[170] Bishwa Keshar Maskay "Poverty Alleviation and SAARC Social Charter Perspective and Issues in Regional Cooperation" Institute of Foreign Affairs 1 Apr 2003 <http://www.ifa.org.np/article/article9.php> (accessed 13 Jan 2006).
[171] Ranabir Ray Choudhury "An exercise in make-believe" <http://www.blonnet.com/2005/01/03/stories/2005010300560900.htm> (accessed 20 Apr 2006).
[172] Richard Falk "Responding to Severe Violations" in Jorge I. Dominguez et al. (eds) *Enhancing Global Human Rights* (McGraw-Hill, 1979) 225.
[173] See the opening quotation of the Introduction to this study.
[174] Chandra Jayaratne "Sri Lanka Country Note Promoting Regional Integration in South Asia: A Private Sector Perspective" *South Asia Regional Integration* <http://siteresources.worldbank.org/INTSOUTHASIA/Resources/SriLanka-Final.pdf> (accessed 3 Mar 2006).
[175] Madhavi Basnet **"**South Asia's Regional Initiative on Human Rights" (1997) 4 Human Rights Brief Washington College of Law, American University.

implementation of various international human rights conventions, charters and treaties to which the member states are parties.

Nonetheless, against this background the SAARC Social Charter was adopted in the 12th Summit in Islamabad in 2004.[176] Despite the assertion in the SAARC Charter that the organization's objective is to promote the welfare of the people in the region, an initiative towards a Rights Charter was not contemplated until the 1998 SAARC Summit in Colombo. Formulated by an Inter-Governmental Group of Experts, the Social Charter was a tentative attempt at creating a set of principles relating to ESC rights at regional level. There was little preparation in terms of public consultations from stakeholders, such as NGOs, human rights activists or civil society, prior to the creation of the Charter. Such consultations would have perhaps avoided its obvious shortcomings. In many respects the member states were ignorant of the colossal commitment they had undertaken when signing the SAARC Social Charter in January 2004. By no means is it an exhaustive enumeration of social and economic rights. In fact, there are many shortcomings and inadequacies in terms of both the rights contained in the Social Charter and implementation mechanisms. However, the Charter has contributed immensely to the establishment of normative standards on ESC rights in the region,[177] revitalized the stagnant collaborative/regional initiative and provided a valuable and a necessary impetus to challenge the mainstream development ideology at a time when the region is in dire need of such an initiative.

Theoretical assertions of the core and content of poverty eradication have been elaborated from global policy to national initiatives but pragmatic implementation mechanisms are slow to evolve within the developing world. The best working mechanism that addresses issues of social and economic rights as well as poverty issues on a regional basis is the European Social Charter.[178] The African Charter on Human and Peoples' Rights 1981[179] and the American Convention on Human

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[176] <http://www.infopak.gov.pk/saarc/charter.htm> (accessed 3 Mar 2006).
[177] This is a significant achievement in light of the fact that only five countries of the seven SAARC members have signed the ICESCR (Pakistan only in Nov 2004). Bhutan and Maldives are not parties to the ICESCR.
[178] <http://www.europarl.eu.int/comparl/libe/elsj/charter/chapter_4_en.htm> (accessed 5 Dec 2006).
[179] <www.unicri.it/.../legal_framework/docs/african_charter_on_human_and_people_s_rights_27_june_1981.pdf - > (accessed 5 Dec 2006).

Rights of 1969, and its Protocols of 1988 and 1990[180], also offer valuable insights into the formulation of social and economic rights and to the processes of implementing those rights. At national levels, both the Indian Constitution and the South African Constitution provide valuable insights into innovative judicial methodologies of implementing social and economic rights.[181] The South Asian Social Charter needs to draw on the experiences of these mechanisms to create a viable structure to implement the rights enshrined in the Charter.

4.3.5   The Strategic Significance of the South Asian Social Charter

Despite its weak structure, especially in relation to the implementation process, the Social Charter is a document with enormous potential not only in the context of human rights but as an effective weapon in the fight against poverty. However, the Charter's intrinsic worth lies in its potential to form the foundation of the bulwark against the neo-liberal global order.

In theoretical terms the South Asian Social Charter[182] appears to be an assertion of the classical ESC rights, although it does not directly refer to the rights that are the subject matter of the ICESCR. In contrast, it takes on a pragmatic approach regarding the burning issues of the region such as poverty alleviation, health, education. human resource development and youth mobilization, promotion of the status of women, promotion of the rights and well-being of the child, population stabilization and drug addiction rehabilitation and reintegration, which essentially come within the purview of the rights enshrined in the international covenant .

The development goals articulated in the Social Charter reflect the region's desire to approach economic development taking into account the human dimension, especially the task of eradicating poverty. The Charter focuses on several significant aspects of social development, which almost transforms it from the realms of a social charter into a rather vaguely worded human rights instrument,

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[180] <http://www.oas.org/juridico/English/treaties/b-32.html > (accessed 5 Dec 2006).
[181] See above Chapter 2 of this study, and also Jayana Kothari "Social Rights and the Indian Constitution" (2004) 2 Law, Social Justice and Global Development Journal 2; and Marius Pieterse "Coming to Terms with judicial enforcement of Social Rights" July 2004 South African Journal of Human Rights Conference.
[182] <http://www.infopak.gov.pk/saarc/charter.htm> (accessed 6 March 2006).

albeit with a bias towards ESC rights. Examining it munificently one could say that in spirit the Charter is all encompassing, enshrining several principles of human wellbeing, which Maskay asserts to be:

(a) enlightenment (access to education);

(b) enablement (capacity building);

(c) enfranchisement (embracing all sectors of the society)

(d) empowerment (promotion of participation opportunities to people to make decisions that affect them); and

(e) entitlement (observance and protection of human rights and all fundamental freedoms).[183]

Analysing the content of the Charter against the backdrop of contemporary economic and social dilemmas faced by the region, Maskay considers that the Charter reflects the "deep concern" that the SAARC leaders share about poverty and human development and is an attempt to infuse a "spirit of humanness" into the development drive within the region.

A perusal of the content of the Social Charter indicates that it takes into cognizance the need for the social development of the people to be a prime national responsibility, and that there should be an integrated approach towards policy formulation in the areas of economy, culture and social issues so that they reinforce each other. Containing a general Preamble and 12 Articles, the Charter calls upon all parties to maintain a social policy and strategy that ensures a balanced social development of their people. The Charter recognizes the interdependence of the public and private sectors in relation to development activities and reiterates the significance of the concepts of participatory governance, social equity, tolerance, non-violence, pluralism, non-discrimination and respect of diversity within and among societies. The Charter seeks to promote environmental security by ensuring inter-generational equity and sustainable use of the environment and natural resources.

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[183] Bishwa Keshar Maskay "Poverty Alleviation and SAARC Social Charter Perspective and Issues in Regional Cooperation" <http://www.ifa.org.np/article/article9.php> (accessed 7 Jan 2008).

The Charter appears to encompass the most significant issues concerning the lives of the people in the region. The access to basic education, primary healthcare, sanitation and safe drinking water; gender equality; an adequate standard of living including adequate shelter, food and clothing, had never been articulated at regional level until the adoption of the Social Charter. However, the Charter falls short of addressing the major sociopolitical issues in the region, such as dysfunctional governance, limited political accountability and issues relating to violation of rights as a corollary of corruption — issues which directly impact on the wellbeing of the people.

In terms of its contents it has been described as "a mixed bag of tall statements, important doable national actions, significant omissions, ambiguous sections and incoherent provisions".[184] Though the incoherent approach to the rights enshrined in the Charter can be regarded as an attempt to locate the Charter within the socioeconomic concerns of the region, this tends to dilute its normative significance.

In South Asia, following the mainstream structures of human rights, relief for victims of rights violations is provided through judicial or quasi-judicial fora. The jurisdiction to provide relief is highly restricted generally to conventional civil and political rights, which are enumerated in special legislation or in the Constitution. There are stringent procedural limitations in relation to rights applications, in that jurisdiction can only be invoked by the aggrieved party within limited time-frames and the grant of relief is critically dependent upon the quality of evidence in each case. Except India, which can boast of a highly evolved concept of public interest litigation or representative action,[185] countries in the region actively discourage collective or representative actions for human rights violations, or limit them to specific interest areas. In most instances rights applications are entertained by the superior courts, to which access is restricted due to legal costs, lack of legal advice and long delays. The Social Charter did provide an opportunity, which South Asia failed to grasp, of creating a regional

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[184] Zafar Mirza "SAARC Social Charter: Cautious Optimism" <http://www.thenetwork.org.pk/pressrelease04-01-18.htm> (accessed 3 Mar 2006).
[185] See Upendra Baxi "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice" in SK Verna and Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, New Delhi, 2000) 156–209.

mechanism to address these issues, by providing an effective implementation mechanism.

The fundamental weakness of the Charter lies in its implementation strategy. It is at the implementation stage that the historical inhibitions, insecurities and reticence of the region re-emerge. Despite the numerous similar mechanisms available elsewhere in the world, the South Asian Social Charter failed to follow them and provide an effective mechanism to realize the rights enshrined in the Charter. SAARC's own proposed implementation scheme, which is to be determined by national governments in consultation with the SAARC Secretariat, is rather vague and dilutes the efficacy of the Charter.

Article 10, which spells out the implementation process of the Charter, provides for the appointment of a National Co-ordinating Committee, the formulation of a national plan of action through a broad-based participatory process, and the participation of stakeholders to implement objectives of the Charter.[186] In this respect the Charter acknowledges that the rights enshrined in it impose a positive obligation for national governments to formulate policies and put in place programmes of action to realize the rights, not only an obligation to compensate once a violation of a right occurs.

The Charter envisaged that the national governments would initiate legislation that would give effect to the rights stipulated by the Charter, but in reality national governments lack not only the impetus but the capacity and the resources to implement it at national level. Effective implementation of the Charter at national level would necessitate not only fundamentally overhauling existing laws but initiating new legislation through Parliament possibly including Constitutional amendments.

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[186] 1. The implementation of the Social Charter shall be facilitated by a National Coordination Committee on any appropriate national mechanism as may be decided in each country. Information on such mechanism will be exchanged between States Parties through the SAARC secretariat. Appropriate SAARC bodies shall review the implementation of the Social Charter at the regional level.
2. Member States shall formulate a national plan of action or modify the existing one, if any, in order to operationalise the provisions of the Social Charter. This shall be done through a transparent and broad-based participatory process. Stakeholder approach shall also be followed in respect of implementation and evaluation of the programmes under National Plans of Action.

The Charter also provides for the implementation process at national level to be reviewed by "appropriate bodies" at regional level. However, there is no elaboration on the nature and composition of the review bodies, their terms of reference and how the process is to be implemented. The Charter also justifies the position that ESC rights are rights that can be achieved only "progressively" and are therefore eligible to be enshrined within the Directive Principles of State Policy to be realized at an undefined future date when sufficient economic growth is achieved through neo-liberal economic globalization.

As reiterated above, this is a reinforcement of the essential weakness of the mainstream ESC rights paradigm, which promotes the concept of progressive realization of ESC rights through the political rather than the legal domain. The current non-radical framework envisaged by the SAARC Social Charter is an acknowledgement of the traditional mainstream paradigm's paradoxical position on ESC rights, also endorsed by the Constitutions of the South Asian states which subscribe to the theory that developing countries cannot reasonably be expected to fulfil their obligations on ESC rights in their current socioeconomic context. Therefore, the socioeconomic rights remain unrealized, consolidating the cycle of underdevelopment.

4.4   Inherent limitations of the SAARC

Twenty years and thirteen Summit Meetings later, the SAARC, its role in the region, and its present and potential success as an effective mechanism to address issues of regional concern such as the economy, poverty alleviation and development, all remain contentious.[187] However, in a region which is diverse in terms of religion, ethnicity, political culture and economic strength, the establishment of a regional organization is in itself an achievement.[188] Nonetheless, when there is a need for aggressive lobbying for common interests, especially in the province of socioeconomic development, such as poverty

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[187] See Abul Ahsan "SAARC Secretariat: A Critique" [Nov-Dec 2004] South Asian Journal 6; Saman Kelegama "South Asian Regionalism and Sri Lanka" in Ranjan Phillips (ed) *Sri Lanka: Global Challenges and National Crises* (The Social Scientist Association, Sri Lanka, 2001); Nihal Rodrigo "SAARC as an institutional framework for corporation in South Asia" in Ramesh Thakur and Oddny Wiggens (eds) *South Asia in the World* (UNU Press, Tokyo, 2004).

[188] Krishan Gopal *Geopolitical Relations and Regional Cooperation: A Study of South Asia* (Trans Asia Publications, New Delhi, India, 1996).

alleviation, equitable terms of trade, capital investment and rational strategies of aid and assistance, the SAARC has remained a passive body and left these issues to be resolved through bilateral and multilateral negotiations outside the purview of the SAARC. Even on conservative estimations, the two decade fallow period which regional leaders have labelled as the "confidence-building stage" intended "to create the basic infrastructure" and "a testing period for both the concept of regionalism and the member nations",[189] is an enormous squandering of time and resources especially considering the socioeconomic calamities the region has endured during this period.

The 13th SAARC Summit in Dhaka, held in November 2005, was supposed to change now familiar ritualistic avowals into implementation, according to Bangladeshi Prime Minister, Khaleda Zia, who claimed "For Bangladesh, the 13th summit of the seven-nation grouping marks the commencement of a third cycle of summits in which the focus will be on implementation rather than declarations."[190] But as the Summit concluded it followed a similar pattern to the previous dozen, where rhetoric dominated over action. The political euphoria with which the state leaders initiated regional cooperation 20 years ago did not equate to tangible operational schemes that fostered a spirit of regional unity in any field. What it created was essentially an empty structure that was founded on certain restricted modalities of cooperation.

The lethargic performance of the SAARC is attributed to the inherent limitations imposed on the organization through its Charter.[191] At evolutionary stages Pakistan and India were both reluctant participants in the regional cooperation initiative as the two states were apprehensive regarding the security and power relations between the countries in South Asia (especially each other). However, arduous diplomatic negotiations resulted in the establishment of the regional organization, but two principles were included when formulating the treaty,

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[189] Sridhar K Khatri "A decade of South Asian regionalism; retrospect and prospect" (1992) 1 Contemporary South Asia 5–23.
[190] Quoted in Anand Kumar *Dhaka SAARC summit: High On Ambition, Short On Progress* (Paper no. 162624 11, South Asia Analysis Group, 2005)
<http://www.saag.org/papers17/paper1626.html> (accessed 6 May 2006) .
[191] SG Pandian "Moving South Asia's economies beyond the Indo–Pakistan paradigm in the South Asian Regional Association for Cooperation" (2002) 11 Contemporary South Asia 329–344

mainly at India's insistence.[192] They were that the organization was precluded from discussing contentious bilateral issues; and that all decisions would be taken on the basis of unanimity.[193]

Added to the above preconditions were the self-imposed limitations on the collective endeavours when the SAARC Charter proclaimed that cooperation within the framework of the Association shall be based on respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of other States and mutual benefit and "that such cooperation shall not be a substitute for bilateral and multilateral cooperation but shall complement them and such cooperation shall not be inconsistent with bilateral and multilateral obligations.[194]

Effective collaboration has been hindered by these clauses, for the SAARC is perceived as an organization that exists for political expediency and is rarely perceived by the member states as an effective forum for advocating common or bilateral interests. Unanimity in all decisions has been insisted on for reasons of underlying mistrust and political divisions, which is hardly a promising start for effective regional alliance. As Thomas astutely prognosticates:[195]

> "failure is almost in-built in its conception — no organization can survive by proscribing bilateral issues. The purpose of every institution — starting from the family at the micro level to the United Nations on a macro scale — is to contribute towards conflict resolution, since conflict is an inevitable part of everyday life. Perhaps the meaningless forum was created because any other form of association was considered rather premature. If that is so, then it is the most powerful reason to 'manufacture consent' around South Asian-ness through a process of the production of culture."

This "functionalist approach" with clearly defined areas for cooperation, which were non-controversial, was regarded as a "maturing process" that would yield to

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[192] R Ahmed "Should SAARC Be Wound Up?" [Dec 2002] The Journal, National Institute of Public Administration.Pakistan <http://www.nipa-khi.edu.pk/RashidAhmed.pdf.> (accessed 14 Sep 2006).
[193] The Charter of SAARC Article X? para 1 & 2; also see Eric Gonsalves and Nancy Jetly (eds) The Dynamics of South Asia, Regional Cooperation and SAARC (Sage, New Delhi, 1999) 249–253.
[194] SAARC Charter Article 2. see Appendix E
[195] K Joe A Thomas "Sub continental free trade utopia SAFTA has been hyped following the SAARC summit, but will it only help the trader and not the people? And what of services?" [2004] Perspective <http://www.himalmag.com/2004/january/perspective.htm > (accessed 5 Jun 2006)

genuine cooperation in all spheres at a later stage.[196] If, however, the member states were able to discuss contentious issues such as the Kashmir conflict,[197] General Musharraf's military coup in Pakistan,[198] or the Gujarat riots in India,[199] the anti-Ahmadiya activities in Bangladesh,[200] ethnic problem in Sri Lanka,[201] democratic crisis in Nepal,[202] or the authoritarian rule in the Maldives,[203] the SAARC's role in the region would have been enhanced and it would have acquired credibility as an effective organization and contributed greatly to the atmosphere of mutual cooperation.

The SAARC's commitment to the doctrine of non-interference and the concept of state sovereignty is increasingly hindering the effective collaboration of the SAARC as a regional organization. [204] If at infancy and in the past two decades the SAARC has been unable to address deep-rooted and contentious bilateral issues and create a culture of cooperation within the framework of the existing Charter, it is now time for a more aggressive means of action through the amendment of Article 10. In retrospect, the present Charter has to be perceived as a transitional arrangement which helped create a framework of regional cooperation but which has now outlived its purpose. The SAARC as it stands now is a transient arrangement "which member nations have agreed upon [to] serve as a test of the way nations may be able to accrue benefits via means of cooperation, without actually sacrificing anything big or gaining anything substantial from the current conditions. As a test period, nations have also been conferred with special privileges to display their willingness for cooperation, without actually testing

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[196] Iftekharuzzaman "The SAARC in Progress: Achievements, Old Problems, New Dimensions" (1987) 88 Regional Studies 1–12.
[197] S Bose "Kashmir: Sources Of Conflict, Dimensions Of Peace" (1999) 41 Survival 149–171.
[198] A Shah "Democracy on Hold" (2002) 2 Journal Of Democracy 67-75.
[199] A Nandy "Obituary of a Culture — Society Under Siege -— A Symposium On The Breakdown Of Civil Society In Gujarat" <http://www.India-Seminar.Com/2002/513.Htm >(accessed 1 Mar 2006).
[200] Anand Kumar "Government Yields To Anti-Ahmadiya Alliance In Bangladesh" (Institute For Conflict Management Article No.1285, 20 January, 2004. <http://www.Ipcs.Org/South_Asia_Articles2.Jsp?Action=Showview&Kvalue=1294&Country=10 16&Status=Article&Mod=A> (accessed 17 May 2006).
[201] Neil Devotta "Democracy, Institutional Decay and the Quest for Eelam: Explaining ethnic conflict in Sri Lanka" (2000) 73 Pacific Affairs 55–76.
[202] PC Stevenson *The tortuous road to democracy: democratic crisis in Nepal* (Lancet, London, 2001).
[203] A Misra "The theorising of small and micro state behaviour using the Maldives, Bhutan and Nepal" (2004) 13 Contemporary South Asia133–148.
[204] Arabinda Acharya and Amitav Acharya "Human Security in Asia: Conceptual Ambiguities and Common Understandings" <http://www.yorku.ca/robarts/archives/chandigarth/pdf/acharya_delhi.pdf > (accessed 10 Feb 2006).

their will to co-operate."[205] It is time that South Asia moved beyond the stage of creating a "culture of cooperation" to effective regionalism that yields concrete results.

South Asia's capacity for sustained civil societal agitation in relation to politics is highlighted by the struggles for independence. Feasible strategies to counteract the adverse impact of globalization demand active cooperation and the mobilization of both state and non-state actors, such as non-governmental organizations, private commercial entities and civil society. However, the SAARC is an initiative that has been created without consultation with such stakeholders, and no attempts have been made to accommodate civil societal participation that would have contributed positively to, and derived benefit from, a regional alliance.

Opportunities for NGO and civil society participation in the proceedings of the SAARC are absent in contrast with other regional bodies.[206] Therefore, people have no real affinity to the regional alliance and remain alienated from its operations though ostensibly its purposes lie close to the everyday lives of the people of the region.[207] This detachment from the people has also contributed to the lack of effective collaboration. There is a growing consensus amongst the regional NGOs that the people do not feel the real impact of a regional collaboration as SAARC activities are restricted to heads of Governments and Foreign Ministries of the member states.[208]

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[205] Sridhar K Khatri "A Decade of South Asian Regionalism: Retrospect And Prospect" (1992) 1 Contemporary South Asia 5–7.

[206] See African Union and OAS. Bangladesh-based Campaign for Good Governance (CGG), a conglomerate of civil society and local NGOs, has requested the participation of NGOs in SAARC proceedings in a similar fashion to the UN, World Bank and the WTO. See "CGG condemns participation of Nepalese, Pak premier in SAARC summit" *Financial Express* (11/12/2005) <http://www.financialexpress-bd.com/index3.asp?cnd=11/12/2005&section_id=2&newsid=6470&spcl=no> (accessed 5 May 2005). Also see Final Statement from the Second South Asian People Summit. <http://www.iansa.org/news/2002/jan2002/asia_summitrelease7102.htm> (accessed 5 May 2005)

[207] Saman Kelegama "A Need for a New Direction for SAARC: An Economic Perspective" (2003) 9 South Asian Survey; Saman Kelegama "South Asia and Other Regional Economic Groupings" in K.K. Bhargava and SK Khatri (eds) *South Asia 2010: Challenges & Opportunities* (Konark, New Delhi, India, 2002)

[208] See < http://www.saarccivilsociety.org/ > and Final statement from the second South Asian People's Summit 7 Jan 2002, Kathmandu <http://origin.sundayobserver.lk/2002/01/27/fea03.html> (accessed 5 May, 2005).

4.4.1 "SAARC fatigue"[209]

In general, many analysts believe that "SAARC remains hostage to the deep undercurrents of political and strategic dissonance in the region."[210] This atmosphere of suspicion and mistrust has also affected the scheduling of SAARC Summits on several occasions. The failure to hold the 5th SAARC summit in 1989, due to tensions between India and Sri Lanka, and the postponement of the 11th Summit (from December 2000, when it was initially scheduled to be held, to January 2002, when it was finally convened) due to the eruption of hostilities between India and Pakistan, are indicative of apathy and the lack of willingness among SAARC nations to resolve bilateral issues. The 13th SAARC Summit scheduled in January 2005 was also postponed until November 2005.[211] In contrast, ASEAN has maintained an uninterrupted practice of frequent regional consultations even when being threatened by the outbreak of bilateral tensions.[212]

Despite the high expectations there is a growing consensus that the SAARC has not accomplished much in comparison with other regional alliances in its 20 year existence, and "[m]ost programmes and achievements of SAARC exist on paper."[213] Whether it is related to SAFTA, drug trafficking, or the environment, the creation of regulatory frameworks has always proved to be gruelling and time consuming and the unanimity clause has resulted in producing weak, ineffective regulatory frameworks in the treaties. This general lethargy, which contributes little to bringing tangible benefits to the people in the region, led to an expression of concern by many who are actively involved in the SAARC. The President of Sri Lanka voiced her disquiet by saying, "….what fruit has SAARC truly borne?

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[209] Saman Kelegama "South Asian Regionalism and Sri Lanka" in Rajan Phillips (ed) *Sri Lanka: Global Challenges and National Crises* (Ecumenical Institute for Study and Dialogue, 2001) 49–160.)(Kelegama 2001).

[210] Rajshree Jetly **"**Conflict management strategies in ASEAN: perspectives for SAARC" (2003) 16 The Pacific Review 53–76.

[211] Qudssia Akhlaque "13th SAARC summit postponed: Pakistan disappointed, calls for new dates" *Dawn: The Internet Edition* (3 Feb 2005) <http://www.dawn.com/2005/02/03/top9.htm> (accessed 30 Jan 2006).

[212] Rajshree Jetly **"**Conflict management strategies in ASEAN: perspectives for SAARC" (2003) 16/1 The Pacific Review 53–76.

[213] Haider A Khan and Zulfiqar Larik "Globalization and Regional Co-operation in South Asia: A Political and Social Economy Approach" (CIRJE F-Series CIRJE-F-480, CIRJE, Faculty of Economics, University of Tokyo, 2007).

Do we need to prune those activities which do not bring significant yield and more carefully nurture others that do?"[214] The discontent over the progress of the SAARC has also prompted countries to seek membership in other regional bodies such as the ASEAN by India and Sri Lanka and the NAFTA by India. India, Sri Lanka and Bangladesh have become members of the Indian Ocean Rim Association Regional Corporation formed in 1997. The others have attempted initiating bilateral ties with the countries in the region, effectively, albeit not formally, abandoning the SAARC framework. Such moves obviously do not augur well for the region as a whole, which needs the cooperation provided by the Association for the long term economic growth and human development of the region.

There are several root causes for the malaise within the SAARC. The Charter, which can be regarded as the foundation of a regional collaboration, has now outlived its purpose, and the Secretariat's mandate and structure is ineffectual in the face of the tasks it is compelled to deal with. The absence of dispute settlement machinery to settle inter-state conflicts on security, border and resource disputes has also proven to be a fundamental weakness of the SAARC.[215] Although greater economic benefits were one of the main objectives of the SAARC collaboration, success in that regard remained low.[216] The region's major trading partners such as Western Europe and America, remain outside the region making inter-regional trade approximately 5 per cent.[217] The success of the newly formulated SAFTA discussed below can be seen only after the scheme has been in operation for a while.

The South Asian region is home to many complex conflicts dating from the colonial era. The struggles for independence from the British and the ensuing battles of partition still remain fresh in the minds of the subcontinental people.[218] Some of the contentious issues have their roots in the ethnoreligious composition

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[214] Kelegama above n 209, 155.

[215] Mohammed Mohsin "The Twelfth SAARC Summit Quest for Durable South Asian Cooperation" (2005) 12/1 South Asian Survey 35–46.

[216] Rehman Sobhan "Regional Economic Cooperation in South Asia" in Pradeep K Ghosh (ed) *Developing South Asia: A modernzsation Perspective* (Greenwood Press Westport, Connecticut, London, 1984) 268.

[217] Navin Dahal **"Salvaging SAFTA"** *The Kathmandu Post*,(10 Nov 2005). Newspapers article <http://www.sawtee.org/uploads/articles/safta.php> (accessed 5 Jan 2006).

[218] Sumit Ganguly *Conflict Unending: India-Pakistan Tensions Since 1947* (Columbia University Press and Woodrow Wilson Center Press, New York and Washington, 2001).

of the region's people, scarce resources and colonial demarcation of state boundaries, and over the years these contentions have been fuelled by antagonism and mistrust.[219] The political acrimony between Sri Lanka and India over the Tamils[220] and Pakistan and India over Kashmir[221] provides examples of ongoing issues of contention that have the potential to evolve into full-scale warfare.[222] A similar controversial issue is the Indo-Nepal Treaty of Peace and Friendship of July 1950[223] and the dispute relating to the border between the two states.[224] The sharing of waters and islands in the Ganges by India and Bangladesh is another fertile ground for intermittent political bickering that contributes to the situation of mistrust and antagonism.[225] The oppressive policy of forcible repatriation of people in Bhutan of Nepalese origin has created friction between these two countries,[226] for Bhutan appears to ignore the humanitarian crisis created by the Bhutanese refugees living in refugee camps in Nepal.[227] The escalating arms race between Pakistan and India, especially on the nuclear front, is another example of the depth of the antagonism between the various countries that make up the region.[228]

In its 20 year existence the SAARC has succeeded only in creating a forum that highlights contentious issues of the region, such as the inherent mistrust of neighbouring states, political domination by India, immature democratic

[219] Rajshree Jetly **"Conflict management strategies in ASEAN: perspectives for SAARC"** (2003) 16 The Pacific Review 53–76.

[220] KM de Silva "Sri Lanka: Surviving Ethnic Strife" (1997) 8 Journal of Democracy 97–111.

[221] Rajen Harshe "India–Pakistan Conflict over Kashmir Peace through Development Cooperation" (2005) 12 South Asian Survey 47–60 .

[222] Zaglul Haider "Crises of Regional Cooperation in South Asia" (2001) 32/4 Security Dialogue 427.

[223] Ibid n 222; The Treaty of Peace and Friendship between India and Nepal is a major point of debate between India and Nepal as it completely ignores Nepal's right to decide anything in its own sphere. Some academics of international law believe that the treaty itself was illegal because (they maintain) it was signed by the caretaker prime minister of Nepal in his final retreat from state affairs just to appease Indian rulers.

[224] Vidya Bir Singh Kansakar "Nepal-India Open Border: Prospects, Problems and Challenges" Democracy Nepal
<http://www.nepaldemocracy.org/documents/treaties_agreements/nep_india_open_border.htm> (accessed 17 May 2006)

[225] Monica Bhanot "Challenges to Regional Cooperation in South Asia: A New Perspective" [August 1999] Online Journal of Peace and Conflict <http://www.trinstitute.org/ojpcr/toc2 3.htm> (accessed 17 May 2006).

[226] John Quigley "Bhutanese refugees in Nepal: what role now for the European union and the United Nations high commission for refugees?" (2004) 13 Contemporary South Asia 187–200.

[227] Birendra Giri "Mourning the 15th Anniversary of Crisis: The Plight of Bhutanese Refugee Women and Children" (2005) 40 Journal of Asian and African Studies 345–369.

[228] MV Ramana and AH Nayyar "India, Pakistan and the Bomb" "The Indian subcontinent is the most likely place in the world for a nuclear war" [December 2001] Scientific American <http://www.Scientific American.com.>

governance, political instability, and lack of security. In some quarters, however, the creation of that forum in itself is "being seen as no mean achievement given the acrimony between the states of this region."[229] However, this study endorses the view that it is time for the SAARC to move on from the so-called confidence building stage, where in reality it was at worst "merely a talking shop, which can provide nothing more than a lip service to the various issues of peace and development in the region" and at best a space "that provided an opportunity for the policy makers, administrators and experts to meet regularly and hold informal dialogues on important regional issues such as security, trade and transport, social development etc."[230] It is time that the Association progressed beyond rhetoric and considered actions regarding the region's critical issues, commencing with a radical reformulation of the Charter. The need is for a regulatory structure that aggressively addresses issues of poverty eradication, democratic deficit, good governance of globalization, and human development, for the needs of the region can no longer be contained within the consensus-building mechanism that the SAARC essentially represents.

A regional initiative should have the concerns and the problems of the region at its core, whether they be development, trade or security, and should fashion the structures of the alliance so that they best achieve its objectives. However, the SAARC reversed this operation and created the structure first, then sought to absorb issues that it was comfortable resolving. Therefore, issues of social and economic development that were non-controversial were the central focus of the Association, which never matured into strategies of implementation for fear of a mêlée amongst member states. If the SAARC aspires to evolve as a viable regional mechanism it would have to undergo a fundamental restructuring process in terms of its structure, core objectives and principles.[231]

4.6   Glimpses of success — SAFTA

[229] CK Lal "The necessary manufacture of South Asia" Himal South Asia 2006 <http://www.himalmag.com/2003/january/asia_special_2.htm> (accessed 5 Jan 2007).
[230] Kishore C Dash "The Political Economy of Regional Cooperation in South Asia" (1996) 69 Pacific Affairs <http://www.mtholyoke.edu/acad/intrel/dash.htm > (accessed 5 Jun 2005).
[231] SD Muni "South Asia as a region" [Aug-Sept2003] South Asian Journal. <http://www.southasianmedia.net/Magazine/Journal/previousissues1.htm> (accessed 5th June 2005)

Amidst all the criticisms, and somewhat optimistically, Ananya Mukherjee Reed argues that there is an emerging "new" sense of regionalism based on economic considerations in South Asia, which is an inevitable corollary of "the contradiction of globalization, which increases competition on the one hand, and the need for collaboration on the other."[232] Despite the apparent defunct nature of the SAARC, it harbours at least an embryonic potential to provide a comprehensive structural background to the mechanisms that are needed to address the adverse effects of globalization.

In this respect, the 12th Summit was significant for it represented a sense of realism about the contemporary dilemmas of the region as well as infusing a sense of hope regarding its future trajectory.[233] It finalized the South Asian Free Trade Area (SAFTA, launched January 2006) agreement with the aim of regional economic integration by year the 2015.[234] These regional trade agreements appear to mushroom in the developing as well as the developed world as a reaction to the adverse global trading climate, and the South Asian initiative draws inspiration from the NAFTA and the custom union initiatives, such as the Mercosur[235] and the obviously successful European Union.[236] The previous attempt of SAARC Preferential Trade Agreement of 1993 (SAPTA) always appeared a non-starter. SAPTA's failure is attributed to many causes[237] and the new initiative appears to have rekindled the desire for economic union that is born out of ideological convictions as much as economic expediency.[238]

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[232] Ananya Mukherjee Reed "Rationalisation in South Asia: Theory and Praxis" (1997) 70 Pacific Affairs 235–239.

[233] Muchkund Dubey "The Twelfth SAARC Summit: Deeper Integration in South Asia" (2005) 12 South Asian Survey 21–34 ; Mohammed Mohsin "The Twelfth SAARC Summit: Quest for Durable South Asian Cooperation" (2005) 12 South Asian Survey 35–46.

[234] As an initial step the Agreement seeks to reduce tariff from the existing levels to 0–5 per cent between the years 2006 and 2015 in two phases.

[235] A Latin American regional integration mechanism with Argentina, Brazil, Paraguay and Uruguay as full members, and Bolivia and Chile as associate members <http://www.redmercosur.org.uy/portal/mercosur.html> (accessed 5 Jan 2006).

[236] <http://europa.eu.int/> (accessed 5 Jan 2006).

[237] Editorial "Such charming simplicity" <http://www.himalmag.com/2004/january/editorial.htm> (accessed 17 May 2006).

[238] Saman Kelegama "South Asian Regionalism and Sri Lanka" in Rajan Phillips (ed) *Sri Lanka : Global Challenges and National Crises* (Ecumenical Institute for Study and Dialogue, 2001) 149–160.

Easing of foreign trade among members has generated a new enthusiasm regarding the relevance of the SAARC in promoting regional economic cooperation in South Asia.[239]   The process is perceived to be an umbrella framework of rules providing for gradual liberalization of intra-regional trade that would facilitate the moves towards eventual economic integration. Global economic development, particularly the impact of the WTO, has provided a new impetus for SAARC to pursue its agenda of economic integration with a new vigour. Secondly, the invigoration of the ASEAN following the South East Asian crisis also contributed to the urge to pursue other possible avenues of economic integration. Regional integration in the economic sphere undoubtedly strengthens the collective bargaining of the region[240] However, considering past experience with SAARC, the scepticism that Alok Bansal expresses when he says, "[t]here is no doubt that SAFTA is in the interests of the region but the political environment in the region makes any forecast of its outcome extremely hazardous,"[241] is entirely justified.

If economic pragmatism was the fundamental driving force behind the successful implementation of SAFTA, other imperative issues common to the region must provide a similar impetus for more functional regional integration. Chief among these are the obvious concerns relating to poverty eradication, meaningful realization of human rights and equitable development.

The incidents of 9/11 and the subsequent "war on terror" should also be of special concern to the region. Until September 11, 2001, South Asia's bickering centred on poverty, corruption, settling of ethnic, religious and caste issues and bilateral concerns relating to Kashmir or the Tamils in Sri Lanka. These were essentially intra-regional concerns that had no impact outside of South Asia. However, the events of 9/11 have challenged the security and the territorial integrity of the

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[239] Alok Bansal "Troubled Road to SAFTA" *The Central Chronicle* (8 Mar 2005).
<http://www.idsa.in/publications/stratcomments/alokbansal100305.htm> (accessed 16 Feb 2008) (Bansal).
[240] Muchkund Dubey "The Twelfth SAARC Summit: Deeper Integration" (2005) 12 South Asian Survey 21–34.
[241] Bansal, above n 230.

region as the "war on terror" has a direct military impact on Pakistan and the new SAARC member, Afghanistan.[242]

As the above analysis illustrated that the SAARC lacks the structural and normative capacity to deal with issues relating to human rights, development or governance. The latest security exigency which invites hegemonic intervention by the USA in the form of the "war on terror" is an opportunity for the region to re-evaluate it's measures of regional corporation and move towards a collaboration that places the interests of South Asia and its people first.

4.7 Conclusion

The title of this chapter set up two distinct but related topics for analysis: democracy, or rather the lack thereof; and the SAARC, or more precisely its inadequacy. The chapter has addressed the two topics in that order. It has also brought out several levels of relationship between them. Firstly, the majority of the seven countries under consideration have at least formally aspired to reinvent or consolidate themselves as independent democracies in the post-colonial period. The SAARC in turn represents the free association of those sovereign states (plus latterly Afghanistan) in a limited union of inter-reliance, assistance and respect. The members of the SAARC have thus essentially entered a form of social contract to yield a small measure of control and scrutiny to the whole for their greater good. This structure could itself be described as democratic; even, in ideal terms, a hoped-for democracy of democracies.

More concretely, democracy and the SAARC are linked because the promotion of democracy is at least nominally honoured by the regional alliance. In the words of the chapter title, the "poverty of democracy" is one of the "region's needs" to which SAARC purports to respond. In reality, failures of democracy within the member states have tended to overstrain and subvert the current structure and self-imposed limits of the alliance, while the converse has also occurred with SAARC's inadequacy deserting the promotion of democracy.

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[242] Farhana Ali "A Post-Musharraf Pakistan Policy" Washington Post March 7, 2008 <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/07/AR2008030702732.html > (accessed 8 Mar 2008).

Finally, returning to the level of more abstract principle, constitutional democracy and regional co-operation are related because both represent attempts at deliberate, normative governance. Specifically, the governance being practised, or at least aspired to, here is the discipline, definition and management of intra-state and inter-state civic affairs respectively. The attempted means of governance in both these cases are political.

The poverty of democracy was seen to mean failures of both democratic form and function. The introduction to the chapter clarified that the kind of democratic state being advocated by this thesis is a plural, tolerant, welfarist democracy, with regular elections from a universal franchise. In addition, to be declared functional rather than merely formal, it must operate under a thoroughly internalized and honoured rule of law and separation of powers, and must be fortified by a strong and independent judicial branch.

The chapter identified democracy, as thus defined, to be one of three key desiderata in this thesis, alongside human rights and human-centred development. The synergies between these three values and their interdependence were analyzed. *Civil and political rights* were noted as being classically democratic rights, being at once required for democracy and protected by it. A measure of egalitarian redistribution of economic wealth though a welfare system goes towards vindicating *economic rights*, while the kind of active civil society and open media required for true pluralism promote *social and cultural rights*. Guarantees of the human rights of individual citizens as well as minority segments of the population in turn guard against majoritarian subversion of democracy or the seductive charms of abuses of utilitarianism. While democratic states rise on a tide of *development* that lifts all boats, development itself becomes at once more vigorous, more reflective of a people's needs, and more fully "owned' by the people in a functional democracy. In such a state, people participate not only as independent economic agents but also as citizens in debating and articulating the desired economic as well as social direction of the state, and actively help constitute, then elect, monitor and hold to account, governments chosen for their promise to deliver that vision.

Although the region was seen to boast the world's largest democracy and two of the oldest democratic states in the developing world, by its very history South Asia lacked any deep well-spring of democratic tradition on which to draw. The actual record of democratic governance was marred both by overt failures of form, where countries have slid back into authoritarianism or never emerged from it in the first place, and by more insidious failures of functioning even within technically correct structures. Both types of failures were catalogued country-by-country and region-wide.

One leading cause of region-wide failures was identified as the effect of neo-liberal economic reforms. In this regard, the World Bank seems to be aware of only part of the problem. It acknowledges: "market-oriented reforms […] can go awry, with painful consequences for poor people. Lack of supporting institutions, mistakes in sequencing reforms, or the capture of the reform process by powerful individuals or groups lie at the bottom of most failed reforms."[243] Yet, while all these faults can be laid at the doors of many South Asian governments, a deeper problem, to which this report seems blind, has lain in the more basic diverting of accountability inherent in the neo-liberal control of domestic policy. Instead of being answerable first and foremost to the real human needs of their respective electorates, governments whose (admittedly sometimes rubber) arms were being twisted by the conditionalities of SAPs and PRSPs, have in practical terms felt more answerable to the constituencies of the IFIs, major donors and, indirectly, the TNCs.In so doing they have also tended to buy into a 'one size fits all" approach instead of reflecting idiosyncratic national needs.

The foregoing paragraphs have encapsulated the governance crisis of South Asia and depicted how the dysfunctional democratic systems have a negative impact on the socioeconomic rights, as well as civil and political rights, of the people in the region. South Asian governments are weak and lack the capacity to make appropriate policy choices. There is no feasible mechanism available nationally or within the region to challenge poor, unviable policy decisions that are made by the national governments, and very limited judicial fora are available to challenge

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[243] *World Development Report 2000/2001: Attacking Poverty* (World Bank, Oxford University Press, New York, 2001) 64.

such choices.[244] There is a dearth of policy initiatives to promote a structure for economic development that also fosters social integration and advocates emancipation for the millions who are trapped in the cycles of poverty.[245]

As highlighted in the introduction of this chapter, the previous analysis has focussed on the international and national mechanisms that attempt to deal with neo-liberal globalization and its ramifications. This chapter focussed on another available whole tier of mechanism that has huge potential to grapple with both inherent regional problems and the undesirable imported corollaries of neo-liberal globalization. This is the regional tier. Executed in a non-aggressive and non-protectionist way, the regional tier is not only compatible with the global but synergises with it as a means of pursuing human rights, democracy and development. It also builds on, and consists of, the nation state, since states are the members that form such alliances.

With this aim in mind an analysis of the existing regional mechanism of the SAARC was undertaken. The discussion highlighted the absence of regional standards relating to democracy and the reluctance of the member states to involve themselves in norm-establishing exercizes relating to democracy or governance. The analysis indicated that SAARC, as a regional apparatus will remain impotent until the structural and jurisdictional failures of the system highlighted in the above discussion remained unaddressed. Since its inception, critics have expressed doubts about the effectiveness of the SAARC as a regional organization for it failed to address the many poverties of the region, mainly human rights, development, democracy and intra-regional tensions. As Dash observes, without addressing these issues, and "[g]iven the low level of mutual trust, spill over effects of the ethnic and religious conflicts, and the magnitude of bilateral disputes in South Asia, it is unrealistic to believe that any substantial growth of regional cooperation is possible without easing political tensions."[246]

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[244] See Chapter 2 above in relation to Social Action Litigation.
[245] Oliver Mendelsohn and Marika Vicziany *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge University Press, Cambrigde, 1998) 10 -12 details of all that of the multiple discriminations that the untouchables suffer the most debilitating effect is from poverty.
[246] Kishore C Dash "The Political Economy of Regional Cooperation in South Asia" Summer (1996) 69 Pacific Affair <http://www.mtholyoke.edu/acad/intrel/dash.htm > (accessed 5 Jun 2005).

One key failing of SAARC was thus seen to be its abdication of responsibility and authority for dealing with particular bilateral tensions, and also with internal strife that reaches the point of civil war. While these conflicts go diplomatically ignored, issues such as Kashmir remain the undiscussed but massively uncomfortable "elephant in the room". In this respect it was notable that in Kofi Annan's words and those of others, peace and security are also desiderata which a regional mechanism can and should aspire to deliver. Peace and security are not only compatible with democracy, development and human rights, but mutually necessary to them. A regional framework that prescribes fixed and enforceable normative standards in relation to human rights, democracy and governance, and establish procedures to prevent democratic backsliding within member states can be achieved.

In the interests of the people of the region it is imperative that individual states institute and honour both the form and the function of democracy, as separate nations and together with each other. At the same time, a new and better regional response to the poverty of democracy and the other needs noted will be advocated in Chapter 6 of this study. In the meanwhile, inspiration and concrete models for structures and rules that will optimally suit South Asia will be sought in the Chapter 5. To that end, this next chapter distils the best and most relevant practices of several regional and cross-regional mechanisms from around the globe.

CHAPTER 5

THE PROMOTION OF HUMAN RIGHTS AND DEMOCRACY IN REGIONAL AND CROSS-REGIONAL PARADIGMS

"[i]n a world of interconnected threats and challenges, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States … States, however, cannot do the job alone. We need an active civil society and a dynamic private sector…We also need agile and effective regional and global intergovernmental institutions to mobilise and coordinate collective action … We therefore need new mechanisms to ensure accountability — the accountability of States to their citizens, of States to each other, of international institutions to their members and of the present generation to future generations."[1]

5.1   Introduction

The previous chapter highlighted the absence of a deep-rooted culture of 'functional' democracy in South Asia and the impact of this lack on governance. The analysis concluded with the observation that it is impossible to inculcate responsible governance "from bottom up" through the individual states in the region and that the best means of achieving good governance is by an infusion of normative standards through a regional mechanism. Chapter 4 then discussed the effectiveness of the SAARC as a candidate for such a regional mechanism and identified its many weaknesses, particularly the structure which precludes it from addressing bilateral or national issues and the absence of legal obligations upon states to ensure human rights and norms of democracy within their own jurisdictions. Finally, Chapter 4 concluded with the observation that if a South Asian regional mechanism is to be effective it must address the specific critical issues of eradicating material poverty, closing democratic deficits and promoting equitable development which remain urgent region-wide.

The present chapter acknowledges that the eradication of poverty and the promotion of equitable development requires a pragmatic and multidimensional effort centred on the promotion of universally accepted human rights. Few initiatives, whether regional, national, or international, do in fact specify an

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[1]Kofi Annan "In larger freedom: towards development, security and human rights for all" (A/59/2005) <http://www.un.org/largerfreedom/chap1.htm> (accessed 5 Mar 2006).

integrated approach towards the eradication of poverty, promotion of democratic governance, just development and human rights. Chapter 1 at section 1.7 already noted the innovative procedures of Social Action Litigation (SAL) that have been created in South Asia at national levels to enhance human rights through Social Action Litigation. That section observed SAL's proven ability to extend into an avenue for scrutinizing and even defining social policy, and the chapter noted the extra significance of this in South Asia as "a climate where other avenues of public and parliamentary debate are defunct or dysfunctional and results of elections are not a true reflection of public opinion."

While SAL will remain extremely valuable, it is neither safe nor sufficient to rely on the ability or willingness of an activist domestic judiciary within each state to promote human rights and democracy, especially given precisely those proven tendencies towards manipulation by the executive; nor is it necessary to plant the burden of such initiatives on bold judges. Chapter 1 itself stated rather that the best possible outcome of SAL would include wider repercussions in the form of "legislative or policy changes" as well as enhanced public debate.[2] In fulfillment of that promise, the present chapter looks beyond even such legislative and policy changes to more radical, regional and cross-regional restructurings that have occurred around the globe. It will be argued in this chapter and Chapter 6 that SAL not only facilitates the introduction of such wider mechanisms in South Asia but is compatible with them and will in fact synergize with them — though they will also be strong enough to work without it if necessary. To this end, the present chapter specifically survey certain key aspects of the mechanisms established at regional levels in the Americas, Europe and Africa and at an inter-regional level through the Commonwealth Association to safeguard human rights, nurture democratic governance and foster development — the three broad aims discussed in the introduction to Chapter 4.

The approaches to regional governance in Europe, the Americas and Africa have taken into consideration the history, socioeconomic and political exigencies of the states in each region and focused on specific issues that were regarded as significant concerns of the particular region. The normative content and

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[2] R Véron "Remaking urban environments: the political ecology of air pollution in Delhi" (2006) 38/11 Environment and Planning A 2093–2109.

implementation strategies contained in each mechanism are aimed at resolving the region specific exigencies. Ghai observes that regional mechanisms also represent a general agreement "as to the standards of government behaviour acceptable in the region" and he adds that the absence of a regional mechanism in Asia and the Pacific is indicative of the absence of such a common consensus.[3]

No mechanisms, however efficient, can be completely transported to another region, as they have to be synthesized into each economic, cultural and political milieu. However, these arrangements can be a valuable guide and an inspiration when creating a mechanism that is particular to South Asia.

5.2 Drawing Inspiration from Alternative Regional and Cross-regional Paradigms

As much as globalization entrenched structures that facilitated global economic integration, it has also created an impetus for entrenching systems of justice, law and human rights. These structures extend from systems incorporated under the United Nations, particularly in relation to environmental law regimes[4] and international criminal law[5], to rejuvenating and enhancing the existing regimes of regional solidarity founded in Europe, the Americas and Africa. These endeavours at global and regional level indicate an increased desire to create definitive legal regimes involving legal rights, responsibilities and obligations.

Regionalism as a means of enhancing human rights and consolidating democracy is not a new idea. Several regional mechanisms that work towards protecting and enhancing human rights exist and they have evolved around the sociopolitical mores of the area concerned. Fawcett describes the advantages of regionalism as follows:[6]

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[3] Yash Ghai *Human Rights and Social Development Toward Democratization and Social Justice* (Democracy, Governance and Human Rights Programme Paper Number 5, United Nations Research Institute for Social Development, October 2001)3.

[4] Climate control regime under the Kyoto Protocol see Mustafa Babikera, Henry D John M Reillyc and David M Reinerc The evolution of a climate regime: Kyoto to Marrakech and beyond (2002) 5 Environmental Science and Policy 195-206.

[5] Marlies Glasius, The International Criminal Court: A Global Civil Society Achievement (Routledge New York 2006).

[6] Louise Fawcett "Exploring regional domains: a comparative history of regionalism" (2004) 80

> [apart] from promoting economic, political and security cooperation and community, it can consolidate state-building and democratization, check heavy-handed behaviour by strong states, create and lock in norms and values, increase transparency, make states and international institutions more accountable, and help to manage the negative effects of globalization. Recent examples from Europe, the Americas, Africa and parts of Asia support this assessment.

Each of these systems is founded on the premise that rights are illusory unless the procedural means of enforcement is compatible with the political, cultural and social ethos of the region. The legal and institutional framework of each regional organization addresses the specific issues that have a special resonance within that region. None of the arrangements have proven to be instantly efficient for each took years to evolve into viable systems and they are still evolving and adjusting to the exigencies of the times.

This chapter does not attempt to make an exhaustive study of all the regional mechanisms in place to promote human rights, democracy and equitable developmental policies. Rather it discusses the key aspects of the various regional mechanisms and their relevance to the new South Asian praxis that is advocated in Chapter 6 of this study. The proposed South Asian mechanism that is discussed in Chapter 6 will draw inspiration from other relevant regional mechanisms already established, but of necessity it differs from them in terms of the normative rights content and the mechanisms of realizing them. However, in terms of the scope and content, the South Asian mechanism will go beyond the traditional European, American and the African regional mechanisms because it has to face new dilemmas and challenges that have been brought to the forefront by globalization.

5.3   EUROPE: Exemplary rights jurisprudence created from the most advanced initial conditions

5.3.1   The European System: Council of Europe and Convention for Protection of Human Rights and Fundamental Freedoms

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International Affairs 429–446, 429.

The post-war impetus to create regional instruments for the protection and enhancement of human rights was hailed as the most "radical development in the whole history of international law."[7] Among these, the European system (under the aegis of the Council of Europe) is widely regarded as the "most advanced and effective"[8] international regime for formally enforcing human rights in the world today. The Council of Europe is a legal regime that caters to a like-minded group of countries that not only share a common political ideology but have joined together to defend the principles of democracy, human rights and the rule of law. The states share similar established systems of democracies that endeavour to protect and promote human rights, an endeavour which has in turn facilitated and streamlined an efficient regional rights regime. The region also has the advantage of economic prosperity, which provides resources for procedural implementation of a human rights system effectively — phenomena that are absent in South Asia.

The Council of Europe, which created the European human rights regime and is administered through the European Court of Human Rights (ECtHR), stipulates that, "[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms"[9] and must contribute to the aims of the Council, which, among others, are the protection of the common heritage, facilitating economic and social progress and "the maintenance and further realization of human rights and fundamental freedoms."[10] It is after the preconditions of the rule of law and the respect for human rights are satisfied that the Committee of Ministers invites a state party to become a member of the Council of Europe. By 2007, 47 states had become members of the Council of Europe;[11] all of them had ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) and had also accepted the right of individual petition to the European Commission of Human Rights

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[7] John P Humphrey "The Revolution in the International Law of Human Rights" (1974) 4 Human Rights 205, 208–209.
[8] Louis Henkin, Gerald L Neuman, Diane F Orentlicher, and David W Leebron *Human Rights* (Foundation Press, New York, 1999) 551.
[9] Article 3 of the Statute of the Council of Europe <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm> (accessed 16 Apr 2006).
[10] Article 1 B of the Statute of the Council of Europe <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm> (accessed 16 Apr 2006).
[11] See list of member states of Council of Europe <http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp> (accessed 12 Feb 2008).

(during its existence until 1998) and the compulsory jurisdiction of the Court.[12] The acceptance of the European Convention, the compulsory jurisdiction of the Court and of the binding nature of its judgments is a prerequisite for membership of the European Council.[13] Therefore, a state's respect for human rights and its domestic human rights record is assessed and ensured before it is accepted into the Council. For instance, Russia's domestic human rights record was deemed inadequate for the country to be admitted to the Council in 1994.[14]

The initial mechanism for the vindication of rights in operation from 1953 until 1998 was the two-tiered structure of the European Commission of Human Rights and the Court. During the initial stages this process was deemed efficient as the Commission was designed to be a filtering mechanism for the cases before the Court. As with all regional instruments, which need to evolve with time to meet contemporary exigencies, the European system, too, was adjusted and underwent a major overhaul in 1998. The changes were designed to streamline and create efficiency in the processing of complaints of human rights abuse.[15] The role of the Commission of Human Rights appeared increasingly redundant with many cases being brought to the Court and therefore the Commission was abandoned and the Court was restructured to be more administratively efficient under Protocol 11 of the European Convention in 1998.[16]

The implementation mechanism of the European Convention is now the European Court of Human Rights in Strasbourg[17] and the Committee of Ministers, which is

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[12] <http://www.coe.int/T/E/Com/About_COE/> (accessed 16 Apr 2006).

[13] Interim Resolution ResDH(2001)80 concerning the judgment of the European Court of Human Rights of 28 July, 1998 in the case of Loizidou against Turkey <https://wcd.coe.int/ViewDoc.jsp?id=217701&Lang=en> (accessed 16 Apr 2006).

[14] Vico Morcote "Why the Council of Europe Should Put Conglomerate Russia on Hold" *International Herald Tribune* (Thursday 2 February 1995) <http://www.iht.com/articles/1995/02/02/edpeter.php>; see also Diane Ethier "Is Democracy Promotion Effective? Comparing Conditionality and Incentives" (2003) 10/1 Democratization 99–120.

[15] Clements, Mole and Simmons *European Human Rights: Taking a Case under The Convention* (2nd ed, Sweet and Maxwell, London, 1999); Pieter van Dijk et al. *Theory and Practice of the European Convention on Human Rights* (3rd ed, Kluwer, The Hague, 1998); R Bernhardt "Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11" (1995) 89 AJIL 145–154.

[16] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=155&CM=7&DF=2/20/200 8&CL=ENG > (accessed 10 Feb 2008).

[17] Richard Pierre Claude, Burns H Weston (eds) *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, 1992).

also the key political institution of the Council of Europe. The European Convention has entrusted the monitoring and the supervision of the Court's judgments to this body. The Court's jurisdiction is wide and offers redress to all persons whose rights, which have been guaranteed under the European Convention, have been violated. The Court entertains applications from individuals as well as states and though it is rare for a state to make an allegation of rights violations by another state, nevertheless the lingering memories of the Holocaust make such a provision essential to the legitimacy of the mechanism. The Court's judgments are final and legally binding on respondent states.[18] However, as the judgments are declaratory in nature, while the Court can pronounce upon the violation of European Convention articles and award compensation, it cannot compel a state to amend the offending legislation or alter the practice to avoid similar future violations.[19]

The requirement that all domestic remedies must be exhausted before an applicant[20] petitions the Court reiterates the position that the regional judicial forum is a place of last resort and that the European Convention envisages that the national governments have appropriate fora to offer redress for human rights violations. The proceedings of the Court usually involve nine judges including a judge from the country in question, but have provision to seat a Grand Chamber of 21 judges in what is essentially an appellate process. Once the case is declared admissible the Court initially strives for an amicable settlement, which can range from the payment of compensation to the amending of offending legislation or administrative process.

The Committee of Ministers of the Council of Europe, which is the implementing organ of the European Human Rights mechanism, is vested with the duty to ensure that the judgments are implemented by individual countries in terms of payment of compensation or the requisite amendments to the laws or

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[18] Articles 44 & 46 § 1 of the Convention as amended by Protocol No. 11 (formerly Article 53) provide: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

[19] Sienho Yee *International Law and the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, London, UK, 2001) 409 (Yee).

[20] The applicants to the Court must not be anonymous and they must be seeking redress for a violation of a right that is enshrined in the Convention. It is also imperative that the petitioner invokes the jurisdiction of the European Court within six months of the final domestic hearing.

administrative proceedings being carried out. It can also assist with the reopening of proceedings if necessary.

The European Convention on Human Rights, while prescribing a regional mechanism for the protection of human rights, places significant emphasis on the point that primary responsibility for securing human rights is vested with individual countries[21] and that the implementation machinery at regional level is activated only once all domestic remedies are exhausted. This preference for national remedies through national rights legislation is efficacious in a region where there are effective and efficient judicial systems and monitoring bodies and where the spirit of human rights is deeply entrenched within the governing structures.[22] In this sense the European system of human rights vindication is a system with sophistication and maturity and also a forum of last resort. In most instances the purpose of the European system has been the reinforcement of rights and procedures that can better safeguard human rights in a domestic context. The ECHR has inspired the legal systems of the member countries significantly in terms of altering legislation, policy stances and the legal perceptions regarding human rights within the system.[23] In this context there is veracity in the Court's pronouncement that the European Convention is "a constitutional document of European public order."[24]

The significance of the emergence of regional mechanisms on human rights lay in the fact that its evolution reflects a particular response to the dilemmas and the concerns of that region at a particular time. The impetus to create the European system of human rights was rooted in the horror of the Nazi atrocities, the deep scepticism towards the Soviet Bloc and the slow development of universal mechanisms to protect human rights under the aegis of the United Nations.[25] In this sense, the European system, as any other regional mechanism, was a reaction to the needs and the concerns of an era and political demography, which is

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[21] ECHR Articles 1 & 13.

[22] Robert Blackburn *The European Convention on Human Rights: The Impact of the European Convention on Human Rights on the Legal and Political Systems of Member States* (Cassel, London, 1998)**.**

[23] Brice Dickson *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (Sweet & Maxwell, London, 1997).

[24] *Loizidou v. Turkey* 310 Eur. Ct. H.R. ser. A 1995 27.

[25] Henry Steiner and Phillip Alston *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2000) 787.

reflected by the exclusion of social rights in the Convention except the Paris Protocol of 1952 to the Convention, Article 2, which decreed no-one is to be deprived of right to education.[26] Pierre-Henry Teigen, one of the architects of the Convention, explained the reasons for this exclusion by saying that the primary duty of the Convention was to safeguard the "political democracy of Europe" and issues of social democracy were to be addressed later.[27] Therefore, the issue of social and economic rights was shelved to emerge later as the European Social Charter in 1961.

The European system was the first attempt at transforming the ideals enshrined in the UDHR into a working legal framework, and half a century later it has matured into an efficient system of implementing human rights and monitoring violations and has contributed immensely to the evolution of contemporary human rights jurisprudence particularly in the field of civil and political rights.

At this moment it is also vital to highlight a fundamental distinction between the European system and the proposed South Asian praxis. The European human rights regime under the aegis of the Council of Europe is a mechanism that empowers individuals against their respective states. The regime ensures governmental accountability internally to a predetermined normative standard. The regime in this sense is a second line of defence, or a tool of reinforcement, for citizens of the participant states, because by definition their states will already have complied with the normative standards that are prerequisites for membership of the Council. The regime in this sense is a tool of empowerment for the people for European system at a regional level as it caters to human rights lapses at domestic level. A functional mechanism to safeguard human rights is presupposed at national level as democracy is a prerequisite to the membership of the European Council. As the discussions of Chapters 2 and 4 indicated, the luxury of efficient domestic human rights systems is unavailable in South Asia. In the South Asian context it would be the regional human rights mechanism's responsibility to

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[26] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, 20.III.1952 Headings of articles added and text amended according to the provisions of Protocol No. 11 (ETS No. 155) as of its entry into force on 1 November 1998 <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm> (accessed 10 Feb 2008).
[27] Quoted in Henry Steiner and Phillip Alston *International Human rights in Context: Law, Politics, Morals* (Oxford University Press, 2000) 794.

determine normative standards, foster them nationally and ensure the correct implementation of the human rights occurs at domestic level.

5.3.2   The European Social Charter: Bringing ESC Rights in from the Cold

The European Social Charter, adopted in 1961 and substantially revised in 1996,[28] is a specialized human rights mechanism that has evolved through the Council of Europe and is regarded as the natural counterpart in the ESC realm of the Convention for the Protection of Human Rights and Fundamental Freedoms, the latter being aimed at safeguarding civil and political rights.

The primary concern of the Social Charter is the classic social and economic rights in the universal system, and the states parties to the Charter seek to honour the obligations of the Charter in spirit as well as implementing strategies nationally to realize the rights contained in the Charter.[29] The Social Charter enshrines the right to work, education, the right to vocational guidance and training, non-discrimination, prohibition of forced labour, trade union rights and the right of women and men to equal pay for work of equal value, as well as elaborate measures on social protection, rights of children and young persons, right to healthcare protection, social, legal and economic protection and to social security.[30] It is designed to address concerns including social welfare, and issues of social cohesion, which would enhance the quality of life of the people.

The revised Social Charter (1996) has broad-based rights that encompass protection against poverty and social exclusion, the right to adequate accommodation and protection in instances of unjust termination of employment

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[28] The revised Social Charter of 1996, which came into effect in 1999, reflects the changing social circumstances in the member states. It consolidated in a single document the rights recognized in the original Charter of 1961, the rights recognized in the Additional Protocol of 1988 and certain new rights. See also Robin R Churchill and Urfan Khaliq "The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?" (2004) 15 Eur Journal of Int Law 417–456.(Churchill and Khaliq).

[29] DJ Harris "The European Social Charter" July (1964) 13/3 The International and Comparative Law Quarterly 1076–1087.

[30] For rights relating to housing, health, education, employment, legal and social protection, movement of persons, and non-discrimination, see Articles 1–31 European Social Charter 1996 <http://conventions.coe.int/treaty/en/Treaties/Html/163.htm> (accessed 23 Jun 2005); see also Nihal Jayawickrama *Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, West Nyack, NY, USA, 2002) 74.

and rights related to the movement of people. The Additional Protocol to the Social Charter entered into force in 1998 and expanded the jurisdiction of the Charter and provided an opportunity for workers' groups and NGOs to initiate collective complaints to the European Committee of Social Rights.[31] The Explanatory Report on the Protocol justified the collective complaints mechanism on the basis that it is: [32]

> designed to increase the efficiency of supervisory machinery based solely on the submission of governmental reports. In particular, this system should increase participation by management and labour and non-governmental organizations ... The way in which the machinery as a whole functions can only be enhanced by the greater interest that these bodies may be expected to show in the Charter.

At the centre of the monitoring and the implementation system of the Social Charter is the European Committee of Social Rights,[33] which scrutinizes the periodic governmental reports submitted to it on the implementation of the Charter. The Committee, quasi judicial in nature, comprises independent experts who evaluate the reports and submit their observations in the form of "Conclusions" to the Committee of Ministers of the Council of Europe, who in turn issue recommendations to governments asking them to change their national legislation or policies to ensure compliance.

In addition to the above mechanisms, the European system also has a Commissioner for Human Rights,[34] an office that was created in April 1999. The European Parliamentary Assembly of the Council of Europe (PACE) elects the Commissioner for a period of six years and the Commissioner is vested with the specific mandate "to promote education and awareness of human rights, to identify areas of laws that fail to recognize human rights to a full extent and

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[31] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints CETS No: 158; see also Churchill and Khaliq, above n 25.

[32] Council of Europe, Explanatory Report on the Collective Complaints Protocol (1995) paras 1–8 <http://conventions.coe.int/treaty/en/Reports/HTML/158.htm.> (accessed 10 Feb 2008).

[33] "The European Committee of Social Rights ascertains whether countries have honoured the undertakings set out in the Charter. Its thirteen independent, impartial members are elected by the Council of Europe Committee of Ministers for a period of six years, renewable once. The Committee determines whether or not national law and practice in the States Parties are in conformity with the Charter." (Article 24 of the Charter, as amended by the 1991 Turin Protocol) <http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation/Charter_glance.asp#TopOfPage>
(accessed 14 May 2006)

[34] <http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/> (accessed 14 May 2006).

human rights laws that are not fully implemented and to promote a respect for and enjoyment of human rights in COE member states."[35] The Commissioner does not have powers of investigation into individual complaints relating to rights that have been violated.

The distinction that is maintained by the European states in relation to civil and political rights on the one hand, and economic, social and cultural rights on the other, has its roots in ideological convictions as much as administrative expediency. Economic, social and cultural rights being progressive in nature are traditionally considered to be lacking in justiciability, a quality that is regarded as an integral characteristic of civil and political rights — but whose nature is now being questioned.[36] In keeping with the ideological premises, the European states have adopted a dual-pronged mechanism for human rights protection. The implementation mechanism of the Social Charter is distinctly different from that of the ECHR. Issues such as prevention, education and the general supervision of national human rights legislation are vested in the Human Rights Commissioner, a role which is essentially administrative.

The European Human Rights system is a fine blend of common political ideological convictions, social expediency and administrative functionalism. The human rights protection mechanism in Europe was created half a century ago; however, the system remained sensitive to the changing conceptual articulations of human rights, and the content and the scope of the Convention have been amended through subsequent Protocols. The European Human Rights Commission was disbanded when it was deemed dysfunctional in the contemporary context of human rights litigation. The scope and the reach of the Social Charter have been repeatedly enhanced to respond to the insecurities that were felt with the rapid expansion of the economic globalization process.[37] The

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[35] Resolution (99)50 of the Council of Europe Commissioner for Human Rights adopted by the Committee of Ministers on 7 May 1999.
[36] Michael Addo "Justiciability Re-examined" in D Hill & R Beddard (eds) *Economic Social and Cultural Rights* 1991 and Eide "Economic Social and Cultural Rights as Human Rights" in A Eide, C Krause and A Rosas (eds) *Economic Social and Cultural Rights A Text Book* (2nd ed, 2001).
[37] Churchill and Khaliq, above n 25.

success of the European Court as an effective mechanism for human rights protection has been proved over the years. As Yee observes: [38]

> The experience of and with the European Court of Human Rights demonstrates that, at least on the regional level, individual rights can be protected by an international court. States were, during a long period, reluctant to accept the jurisdiction of the European Court, but over the decades and in spite of decisions considerably restricting the sovereignty of States, at first the western European States and since 1990 nearly all other European States have accepted the international control and the compulsory jurisdiction of the Court.

The implementation apparatus of the ECHR is the most sophisticated and best executed of all of the regional mechanisms considered in this chapter. This success is largely dependent on the mature and well established national adjudicatory systems and the functional democratic governance which is the norm in the region.

Social rights, while traditionally sidelined especially within the Western European discourse of human rights, have been prominent on the agenda in Europe in recent years. The debate about providing equal status to both social and economic rights gathered a new impetus with the influx of post-communist states into the Council of Europe. Moreover there is increased academic observation that "to consider that all of the rights that are found in treaties which promote and protect economic and social rights are incapable of being judicially determined is an oversimplification."[39] The revision of the Council of Europe's European Social Charter to allow for a collective complaints procedure also appears to endorse this position.

Today, the European human rights system that operates through the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter is a fundamental facet of the European regionalization ethos despite the challenges that have emerged, particularly through the expansion of its membership to states that have not always shared a liberal democratic political history. "In the first few decades of its existence, the organs of the European Convention system, in contrast to those of other regional systems for the protection of human rights, were privileged in that their field of application

[38] Yee, above n 16.
[39] Churchill and Khaliq, above n 25, 420.

extended, on the whole, to a relatively homogeneous region of Europe where democracy and the rule of law were well-established."[40] However, increasingly both the Council of Europe and, at a slower pace, the EU are embracing states that have evolved in the past with different political and social ideologies.[41] These states have vastly different legal systems and the concept of rights embraced by them is vastly different from the familiar liberal rights theories of Western Europe. While democratic governance and acceptable human rights standards are deemed to be preconditions for acceptance into the Council of Europe, such values are not yet fully embedded in the sociopolitical and cultural mores of many of the states that are classified as "transitional democracies".[42] It is these new member states that will test the capacity of the European regional system and offer challenges in terms of the substantive rights enshrined in the Convention and the Social Charter and the adequacy of the mechanisms in place to vindicate these rights.

Chapter 6 will illustrate how the proposed South Asian system can learn from the coherence and the systematic implementation of human rights within the Council of Europe's States. It will also debate the efficacy of introducing a Social Rights Charter and whether in respect of monitoring and implementation South Asia should go further than its European counterpart, which has a restricted and clearly defined collective complaints system that the states have the prerogative to opt into and also operates a system of annual country reports to the Council of Ministers.

5.4   The Americas and the Caribbean: A Powerful Mechanism for Democracy through a Turbulent History

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[40] Yee, above n 18.

[41] The Council of Europe has 47 members as of 2007 member states including 22 from the former Soviet Bloc. It has granted observer status to 5 more countries (the Holy See, the United States, Canada, Japan and Mexico).

[42]   Shale Horowitz "Causes and consequences of variation in post communist human rights practices" in Shale Horowitz and Albrecht Schnabel (eds) *Human Rights and Societies in Transition* (UN University Press, 2004) 242.

5.4.1 The Organization of American States – The Organization of American States: Rebuilding democracies and breaking the non-intervention mould

The Inter-American system is a remarkable example of regional collaboration that not only promotes human rights but also contributes to the evolution of a new ethos of democratic governance, which is an essential pre-condition for the success of human rights. Latin America, notorious for its brutal political history,[43] authoritarianism and military dictatorships, has evolved a "well-established norm of civilian, constitutional government in the hemisphere."[44] Many observe that within the past three decades the American states have being a part of the global 'third wave' transition to democracy.[45] Diamond expands on Huntington's classification of the period stemming from the mid 1970s as the "third wave" of global democratic expansion and explains that Huntington "defines 'a group of transitions from nondemocratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period".[46] He identifies two previous waves of democratization: a long, slow wave from 1828 to 1926 and a second wave from 1943 to 1964. Significantly, each of these ended with what he calls a "reverse wave" of democratic breakdowns (the first lasting from 1922 to 1942, the second from 1961 to 1975), in which some of the newly established (or re-established) democracies failed."[47] This democratic transition in Latin America is remarkable as this was the era when stabilisation and privatisation policies introduced by the IFIs had devastating repercussions on the region's political and social life,[48] often

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[43] For a brief historical account see Juan E Mendez and Javier Mariezcurrena "Human Rights In Latin America And The Caribbean: A Regional Perspective" Paper submitted to the Human Development Report 2000 *Human Rights and Human Development*; and also Jorge I Domínguez and Michael Shifter (eds) *Constructing Democratic Governance in Latin America* (Johns Hopkins University Press, 2003) (Mendez and Mariezcurrena).

[44] *The Third Wave of Democratization in Latin America: Advances and Setbacks* Frances Hagopian and Scott P Mainwaring (eds) (Cambridge University Press, Cambridge 2005); Michael Shifter "Tensions and Trade-Offs in Latin America" (1997) 8/2 Journal of Democracy 116.

[45] Michael Dodson and Donald Jackson "Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala" (2004) 46/4 Latin American Politics & Society 1–27.

[46] Samuel P Huntington *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, Norman 1991) 15.

[47] Larry Diamond "Is the Third Wave Over?"(1996)7 Journal of Democracy 20–37, 20.

[48] Riordan Roett, Carol Wise (eds) *Post-Stabilization Politics in Latin America: Competition, Transition, Collapse* (Brookings Institution Press, 2003).

fuelling civil dissent and resentment against the governments, which in turn created opportunities for the governments to react with violence and brutality.

The Americas and the Caribbean are a region that has a peculiar political history and culture which is heavily influenced by more than one nation's colonialism as well as by indigenous traditions.[49] The region's relationship with democracy and human rights has been at best sporadic, with dictatorships, coups-d'état, autogolpes and military juntas dominating the political landscape of the region particularly in the 1970s and the 1980s.[50] Referring to this period as the era of the "Doctrine of the Security of the State",[51] Gomez explains how the military carried out "disappearances" to eliminate subversive elements that sympathised (at least allegedly) with the theories of communism. Such a political climate, which disregarded the finer traditions of democracy and the rule of law, also contributed to massive human rights abuses that were perceived to be the price one paid for containing communism.[52]

The end of the Cold War eradicated past insecurities[53] and the region has emerged as one that has experienced a "democratic renaissance".[54] According to Ambassador Odeen Ishmael of Guyana, Caribbean countries played a crucial role in this revival: "The CARICOM nations have a long tradition of representative democracy and the respect and protection of human rights, and the fresh ideas they brought to the forum of the OAS encouraged this hemispheric body to adjust its perspective. Issues relating to democracy in the hemisphere became more important, and programs to encourage democratic development such as promoting

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[49] Maxwell A Cameron "Threats to Democracy in the Americas" (Policy document, Canadian Foundation for the Americas, Ottawa, May 2000) <http://www.focal.ca/pdf/threats.pdf> (accessed 5 Mar 2005).
[50] EL Lutz and K Sikkink "International Human Rights Law and Practice in Latin America" (2000) 54 International Organization 633–659.
[51] Veronica Gomez "The Inter American System for the Protection of Human Rights" Human Rights Law Centre Newsletter 20 June 1996 1, 3.<http://www.nottingham.ac.uk/law/hrlc/hrnews/june96.htm> (accessed 16 Mar 2005).
[52] Connie Peck *Sustainable Peace: The Role of the UN and Regional Organizations in Preventing Conflict* (Rowman and Littlefield Publishers, New York, 1998) 139.
[53] As Francisco Villagrán de León, Guatemala's former Ambassador to the United Nations and the OAS, points out, "The Cold War constrained the role that the OAS and other international organizations were able to play in many areas and precluded any effective efforts by the OAS to promote democratic development." *The OAS and Democratic Development* (United States Institute of Peace, Washington, September 1992) 8.
[54] Tom Farer "Collectively Defending Democracy in the Western Hemisphere: Introduction and Overview" in *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (Johns Hopkins University Press, Baltimore, 1996) 7.

and supporting programs to reduce poverty and to combat crime became more and more significant as the years progressed."[55] The Caribbean influence as a phenomenon in itself, apart from the exhaustion of the civil society from endless political strife and the changing ethos of world politics, indeed also contributed to the transformation. Today, other than Cuba and perhaps Haiti, all countries in the Caribbean and also the Americas enjoy some form of democracy although a majority of the regimes are classified by analysts as "semi democracies", "near democracies" or "partially illiberal democracies".[56] Diamond also agrees with this point of view and concedes that the democratic governance in the Americas is yet to be internalized and to achieve a sense of legitimacy within both the elite political circles and the people.[57]

Democratic consolidation is a long and arduous trajectory and the neo-liberal economic drive in the Americas have not aided in creating a conducive environment for democracy to thrive. In this context the achievements in relation to democratic transition within the member states of the OAS are laudable. The OAS asserts that one of its essential purposes is "[t]o promote and consolidate representative democracy."[58] The OAS, through both the creation of institutions and the adoption of several instruments, has created a unique framework to foster democratic governance in the region. Not only have the OAS Charter and supporting treaties emphasised the significance of democracy, they also reiterate[59] the natural nexus between democracy, human rights and development as discussed in the introduction to Chapter 4 of this study. To Spehar, the action of the OAS "reflects a long-term commitment to institutional strengthening and to the promotion of a democratic political culture in the Americas, which in itself

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[55] Statement by Ambassador Odeen Ishmael of Guyana in the Permanent Council of the OAS During Discussions on the Inter-American Democratic Charter Washington DC, 20 June 2001 <http://www.guyana.org/Speeches/ishmael_oas062001.html> (accessed 7 Mar 2005).
[56] Guillermo O'Donnell "Delegative Democracy" (1994) 5/1 Journal of Democracy 55–69; Freedom House 2003b "Freedom in the World country ratings, 1972 through 2003" available on-line at: <http://www.freedomhouse.org/ratings/allscore04.xls> (accessed 10 Mar 2005).
[57] Larry Diamond Consolidating Democracy in the Americas (1997) 550 The Annals of the American Academy of Political and Social Science 12–41.
[58] Article 2 B - Charter of the Organization of American States, as amended by the Protocol of Buenos Aires signed on 27 February 1967; by the Protocol of Cartagena de Indias on 5 December 1985; and by the Protocol of Washington, 14 December 1992; by the Protocol of Managua, 10 June 1993 <http://www.oas.org/juridico/english/charter.html> (accessed 10 Mar 2005).
[59] Ibid Article 3.

can be considered a form of prevention against future conflicts or ruptures in the democratic process in Member States."[60]

5.4.2   OAS Mechanisms to enhance democracy

The Unit for Promotion of Democracy (UPD)[61] established in 1990 under Resolution 1080 is the principal body of the OAS responsible for activities in support of democratic consolidation within the member states of the OAS. It provides immediate and effective technical support and guidance to strengthen democratic institutions and procedures. Over the nearly two decades of its existence it has evolved into the fundamental source which the countries in the region can rely on to provide an impetus for national peace building and reconciliation processes, especially after emerging from often volatile and violent autocratic regimes. The UPD is also responsible for the provision of education and training and information about democratic practices for the region. It has furthermore played a pivotal role in providing modern technology to the countries so that they are able to effectively implement electoral processes.[62]

The Electoral Observation Missions, undertaken by the UPD on behalf of the Secretary General of the OAS since 1990, have contributed to the fostering of democratic practices in the region. Although elections are not a sufficient guarantee of the health of a democracy they are certainly necessary and help to create or restore legitimacy and transparency to the process of governance.[63]

The OAS mission of promoting and consolidating democracy in the region has also involved several amendments to the OAS Charter and other resolutions. The OAS Charter's Preamble, which was amended through the Cartagena Protocol of 1985, is in many ways the prelude to the Organization's renewed commitment to democracy, for the amendment succinctly declared "representative democracy as

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[60] E Spehar "The Role of the Organization of American States in Conflict Prevention" (2001) 8/1 International Journal on Minority and Group Rights 61–70.
[61] <http://www.upd.oas.org/lab/aboutupd.html> (accessed 10 Mar 2005).
[62] Presentation by Elizabeth Spehar, Executive Coordinator of the Unit for the Promotion of Democracy, GS/OAS, 18 February 2000 <http://www.summit-americas.org/CEGCI%20Meetings/18-FEB-00- CEGCI/Presentation> (accessed 5 Mar 2005).
[63] Thomas Carothers "The Observer Observed" [1997] Journal of Democracy 8.

an indispensable condition for the stability, peace, and development of the region", thereby elevating democracy into a core concern of the organization.[64]

The commitment to democracy was further enhanced when the OAS General Assembly adopted the resolution "The Santiago Commitment to Democracy and the Renewal of the Inter-American System" in June 1991, which reiterated the member states' stance on democratic governance and undertook to create "efficacious, timely and expeditious procedures to ensure the promotion and defence of democracy".[65] The Santiago Commitment, although devoid of legal strength or systematic procedures to implement the commitment to democratic governance, was nevertheless significant as it indicated the member states' intolerance [dislike sounds weak]of undemocratic governance. The Santiago Commitment also reaffirmed the "inescapable commitment to the defense and promotion of representative democracy and human rights ... within the framework of respect for the principles of self-determination and non-intervention." In this sense, the Santiago commitment was paradoxical. While it affirmed the members' commitment to the "principle of non intervention" it also laid the foundation of the radical idea that a domestic political crisis can justify regional intervention. In a region where the notion of sovereignty appeared sacrosanct, such a step indicates the level of disenchantment with recurring military governance as well as the genuine desire of the member states to establish democracy in the region.[66] In fact, this was the point where Muñoz claims the right to democracy transmuted from being a mere "moral prescription" to "an international legal obligation".[67]

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[64] Protocol of Amendment to the Charter of the Organization of American States "Protocol of Cartagena de Indias", O.A.S. Treaty Series No. 66, entered into force 16 November 1988. <http://www.oas.org/juridico/english/treaties/a-50.html> (accessed 5 Nov 2007).
[65] <www.oas.org/xxxiiiga/english/docs/agdoc4224_03rev3.pdf> (accessed 5 Nov 2007).
[66] Article 19, chapter 4 of the OAS Charter, "Fundamental Rights and Duties of States," states these guidelines clearly: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."
[67] Heraldo Muñoz "The right to democracy in the Americas" (1998) 40 (translated by Mary D'Leon) Journal of Interamerican Studies & World Affairs 1–18.

The Santiago Commitment was a declaration and lacked legal force. By contrast, the subsequent Resolution on Representative Democracy (Resolution 1080)[68] provided for the Secretary General to call for the immediate convocation of the Permanent Council in the event of any sudden interruption to the democratic political institutional process or to the legitimate exercise of power by the democratically elected government in any of the Organization's member states. In such an event the permanent Council could be convoked in order, within the framework of the Charter, to examine the situation, and to decide on and convene an ad hoc meeting of the Ministers of Foreign Affairs or a special session of the General Assembly, all of which must take place within ten days.[69] Resolution 1080 has been relied upon on several occasions as a means of responding politically to interruptions to democratic governance and has proven to be an effective tool to defuse volatile situations as well as instances of "democratic backsliding"[70] in the region. The Santiago Declaration and Resolution 1080 created the procedure for swift regional action in situations of democratic backsliding in the form of military coups and/or the assumption of power by dictators, such as those cases which occurred in Guatemala, Peru, Haiti, and Ecuador. This process placed the OAS in the forefront of efforts by international organizations to promote democracy in the central and southern American region.[71]

The two documents discussed above initiated the evolution of a new principle of the multilateral defence of representative democracy in the region, which diminished the significance of the doctrine of state sovereignty and the principle of non-intervention from intra- regional relationships. The essential spirit of the two documents succeeded in creating "a new, automatic procedure to follow for organizing an external response to democratic breakdown. Second, they issued a

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[68] AG/RES.1080(XXI-O/91) Representative Democracy (Resolution adopted at the fifth plenary session, held on 5 June, 1991) <http://www.oas.org/juridico/english/agres1080.htm> (accessed 10 Mar 2005).

[69] Ibid Article 1.

[70] Munir Squires "Democracy Without Borders Cross-Regional Survey of Multilateral Pro-Democracy Efforts" Prepared for presentation at the workshop Transnational Dimensions of Democratization in the Americas, Mount Allison University, New Brunswick, Canada, 14–26 June 2005
<http://www.mta.ca/faculty/socsci/international_relations/workshop/PDFs/_squires.pdf> (accessed 17 Oct 2006).

[71] Ellen L Lutz and Kathryn Sikkink "International Human Rights Law and Practice in Latin America" (2000) 54 International Organization 633–659.

license to the OAS to undertake a wide range of collective activity so long as such actions were approved by its member states' foreign ministers or the General Assembly. Finally, they established the principle of rapid response."[72]

The drive for democratic consolidation achieved another milestone at the 22nd OAS General Assembly in Nassau, Bahamas, in May 1992, where the member states resolved to take specific action against the democratic delinquents in the region by suspending the governments of member states when a sudden or irregular interruption of the institutional democratic process takes place.[73]

Furthermore, the creation of a new regional norm of democratic governance achieved another boost through the adoption of the Managua Declaration for the Promotion of Democracy and Development in June 1993.[74] This declaration was significant in that it not only incorporated the need for democratic governance but also reiterated the essential nexus between democracy and broader issues such as freedom, social justice, human rights and peace. It also highlighted the need for an overall approach to resolve these issues if democratic governance is to succeed in the region.

The Inter-American Democratic Charter (IADC) of 2001[75] was the culmination of a long period of effort by the OAS in creating a multilateral response to interruptions of democracy in the region. It is significant that democracy was regarded as a condition for member states to participate in the proceeding's summit process, which adopted the Democratic Charter.[76] The Charter heralded in a new era for intra-regional relations as "[t]he normative purpose behind the charter centred on the collective right to democracy as opposed to the traditional

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[72] Andrew Cooper and Thomas Legler "The OAS Democratic Solidarity Paradigm: Questions of Collective and National Leadership" (Spring 2001) 43 Latin American Politics and Society 106.
[73] Article 9 "[a] Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialised Conferences as well as in the commissions, working groups and any other bodies established." Amendment to the Charter through the Washington Protocol of 1993 which came into force in 1997 <http://www.oas.org/juridico/english/charter.html> (accessed 5 Mar 2005); see also Francisco Villagrán de León *The OAS and Democratic Development* (United States Institute of Peace, Washington, September, 1992) 10.
[74] [AG/DEC. 4 (XXIII-O/93)] <http://www.upd.oas.org/lab/history.html> (accessed 17 Mar 2005)
[75] http://www.oas.org/charter/docs/resolution1_en_p4.htm (accessed 7 Nov 2007).
[76] Andrew F Cooper "The Making of the Inter-American Democratic Charter: A Case of Complex Multilateralism" (2004) 5/1 International Studies Perspectives 92–113.

defence of sovereignty."[77] Article 1 of the Charter states that "[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it",[78] thereby promoting democracy as a specific right as well as a hemispheric principle.

The IADC is a special document in its genre because it has taken into account the political climate of the region and caters specifically to the exigencies that will arise during democratic governance, especially the prevention of the emergence of new authoritarian practices in the hemisphere. The Charter expanded the notion of democratic crisis beyond traditional coup-d'état or military rule to include an undefined "unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state."[79] It created a response mechanism in the event of an intended threat to democracy.[80] That mechanism can be invoked by a member state voluntarily if it deems that there is an imminent threat to democratic governance. In the event of a breach of the IADC the Permanent Council can be convened at the request of *any* member state or the Secretary General to undertake a collective assessment and appropriate "diplomatic initiatives".[81] The Permanent Council is empowered to recommend an immediate meeting of the General Assembly, and the General Assembly, with a two thirds majority, can suspend a member state for violations of the Charter through an unconstitutional interruption to the state's democratic order .[82] From this perspective the IADC contains a deterrent against any actions that disrupt democratic order within a state.

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[77] Ibid..
[78] <http://www.oas.org/charter/docs/resolution1_en_p4.htm> (accessed 10 Mar 2005).
[79] Article 19 <http://www.oas.org/charter/docs/resolution1_en_p4.htm> (accessed 18 Mar 2005).
[80] Article 17: "When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system."
Article 18: "When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening." <http://www.oas.org/charter/docs/resolution1_en_p4.htm> (accessed 6 Mar 2005).
[81] Ibid Article 20.
[82] Ibid Article 21.

In many ways the IADC transformed democratic rhetoric into reality in the Americas. This is not to say that words themselves, alone, are meaningless. Indeed, as Munir Squires says, "[i]t is important to note however that words, even without action, play an important role of creating and sustaining norms that have an impact on state behaviour."[83] The IADC nevertheless goes the extra mile and as such is an action-backed reiteration of members' commitments to democracy. It has proven that doctrines of "[t]erritorial inviolability, nonintervention, and self-determination"[84] are luxuries that can only be afforded by states with democratic governance. The drive for a "collective defence of democracy"[85] has made delinquent states' boundaries porous to the regional organization as well as bilateral and multilateral intrusions.

The OAS procedures that are in place to defend democracy have been invoked several times with varied degrees of success[86] and with scepticism from various quarters.[87] Democratic consolidation in the region has been only partially successful, resulting in a situation of "insufficient democracy" whereby even seemingly established democratic regimes encounter issues of legitimacy.[88] There have been accusations made against the OAS that the organization has reacted haphazardly in instances of democratic disruptions and moreover that they appear satisfied with the "appearance" of democracy "with a nominal return to elections, as long as they are more or less defensible as expressions of majority opinion, though not fully free and fair by more rigorous standards."[89] Indeed, as has been

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[83] Munir Squires "Democracy Without Borders: Cross-Regional Survey of Multilateral Pro-Democracy Efforts" Prepared for presentation at the workshop Transnational Dimensions of Democratization in the Americas, Mount Allison University, New Brunswick, Canada, 14–26 June, 2005. <http://www.mta.ca/faculty/socsci/international_relations/workshop/PDFs/_squires.pdf> (accessed 20 June 2006).

[84] Andrew Cooper and Thomas Legler "The OAS in Peru: A Model for the Future?" (2001) 12 Journal of Democracy 4.

[85] Dexter M Boniface "A democratic Norm for the Western Hemisphere? An Analysis of the Organization of American States, 1991 – present" Latin American Studies Association (LASA) Conference Las Vegas, Nevada, 7-9 Oct 2004 <http://web.rollis.edu/~dboniface/> (accessed 17 May 2006) (Boniface).

[86] Ibid at Tables 2, 3 and 4..

[87] Cynthia McClintock "The OAS in Peru: Room for Improvement" (2001) Journal of Democracy 12 4; M Wucker "Haiti: So Many Missteps" (2004) 21/1 World Policy Journal 41–49.

[88] Larry Diamond "Consolidating Democracy in the Americas" in "NAFTA Revisited: Expectations and Realities" Annals of the American Academy of Political and Social Science (1997) 550 12–41.

[89] Mendez and Mariezcurrena, above n 42

noted above,[90] a majority of the regimes are classified by analysts as semi democracies, near democracies or partially illiberal democracies.[91]

While there has been no automatic democratic transformation within the region, the OAS has certainly, through its multilateral effort, contributed to the creation of a "principle of collective intervention for democracy" which the member states are willing to support.[92] In many instances, while the democratisation drive of the OAS did not entirely succeed through formal procedures, the informal presence of the OAS in the form of facilitators of democratic processes, conveners of *mesas de diálogo* (roundtable discussions), diplomatic missions and threats of economic embargos has contributed to avert the immediate political crisis.[93] The OAS has, in principle, also not rejected options of "economic sanctions, including the interruption of aid from multilateral financial institutions" in instances of interruptions to democratic governance.[94] Such informal multilateral scrutiny and action has also proven to be a deterrent against the consolidation of authoritarian rule.[95]

In the 1980s the OAS embarked on the arduous task of creating an enduring democratic norm in a region that was not only predominantly governed by assorted authoritarian regimes but also beleaguered with problems of extreme poverty, social exclusion, and corruption, and had a disastrous human rights record. While it seemed the earlier Declarations on commitments to democracy went little beyond rhetoric, they were in reality the catalysts of the democratic metamorphosis that subsequently occurred and contributed to the process of consensus-building within the region. Although democracy remains shallow, troubled and illiberal in much of the Americas, it at least still exists in most countries a decade or more after the transitions to it. This in itself is an achievement without precedent in hemispheric history. Any multilateral effort

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[90] See the text to footnote 55 of this chapter.

[91] Guillermo O'Donnell "Delegative Democracy" (1994) 5 Journal of Democracy 55–69; Freedom House 2003b "Freedom in the World country ratings, 1972 through 2003," available on-line at <http://www.freedomhouse.org/ratings/allscore04.xls> (accessed 7 Nov 2007).

[92] Andrew Cooper and Thomas Legler "The OAS Democratic Solidarity Paradigm: Questions of Collective and National Leadership" (2001) 43 Latin American Politics and Society 103–126.

[93] Boniface above n 85.

[94] Richard J Bloomfield "Making the western hemisphere safe for democracy? The OAS Defense-of-Democracy regime" (1994) 17 The Washington Quarterly 157–169

[95] Heraldo Muñoz "A New OAS for the New Times" in Viron P Vaky and Heraldo Muñoz *The Future of the OAS* (Twentieth Century Fund Press, New York, 1993) 82–83.

takes time to evolve, to create and to fine-tune its capability, structures, modalities and priorities, and the democratic initiative of the OAS has proven this. As Mendez and Mariezcurrena emphasise "[i]t is a mistake to assume that democracy and human rights are in full effect only because elections are generally held. On the other hand, it would be an even more serious mistake to overlook the immense benefits and opportunities that the new democratic period offers."[96]

While some analysts hail the hemisphere as playing an active role in the global "third wave" towards democracy, replacing illiberal democracies and dictatorships, others remain sceptical about the region's continued commitment to democracy. This scepticism prevails especially in the context of the many poverties that the region faces in terms of lack of respect for human rights and inequitable spread of economic growth, which in turn fuels social discontentment threatening the delicate democratic systems. For instance, Diamond and Jackson assert that the fledgling democracies in the region demonstrate a "fragile commitment" to the rule of law for there exists a "disturbing undertow" of "pervasive corruption and politicisation of justice sector institutions."[97] This observation supports the position that the establishing of democracy must take on a multidimensional approach that also addresses issues of human rights and equitable development.

5.4.3　The Human rights protection system under the OAS

The normative framework of the Inter-American system of human rights protection stems from two instruments: The American Declaration of the Rights and Duties of Man[98] and the American Convention.[99] The structure that is in place for the protection of human rights in the Americas consists of the Inter-American

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[96] Mendez and Mariezcurrena, above n 42.

[97] Michael Dodson and Donald Jackson "Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala" (2004) 46/4 Latin American Politics & Society 1–27

[98] American Declaration of the Rights and Duties of Man (Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948) <http://www.cidh.oas.org/Basicos/basic2.htm> (accessed 16 Jan 2008).

[99] American Convention on Human Rights Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969; entered into force 18 Jul 1978 <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (accessed 16 Jan 2008).

Commission on Human Rights[100] and the Inter-American Court of Human Rights. The Inter-American system of human rights protection is claimed to be more complex than its European counterpart especially as it is based on two complementary instruments.[101]

The Inter-American Commission on Human Rights (IACHR) is the principal organ for the protection and promotion of human rights in the Americas.[102] Comprising seven independent experts who are elected to four-year terms by the OAS General Assembly, the main function of the IACHR is to entertain and scrutinise petitions relating to human rights abuses by member states of the OAS. The functions and the powers of the Commission are enshrined in the Commission's Statute and Regulations. Individuals, groups or NGOs who have a legal link to a member state (or a state that has formally recognised the competence of the Commission) of the OAS can initiate a petition for human rights violations. A third party also has the capacity to submit a petition against individual violations of human rights with or without the knowledge of the victim.[103] In each petition the information relating to the individual or individuals filing the petition, the issue and the procedural posture of the petition must be indicated. The Commission entertains both individual petitions and group petitions, and petitions may include several sequences of rights abuse.

Similarly to the European system, the Commission will entertain petitions only if all available domestic remedies have been exhausted, access to local judicial fora to vindicate the rights abuse has been denied or prevented, or if avoidable delay in providing satisfactory remedy, a denial of sufficient legal advice or a legal lacuna in domestic legislation hinders due process to protect the rights violated. A petition must be filed within six months of exhausting all domestic remedies for the right violation.[104]

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[100] <http://www.cidh.oas.org/what.htm> (accessed 16 Jan 2008).
[101] David Harris "Regional Protection of Human Rights: the Inter American Achievement" in David Harris and S Livingston (eds) *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998) 1 (Harris).
[102] Tom J Farer "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox" (1997) 19 Human Rights Quarterly 510–546 (Farer).
[103] Articles 44–47 of the American Convention and Articles 26 and 32–41 in the Commission's Regulations.
[104] Article 56 of the American Convention.

The Commission is empowered to entertain an oral hearing if it is deemed necessary and also to carry out in loco investigations in the country in question.[105] The Commission will carry out in loco investigations for allegations of widespread human rights violations within a country, and then investigate the individual cases in the course of a wider investigation. After concluding a decision on a petition the Commission issues a judgment, including recommendations to be adopted by the state concerned. If the state concerned is party to the American Convention, the Commission must attempt to formulate a "friendly settlement" as far as possible.[106] The Commission, following this outcome, drafts a report for each party and for the OAS Secretary General.

If a friendly settlement has not been achieved the Commission prepares a report with the facts of the case and the Commission's conclusions, recommendations and proposals. There is a period of three months within which the Commission and the state determine whether or not to submit the case to the Court of Human Rights or to negotiate a settlement. If the state is a party to the American Convention and has accepted the Court's optional jurisdiction, the Commission or the state has the capacity to refer the petition to the Court of Human Rights for a new evaluation which will result in a judgment that is binding on the state party.

If a state is not a party to the Convention it will be beyond the purview of the friendly settlement clause. Therefore, the Commission will conclude examining the petition, determine the merits and adopt a final decision with recommendations and deadlines. The Commission may recommend compensation to the victims, but does not have the power to officially award such compensation. The decisions of the Committee are not legally binding.

The Commission also has the capacity to investigate on its own initiative and to issue a report on the human rights situation in any OAS member state. The investigations of the Commission can be founded on independent research from reports from NGOs and individuals. The Commission also submits an annual report to the OAS General Assembly, with information on resolutions of particular cases, reports on human rights situations in various states, and

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[105] Article 48.2
[106] Articles 48–49.

discussions of areas needing further action to promote and protect human rights. With a history of military dictatorships, violent suppression of political opposition, terrorism and incidents of gross human rights abuses in the region, the Commission's capacity to investigate has been valuable in ameliorating the state of regional human rights situation. The power to undertake on-site visits have been critical to the reporting of gross human rights abuses by OAS countries.

The Inter-American Court of Human Rights (IACtHR), which is a part of the American Convention, may hear cases only where the state involved has ratified the American Convention on Human Rights and has accepted the Court's optional jurisdiction.[107] The Inter-American Commission on Human Rights first completes its investigation on a particular case and it is then referred to the Court by either the Commission or the state involved in the case within three months of the release of the Commission's report. The Court lacks the capacity to entertain individual petitions independently without the cognizance of the Commission.

Proceedings of the Court can be both written and oral. If there are complex legal issues involved, petitioners can request a supporting amicus curiae brief from an NGO. The Court's deliberations are held in secret and are confidential; its judgments and opinions are published. If the Court determines that a right has been violated, it will order appropriate remedies. It may award compensation to the victim for actual damage, emotional harm and/or litigation costs, but it does not award punitive damages.

The protection of human rights in the Americas has been a difficult task especially in the context of the political situations[108] of the member countries where the abuse of political and civil rights were part and parcel of the process of safeguarding "national security".[109]

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[107] Articles 48 and 50.
[108] David Scott Palmer "Collectively Defending Democracy in the Western Hemisphere" in Tom Farer (ed) *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (Johns Hopkins University Press, Baltimore, Md,1999).
[109] Mendez and Mariezcurrena, above n 42.

The move towards economic liberalisation through Structural Adjustment Policies has also contributed to the deterioration of human rights standards in the region. Edwards, observing the complexity of the situation, writes that: [110]

> [a] comprehensive view of the reasons behind the human rights explosion is difficult to gain, because the activity is new and growing. But one can point to four factors. First, Latin America has suffered major social breakdowns. These breakdowns greatly increase the incidence of human rights violations. Human rights advocates criticise governments for indiscriminate repression, torture, and denial of habeas corpus. They also oppose governments for not promoting wide participation of ordinary citizens in the countries' political life. The socioeconomic woes of the classes at the bottom have meant, as Latin Americans were saying, that many poor went from being marginalised to being excluded.

The situation was further complicated by a weak and often corrupt judiciary in most of the countries, which was not willing or able to do much to ameliorate the situation of human rights. The regional human rights mechanism played a fundamental role in critiquing poor governance and highlighting incidents of human rights violations in the region.[111]

The Commission's work essentially centres on addressing issues of endemic violations of the human rights norms, which have been exacerbated by the non-existent or impotent domestic mechanisms available to deal with such violations. According to Medina, during the initial years of its existence: [112]

> [t]he main objective of the Commission was not to investigate isolated violations but to document the existence of these gross, systematic violations and to exercise pressure to improve the general condition of human rights in the country concerned. For this purpose, and by means of its regulatory powers, the Commission created a procedure to 'take cognizance' of individual complaints and use them as a source of information about gross, systematic violations of human rights in the territories of the OAS member states.

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[110] Edward L Cleary *Struggle for Human Rights in Latin America* (Greenwood Publishing Group, Incorporated, Westport, CT, USA, 1997) 64.

[111] Kathryn Sikkink **"**Human Rights, Principled Issue-Networks, and Sovereignty in Latin America"
 (1993) 47/3 International Organization 411–441.

[112] Cecilia Medina "The Inter American Commission on Human Rights and the Inter American Court of Human Rights: Reflections on a Joint Venture" (1990) 12 Human Rights Quarterly 440.

The Commission systematically reported that the commonest violations of human rights in member countries were forced disappearances and torture.[113] While the reports appeared to have had no immediate impact, the recording and publication of the reports over the years has led to an increasing international awareness of the situation. The natural corollary of that international awareness is international condemnation, which has helped to eradicate the culture of violence within member states.[114] This has been a vital part of the Commission's work and it has contributed to the general rising of human rights standards in the region. According to Donnelly, the "Inter American Commission has aggressively exploited its powers, to at least some effect in a number of countries"[115] to achieve an amelioration of human rights in the region.

In a region where inequality and poverty are high and "where many governments are not consistently successful at meeting the basic needs of the majority for food, shelter, employment, medical care, education, and physical security from private and official villains,"[116] there appears little significance accorded to economic, social and cultural rights in the hemispheric rights protection system. This is despite the vehement assertion of an Additional Protocol that: [117]

> [c]onsidering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realised, and the violation of some rights in favour of the realization of others can never be justified.

The OAS Charter and the two main documents on human rights in the American system — the Declaration and the Convention — acknowledge the existence of economic, social and cultural rights.[118] The American system, following the

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[113] Farer, above n 101.

[114] David Harris "Regional Protection of Human Rights: The Inter American Achievement" in David Harris and S Livingston (eds) *The Inter American System of Human Rights* (Clarendon Press, Oxford, 1998).

[115] Jack Donnelly *International Human Rights* (Westview Press, Boulder, 1993) 90.

[116] Tom J Farer "Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect" (1993) 15 HRQ 746.

[117] Additional Protocol To The American Convention On Human Rights In The Area Of Economic, Social And Cultural Rights, "Protocol Of San Salvador" Done At San Salvador 17 November 1988 OAS Treaty Series 69.

[118] The Preamble and Arts. 33, 44 and 48 of the Charter of the OAS; Arts. XI, XII, XIII, XIV, XV, XVI and XXII of the American Declaration; and Art. 26 of the American Convention.

hierarchical presentation of the early universal model of human rights, does not accord justiciability to social, economic or social rights, but maintains that they are to be achieved progressively.[119]

The "Additional Protocol To The American Convention On Human Rights In The Area of Economic, Social And Cultural Rights" (Protocol of San Salvador) of 1988, which was intended to enhance the means of protection of ESC rights, seeks to do so through the submission of periodic reports to the IACHR.[120] The exception is trade union rights and the right to education: where these are violated by action directly attributable to a state party, the Protocol makes them justiciable through an individual petition to the IACHR.

The segregation of rights into those that are "justiciable" and those that must be "progressively achieved" in the Inter-American system is a huge drawback for a region that is beset with economic deprivation. Little effort has gone into changing the status quo, and Mendez and Mariezcurrena assert, "[t]o date, the division of rights into different categories, and the paradigm of the *progressive development of rights*, have served only one purpose: to provide those States that do not fulfil their obligations with a means of justifying their position."[121]

All in all the chief flaw of the OAS human rights structure is the opportunity for non-compliance with the human rights mechanism. Unless the OAS member states have specifically ratified the Inter-American Convention on Human Rights and have accepted the jurisdiction of the Court, they will remain beyond its jurisdiction and will have obligations only under the American Declaration of the Rights and Duties of Man. Even where states have ratified the Convention and have accepted the jurisdiction of the Court, the Court has no authority to compel the states to abide by its decisions. The only recourse available to the Court is to

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[119] Art. 26 of the American Convention: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

[120] Article 19 "Means of Protection 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol."

[121] Mendez and Mariezcurrena, above n 42.

report the delinquency to the OAS General Assembly. This is quite different from its European counterpart, the ECHR, which makes both democratic governance and the ratification of the European Convention on Human Rights preconditions for the membership of the Council of Europe.

5.5   AFRICA: from the worst Starting conditions to assertively autochthonous rights and radical potential

5.5.1   The African Charter on Human and Peoples' Rights[122]

The African continent has grappled with myriad socioeconomic and political issues such as illiberal governance and lackadaisical and muted development both in the economic and social spheres. It is a region that was combating colonialism until two decades ago and still struggles to distance itself from the legacies of colonialism which linger in the form of an ideological reliance on the West.[123]

The creation of the Organization of African Unity (OAU) was in many ways an initiative to let go of Africa's colonial past, particularly the inhibitions and the insecurities that were part of that colonial legacy, and to create a common agenda for African development. At the inception of the OAU now replaced by the African Union (AU),[124] human rights were not included in its list of priorities although the Charter did make overt reference to the Universal Declaration in relation to its aim of extending international co-operation.[125] The OAU focussed its attention on colonialism and issues of racial domination, particularly in relation to the apartheid regime of South Africa. However, as Mathews observes, "the OAU Charter, for instance, does not contain any provision for the protection of the rights of the African masses….. it appears to be an institution of the African heads of states, by the heads of states for the heads of states".[126] The Organization's own document on human rights — The African Charter of Human

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[122] The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 – (1982) 21 ILM 58, available at <www.achpr.org> (accessed 5 Oct 2006).
[123] Art Hansen "African Refugees: Defining and Defending Their Human Rights" in Ronald Cohen et al. (eds) *Human Rights and Governance in Africa* (University Press of Florida, Gainesville, Florida, 1993) 139–161.
[124] The OAU was established in 1963 and formally abolished in 2002 as the AU came into existence in March 2001. The Constitutive Act of the AU entered into force on 26 March 2001. The text of the Act is available at <www.africa-union.org> (accessed 25 Jan 2006).
[125] GJ Naldi *The Organization of African Unity* (2nd ed, Mansell, London, 1999) 2–18.
[126] K Mathews "The organization of African Unity" in Dominico Mazzeo (ed) *African Regional Organisations* (Cambridge University Press, Cambridge 1984) 49–84 , 79.

and Peoples' Rights ("the African Charter") — was created fully two decades later and came into force in 1986.[127] Today all of the AU's 53 member states have ratified the African Charter and it is one of the most widely accepted regional conventions on human rights.[128]

The uniqueness of the African mechanism for human rights protection lies in the normative content of the Charter, which ventures beyond the traditional first and second generational rights as represented in the universal model.[129] The inclusion of social, economic and cultural rights in the Charter at inception rather than as an after-thought stemmed from the conviction that the Charter of Rights had to be located "in our values of civilization and the real needs of Africa."[130] Through the inclusion of social and economic rights the Charter highlights the economic and developmental inadequacies of the African subcontinent and seeks to establish mechanisms of resolving the issues from a rights perspective as well.

Drawing inspiration from the African culture and way of life, the African Charter also accords a place to what is now classified as group rights. A further attempt at cultural location of the African Charter is the inclusion of the duties of the individual towards others (both groups and individuals). Zeleza, commenting on the efficacy of the inclusion of the third generation of rights into the African Convention, says: [131]

> neither the North nor the South, the developed nor the developing worlds can claim to be on the side of angels where human rights are concerned. Yet, ethnocentrism continues in human rights discourse about conceptualisation, constitution and contextualisation of human rights. A more holistic global regime of human rights would have to encompass all the so-called three generations of [rights]. The growing list of rights [is] itself a reflection of [the] emergence of an increasingly universal human rights regime as more and more societies and social constituencies,

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[127] Rachel Murray *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, Cambridge, 2004).

[128] R Murray "Africa" (1999) 17 NQHR 350.

[129] Articles 2–18 of the Convention contain the traditional civil and political rights as well as economic and social rights.

[130] Address of President Leopold Senghor to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/X, reprinted in Philip Kunig, Wolfgang Benedek and Costa R Mahalu (eds) *Regional Protection Of Human Rights By International Law: The Emerging African System* (Nomos, Baden-Baden, Germany, 1985) 121.

[131] Paul Zeleza in Paul T Zeleza and Philip J McConnaughay (eds) *Human Rights, The Rule Of Law And Development In Africa* (University of Pennsylvania Press, Philadelphia, 2004) 16.

hitherto excluded from human rights claims, make their demands for inclusion.

In fact, the outright rejection of the dominant paradigm of human rights is a significant normative feature of the African model that sets it apart from its counterparts in Europe and the Americas.[132] The African Charter on Human and Peoples' Rights attempts to harness the potential of the "relativism" debate within human rights to highlight issues of socioeconomic development such as poverty and self-sufficiency in a human rights context. Agbakwa rationalises the departure of the African Charter from the conventional paradigm and justifies it in terms of the African social, cultural and economic exigencies:[133]

> Unless there is a committed rejection of the dominant Western paradigm that has historically viewed civil and political rights as the rights that are most worthy of enforcement, substantial progress towards the enforcement of ESCR in Africa may continue to elude African states. The West may be able to maintain such a model, because its attainment of an appreciable standard of living provides an environment that enables the enjoyment of civil and political rights. African states do not enjoy this luxury. They cannot afford this model without facing widespread civil and social strife. Already, by adopting a charter that departs markedly from the European Convention and Inter-American Convention, African states demonstrated an understanding of the inadequacies of the two systems for their purposes. A rejection of the Western model, therefore, merely requires a practical commitment to the noble intentions expressed in the African Charter.

However, the content of the substantive rights has not been matched by an effective implementing mechanism, for many agree that, "[a]lthough the African Charter makes a significant contribution to the human rights corpus, it creates an ineffectual enforcement system."[134]

5.5.2   The African Commission on Human and Peoples' Rights

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[132] Obinna Okere "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 Human Rights Quarterly 141.

[133] Shedrack C Agbakwa "Reclaiming humanity: economic, social, and cultural rights as the cornerstone of African human rights" 5 2002 Yale Human Rights and Development Law Journal 177–216.

[134] M Mutua "The African Human Rights Court. A Two–Legged Stool?" (1999) 212 HRQ 342–363 (Mutua).

The African Commission on Human and Peoples' Rights, whose establishment was contemplated by Article 30 of the Charter, is the principal organ of the African human rights system, which will soon be relegated into a secondary role with the establishment of the Court in mid-2007.[135] The Commission was established in July 1987, less than one year after the African Charter on Human and Peoples' Rights came into force.[136] It is mandated with the broad goals of "promoting human and peoples' rights, protecting human and peoples' rights and interpreting the African Charter on Human and Peoples' Rights."[137] Article 45 of the Charter stipulates the specific functions of the Commission to be the following: to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, and encourage national and local institutions concerned with human and peoples' rights.

The African Commission appears to have taken its role as the promoter and educator of African human rights seriously and has held ordinary sessions regularly in a number of countries around the continent. The regular sessions and its work relating to education about human rights have contributed considerably to the Commission's "growing credibility"[138] in terms of its promotional functions. However, the previous rather questionable individual backgrounds of the Commissioners, their relationships to the respective governments, the lack of professional expertise such as adequate Special Rapporteurs, and financial constrictions have all compromised the effective working of the Commission.[139]

The African Commission on Human and Peoples' Rights is also deemed to be a quasi-judicial body that resembles the UN Human Rights Committee with what

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[135] Mashood A Baderin "Recent Developments in the African Regional Human Rights System" (2005) 5 HRLR 117–149.
[136] Article 31 African Charter on Human and Peoples Rights <http://www.achpr.org/english/_info/charter_en.html> (accessed 12 Jan 2008).
[137] African Charter on Human and Peoples' Rights, *Mandate Of The Commission* Article 45.
[138] "The African Commission on Human and Peoples' Rights (ACHPR): New Challenges and Opportunities for Human Rights Promotion and Protection" International Conference Organised by the ACHPR, The Nordic Africa Institute, CODESRIA and The Swedish NGO Foundation for Human Rights In Collaboration with SIDA & NORAD Stockholm, 9–10 June 2004 <http://www.codesria.org/Links/Research/activities/human_conf_stockholm.pdf> (accessed 16 Mar 2005).
[139] N Udombana "Toward the African Court on Human and Peoples' Rights: Better Late than Never" (2000) 3 Yale Human Rights and Development Law Journal 71.

has been termed an "ambiguous"[140] protective function. It is entrusted with the role of providing "protection of human and peoples' rights under conditions laid down by the present Charter."[141] The Commission also examines the reports that are submitted by the state parties every two years, it considers communications regarding violations of the Charter, and it expounds the Charter at the request of a state party, an institution of the OAU or an African Organisation recognised by the OAU.[142] The meagreness of the enforcement procedure accorded to the Commission can be excused as a reflection of the insecure political climate in the continent at the time of creating the Charter. At the point of adoption only three countries in the region could be classified as having governing structures that respected the rule of law.[143]

Article 62 of the Charter requires the member states to submit periodic reports to the Commission on the "legislative or other measures taken with a view to giving effect to the rights and freedoms" within national jurisdictions. However, in the absence of further guidelines on the reporting system set out in the Charter,[144] and with a characteristic lack of imagination and innovation by the Commission itself, the Commission simply borrowed its guidelines from other systems. The lack of interest in the actual reports made by the Commission and the state parties has reduced it to a hollow process with no consequence.[145] With a more robust Commission the reporting system could have evolved into a valuable exercise where the Commission played an active role in the formulation of national rights protection schemes that were being created in the emerging democracies in the continent. However, the member states do not seem to take seriously the responsibility of submitting reports to the Commission. Many fail to submit entirely and although a few do submit, sporadically, the Commission does not provide comprehensive analysis in these cases of the reported success of the efforts to enhance the rights regime within the national jurisdiction. In this

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[140] Makau Mutua *The African Human Rights System A Critical Evaluation* <http://hdr.undp.org/en/reports/global/hdr2000/papers/mutua.pdf> (accessed 17 Jun 2006).
[141] Article 45 (2).
[142] Aricle 45(3).
[143] Only Gambia, Senegal, and Botswana at the time had democratic systems of governance. See Makau Mutua "The African Human Rights System in a Comparative Perspective 1993 African Commission on Human and Peoples' Rights" 3 Rev Afr Comm'n on Hum. & Peoples' Rts 5 (Mutua).
[144] Felice D Gaer "First Fruits: Reporting By States Under the African Charter on Human and Peoples' Rights" (1992) 10 Neth Q Hum Rts 29.
[145] Evelyn A Ankumah The African Commission on Human and Peoples' Rights: Practice and Procedures (Dordrecht: Martinus Nijhoff Publishers, 1996) 79–110.

respect, "[w]hether the African Commission on Human and Peoples' Rights will be perceived as an effective institution for the protection of human rights in Africa will largely depend on how far and how much the state parties to the African Charter take seriously, and respect, the Commission's views and recommendations. *So far, they have not.*"[146][emphasis in original]

Although the Commission lacks the capacity to condemn states legally for human rights violations, or to compel them to make reparations, the Convention allows the Commission to consider complaints termed "communications" filed by individual victims as well as NGOs and state parties.[147] This power has not been effectively utilised by the Commission to promote its quasi judicial role. The Commission in the past has made uninspiring evaluations of the rights violations and conveyed its findings to the African Union Assembly,[148] which in practice has resulted in their gaining little publicity.[149] The Assembly in turn has no capacity to act on the findings although it has the right of publication.[150] Therefore, despite an elaborate catalogue of rights, the rights are meaningless in the context of the African Convention for they offer no real redress nor do they contribute to the creation of better national legal systems that would seek to protect rights in the future as in the case of the European system.[151]

With respect to specific functions and to its performance in general, the African Commission has therefore been a disappointment. Critically evaluating the Commission's performance, Mutua says that the "[h]opes by observers of the African Commission that its commissioners would robustly construe the Charter's powers to alleviate its weaknesses have largely gone unrealised."[152] In the role of a catalyst to protect, enhance and vindicate the rights enshrined in the Charter, the Commission has, according to this school of thought, been an abysmal failure. This can be partly attributed to the inherently impotent quasi-judicial role created

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[146] *Human Development Report 2000* (Background Paper, U.N. Development Programme, Oxford University Press, New York, © 2000)
[147] Articles 47–54 of the Convention.
[148] Composed of Heads of State and Government or their duly accredited representatives. This is deemed to be the supreme organ of the Union.
[149] Mutua, above n 140.
[150] C. Odinkalu and C Christensen "The African Commission on Human and Peoples' Rights: The Development of its Non-state Communication Procedures" (1998) 20 HRQ 235 (Odinkalu and Christensen).
[151] Ibid.
[152] Mutua, above n 143.

for it through the Charter; in other words, the Commission should never have been placed in this position where it needed to construe the Charter in a robust, or even an activist, way simply to overcome a handicap from birth. Under these circumstances, even a charitable assessment is that the Commission has so far "only been able to make a modest contribution to the protection of the rights enshrined in the Charter."[153]

There is, nonetheless, a school of thought that is more charitable and optimistic. According to this school, the poor articulation and the inadequacy of the contributions of the Commission can perhaps be forgiven as being symptomatic of an evolving regime. Certainly, Odinkalu and Christensen appeared to be more sympathetic to, and hopeful regarding, the Commission when they observed of the non-state communications jurisdiction that "the decisions of the Commission have been both more substantive and elaborate on the issues of law and fact that are raised in and considered by communications. This is a welcome development that now enables the Commission to contribute meaningfully to the creation of an international human rights jurisprudence that authoritatively reflects the experience of Africa. In addition, the judiciary and other national institutions for the protection of human rights, as well as NGOs in African states, can now increasingly look to the Commission for guidance in the interpretation and implementation of nationally-applicable human rights norms."[154]

5.5.3 African Court of Human Rights: A Late but Potentially Radical Addition

Perhaps consonant with this sympathetic view of an evolving regime, the impetus for the creation of a more efficient mechanism to adjudicate human rights violations in the region is a reflection of the amelioration of the region's political climate. The late inclusion of the Court into the African human rights system has been attributed to several causes. Among these are the political instability of the region emanating from the colonial period,[155] the power relations of the Cold War

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[153] Anne Pieter Van Der Mei "The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa" (2005) 18 Leiden Journal of International Law 114 (Van Der Mei).
[154] Odinkalu and Christensen, above n 149.
[155] Mahmood Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996); and Crawford Young "The Heritage of

and the volatile national political systems, all of which augured badly for a systematic evolution of a human rights regime in the continent. Africa was inundated with enormous social, economic and political problems at the time of the creation of the African Human Rights system and, as has been mentioned, very few countries in Africa had functional democracies that respected the rule of law, let alone human rights. In this context the elaborate trappings of a formal court of human rights may have appeared ill-timed to the drafters of the African Charter. In many respects the African Charter was initially an affirmation and an acknowledgement of the general human rights culture rather than an attempt at formalizing a regional enforcement and compliance control mechanism. However, to Kunig, "[t]he real objection to a human rights court was much more practical in nature: in the early 1980s Africa's leaders were simply still not willing to subject themselves to a supranational court."[156]

As the democratic governing culture of Africa has improved over the last decade or so, the inadequacy of the Human Rights Commission's mandate and its limited sphere of operation have become the subject of discussion amongst activists[157] as well as in the African regional fora.[158] The idea of the creation of a Court to complement the Charter became increasingly attractive when "[i]t had become clear by the mid-1990s … that the African system was a disappointment, if not an embarrassment for the continent,"[159] and that the Commission was incapable of catering to the growing exigencies of human rights in the region. It is against this background that in 1994, under the direction of the OAU Heads of State Assembly, a panel of experts was summoned to devise methods in collaboration with the African Commission "to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights."[160] The Court was thus a result of external agitation as much as a

Colonialism in Africa" in John W Harbeson and Donald Rothschild (eds) *Africa in World Politics: Post-Cold War Challenges* (Westview Press, Boulder, Colorado, 1995) 19

[156] PH Kunig "The Protection of Human Rights by International Law in Africa" (1982) 138 German Yearbook of International Law 716.

[157] Ahmed Motala "Non Governmental Organization in the African System" in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge University Press, Cambridge, England, 2002).

[158] Josiah AM Cobbah "African Values and the Human Rights Debate: An African Perspective" (1987) 9 HRQ 309.

[159] Mutua, above n 143.

[160] Report of Government Experts Meeting, AHG/Res 2, 30th Ordinary Session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994, cited in Ibrahim Ali Badawi El-

process of self-realization. In terms of creating the Protocol, the Court now has enormous potential and in many areas it has included innovative features that are absent in both the European and the Inter-American systems.[161]

The creation of the African Court of Human Rights as a result of the subsequent Protocol to the Rights Convention expanded the avenues available for the resolution of human and peoples' rights considerably. The Court technically became operational in January 2004 and with this development the Commission is vested with the responsibility of the preparation of cases for submission to the Court's jurisdiction. In the African context a formal adjudicatory forum in the form of a court was very much a response to the needs and the expansion of capacity of the region to accommodate a judicial body dealing with human rights issues. This contrasts with the European and the Inter-American systems of human rights, where the judicial branch of the implementation mechanism was an integral component of the regime's operations from the outset.

The Protocol does not define the exact relationship between the Court and the Commission, although Article 2 of the Protocol stipulates that the Court should "complement the protective mandate of the African Commission". This "notion of complementarity, prescribed by the Protocol, would seem to require a prior Commission procedure. Vague as it may be, the notion of complementarity does make it clear that the Commission will continue to play an important role in the future African human rights protection system."[162] Still in an embryonic stage, the Court and the Commission's relationship is yet to be established.

In normative terms the jurisdiction of the African Court reaches beyond both the European and the Inter-American human rights system. Through a ground-breaking initiative, the Protocol to the African Court stipulates that it has the capacity to entertain actions that are brought to its cognizance on the basis of any instruments, including international human rights treaties, which have been

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Sheikh "Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory Note" (1997) 9 Afr J Int'l & Comp L 943, 943 n.1.
[161] A O'Shea "A Critical Reflection on the Proposed African Court on Human and Peoples' Rights" (2001) 1 African Human Rights Law Journal 285.
[162] Van Der Mei, above n 152.

ratified by the state party in question.[163] The Protocol also proclaims that the Court can take into consideration such instruments as a source of law.[164]

Thus in theoretical terms the Protocol of the African Court has mandated that all human rights instruments created under the aegis of the United Nations and other relevant legal instruments codifying human rights, such as treaties dealing with issues of humanitarian law and treaties adopted through the ILO, are justiciable in the African Court provided that the state in question has ratified those instruments. Therefore, in theory at least, the African human rights system provides a forum for dispute resolution and implementation of several international treaties relating to human rights law, which the individual treaty itself may not have envisaged. However, some argue that Article 3(1) of the Protocol refers only to other *relevant* human rights instruments. According to Heyns, only treaties that explicitly confer jurisdiction on the Court would or should be perceived to come within the ambit of Article 3(1).[165] A broader interpretation would result in infringing upon the jurisdiction of the adjudicatory institutions created by other treaties, leading to inconsistent interpretations and undermining the effectiveness of those treaty regimes. Further, Heynes asserts that African states would prefer a restrictive interpretation of Article 3(1), for the states may have ratified other human rights treaties with the knowledge that the rights guaranteed under them were not enforceable in a court of law.[166]

The contentious jurisdiction of the Court can be invoked by the Commission, a state party that has brought a complaint before the Commission, a state party whose citizen is a victim of a violation, or an African intergovernmental organization.[167] In fact, the African Commission, state parties, and African intergovernmental organizations enjoy unfettered or "automatic" access to the Court once a state ratifies the Protocol.

An individual's capacity to invoke the jurisdiction is severely restricted by the stipulation that such a complaint can be made by an individual (or an NGO) only

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[163] Article 3.1 of the Protocol.
[164] Article 7 of the Protocol.
[165] C Heyns "The African Regional Human Rights System: In Need of Reform?" (2001) 1 African Human Right Law Journal 166–168.
[166] Ibid 167–168.
[167] Article 5 of the Protocol.

if, at the point of ratification of the Protocol or thereafter, the state under scrutiny has made a declaration accepting the jurisdiction of the Court to hear such cases.[168] This position was reached when it was made clear at the drafting stages of the Protocol that states were not eager to be in a position where their human rights record was challenged by individuals or NGOs. This limitation is certainly an anomaly considering the other innovative features of the Protocol. If individual petitions were allowed without this barrier it would contribute significantly to the advancement of international procedural law.

However, after a state has made a declaration accepting the Court's jurisdiction in cases brought by individuals and NGOs, individuals and NGOs do not have to show any other particular interest. "More specifically, unlike the European Convention (Article 34), the Protocol does not require individuals to show that they themselves are victims of a human rights violation."[169] However, according to Anne Pieter Van Der Mei, "[t]his compromise may have been necessary to get enough states on board, but it is, especially from the perspective of 'recourse to judicial process on command', a disappointment."[170] So far only Burkina Faso has accepted the Court's jurisdiction relating to individual and NGO petitions despite the fact that 24 African states have ratified the Protocol.[171] Though Pieter Van Der Mei has lamented that "[m]ore than 40 years after 'Lagos' it thus appears that African states are still not willing to subject themselves to a court that is accessible to victims of human rights violations,"[172] it is indicative of the extent of the sense of insecurity that the African states harbour even after many of the states have emerged from dictatorships and undemocratic systems of governance and implemented democratic rule. In fact, such conservatism reiterates that in the African system the concerns of the states still outweigh the interests of the people.[173]

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[168] Articles 5.3 and 34.6.
[169] Van Der Mei, above n 153.
[170] Van Der Mei, above n 153.
[171] As of 15 Oct 2007 <http://www.achpr.org/english/_info/index_ratifications_en.html > (accessed 3 Jan 2008).
[172] Van Der Mei, above n 153.
[173] J Harrington "The African Court on Human and Peoples' Rights" in Evans and Murray (eds) *The African Charter on Human and Peoples' Rights — The System in Practice, 1986–2000* (Cambridge University Press, New York, 2001) 329.

The evolving stakeholders of the human rights discourse are also acknowledged by the Protocol to the African Charter, as it enables the NGOs with consultative status with the AU to seek advisory opinions by the Court. This measure is an affirmation of the valuable role that NGOs perform in the region through their activism relating to the promotion and education of human rights throughout Africa, as much as the NGO contribution to the formulating of the Protocol that created the Court. According to Pieter Van Der Mei, "[i]ndeed, it is no exaggeration to state that the Protocol is above all the product of the NGOs' work."[174]

The Protocol provides that the Court's judgment will be final and without appeal[175] and that the states will be bound by its judgments.[176] In its annual report to the AU, the Court can list the states that are in violation and those that have not complied with the Court's judgments.[177] The AU Council of Ministers is entrusted with the duty of monitoring the execution of the judgments.

Another issue of contention regarding the effectiveness of the mechanism provided by the Charter is the "clawback" clauses that pervade the African Charter and allow the states to restrict basic human rights to the maximum extent allowed by domestic law.[178] Such clauses are especially regressive considering the immature legal systems that prevail, as a colonial legacy, in many African states, which do little to enhance human rights in the domestic sphere. Many states still cherish the draconian laws that curtail freedom of expression, association and assembly, movement, and conscience. The "clawback" provision of the Charter, which was perhaps included as an inducement for wider participation in the regime, in fact does little to ameliorate national human rights conditions. However, these provisions are of only academic relevance at this stage as the Court is yet to be fully functional.

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[174] Van Der Mei, above n 153.

[175] Article 28(2).

[176] Article 30 (providing, in part, that states "*undertake to comply with the judgment* in any case in which they are parties within the time stipulated by the Court and *to guarantee its execution*") (emphasis added).

[177] Article 31.

[178] Mutua, above n 143, 7.

The African human rights regime with all its imperfections is a remarkable achievement. The African Charter on Human and Peoples' Rights was formulated at a time when illiberalism was the norm rather than the exception in African governance. It was no exaggeration to describe the then political climate and rulers as follows:[179]

> As dictators in single-party or military states — and in some cases of both hues — hardly any of the African leaders who participated in the negotiation and adoption of the Charter in Nairobi in 1981 could claim a democratic mandate. With a few exceptions such as the late Julius Nyerere of Tanzania and former President Kenneth Kaunda of Zambia, who did not enrich themselves through high political office, most of these rulers were also widely suspected of impoverishing their own peoples through a combination of wrong-headed policies and brazen corruption at a time when the priority of the leadership of the continent was not the protection of the individual but the preservation of their own personal power and influence in the territories inherited from the then recently departed metropolitan colonial powers.

The global context in which Africa operates has changed significantly since the 1980s.[180] The rule of law, good governance, transparency and respect for human rights are pre-conditions to maintaining good relations with international organizations and other states. The cultivation and maintenance of relations is essential to the existence and the development of Africa. It is in this context that the African states have been eager to establish more pluralistic political systems and to hold free elections. In such a political climate violations of democracy are swiftly challenged by national and international media and civil society organizations that have become more competent and confident in scrutinizing violations of rights and liberties.

Most countries in the continent have some sort of democratic governance in place and the natural corollary of democracy is the increased accountability for rights abuses. The proliferation of Truth Commissions[181] and the increase of human

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[179] Anselm Chidi Odinkalu "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights" (2001) 23 HRQ 2.

[180] See J Oloka-Onyango "Beyond The Rhetoric: Reinvigorating The Struggle For Economic And Social Rights In Africa" (1995) 26/1 Cal W Intl LJ 42–43; Chris Maina Peter *Human Rights In Africa: A Comparative Study Of The African Human And Peoples' Rights Charter And The New Tanzanian Bill Of Rights* (Greenwood Press, Westport, Ct., 1990) 7–10; Rhoda Howard "The Full Belly Thesis: Should Economic Rights Take Priority Over Civil And Political Rights? Evidence From Sub-Saharan Africa" 1983 HRQ 5 467; Ahmed Nasir M Abdullahi "Human Rights Protection In Africa: Toward Effective Mechanisms" [1996] Afr J Peace & Hum Rts 3E 1.

[181] Priscilla B Hayner **"Fifteen Truth Commissions — 1974 to 1994: A Comparative Study"** (1994) 16/4 HRQ 597–655.

rights mechanisms in the domestic constitutional systems are examples of this trend. The unfolding scenario is similar to the wave of decolonization processes:
[182]

> There is already a "Second War of Liberation" in Africa, an "explosion of anger against the abuse of power, violations of human rights, economic failure, and hardship, and a deep longing for peace and order." There is an optimism now pervading the continent, similar to that at the wave of independence in the late 1950s and early 1960s. The change, of course, will not occur suddenly, because the rot is deep and continuous. It will come gradually.

The change from the OAU to the AU, the adoption of the Protocol to the Human Rights Convention, the democracy clauses in the NEPAD framework, the Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission in 2003 are all indications of that trend towards sociopolitical transformation, which is both widespread and sustained. There is a need for yet greater expansion of the rights regime as well as more creative ways of interpreting the existing rights of the Charter.

5.6   THE (BRITISH) COMMONWEALTH: going beyond regionalism by redeeming a unique shared heritage

The Commonwealth, which is an association of states that were part of the British commonwealth of which India, Maldives, Bangladesh, Pakistan (with qualifications discussed below) and Sri Lanka are members as a result of their common colonial history. The member sates of the Commonwealth co-orperates on issues of common interest and work towards the "promotion of world peace" and "international understanding".[183] Operating without a formal constituting Charter the principles, objectives and the scope of the Commonwealth is enshrined in several Declarations and Statements issued at the Commonwealth Heads of Government meetings. Stemming from the 1971 Singapore Declaration

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[182] Nsongurua J Udombana "Can The Leopard Change Its Spots? The African Union Treaty And Human Rights" (2002) 17/6 American University International Law Review 1177–1262 (footnote omitted).
[183] <http://www.thecommonwealth.org/subhomepage/151236/commonwealth/> (accessed 5 Feb 2006).

the Commonwealth has commenced an ambitious project of creating a rule- based regime to foster and maintain democracy and good governance within its member states.[184] The 1971 Declaration on Commonwealth Principles states that the Commonwealth believes in the "inalienable right to participate by means of free and democratic political processes in framing the society in which they live. We therefore strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law that are our common heritage."[185] The Singapore Declaration laid the foundation for the creation of a norm of good governance and democracy within the member states.

Two decades later the Harare Declaration[186] was a significant step in the new role that the Commonwealth had acquired for itself, for in 1991 the Heads of Government Meeting in Zimbabwe commenced the "global norm creating" mission of the Commonwealth. The Harare Declaration reasserted the "fundamental political values of the Commonwealth to be: democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government,"[187] and further stated that the Commonwealth was willing to collaborate with NGOs and the Commonwealth Parliamentary Association for the promotion of these values.

As Alison Duxbury[188] elaborates, "standard-setting, supervision and the enforcement of values" are all significant elements of an international organization and the Harare Declaration was one such significant exercise of standard-setting for the Secretary-General, Emeka Anyaoku, addressing CHOGM, described the Harare Declaration to be a "our guiding compass"[189] which implied that the Declaration was not intended to create binding legal obligations on democracy or good governance. Duxbury also appears to agree with this position

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[184] Singapore Declaration of Commonwealth Principles 1971
<http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=32987>(accessed 5 Feb 2006); see also Don McKinnon "The Commonwealth Secretariat: Looking Forward to the Next 40 Years" (2005) 94/380 The Round Table 293–300 (McKinnon).
[185] The Declaration of Commonwealth Principles, 1971, issued at the Heads of Government Meeting in Singapore on 22 January 1971.
[186] J Mayall "Democratizing the Commonwealth" (1998) 74/2 International Affairs 379–392.
[187] Harare Declaration Issued by Heads of Government in Harare, Zimbabwe on 20 October 1991.
[188] A Duxbury "Rejuvenating the Commonwealth — the human rights remedy" (1997) 46 International and Comparative Law Quarterly 344–377 (Duxbury).
[189] Quoted in Chi-Kan Lawrence Chau "'Malice to None, Goodwill to All?': The Legitimacy of Commonwealth Enforcement" (2005) 6 Japanese Journal of Political Science 259–279 (Chau).

in that the Harare Declaration was essentially a recapitulation of generally accepted principles of state conduct rather than a creation of a series of legally binding obligations.[190] However, Srinivasan appears to perceive the Harare Declaration as a prelude to the evolution of a rule-based regime for democracy monitoring throughout the Commonwealth.[191]

The character of the Harare Declaration changed with the adoption of the Millbrook Commonwealth Action Programme on the Harare Declaration 1995.[192] The Millbrook Action Programme laid the foundation for the evolution of a normative commitment to democratic governance through the Harare Declaration, for it was decided that if a government is perceived to be clearly in violation of the Harare Declaration by an unconstitutional overthrow of a democratically elected government, action "should be taken to express the collective concern of Commonwealth countries and to encourage the restoration of democracy within a reasonable time frame."[193]

The Commonwealth Ministerial Action Group (CMAG), created pursuant to the Millbrook Commonwealth Action Programme in 1995, established the institutional mechanisms to deal with interruptions to democracy within member states. The CMAG assesses the nature of the violation and formulates a collective action to restore democracy and the rule of law. The CMAG is also empowered to take certain punitive action in the form of bilateral and multilateral sanctions by all member states ranging from restrictions on governmental contacts and trade, and if the errant member persists in violating the Declaration the ultimate result is the suspension and expulsion of a member state from the Association.[194] A

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[190] Duxbury, above n 188.
[191] K Srinivasan "A force for democracy, human rights and the rule of law? Do Harare and Millbrook go too far or not far enough?" (1997) 344 Round Table 513–516.
[192] Issued by Heads of Government at Millbrook, New Zealand, on 12 November 1995 <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=34458> (accessed 5 Oct 2006).
[193] Commonwealth Secretariat *The Commonwealth at the Summit II: Communiqué of Commonwealth Heads of Government Meetings 1987–1995* (Commonwealth Secretariat, London, 1997).
[194] "Such measures include an immediate public expression by the Secretary-General of the Commonwealth's collective disapproval of any such infringement of the Harare principles; the encouragement of bilateral démarches by member countries, especially those within the region, both to express disapproval and to support early restoration of democracy; a stipulation of up to two years as a timeframe for the restoration of democracy; exclusion of the government concerned from participation at ministerial-level meetings of the Commonwealth, including CHOGMs; and finally suspension of participation at all Commonwealth meetings and of Commonwealth technical

significant feature of the Commonwealth mechanism for democracy monitoring is that the Commonwealth Secretary General is empowered to alert the CMAG on his/her own initiative or at the request of a member of government on any disruptions to democratic governance within a member state.[195] As Cghau observes, "the CMAG was a protection mechanism set up for the Commonwealth to monitor member states' compliance with the organization's principles, and this transformed the Commonwealth into a rules-bound institution,"[196] a quality that was not a part of the Commonwealth before. "This "democracy watchdog", empowered to suspend member countries when they are in breach of fundamental Commonwealth principles, has given a great deal of influence and moral authority to the organization globally. On its 10th anniversary CMAG is still the only international mechanism of its kind."[197]

The Commonwealth Democracy clause was soon put into action in 1995 when the Commonwealth reacted strongly against Sani Abacha's regime in Nigeria,[198] issuing sanctions and then suspending its membership for executing political dissidents. It was considered that the severity of the actions against Nigeria by the Commonwealth prompted a positive response from the undemocratic regime. The democracy watchdog CMAG has since brought The Gambia, Sierra Leone, Zimbabwe, and Solomon Islands under its scrutiny for the violation of democratic principles under the Harare Declaration. This definitive and often punitive action for the violation of democratic principles "marked a major transformation from the former, rather easy-going, permissive, fudging Commonwealth towards a more rules- or norms-based Commonwealth."[199]

The CMAG enforcement mechanism was activated by the Commonwealth against

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assistance." Ian Taylor "'The Devilish Thing': The Commonwealth and Zimbabwe's Dénouement" July (2005) 94/380 The Round Table 367–380, 368 (Taylor).
[195] Article B The Millbrook Commonwealth Action Programme on the Harare Declaration, 1995, Issued by Heads of Government at Millbrook, New Zealand, on 12 November 1995 <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=34458> (accessed 5 Oct 2006).
[196] Chau, above n 189.
[197] Don McKinnon "The Commonwealth Secretariat: Looking Forward to the Next 40 Years" (2005) 94/380 The Round Table 294.
[198] J Temin "Troubled Times in Nigeria" http://www.africanconflict.org/Downloads/Nigeria_ACJ.pdf>. Also see J Mayall "Democratizing the Commonwealth" (1998) 74 International Affairs 379-392.
[199] Duxbury above n 188.

Fiji in 2000,[200] when its membership was suspended and economic sanctions imposed after the coup. Fiji's membership was restored in December 2001 pursuant to the elections in 2001 where the Commonwealth Elections Observer Team declared that the elections in general were free and fair and George Speight was arrested for treason. However the 2006 coup-d'état saw Fiji being suspended from the Commonwealth once again.[201]

Ironically, the spirit of the Harare Declaration does not seem to have an effect on President Mugabe's authoritarian regime with which the Commonwealth has been waging a battle on behalf of democracy and the rule of law.[202] The authoritarian rule of Mugabe during the elections of 2002 was vehemently criticized by the Commonwealth Observer Team and Parliamentary Forum of the Southern African Development Community for creating "a climate of violence and fear that had impeded Zimbabweans in the exercise of their democratic rights."[203] The Commonwealth Association reacted to the breach of the Harare Declaration with a gamut of offensives, which included the suspension of Mugabe from Council meetings despite the opposition by both South Africa and Nigeria. The Commonwealth's suspension and the subsequent deliberations at CHOGM 2003 regarding Zimbabwe's political climate resulted in Mugabe withdrawing from the Commonwealth in 2003.[204] The current political situation in Zimbabwe persuades one that the Commonwealth's efforts in restoring democracy to the country have not been successful.

Pakistan, despite its close affinity for constitutional governance which it regards as a legacy of British colonial rule, has had numerous encounters with military governance,[205] the latest being the overthrow of the democratically elected government of Nawaz Sharif in a military coup by General Pervez Musharraf in 1999. In an era where authoritarianism and military governance is looked upon with disdain, paradoxically in May 2000 the Supreme Court of Pakistan upheld

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[200] R Robertson and W Sutherland *Government by the Gun: the unfinished business of Fiji's 2000 coup* (Pluto Press, Sydney, 2001) and TS Eliot "'Chiefs and Thieves and Other People Besides': The Making of George Speight's Coup" (2000) 35 Journal of Pacific History. 281-293.
[201] Fiji suspended from Commonwealth <http://news.bbc.co.uk/2/hi/asia-pacific/6161587.stm> (accessed 12 Feb 2008).
[202] Taylor, above n 194.
[203] John Makumbe "Zimbabwe's Hijacked Election" (2002) 13/4 Journal of Democracy 87–101.
[204] W David McIntyre "CHOGM 2003: the people's Commonwealth fails to make headlines" (2004) 29 New Zealand International Review 22-26.
[205] Iftikhar H Malik "Pakistan in 2000: Starting Anew or Stalemate?" (2001) XLI Asian Survey 1.

Musharraf's coup as "legitimate under 'the doctrine of state necessity' provided that elections were held within three years of the takeover."[206] As Pakistan was in clear violation of the democracy principles promoted by the Commonwealth, the CMAG suspended Pakistan from the Councils of the Commonwealth in October 1999. However, the ensuing global political developments in the wake of the September 11 2001 terrorist attacks in the USA and a promise from Pakistan to return to civilian rule within three years resulted in the lifting of the suspension of Pakistan in May 2004. The continued political crisis in Pakistan emanating from the military rule of Pervez Musharraf troubled the Commonwealth Organization that issued an ultimatum to restore the suspended Pakistani Constitution and suspend the emergency rule on the 12 November 2007. Non-compliance with these terms resulted in the suspension of Pakistan from the Commonwealth Organization on 22 November 2007.[207]

Within the last decade the Commonwealth has distanced itself from its previous "political culture" of not mentioning "the internal problems of and disputes between other member countries."[208] The new impetus to promote democracy and good governance is perceived by some analysts rather cynically as a means of creating a *raison d'être* for its own survival. Evaluating the disappearing political significance of the Commonwealth, Akinrinade observes that "[t]he continued existence of any institution has to be for a purpose. If the Commonwealth is to continue to function it has to be relevant in terms of meeting the needs of its members. Indeed, a test of the relevance of any institution, be it political, economic, social or whatever, is the extent to which it addresses the problems of its members."[209]

The transformation also reflects the concerns of Commonwealth leaders regarding the Association's political standing, its role and significance within member states and its general international profile. The emergence of the Association as a watchdog of democracy fulfils a lacuna in the global arena that was present since the conclusion of the Cold War. The decline of the sovereignty of nation-states

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[206] Aqil Shah "Democracy on Hold in Pakistan" (2002) 13/1 Journal of Democracy 67–75 .
[207] Failure to meet deadline brings fresh Commonwealth suspension
<http://www.guardian.co.uk/world/2007/nov/23/pakistan.politics> (accessed 5 Dec 2007).
[208] Chau, above n 189.
[209] O Akinrinade "The 1971 Declaration of Commonwealth principles after 20 years" (1992) 321 Round Table 33.

and the increasing involvement of international organizations has been justified as a corollary to economic globalization and integration into global markets and not so much in terms of democracy and the rule of law. The democracy standard setting and evaluation machinery in the form of the CMAG, as McIntyre elaborates, is "a demonstration that the Commonwealth aspires to having some teeth"[210] to deal with problems within its own membership.

From the perspective of South Asia, where the rhetoric of constitutional governance is ingrained into the sociopolitical fabric of society, the standard setting mechanism of the Commonwealth does serve an invaluable function. In this context, the drive to promote and protect fundamental political values in the Commonwealth and the implication that in future any interruption to democratic governance within a member state may result in the intervention in the domestic affairs of a member state, with validity in international law, is a welcome development.

5.7   Conclusion

This study advocates a new praxis of regional co-operation for South Asia that would determine its own terms of engagement with contemporary globalization, and defines the normative content of governance to contribute meaningfully towards the eradication of poverty, the enhancement of equitable development and the realization of human rights. It is not the task of the present study somehow to rank the four systems discussed with respect to any one variable or using some overall weighted aggregate, in a form of league table, then adopt this wholesale. For one thing, there is no need to do so: inspiration for the South Asian praxis can and should borrow as eclectically as necessary.

As the above regional mechanisms of Europe, the Americas and Africa indicate, each system has adopted particular groups of rights in a manner and to a degree that is best suited to the sociopolitical exigencies of the region. The European system operates against a quintessential atmosphere of regulated democracies that

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[210] W D McIntyre *A Guide to the Contemporary Commonwealth* (Palgrave, Basingstoke, UK, 2001).

take pride in independent judiciaries and governing structures that value the rule of law.[211] With its economic prosperity and established welfare states, civil and political rights take more significance than the second-generation rights but balance has been partly restored by the Social Charter. The European system has, after five decades of existence, moved beyond both the norm creating and procedural establishment stages to a stage of procedural fine tuning. The abolition of the Human Rights Commission and the expansion of the capacity of the Human Rights Court and the amendments to the Social Charter are milestones of that procedural fine tuning.

The political circumstances of the American continent are vastly different, as many of the countries were governed by military dictatorships. It is a region where rights declarations predate the Universal Declaration of Human Rights. However, the violent and repressive governing structures of the region resulted in mass scale denial of rights and freedoms. As much as reviving the dormant human rights system, the establishment of democratic governance was a regional priority. Therefore, the OAS was compelled to devote similar energies to the revival of democracy as well as to the establishment of an effective human rights regime.

The African continent, emerging from years of colonial rule, faced not only issues in relation to the nation state and governing structures but also massive problems of under-development and poverty. Coming out from a repressive and violent colonial past the African nations were sceptical about the adoption of rights treaties that appeared to reduce their national sovereignty. The sense of individualism that is pervasive in the established human rights treaties also appeared to sit uncomfortably with the African social and cultural values that emphasize the family and the community over the individual. Therefore, the human rights regime that Africans created for themselves places an emphasis on group rights as well as those of the individual. Taking into cognizance the endemic poverty and under-development of the region it accords equal emphasis to both civil and political rights and social and economic rights.

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[211] David Harris "Regional Protection of Human Rights : the Inter American Achievement" in David Harris and S Livingston (eds) *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998).

This chapter evaluated the cross-regional mechanism of the Commonwealth that have evolved to deal with similar social, political and economic issues. Each system has identified the pertinent issues of the region ranging from democratic governance to enforcement of socioeconomic issues and has devised mechanisms to address them. As reiterated before, each system is a product of its own socioeconomic and political circumstances and no system can be transplanted unchanged to another region to address its unique concerns. However, successful regimes in other regions remain an example and an inspiration to South Asia as it grapples with the task of formulating its regime.

The new regional system that is advocated for South Asia is a harnessing of resources from the South Asian region. There is great expertise and a wide knowledge base that would prove to be an effective bulwark against the contemporary neo-liberal forces of globalization. A regional coalition would not only counteract the adverse impact of neo-liberal globalization; it would help reinforce the capacity of national governments in developing countries to act in the interests of their people in the context of formulating development policies. As Kofi Annan observes in his report *In Larger Freedom*: [212]

> [i]n a world of interconnected threats and challenges, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States … States, however, cannot do the job alone. We need an active civil society and a dynamic private sector ….We also need agile and effective regional and global intergovernmental institutions to mobilise and coordinate collective action … We therefore need new mechanisms to ensure accountability — the accountability of States to their citizens, of States to each other, of international institutions to their members and of the present generation to future generations.

The regional praxis advocated in Chapter 6 is founded on the postulates that democratic governance and effective realization of ESC rights contribute to the amelioration of endemic poverty (in all its senses, starting with material poverty), which is the single most debilitative feature of the socioeconomic and political landscape of South Asia. Effective regional co-operation can be the basis for

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[212]Kofi Annan "In Larger Freedom: towards development, security and human rights for all" (A/59/2005) <http://www.un.org/largerfreedom/chap1.htm> (accessed 5 Mar 2006).

creating an effective mechanism that addresses the issue of poverty from a normative stand-point.

The new praxis will contain procedural mechanisms executed at regional level to enhance democratic governance at national level. Issues of equitable development and the promotion of economic and social rights will be addressed through a policy filtering mechanism that would encourage accountability and transparency at national policy formulation. The need for good governance of globalization will be addressed at regional level to extract the benefits of global integration.

The new regional initiative will also emphasize norm-creation and consolidation relating to democratic governance. The new scheme will devise a mechanism for education, promotion and consolidation of democratic governance in the region. The regional praxis will encourage empowerment of people through providing avenues for expression of public opinion in relation to public policy formulation nationally. As Amartya Sen explains, "democracy has an important *instrumental value* in enhancing the hearing that people get in expressing and supporting their claims to political attention (including claims to economic needs)."[213]

The remedy mechanism would go beyond the conventional systems of seeking remedies for rights violated and incorporate measures to negotiate aid and loan conditionalities of the IFIs and trade-based policy formulations from the WTO. Procedural mechanisms to challenge policy formulation of member states and IFIs on the basis of rights violations will be incorporated into the new praxis. In essence the new praxis advocated for South Asia in Chapter 6 envisages a pragmatic expansion of the concepts of a rights-based approach to development and inclusive democratic governance which enhances and consolidates the universal paradigm of human rights. The mechanisms advocated in the new praxis aim to shift the concepts from their normative premise to a stage of viable implementation.

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[213] Amartya Sen "Democracy as a Universal Value" (1999) 10 Journal of Democracy 3 -17 <http://muse.jhu.edu/demo/jod/10.3sen.html >(accessed 7 Feb 2008).

CHAPTER 6

THE WAY FORWARD: A NEW, AUTOCHTHONOUS REGIONAL PRAXIS IN SOUTH ASIA FOR PROMOTING HUMAN RIGHTS, DEMOCRACY AND EQUITABLE DEVELOPMENT

"Still, though not radically ameliorative of here-and-now suffering, international human rights standards and norms empower people's movements and conscientious policy-makers everywhere to question political practices. That to my mind is an inestimable potential of human rights language, not available in previous centuries. Human Rights languages are all that we have to interrogate the barbarian power, even when these remain inadequate to humanize fully the barbaric practices of politics."[1]

6.1 Introduction

Chapter 1 traced the evolution of the universal paradigm of human rights, which shared resonances with the South Asian ethos of compassion, humanism and the notion of tolerance. South Asia, through the influence of colonialism, embraced the conceptual developments of human rights and utilized the rights idiom not only in the struggles against colonialism but also against the its own "social evils" and "culturally sanctioned indigenous human rights violations".[2] The Western articulation of human rights therefore had affinity and relevance to the South Asian context and was incorporated into the governing mechanisms of the states in the region.

Chapter 1 also analysed the inadequacy and the failure of contemporary national regimes that were put in place to protect human rights and achieve social justice in the region. These dysfunctional human rights mechanisms exacerbated the marginalization of the poor and the vulnerable segments of society, contributing to both disenfranchisement and disenchantment, fertile grounds for civil dissension and militarism — aspects that were further elaborated in Chapter 4.

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[1] Upendra Baxi "Voices of Suffering and the Future of Human Rights" Fall (1998) Transnational Law and Contemporary Problems 126–175, 126–127.

[2] Stig Toft Madsen *State, Society, and Human Rights in South Asia* (Manohar, New Delhi, 1996) 46.

Against this background, Chapter 1 nevertheless gave credit to one peculiarly creative and expansive response to this dysfunctionality: Social Action Litigation. The chapter discussed how SAL has been accepted and expressly facilitated by a sympathetic and activist judiciary, largely in India. If human rights were being "more honoured in the breach than the observance", then the courts' adoption of SAL had represented a step into this breach. The study nevertheless stressed that SAL and judicial activism alone are not a sufficient response to dysfunction, which still needed to be addressed systematically, although public interest litigation and judicial activism on a broad range of justiciable rights could remain very valuable adjuncts to any overhaul of the system.

Chapter 2 began the analysis of globalization, and specifically its economic drivers. It started by identifying that economic globalization is not new but has had historical antecedents. The chapter traced the geo-historical evolution of those antecedents by reference particularly to the apt chronology used by Hopkins, who delineated archaic, proto, modern and post-colonial phases respectively. What Hopkins termed post-colonial globalization, the present study included under a slightly broader period that the author called "contemporary", dating essentially from the end of the Second World War. Broadly speaking, "contemporary" globalization remains so in the sense of that word as meaning current and topical. For, even today, the overarching institutions of the global economic system remain those founded at Bretton Woods in the 1940s, above all the World Bank and the International Monetary Fund, but also the World Trade Organization. In a parallel that was made more explicit in the introduction to Chapter 3, contemporary globalization has also been contemporaneous with the internationalization of human rights discourse and regimes, which again rose out of the ashes of World War II.

Chapter 2 signalled that out of the phases of globalization, the prime interest of this study is in contemporary globalization, to which the other phases serve mainly as antecedents or historical context. For the reasons just given, the post-war or contemporary era was seen to be coherent enough to warrant being considered a discrete entity. This, even though on a different scale one could sensibly recalibrate it

more finely into, for instance, the Cold War and post-Cold War stages, or more recently the acceleration and magnification of the phenomenon since the rise of the internet, and so on. Crucially though, Chapter 2 began to focus in on the subset of the contemporary form that this thesis argues is the most powerful, pervasive, insidious and the most destructive to the vulnerable in South Asia as elsewhere. That subset is the contemporary phenomenon's *neo-liberal* form, which has enjoyed ascendancy since the late 1970s on the back of what later came to be known as the Washington Consensus.

Neo-liberal globalization has trumpeted itself as, so to speak, the one, true contemporary globalization: not only inevitable and inexorable, but also, as if by market magic, ideal and optimal "for the whole globe". It is equally crucial to the argument of this thesis, however, that neo-liberalism is in fact none of those things, but rather only one possible version of globalization. To have successfully sold itself as being generic and synonymous with globalization is simply the greatest, most insidious marketing achievement of the neo-liberal brand. Specifically, the neo-liberal brand is a form of globalization which allows the owners and other beneficiaries of economic wealth — predominantly Western capital — to perpetuate, redouble and spuriously justify their own economic privilege and associated ideological hegemony. That reinforcement of privilege rides on the back of the already exploited "margins" of society that in truth represent an enormous chunk of the globe: more than two-thirds of the world. Forty per cent of that number are in turn clustered in South Asia and therefore of particular relevance to this thesis.

Chapter 2 demonstrated how individual states, particularly the developing states, have proven to be too weak to resist the neo-liberal onslaught of contemporary globalization. Yet, because neo-liberalism is only one possible content of globalized structures, and because the rules of the economic game can in fact be rewritten, Chapter 2 concluded on the optimistic note that better governance of the globalization process and new rule-setting could potentially ameliorate this situation. In particular, given that individual states in South Asia, as elsewhere, lacked the capacity

individually to determine the terms of engagement with globalization, in principle a collective initiative in the form of a regional alliance would have better success.

Chapter 3 opened by drawing together the two strands teased out in the first two chapters, both pivotal to the discussion on the poverties of South Asia. It thus compared and contrasted the internationalization (or effectively globalization) of human rights traced by Chapter 1 with economic globalization, and specifically its still-prevailing neo-liberal form, as tracked by Chapter 2. These opening comments identified the key public and private agents of specifically neo-liberal globalization — the IFIs and TNCs respectively — and its main instruments: the SAPs and PRSPs. The analysis illustrated in more detail than that of Chapter 2 the way in which neo-liberal globalization with its false inevitability ("There is No Alternative") has in turn mutated the concept of sovereignty[3] and transferred much of the traditional power base from the nation state to international financial institutions, bilateral donors and transnational corporations, creating a fissure of accountability and rendering individual national governments in many ways impotent. It illustrated the specific manner in which the phenomenon has rendered states ineffective in terms of negotiating new terms of conduct for global trade, defining aid conditionalities or prioritizing issues such as social expenditure and other critical policy decisions that affect the people above debt repayment. On the positive side, Chapter 3 identified the Governance-Related Conditionalities, which at their best recognize that plural democracy both is required for and itself requires the vindication of human rights. As Sen observes "[d]evelopment consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. The removal of substantial unfreedoms, it is argued here, is constitutive of development." [4] This study regards the GRCs as a weapon of empowerment in the development discourse which assists the elimination of "unfreedoms" in society, even though the GRCs were not deliberately conceived to achieve this.

[3] DL Sheth "Democracy and Globalisation in India: the post cold war discourse" (1995); 540 The ANNALS of the American Academy of Political and Social Science 24-39; Ponna Wignaraja and Akmal Hussein *The Challenge in South Asia: Development, Democracy, and Regional Cooperation* (Sage Publications, New Delhi, 1989).
[4] Amartya Sen *Development as Freedom* (Anchor Books, New York, 1999) xii.

The focus of Chapter 4 was upon the third strand of discussion of the many poverties of South Asia: a poverty of democracy. The chapter reiterated that human rights, development and democracy draw sustenance from each other and that human rights and equitable development cannot be sustained in the absence of democracy. Chapter 4 narrated this poverty of democracy in terms of the national circumstances of South Asian states, describing how governing institutions lack accountability to their people in policy formulation, avoid transparency in executing these policies, and reject public participation in evaluating critical policy decisions. This chapter illustrated increasing public frustration regarding corruption, autocratic governance, and the absence of an effective means of influencing policy formulation. The chapter showed how these developments have resulted in civic strife and insurgency, and the deterioration of the relations between the government and civil society, in turn culminating in massive violations of human rights.

Chapter 4 also discussed the regional response to the resolution of the poverties of human rights, development and democracy in South Asia. Identified as the "middle tier" between national and global levels, regionalism holds great potential as a means of addressing all the poverties of South Asia. In this context the existing regional attempt at integration through the South Asian Association for Regional Cooperation (SAARC) was analysed in detail. The analysis showed that SAARC has failed to answer not only the need for the vindication of human rights, but also the needs for equitable, human-centred development, and for the flourishing of reliable democracy — all of these aspects being bound up together and mutually reinforcing. This study therefore advocated an urgent replacement of the existing regional mechanisms to improve governance, the conditions of human deprivation and the state of human rights in the region.

Chapter 5 focused on selected supranational mechanisms and their legal or treaty instruments that have been used within or among regions around the globe to ensure the protection of human rights, democratic governance and the advancement of social justice among other particular purposes such as breaking the ties of various colonialisms or buffering against Communism.

Chapter 5 noted the regional disparities in terms of the institutionalization of human rights and the general effectiveness of the normative standards relating to human rights. The protection regimes appeared most legalized in a European and an American context, while in Africa the regime is at a stage of establishing norms and evolving mechanisms to protect and promote human rights through a functional Human Rights Commission. An examination of these various mechanisms in operation to ensure the establishment of democracy and prevent democratic backsliding in Europe and the Americas was also undertaken in Chapter 5. The efforts of the Commonwealth Association to create a normative framework for democratic governance were discussed. The discussion throughout Chapter 5 highlighted the need to create mechanisms that responded to the particular exigencies of each region, and observed the corresponding futility of trying to transplant root and branch any normative regime that had evolved in an incompatible different socioeconomic and historical context to the soil of the South Asian subcontinent, which has its own civilizational history and its own distinct blight of afflictions — as well as its own landscape of resources to be tapped in curing them.

The present chapter proposes a new regional praxis that is designed for South Asia, taking into consideration the issues that were discussed in all the preceding chapters. The underlying quest of the new praxis is to formulate an efficient autochthonous mechanism that responds to the exigencies and poverties of the region, in that it would close the material poverty gap, vindicate rights and enhance human-centred, equitable development and democratic governance — all synergistic aims, as has been shown. The proposed new praxis of regional governance, to be called the South Asian Union for Development, Democracy and Human Rights (SAU), is put forward to replace the dysfunctional SAARC. It is envisaged that the contemporary members of the SAARC — India, Pakistan, Sri Lanka, Bangladesh, Nepal, Bhutan, the Maldives and Afghanistan[5] —will be the constituting members of the SAU. In formulating the regional mechanism this study reiterates the significance of the Vienna Declaration of 1993 as a restatement of the international law relating to

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[5] Refer n 2 of the Introduction to the thesis.

human rights.[6] This study also adapts and applies the Paris Principles, which were formulated to provide guidance for the creation of national mechanisms for the protection of human rights, as a loose framework for a regional structure.

6.2 The Search for a New Paradigm of Regional Standard-setting and Co-operation.

Regionalism as a means of maintaining regional co-operation and preserving and advancing the common interests of states within the geographical proximity has been in "vogue"[7] since the end of World War II but has far deeper validity than any passing fad and instead rightly remains a "central concept for organising world politics".[8] As highlighted in Chapter 5, human rights — both civil and political rights and economic, social and cultural rights — have been incorporated in principle into the regional mechanisms in Europe, the Americas and in Africa for many decades. But the analysis indicated that the success with which rights are vindicated is determined to a large extent by the mechanisms that are in place within each regional mechanism to realize the rights. Moreover, massive buffeting forces impinge from without, and it is to a large extent these forces with which the regional mechanism must deal. This study reiterates that the existing mechanisms in place to vindicate human rights particularly in the context of the Americas and Africa are compromised by the forces of neo-liberal globalization especially through the dictates of the IFIs.

The underlying presumption of the universal regime of human rights is that national governments are the ultimate repository and determinant of obligations relating to human rights. The reason for presuming this is partly the further assumption that states have the power to fulfil those rights and partly the parallel assumption that they

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[6] *Vienna Declaration and Programme of Action* World Conference on Human Rights, Vienna, 14–25 June 1993 UN Doc A/CONF.157/23 12 July 1993
<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En> (accessed 6 Nov 2006) (Vienna Declaration).
[7] Krispa Sridharan *Regional Cooperation in South Asia and South East Asia* (Institute of South East Asian Studies, Singapore, 2007) 1.
[8] Peter Katzenstein "Regional States: Japan and Asia, Germany and Europe" in Kozo Yamamura and Wolfgang Streeck (eds) *The End of Diversity? Prospects for German and Japanese Capitalism* (Cornell University Press, Ithaca, 2003) 89.

are the most likely to violate them: if both assumptions were true, there would be no need either to protect or to empower citizens against anything other than their own state. Clearly, this is not the case. Yet, governments do continue to be the organs which deliberate and vote on the content and sphere of human rights obligations they undertake through the various treaties on human rights before they accept those treaty obligations (either by ratification after signing or by accession) and take any further necessary steps to implement them into domestic law. The success of the treaties is measured by the extent to which they are implemented and are adhered to within each state.

Previous chapters indicated how globalization has strongly induced developing states to compromise the obligations they had thus accepted under the universal human rights regime. This occurred because, despite the declared obligations of the states to promote the rights, including ESC rights, of their own peoples, in reality priority was instead required (as a condition of assistance) to be given to policies that facilitated the states' integration into the global market economy on the terms stipulated by the World Bank and the International Monetary Fund and by bilateral donors. Direct, legal control over policy formulation, which has traditionally been the exclusive domain of national governments, may thus have remained in the hands of the states. However, de facto leverage over the scope and content of that policy has instead been gained by IFIs and bilateral donors. This has resulted in a fundamental restructuring of the domestic sphere to reflect (currently, though this need not continue to be the case) neo-liberal values.[9]

Although conditionalities may technically be agreed to rather than simply imposed, the bargaining power of a monolithic — and, in the case of the unique IFIs, monopolistic — holder or controller of desperately needed funds has thus far been so much greater than that of the individual decision-"taking" state that the latter's input has been nugatory. These changes, particularly in the constitutional and legal realms, are impacting negatively on social, economic and cultural rights of citizens in the

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[9] See Chapter 3 of this study.

recipient states.[10] At the same time, however, states, by giving effect nationally to human rights obligations undertaken at international level through treaties, will to some extent try to counteract the fall-out from policy prescriptions of the IFIs upon whom the developing world is economically reliant. This paradoxical situation can be resolved only by effecting a change to the terms of engagement in the globalization process and more specifically demanding a change of its neo-liberal hue.

As reiterated in previous chapters, this change cannot be achieved through individual state efforts alone. Instead it has to come through the collective action of states. This can occur at both the global level or tier, under the auspices of the United Nations and associated agencies, and at the regional level. Regional mechanisms bring together states which have geographical, cultural and historical affinity, and which, more significantly, are affected in a common way by the common predicaments that globalization has precipitated. It is in this context that the following section of this study emphasizes the justification for negotiating a regional initiative for South Asia that deals with issues relating to human rights, democracy and poverty eradication in the context of globalization.

Two prerequisites before even entertaining the setting up of a (new) regional organization stand out. Firstly, this study has accepted as a foundation since Chapter 1 the norms and structures of the universal human rights regime as established under the auspices of the UN. In endeavouring to treat the ills of rights violations, democratic deficit and mutated development, any proposal must be legitimate within, and compatible with, the global human rights regime. Secondly, lest time and effort be misdirected and wasted, there must be at least some reason to believe that such a mechanism would also be efficacious at treating those ailments.

The following section therefore demonstrates both the legitimacy of a regional mechanism within global rights organizations — in other words, compatibility between them — and the potential efficacy of such a mechanism. Indeed, it shows

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[10] Impacts on ESC rights due to the changes relating to taxation, labour laws, subsidies of basic needs and food , water and housing and services such as education and healthcare have been discussed in Chapter 4 of this study.

that regional arrangements are not only compatible with UN structures and norms, but expressly contemplated by them, and it recalls the incomplete yet considerable success of other regional and cross-regional structures. Other regional structures have evolved systems that address these sociopolitical and economic issues faced by the regions. The praxis advocated in this study aims to establish regional monitoring systems of policy formulation for its compatibility with and promotion of equitable and human-centred development human rights protection and democratic governance. Collective responsibility in initiating and executing strategies for development, human rights protection and effective democratic governance will strengthen the South Asian regional capacity to manage the process of globalization more effectively.

6.3.   The Legitimacy and Efficacy of a Regional Praxis and the Need for a Law-based Regime

The praxis takes the form of a legal regime, for this thesis acknowledges the unique capacity of law to achieve social transformation, govern the process of globalization and instil democratic governance in the region. This capacity was summed up elegantly by the Dominican Republic envoy to the United Nations in 1966 during the UN General Assembly proceedings relating to the ICCPR. In a quotation to which this chapter will return, the envoy said: "we, the unarmed, the economically under developed, the technologically under privileged, have no strength except the strength of law… .[and so] we are pleased to vote for the draft Covenants on Human Rights". The thesis has also stressed since Chapter 1 the primacy — as well as the sheer ubiquity — of the language of human rights. The unique value of rights talk is repeated in the opening quotation of this chapter from Upendra Baxi, and will be taken up again. For these reasons, this chapter will focus on a synthesized proposal to achieve a common *legal* standard in relation to human rights, democratic governance in the context of globalization and to equitable, human-centred development in South Asia. In doing so it takes into consideration the historical and cultural affinity of the South Asian region, the common obstacles that prevent effective realization of

development, and the norms required to inculcate democratic governance in the region, including the tying together of both democracy and development as rights in themselves.

The impetus for a regional coalition for the promotion of human rights, democracy and human development is supported by international legal jurisprudence and other regional collaborations. The United Nations envisages cooperation among states for human development, and such an intention is included in major documents of the UN. The UN Charter requires member states to take "joint and separate action" to promote the following UN purposes stipulated in Article 55:[11]

a.   higher standards of living, full employment, and conditions of economic and social progress and development;
b.   solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c.   universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[12]

The Universal Declaration of Human Rights declares that "[e]veryone, as a member of society . . . is entitled to [the] realization, through national effort and international cooperation . . . of economic, social and cultural rights."[13] The ICESCR also presupposes that the realistic realization of ESC rights is through "international assistance and co-operation".[14] This position was reiterated by the UN Committee on Economic, Social, and Cultural Rights when it stated: "The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions

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[11] *Charter of the United Nations*, Article 56, signed 26 June 1945 (entered into force 24 Oct 1945). <http://www.un.org/aboutun/charter/> (accessed 17 Oct 2006) (UN Charter).
[12] N Charter, above n 9, Article 55 (A)-(C).
[13] *Universal Declaration of Human Rights*. Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948 Article 19 <http://www.un.org/Overview/rights.html> (accessed 17 May 2006).
[14] Article 2, *International Covenant on Economic, Social and Cultural Rights*. Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with Article 27
 <http://www.unhchr.ch/html/menu3/b/a_cescr.htm> (accessed 17 Oct 2006) (ICESCR).

of the Covenant itself, international co-operation for development and thus for the realizations of economic, social and cultural rights is an obligation of all States."[15]

The legitimacy, compatibility, and potential efficacy of a regional effort for human development is further reinforced by the UN Declaration on the Right to Development, which encourages collaborative efforts in realizing goals of development: "[a]ll human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development."[16] More significantly, the UN Declaration on the Right to Development also stipulates that "[s]tates have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."[17]

Of most direct relevance to this study is a resolution on regional arrangements for the promotion and protection of human rights, adopted by the UN General Assembly on 3 March 1997. This resolution expressly "[i]nvites States in areas where regional arrangements in the field of human rights do not yet exist to consider concluding agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights."[18] The subsequent UN Human Rights Commission Resolution on Regional Arrangements for the Promotion and Protection of Human Rights endorsed the UN General Assembly Resolution.[19]

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[15] *The Nature of States Parties' Obligations,* General Comment No. 3 adopted 13–14 Dec 1990 UN ESCOR, Comm on Economic Social and Cultural Rights, 5th Sess., 49th and 50th meetings, 14 UN Doc E/C12/1990/8 (1990).

[16] *Declaration on the Right to Development*, adopted 4 Dec 1986 GA Res 41/128, UN GAOR, 41st Sess. Supp No 53 Agenda Item 101 at 186 UN Doc A/41/53 (1987).

[17] Ibid, Art 2(2).

[18] <http://www.un.org/documents/ga/res/51/ares51-102.htm> (accessed 5 Nov 2006).

[19] Commission on Human Rights Resolution 2003/75 62nd meeting, 25 April 2003 [Adopted without a vote. See chap. XVIII. - E/CN.4/2003/L.11/Add.6] Office of the United Nations High Commissioner for Human Rights Geneva, Switzerland <http://www.ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-75.doc> (accessed 5 Nov 2006).

Nowhere in the international framework for the protection of human rights does it specify one procedural mechanism for the protection of human rights. Historical factors such as the Westphalian state system and British colonialism, which established Westminster-styled constitutional systems in former British colonies, contributed to a general acceptance of international legal norms such as the concept of sovereignty and the notion that the primary duty bearers regarding human rights are the states. The same jurisprudential ethos has propagated the mainstream paradigm of human rights with justiciable rights and the judiciary as the primary forum for the resolution of issues relating to rights violations. However, the preceding chapters have noted the unreality, given globalization, of the conventional paradigm that posited states as being sovereign and equal and each powerful enough to craft its own destiny and supply all the needs of its citizens. This realization necessitates exploring beyond the conventional paradigm for the resolution of the current afflictions and real limitations of the developing world in general and South Asia in particular.

One can also properly recall the need for human rights to be contextualized, which is the grain of truth in the often overdone, easily abused and potentially divisive, even anarchic, assertions of cultural relativism.[20] This need is articulated for instance in the Bangkok Declaration. This document recognizes that, "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[21] This further legitimizes the exploration of other avenues to safeguard human rights.

6.3.1   Creating a Legal Regime of Human Rights in South Asia

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[20] See Chapter 1 of this study, subsection 1.9.
[21] Final Declaration of the Regional Meeting for Asia of The World Conference on Human Rights The Ministers and Representatives of Asian States, Meeting At Bangkok From 29 March To 2 April 1993, Pursuant to General Assembly Resolution 46/116 Of 17 December 1991 In the Context of Preparations for The World Conference on Human Rights UN Doc A/Conf.157/Pc/59 <http://www.justiceinitiative.org/db/resource2?res_id=101629> (accessed 10 Nov 2006).

There is an enormous capacity within the human rights paradigm to use it creatively and to make human rights both relevant and inclusive.[22] The rights paradigm has distinguished itself as the vehicle of choice for articulating notions of human dignity and well-being and for granting these notions legal and constitutional validity.[23] The legitimacy of the rights paradigm was consolidated in the developing world, as Mutua observes, through the "popular mass struggles by marginalized groups and colonized peoples …Examples of these struggles are the anti-colonial and anti-racist movements by the peoples of Africa, Asia, the Pacific, the Caribbean and Latin America. These struggles for self-determination and independence have left an indelible mark on human civilization."[24] The right to self-determination as a legal right is a result of such struggles[25] proving that diverse manifestations of dissent against oppression and marginalization can contribute to the evolution and expansion of the rights paradigm.

As the previous chapters of this thesis illustrated, the current crisis within the human rights paradigm, which includes the gross violation of ESC rights and the resulting poverty, is an inevitable consequence of policy decisions based on neo-liberal economic principles. Neo-liberal globalization has created a new base of unaccountability and established new structures of systematic rights violations. Echoing the popular mass struggles against colonial rule and apartheid, people have come together against the inequitable manifestations of neo-liberal globalization.[26] The mass dissent against the contemporary trajectory of globalization reflects the need for the evolution of a normative regime to govern globalization and regulate its negative impact on people.

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[22] Makau Mutua 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 Human Rights Quarterly 547–630, 552 (Mutua).
[23] See Chapter 1 of this study and also K Sikkink and SC Ropp *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); and Richard Pierre Claude and H Burns Weston *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, 1992).
[24] Mutua, above n 22.
[25] Article 1.1 All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
[26] Chapter 2 of this study and also see John Clark *Worlds Apart: Civil Society and the Battle for Ethical Globalization* (Earthscan, UK, 2003).

The rights paradigm has demonstrated the ability to recreate innovatively its duty-bearers, identify new violators and evolve new mechanisms to protect and enhance human rights.[27] Such new standard-setting through the rights paradigm has been successful in instances of overwhelming global support. The ICCPR,[28] the ICECSR,[29] and the Vienna Declaration on Human Rights[30] are instances where such universal standard setting efforts have had global support and empathy. On the other hand, the Declaration on the Right to Development is an instance where support has been divided. The UN Human Rights Commission initiated the idea of a right to development in 1977 and a decade later the UN General Assembly adopted the Declaration.[31] Sengupta's observation is that "[i]n effect the right to development emerged as a human right which integrated economic, social, and cultural rights with civil and political rights in the manner that was envisaged at the beginning of the post-World War II human rights movement. The world got back, so to speak, to the mainstream of the human rights movement, from which it was deflected for several years by Cold War international politics."[32] Despite the ardent support extended by Sengupta for the Declaration there has not been a consensus on the legitimacy of the right to development, particularly due to its incompatibility with neo-liberal ideology, "which see[s] the global redistributive justice discourse of the right to development as incompatible with free market and capitalist structures of the global economy."[33]

The lack of consensus regarding the normative validity of the right to development and the academic debate surrounding it have highlighted the uncertain capacity of the rights paradigm to contextualize issues in economic, sociopolitical and cultural terms,

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[27] Tony Evans *The politics of human rights: a global perspective* (Pluto Press, London, 2005); David Kinley and Rachel Chambers "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law" (2006) 6 Human Rights Law Review 447–497.

[28] <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (accessed 16 Feb 2007).

[29] <http://www.unhchr.ch/html/menu3/b/a_cescr.htm > (accessed 16 Feb 2007).

[30] <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En> (accessed 16 Feb 2007).

[31] . CHR Res. 4 (XXXIII), UN ESCOR, Comm'n on Hum Rts (21 Feb 1977). The Declaration on the Right to Development was adopted by the United Nations General Assembly, Resolution 4/128 on 4 December 1986 <http://www.unhchr.ch/html/menu3/b/74.htm> (accessed 16 Feb 2007).

[32] Arjun Sengupta *The Right to Development as a Human Right* <http://hsphsun3.harvard.edu/fxbcenter/FXBC_WP7--Sengupta.pdf.> (accessed 8 Mar 2008); see also Arjun Sengupta, Archna Negi and Moushumi Basu *Reflections on the Right to Development* (Sage Publication, London, 2005); Arjun Sengupta "Realizing the Right to Development" (2000) 31 Development and Change 553–578.

[33] Mutua, above n 22.

and to promote normative standards in situations where there is a lack of universal consensus against neo-liberalism. While the developed states view the right to development with great trepidation the developing countries have been quick to see its potential, particularly the prescription that declares: "States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right."[34] Despite uncertainty of its legality as a human right, the right to development provides means of channelling the concerns of the anti-globalization movement, such as the demand for global distributive justice, equitable terms of trade, debt relief and better governance of globalization.

The preceding chapter highlighted how regional mechanisms strive to cater to the new exigencies that underpin globalization within various sociopolitical and cultural contexts. In the South Asian context too, it is vital that there is regional collaboration to circumvent the gross violation of human rights that poor management of globalization produces. The crisis requires the formulation of new strategies and new structures not only to vindicate the rights that are violated but to create filtering mechanisms, which will avert potential future violations.

Claiming evolution from a vastly different ideological base, the ESC rights, unlike the "first generational" civil and political rights, are not consistent with the demands of the neo-liberal economic agenda.[35] The UN Special Rapporteur on ESCR's warns "[t]he flurry of many States romantically to embrace the market as the ultimate solution to all of society's ills, and the corresponding rush to denationalize and leave economics, politics and social matters to the whims of the private sector, although the theme of the day, will inevitably have an impact upon the full realization of economic, social and cultural rights. History has adequately shown that many aspects of social

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[34] Article 4 *Declaration on the Right to Development* Adopted by General Assembly Resolution 41/128 of 4 December 1986 <http://www.unhchr.ch/html/menu3/b/74.htm> (accessed 16 Feb 2007).
[35] For a discussion see Chapter 2 of this study and also Michael J Dennis and David P Stewart "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98 American Journal of International Law 462–515.

policy cannot be attained through blind reliance on market forces."[36] Indeed, such reliance has created mass social, economic and cultural devastation. Therefore the regional praxis that is advocated here is premised on the endeavour to discard the strong neo-liberal bias of contemporary globalization and create a normative standard regionally in relation to human rights, development policy formulation and democratic governance.

6.3.2   Sociopolitically and Culturally Contextualized Development

Chapters 3 and 4 of this study raised the issue of the homogenizing thrust of contemporary development and its negative impact on South Asia. Observing the trajectory of the mainstream developmental ideology, Ashis Nandy comments, "I think that the drive for homogenization is written into the birth certificate of development. Despite what many like to believe, development presumes that, in the long run, you will have only one particular kind of society all over the world."[37] The mainstream paradigm of development therefore ignores the intricacies of multiculturalism and the diversity of South Asia and of traditional knowledge systems.

The proposed South Asian Union Charter (SAU) will strive to incorporate the notion of sociopolitically and culturally contextualized development into its regional mechanism. This notion is significant from the perspective of what are currently the marginalized and the disenfranchised segments under the mainstream paradigm of development. As a conceptual notion it acknowledges the mainstream human rights discourse and the consensus on human dignity which this represents, but it rejects the pervasive neo-liberal ethos and the homogenizing thrust that has been articulated through the last three decades of contemporary globalization. Regional assertion of

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[36] Danilo Türk, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Realization of Economic, Social and Cultural Rights* (Final report) E/CN.4/Sub.2/1992/16, 3 July 1992.<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.1992.16.En?Opendocument> (accessed 6 Mar 2006).
[37] Smithu Kothari "Revisiting the Violence of Development: An Interview with Ashis Nandy" (2004) 47 Development 8–14, 10.

the notion of contextualized development will focus on the unique requirements of the region with its sociopolitical and cultural exigencies, rather than formulating policies that cater to the self-interest of Western capital but which are then passed off as being both inevitable and optimal for all.

Any assertion of cultural relativism in human rights often invokes violent outbursts that such claims are an attempt to dilute the validity of the "universal" quality of human rights.[38] But in an era where homogeneity has assumed the central place in every conceivable aspect of human life, cultural and regional identities offer a real alternative, a genuine sense of security and belonging for both communities and individuals who are pressurized to adjust to economic and social change precipitated by neo-liberal globalization.[39] Sociopolitical and cultural contextualization is not an attempt to reinforce or speciously justify socially debilitating practices, such as ethnoreligious, caste and gender discrimination or the marginalization of the vulnerable segments of society. Rather, it is an attempt to locate development within the socioeconomic context of a particular community. It is a means of identifying the vulnerable segments of society — aspects of culture and sections of the national economy that are threatened by the expansion of the neo-liberal globalization process. Contextualized development creates a safety mechanism to deal with the insecurities and the vulnerabilities of the marginalized segments of society who end up as the victims of the globalization process, such as communities displaced by macro development or urbanization schemes, marginalized small-scale farmers, and the urban poor.

The new regional mechanism proposed by this thesis is premised upon the conceptual foundation articulated above and will take into account the key recommendations of the Paris Principles on human rights mechanisms.

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[38] Yash Ghai "Human Rights and Governance: The Asian Debate" (Occasional Paper Series No. 1, The Asian Foundation's Centre for Asian Pacific Affairs, November 1994); Michael C Davis "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (1998) 11 Harvard Human Rights Journal 109, and also see the assertions of the universalism of human rights in Jack Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 1989).
[39] See Chapters 3 and 4 of this thesis.

6.4 UN Policy Guidelines on Possible National and Regional Institutional Frameworks

The following section discusses the recent policy statements regarding national and human rights endeavours to establish mechanisms that foster and promote human rights. The Vienna Declaration is regarded by this study as a restatement of international human rights law. It provides the conceptual basis for the initiation of a regional mechanism to protect human rights in South Asia. The Paris Principles prescribe the framework and the essential requirements to establish a national human rights enforcement mechanism. However, the guidelines can be a foundation for a regional framework.

6.4.1 The Vienna Declaration

Significant among several policy statements relating to the creation of regional arrangements for human rights protection under the auspices of the United Nations is the Vienna Declaration and Programme of Action 1993, which declares that:[40]

> Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.

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[40] Vienna Declaration, above n 6.

Inherent in the Declaration is the presumption that a regional normative framework can be more effective in reinforcing universal human rights values, can expand their scope and can re-contextualize rights in the light of the cultural, political and economic peculiarities of the region. A regional mechanism, often focussing on a specialized set of issues, has the capacity to evolve conceptually adding new ideas into the rights paradigm.

The overwhelming endorsement of the Vienna Declaration by 171 states clearly supports the view that the Declaration is a restatement of the international law on human rights. Donnelly observes that such approval is also indicative of the "dramatic change in dominant international attitudes" in relation to the contemporary paradigm of human rights. For he says, "[w]hatever the gap between theory and practice, most states today prominently feature appeals to human rights, democracy, and development in their efforts to establish national and international legitimacy."[41] The Vienna Declaration therefore has remained a significant milestone in the trajectory of incorporating human rights standards into national policy formulation.

The Vienna Declaration asserts that "the universal nature of these rights and freedoms is beyond question" and "reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues."[42] The Declaration also reinforces the notion that human rights are indivisible and interdependent and rejects the perception of generational human rights.[43]

6.4.2   The Paris Principles

The significance of effective national level structures for implementing human rights has been reiterated by the UN Human Rights Commission several times. The UN General Assembly in December 1978 adopted a resolution which created the

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[41] Jack Donnelly "Human Rights, Democracy, and Development" (1999) 21/3 Human Rights Quarterly 608–632, 611.
[42] Vienna Declaration, above n 6, Article 1.
[43] K Boyle "Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993" (1995) 43 Political Studies 79–95.

guidelines on the structure and functioning of national institutions for the promotion and protection of human rights.[44] The resolution specified methods of effective implementation of international human rights standards and created basic ground rules for such national mechanisms at a meeting in Paris in 1991.[45] This meeting culminated in the in-depth guidelines commonly known as The Paris Principles[46] that established structures for the protection of human rights on a national basis.[47] The present study asserts that these principles can also be the foundation for a South Asian regional mechanism of human rights, since the underlying purpose of the Paris Principles is the promotion of decentralized/localized effective human rights protection mechanisms.

The Paris Principles of 1991 stipulate the following basic parameters for a general human rights mechanism:

Competence and Responsibilities:[48]

The Paris Principles do not envisage empty structures that are unable to yield sufficient power to make an effective difference in the human rights sphere within a defined geographical area. The Principles encourage the scrutiny of legislation and procedures for compatibility with established human rights norms and encourage conformity through amendments to existing laws or adoption of new legislation. They encourage human rights treaty ratification and the harmonization of domestic regimes

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[44] National Institutions for the Promotion and Protection of Human Rights A/RES/33/46 14 December 1978 <http://www.un.org/documents/ga/res/33/ares33.htm> (accessed 12 June 2007).

[45] Julie Mertus *The United Nations and Human Rights: A Guide for a New Era* (Routledge, London, 2005).

[46] *National institutions for the promotion and protection of human rights* Adopted by General Assembly Resolution 48/134 of 20 December 1993 <http://www.unhchr.ch/html/menu6/2/fs19.htm > (accessed 12 Jun 2007) (Paris Principles).

[47] These principles were subsequently endorsed by the UN Commission on Human Rights (Resolution 1992/54 of 3 March 1992) and the UN General Assembly (Resolution 48/134 of 20 December 1993). The same content was reiterated in a number of UN-sponsored conferences on human rights issues, including the Regional Meeting for Africa of the World Conference on Human Rights, held in Tunis in 1992; the Regional Meeting for Latin America and the Caribbean, held in San Jose in 1993; the Regional Meeting for Asia, held in Bangkok in 1993; the Commonwealth Workshop on National Human Rights Institutions, held in Ottawa in 1992; and the workshop for the Asia and Pacific Region on Human Rights Issues, held in Jakarta in 1993.

[48] Paris Principles, above n 45, Article A.

to reflect the universal human rights norms. Expansion of avenues available for human rights protection and education is recommended.

Composition, Guarantees of Independence and Pluralism:[49]

The principles envisage that devoid of "Autonomy/independence and pluralism" guaranteed through a legally binding mechanism, any institution designed to protect human rights would be unable to carry out the tasks mandated to it. Taking into consideration the complex power relations, the institution should include representation of various sections of civil society actively involved in the promotion and protection of human rights. Pluralism ought to be reflective of the society represented.

Methods of Functioning:[50]

The Paris Principles envisage that the institution would have the freedom to consider any question within its competence and would enjoy free access to the people, directly or through media; free access also to information from any department or authority; complete freedom to promote and propagate awareness among the people about human rights and basic rights, remedies and entitlements of the people; adequate powers to conduct enquiries, to undertake investigations, or intervene in any proceedings, make mandatory recommendations and conduct the trial and hearing of specific cases; and adequate powers also to submit to the government or Parliament and other competent bodies, reports, requests and proposals on any matter concerning the promotion and protection of human rights.

Quasi--judicial competence:[51]

The national apparatus will have the competence to receive, hear and decide complaints and petitions of any individual or group of persons or any NGO concerning human rights issues or violations; to seek an amicable settlement through conciliation or to decide disputes in accordance with the law. This fourth principle

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[49] Paris Principles, above n 45, Article B.
[50] Paris Principles, above n 45, Article C.
[51] Paris Principles, above n 45, Article D.

envisages an expansion of the conventional rules relating to standing before judicial bodies.

If the Paris Principles are applied, SAARC falls down seriously as a regional mechanism to ensure human rights. Abdul Ahsan, the first Secretary General of the SAARC, acknowledges that there are inherent weaknesses in the SAARC secretariat; tellingly, he asserts that it is only an institutional structure and that it is impotent to make a meaningful contribution towards the realization of the Association's objectives.[52] Ahsan's assertion is particularly significant in terms of the Social Charter. The Charter in its current form does not contain a regional institutional framework for the implementation of its objectives, which renders it effectively meaningless.

While there are inherent weaknesses in the SAARC Social Charter it is undoubtedly a major breakthrough in relation to creating a regional consensus for the protection and advancement of social and economic rights within the region. The Social Charter can be the foundation upon which the strategy for a regional mechanism for implementing universal human rights and equitable development policies can be founded. The new praxis advocated in this thesis needs to expand through the space provided by the Social Charter to initiate and implement fundamental changes in the spheres of development, human rights and governance in the region. The new praxis must, on the basis of social, political and cultural contexualization of development, do the following:

a) Address concerns related to poor governance, especially corruption on a regional or sub-regional level;

b) Create a mechanism to realize human rights in the region and promote national policies for poverty alleviation and equitable development; and

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[52] Abul Ahsan **"SAARC Secretariat: A Critique"** (2004) 6 South Asian Journal. <http://www.southasianmedia.net/Magazine/journal/6_saarc_secretariat.htm> (accessed 16 Aug 2007).

c) Be a medium for effecting a fundamental change in the mainstream development ideology and renegotiate the terms of engagement in relation to globalization.

The South Asian mechanism can draw inspiration from other regional mechanisms already established in Europe, Africa and the Americas as discussed in Chapter 5. However, it must go further in the normative scope of rights and the mechanisms for realizing them. Taking into account the critical problems encountered by South Asia in relation to neo-liberal globalization, poor governance and ineffective human rights mechanisms,[53] this study reiterates that the regional praxis advocated for South Asia would be compelled to extend beyond the conventional systems of seeking remedies for rights violated. It will incorporate measures to negotiate aid and loan conditionalities from the IFIs and trade-based policy formulations from the WTO, and to challenge developmental policy formulation of states, all of which has the potential to violate human rights contained in the SAU Charter.

6.5 The New Praxis: The South Asian Union for Human Rights Development and Democracy (SAU)

The South Asian Union on Development and Human Rights (SAU) will be a syncretic effort that reflects the collective identity and the sociopolitical and economic challenges of the region. Its specific objective is the creation, through law, of a structure and a culture of sociopolitical and economic governance in the region that respects the rule of law, fundamental tenets of plural, representative democracy and universal human rights norms. To achieve these fundamental objectives the SAU charter will create a legal regime with specific obligations and responsibilities of and to member states. Therefore, it will move away from the previous aspirational and rather toothless premise that was created under the aegis of the SAARC. As the Dominican Republic envoy to the UN General Assembly, Ornes-Caiscou, observed in 1966 during the General Assembly proceedings relating to the ICCPR, "we, the

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[53] As highlighted in section 6.2 of this chapter and also Chapters 2, 3, and 4 of this study.

unarmed, the economically under developed, the technologically under privileged, have no strength except the strength of law… .[and so] we are pleased to vote for the draft Covenants on Human Rights."[54] Similarly, this thesis endorses the intrinsic value and the potential benefits of a legal regime to a region such as South Asia that is economically weak and politically unstable.[55] The creation of a legally binding normative framework will contribute positively to the enhancement of human rights; functional, plural democracy; equitable development; and the governance of globalisation in the region.

However, the political reality is that the regional praxis will be compelled to strive for a regime that is acceptable to all states in the region. The new praxis will therefore necessarily deal with issues of sovereignty and self-determination and strive for an achievable compromise that would not affect the viability of the regime and would reflect the growing world consensus regarding these concepts. The consensus is that "the emergence of a serious human rights process at regional and global levels would seem to be the most impressive ethical achievement of the past century" and that the emerging human rights standards and their implementation are "definitely challenging the idea that sovereignty provides governments with insulation against accountability provided that their actions are confined to territorial limits, and that their leaders have an immunity respected throughout the world."[56] Against this background, and given embarrassment at the track record of poor governance, corruption and human rights violations, no state in South Asia would want to be seen to reject a regional venture that strives for such laudable and credibility-enhancing aims as democratic governance, human rights and the regulation of globalisation.

The South Asian states will also be compelled to reflect the growing global consensus on the adverse impact of neo-liberal gobalization and accept the articulation of the

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[54] Ornes-Caiscou speaking at the General Assembly Plenary Meeting, paras 137–138, UN GAOR, 21st sess, 1495th mtg,16 Dec 1966 quoted in A Mashood Baderin and Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (Oxford University Press, Oxford, 2007) 3.
55 See Chapters 3 and 4 of this study.
56 Richard Falk "Sovereignty and Human Rights: The Search for Reconciliation" May (2000) Issues of Democracy <http://www.globalpolicy.org/nations/future/0312falk.htm> (accessed 23 Nov 2006) (Falk).

concept of sovereignty from another perspective that has gained global currency in the past few years.

Kofi Annan elaborates this alternative articulation of sovereignty:[57]

> State sovereignty, in its most basic sense, is being redefined — not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty — by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties — has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.

This conceptual enunciation that sovereignty is held by the people is not new and has been expressed in several constitutions that emerged from colonial rule.[58] As Falk observes:[59]

> [I]f sovereignty is understood as inhering in the people, the idea of popular sovereignty that has been historically associated with the French Revolution, then in many situations the realization of human rights is precisely the political project being espoused by "the sovereign" (i.e., the people). Even if sovereignty is associated with the state as a representative of the people, particularly a democratic state, then it is still possible to conceive of sovereignty as a bundle of rights and duties that can be modified by the lawmaking powers of the state, thereby creating the possibility that the acceptance of human rights, even with the prospect of some external accountability, is a fulfilment of sovereignty under contemporary conditions.

From this perspective the proposed regime is an exercise of empowering the people of South Asia to hold their countries accountable at a regional level for violations of democracy and human rights including in their policy choices. The regional apparatus containing a commission and an ombudsman will enable the people to challenge national governments at a regional level for the violations of their regional commitments.

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[57] Kofi Annan "Two concepts of sovereignty" *The Economist* (The Economist Newspaper Ltd, London, 18 September 1999).

[58] The Preamble of the 2nd Republican Constitution of Sri Lanka states: "WHEREAS it is the will of the People of Sri Lanka to establish a stable legal order based on a Supreme Law in the form of a Constitution which – Strengthens institutions of governance; assures a wider sharing of power; enshrines democratic values, social justice and human rights; facilitates economic, social and cultural advancement; and promotes peace, ethnic harmony and good governance; NOW THEREFORE, WE THE PEOPLE OF SRI LANKA in the exercise of our sovereign legislative power, do hereby give unto ourselves this CONSTITUTION." In a similar vein Article 2. (1) stipulates: "In the Republic, Sovereignty is in the People and is inalienable."

[59] Falk, above n 57.

Therefore, the legal regime espoused by the SAU will be premised on two parallel foundations, which are an expression of the sovereignty of the people of South Asia represented by their collective wishes and aspirations, and the universal validity of the human rights paradigm. Article 8 of the Bangkok Declaration observes that "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[60] This thesis acknowledges that diversity, and the new praxis will both take cognizance of intra-regional disparities in terms of economic strength, democratic maturity, and legal structures, and work towards common human development goals in the region. It will focus on the collective efforts and as well as each member state making a commitment to redesign the structures of governance, and reformulate, or create, legal regimes so as to enhance the objectives of the regional organisation particularly in relation to democratic governance, human rights and eradication of corruption.

The common socioeconomic reality of the region is one of abject poverty and a lack of legal and political sophistication amongst the people, which the new praxis will take into consideration. The SAU will encourage the participation of civic organisations to litigate and make representation at a quasi-judicial forum that will promote the rights of the people. It will formulate new policies to foster avenues for meaningful participation of civil society in policy formulation, provide educational opportunities that increase the peoples' consciousness on issues that affect their livelihoods, and end the culture of elite governance that has made the structures of democratic political processes all too often a meaningless mockery.

6.6   The Charter of the South Asian Union for Human Rights, Development and Democracy (SAU Charter)

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60 *Bangkok Declaration on Human Rights* Final Declaration of the Regional Meeting for Asia of the World Conference On Human Rights, Bangkok, 7 April 1993 (Pursuant To General Assembly Resolution 46/116 of 17 December 1991) UN Doc A/Conf.157/Pc/59 (1993) <http://www.justiceinitiative.org/db/resource2?res_id=101629> (accessed 5 Dec 2006).

The constituting document of the South Asian Union on Development and Human Rights (SAU) will be the SAU Charter to promote regional solidarity, peace and social justice for all people in the region. Similar to Article 3(d) of the Constitutive Act of the African Union, the SAU will promote and defend "common positions on issues of interest to the continent and its peoples",[61] particularly in relation to development, global trade and human rights. While the normative content of the SAU Charter will be based on universally accepted values of human rights it will also reflect regional exigencies, such as the need for democratic governance and equitable development. Therefore, the SAU Charter, while incorporating the rights that are contained in the ICCPR and the ICESCR, will also include the right to development and the right to democratic governance.

The SAU Charter will also delineate the rules and the procedures of the regime, prescribe the specific organs of the SAU and their functions, and detail the methods of implementing the objectives of the Charter.

6.7 The Objectives of the SAU Charter

The objectives of the SAU Charter are to create a normative schema to resolve the sociopolitical and economic afflictions that prevail in contemporary South Asia. Therefore, the primary objective of the SAU Charter is the establishment of the rule of law that fosters functional democracy and respect for human rights. The collective identity of the regional coalition of states will also be able to create and establish practices to govern the contemporary globalisation process. More specifically, the objectives will be as follows:

a)   Good governance of globalisation and development in the region

This study observed that the devastating human cost of globalisation could have been avoided with prudent policy choices that did not place economic growth and profit over social justice. The SAU will facilitate the member states to negotiate policy

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[61] Constitutive Act of the African Union Article 3(d) <http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm#Article3> (accessed 16 Oct 2007).

selection with IFIs that is human-centred and promotes principles of social justice. To this end the SAU Charter will create the Commission on Good Governance of Globalisation, which will assist member states to negotiate aid and loan conditionalities.[62]

b)   Promotion of regional solidarity and territorial integrity and intra-regional conflict resolution

As discussed in Chapter 4, the colonial legacy of regional conflicts still hinders cordial inter-state relations in the region. The SAARC adopted a myopic attitude regards regional conflicts by excluding bilateral issues from the mandate of the regional association. This study is of the view that bilateral conflicts hinder the overall progress and the prosperity of the region, and that the best avenue for bilateral conflict resolution is a regional forum. Therefore, echoing the Charter of the Organisation of the American States, all disputes between two or more states will be resolved amicably through good offices or negotiation and mediation.[63] The SAU Charter, however, will go beyond Article 27[64] of its OAS counterpart and will determine that all bilateral or multilateral conflicts will be resolved within three years though the assistance of the Governing Council of the SAU.[65] When creating a legal regime to resolve issues this region has to take into consideration regional circumstances. The African continent, with a large number of states with long-standing bilateral and multilateral disputes, had to consider a strategy based on a set of principles attempting to promote and consolidate peace and security in the region.

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[62] See section 6.13 of this chapter.

[63] Pacific Settlement of Disputes – Charter of the Organization of American States
"Article 24 - International disputes between Member States shall be submitted to the peaceful procedures set forth in this Charter. This provision shall not be interpreted as an impairment of the rights and obligations of the Member States under Articles 34 and 35 of the Charter of the United Nations." "Article 25 - The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time."
"Article 26 - In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution."
"Article 27 - A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time."
<http://www.oas.org/juridico/English/charter.html> (accessed 26 Oct 2006).

[64] Ibid Article 27.

[65] See section 6.10.1 below.

Therefore, with the objective of preventing and resolving inter-state conflicts the African Union adopted the African Union Non-Aggression and Common Defence Pact.[66] This is an extensive document that deals with wide-ranging issues including situations of armed conflict. The present initiative is in fact one of several such attempts to deal with the "security challenges" that Africa faces.[67] In South Asia, with far fewer states, though mutual distrust and bilateral tensions are rampant, the legal obligation to resolve bilateral and multilateral issues within a prescribed time frame on a peaceful basis will augur well for peace and security in the region.

c)   Consolidation of democratic governance based on transparency, accountability and promotion of popular participation in governance

Issues relating to the democratic deficit in South Asia were discussed in Chapter 4 of this study. This study endorses the caution expressed by Alston regarding the creation and recognition of "new rights"[68] in the context of democracy. This study maintains that if the key conventional safeguards enshrined in representative democracy, such as parliamentary responsibility to the electorate, Cabinet responsibility to Parliament, separation of powers and judicial independence, are operational at optimum levels in South Asia the search for new paradigms to enhance democracy in the region is not required. There is a need for strict implementation of the familiar processes and values of representative democracy, which are already partially, but only partially, internalised in the South Asian psyche, as a means of rectifying the malfunctioning of the structures, and safeguards must be put in place for effective democratic governance. In this context the task of the SAU is to establish regional procedures that will implement the familiar safeguards just mentioned to enhance democratic governance and help citizens, politicians and public servants internalise the normative concepts of corruption-free representative democracy.

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[66] Assembly of the African Union, Fourth Ordinary Session 30-31 January 2005, African Union, documents Assembly/AU/Dec.55–72 (IV) and Assembly/AU/Dec.1–2 (IV).
[67] Omar A Touray "The Common African Defence and Security Policy" (2005) 104 African Affairs 635–656.
[68] Philip Alston "Conjuring Up New Rights: A Proposal for Quality Control" (1984) 78 American Journal of International Law 607–621.

The SAU Charter will consider the promotion of democratic governance a fundamental tenet. Given the contemporary political climate of South Asia, it is unrealistic to demand functional democracy and respect for the rule of law as prerequisites from prospective member states to obtain membership in the SAU, unlike its European counterpart.[69] Therefore, on a more pragmatic basis the SAU Charter, echoing Article 3 (f) of the OAS Charter, will consider that "The elimination of extreme poverty is an essential part of the promotion and consolidation of representative democracy and is the common and shared responsibility" of all member states of the SAU.[70] The Charter of the SAU will mirror the mechanisms embodied in Resolution 1080 of the OAS and the Washington Protocol in situations of democratic lapses and will include provisions for the Council of Ministers of the SAU to convene and consider appropriate measures in situations of democratic disruptions.[71]

d)   Consolidation of national mechanisms to combat corruption and foster a culture free from corruption

The endemic corruption in the structures of governance and the limited success of national endeavours to combat it has been discussed previously in Chapter 3 of this study. The study identified a lack of common standards and effective complaints mechanisms that would curb corruption and provide information about corruption to independent investigative authorities, a lack which further aggravated corruption within South Asia.[72]

The World Development Report's empirical study of corruption and its devastating impact on poverty in 2000/2001 demands that corruption be viewed from a human rights perspective, since:

> "[t[he burden of petty corruption falls disproportionately on poor people … . For those without money and connections, petty corruption in public health or police

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[69] See Articles 3 and 4 of the Statute of the Council of Europe
<http://www.coe.int/T/e/Com/about_coe/> (accessed 5 Aug 2007).
[70] Article 3(f) <http://www.oas.org/juridico/English/charter.html> (accessed 5 Aug 2007).
[71] See Chapter 5 section 5.4.2 of this study.
[72] Transparency International Annual Report 2004 (Transparency International, Berlin, Germany, 2004).

services can have debilitating consequences. Corruption affects the lives of poor people through many other channels as well. It biases government spending away from socially valuable goods, such as education. It diverts public resources from infrastructure investments that could benefit poor people, such as health clinics, and tends to increase public spending on capital-intensive investments that offer more opportunities for kickbacks, such as defence contracts. It lowers the quality of infrastructure, since kickbacks are more lucrative on equipment purchases. Corruption also undermines public service delivery."[73]

Rampant corruption as described in Chapter 3 subverts national initiatives to combat corruption through the creation of legislative mechanisms such as Bribery Commissions and Offices of Ombudsmen.[74]

In this context, the SAU Charter proposes the establishment of an Ombudsman Against Corruption with quasi-judicial powers to investigate allegations of corruption.[75] The office of the Ombudsman will liaise with national institutions to evolve strategies to combat corruption.

e)   Promotion and protection of human rights in accordance with universal human rights principles and eradication of poverty

The SAU Charter's provisions for human rights will echo universally acknowledged human rights but will also incorporate specifically the right to development. The SAU Charter, which will incorporate the rights enshrined in the ICESCR as well as the ICCPR, will follow the recommendation of the Limburg Principles:[76]

> [T]he obligation to achieve progressively the full realization of the rights requires State parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all State parties

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[73] *World Development Report for 2000/01: Attacking Poverty* The World Bank 2001.
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:2019598
9~pagePK:148956~piPK:216618~theSitePK:336992,00.html > (accessed 12 Nov 2006).
[74] Partha S Ghosh "Corruption in India" in *Corruption in South Asia*' in KM De Silva, GH Peiris and SWR de A Samarasinghe (eds) *ICES* (Kandy Publication, 2002).
[75] See section 6.13 of this chapter.
[76] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights adopted 8 Jan 1987 UN ESCOR, Comm'n on Hum Rts 43rd Sess. Agenda Item 8 UN Doc E/CN4/1987/17/Annex (1987), reprinted in "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 122 available at <http://www.law.uu.nl/english/sim/instr/limburg.asp> (accessed 5 Oct 2006).

have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

As stated before, this thesis is of the view that it is no longer tenable to assert the progressive realisation of ESC rights on the basis of "available resources". The SAU Charter instead, following the Limburg Principles, will expressly commit to and invite scrutiny of the "effective use of available resources" as described in the next paragraph, since any lack of systematic protection or apathy towards the implementation of obligations would render the ESC rights incorporated into the Charter meaningless.

Therefore, the rights contained in the SAU Charter will go beyond the traditionally under-specified commitments to ESC rights and impose specific time-related targets of compliance in relation to ESC rights such as primary education, healthy environment and access to healthcare and shelter. These rights have been litigated with limited success in South Asia already, thanks only to champions of activism in the judiciary, and that aspect has been discussed in Chapter 1 of this study; the success expected under the new regime which actively commits to these rights and provides for their inspection will of course be much greater.[77]

The significance of social, cultural and economic rights to the process of poverty eradication has been elaborated in Chapter 3 of this study. The concept of ESC rights that are justiciable through public interest litigation is familiar to the human rights jurisprudential culture of some of the South Asian countries.[78] The evolution of the concept in South Asia is founded on the economic deprivation and sociopolitical marginalisation of vast segments of the community. In the context of abject poverty and social deprivation, "generational" rights which accord primacy to civil and political rights have little validity. The circumstance is best elucidated in Para 30 of the judgment in the case of *C.E.S.C. Limited v. Subash Chandra Bose*, by the Supreme Court of India: "To the tillers of the soil, wage earners, laborers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights

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[77] See also S Gloppen "Public Interest Litigation, Social Rights and Social Policy" Paper presented at Arusha Conference New Frontiers of Social Policy 12–15 Dec 2005.
[78] See Chapter 1 subsection 1.7 of this study.

are mere cosmetic rights. Socio-economic rights and cultural rights are their means and relevant to them to realize the basic aspirations of meaningful right to life."[79]

In the above context this thesis reiterates that a disparate recognition of ESC rights is no longer tenable for it affects the enhancement and protection of all human rights. While the significance of having judicial mechanisms to enforce rights cannot be underestimated, in the particular sociocultural context of South Asia it is important to have concrete strategies to implement fundamental ESC rights, such as education, health care, shelter and minimum standards of living through quasi-judicial methods as envisaged by the SAU Charter.

This study recommends that the South Asian Commission on Human Rights (SAC) should be the first step towards establishing a comprehensive human rights protection regime that would include a court at a later stage. As with the African regime of human rights protection a large amount of consolidation work has to be done at national level before a comprehensive regional legal mechanism can be instituted. The suggestion of a regional court at this point in time is premature in the context of member states that have yet to consolidate the national human rights protection regimes already nominally established. The quasi-judicial nature of the SAC has the attraction of a more broad-based reach that is not hampered by procedural requirements, affords easy access and is cost effective.

f) Creation of avenues to challenge policy formulation by both national governments and global institutions, to ensure maintenance of sustainable environments, and to promote self-reliance, traditional knowledge systems and indigenous livelihoods

This thesis acknowledges the significance of democracy and human rights for human development. Therefore, there is a need for positive synergy between economic development and investment in social welfare to see results of poverty eradication. It is at this point that pragmatic policy creation comes into play. There is no precise

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[79] *C.E.S.C. Limited* v. *Subhash Chandra Bose* [1992] 1 SCC 411.

means of scrutinising policy formulation for violation of universal human rights norms and this difficulty is acknowledged by Mary Robinson, who concedes that "[p]roblems of precision in how human rights standards can be applied in different policy making situations remain."[80]

The Human Development Report of 1990 observed that the "[d]eveloping countries are not too poor to pay for human development and take care of economic growth",[81] intimating that choice of policy relating to development can remain in the exclusive domain of the developing world. However, as empirical evidence indicates, the freedom of policy choice is not always exercised wisely and poor prioritisation of the objectives by national governments results in large amounts of resources being diverted to military spending, ineffective parastatals, and a focus on global market integration at the cost of compromising the livelihoods of the rural peasantry, which in turn exacerbates poverty. A topical example is the hosting of the Commonwealth Games of 2010 in India.[82] In terms of the prioritisation of the concerns that need to be resolved by the Indian government, the Games must be regarded as secondary to the provision of education, healthcare and a long list of public expenditure.[83] There is no effective forum in the present context for civil society to question such policy decisions of government, which frequently prioritises policy in an iniquitous manner. Non-prioritisation or poor prioritisation of issues and policies is a huge contributory factor to the mal-development of South Asia.

Empirical examples cited in Chapters 3 and 4 of this study prove that the supposed existence of country-specific aid or conditionality is a currently a fiction in the context of South Asia as much as elsewhere in the global South. Policies are formulated with the uniform neo-liberal makeup, which prioritises the concerns of the

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[80] Mary Robinson "Advancing Economic, Social, and Cultural Rights: The Way Forward" (2004) 26 Human Rights Quarterly 866–872, 868.

[81] *Human Development Report 1990* (UN Development Programme, Oxford University Press, New York, Oxford, 1990) <http://hdr.undp.org/en/reports/global/hdr1990/> (accessed 17 Dec 2006).

[82] The media have already commenced inquiring into the rationality of spending. See for instance Rohit Brijnath 'Is the Games worth it to India? In a land of so much poverty let's have an austere but efficient Games, not an extravagant one' *The Hindu* (30 Mar 2006) <http://www.hindu.com/2006/03/30/stories/2006033008942200.htm> (accessed 1 Apr 2006).

[83] In contrast the Sports Minister of New Zealand has intimated that New Zealand is unable to host the Games in 2014 due to the huge cost which New Zealand feels it would be unable to afford <http://news.ninemsn.com.au/article.aspx?id=93084h> (accessed 17 Apr 2006).

IFIs, and individual countries are coerced into accepting them without protest.[84] This thesis has also observed that the ideological leanings of the IFIs or the dominant development paradigm cannot be transformed through individual state resistance. It is in this context that a regional collaborative mechanism to negotiate the terms of engagement of development and globalisation with the IFIs and bilateral donors is envisaged.

The SAU Charter, therefore, will provide for a mechanism of collective bargaining through the Commission of the SAU to provide assistance in negotiating policies and aid conditionalities. It is envisaged that collectively through the regional organisation the conditionalities attached to development assistance and loans that are not compatible with South Asia's commitment to values of human rights, equity and social justice can be resisted.

To achieve the specified objectives cited above the SAU will comprise a non-politicized Governing Council that will be at the apex of the framework of the regional apparatus, sitting above a Secretariat that would service all the organs of the SAU, and in turn a SAU Commission on Human Rights, Development and Democracy and, at the same level, an Ombudsman Against Corruption. The Commission of the SAU will have three Sub-Commissions that will focus exclusively on development, democracy and human rights respectively, these being crucial goals of the region. As an embryonic regional mechanism it is envisaged to keep its structure and organs simple to garner state support and commitment to the objectives of the SAU Charter. To implement the mandate of the Charter these organs of the regional mechanism will have both quasi-judicial powers and administrative powers. The following sections of this study will elaborate on the composition, the mandate and functions of each organ of the SAU.

6.8   The SAU Governing Council

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[84]A Marshall, J Woodroffe and P Kjell "Policies to roll-back the State and privatise? Poverty Reduction Strategy Papers investigated. Do PRSPs constitute progress?" WIDER Development Conference on Debt Relief, 2001.

The Governing Council of the SAU will reflect a fusion of the powers, and the mandate, of the following organs of the OAS: the General Assembly, the Governing Council and the Meeting of Consultation of Ministers of Foreign Affairs.[85] The Governing Council will comprise three members who are nominated from each member state and it will constitute the supreme governing body of the Organization. The members of the Governing Council will be nominated by the member states and will hold office for a period of five years serving in their personal capacity.[86] The member states will have the power of nominating persons other than their own nationals to serve on the Council. In this sense the nature of the governing body of the SAU will be different from that of the African Union, where the Executive Council comprises the Ministers of Foreign Affairs for each member state.[87] The SAU will depart from this position as such a membership would politicise the governing body of the regional union and subvert the overall objectives of the SAU. Such politicisation of the governing body would be detrimental to the viability of SAU in the context of the national political scenarios of member states such as Pakistan, Nepal and Bhutan, where democratic governance is not functional.

The Head of the Governing Council will be the President of the SAU, who will be appointed to office for a five-year term by the members of the Governing Council of the SAU. The Charter of the SAU, reflecting the basic spirit of the Paris Principles, will define the powers and functions of the President. Each member state will have the right of nominating a President on a rotational basis.

As the governing body of the SAU, the Council will have a mandate to oversee the functions of its organs. The Council will be entrusted with the formulation of policy

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[85] Articles 54 to 69 of the Charter of the OAS.
<http://www.oas.org/consejo/GENERAL%20ASSEMBLY/overview.asp> (accessed 26 Oct 2007).
[86] Taking into account the political reality of the subcontinent, a certain flexibility regarding the method of the appointment of members to the Governing Council is required. The SAU Charter will specify that the three nominations from each member state should be made by the national legislatures of each state and be endorsed by the Head of State of each. In member states without functional democracy, and until democracy is established, the nominations to the Governing Council can be made by the Head of State.
[87] Article 10 of the Constitutive Act of the African Union
<http://www.africaunion.org/root/au/organs/Executive_Council_en.htm> (accessed 4 Feb 2006).

based on the objectives of the SAU Charter, monitoring the progress of the SAU objectives, introducing new areas of collaboration and the general overview of the organisation.[88] In this regard the Governing Council will be responsible for the scrutiny of initiatives that are undertaken by the SAU Secretariat and the Commission to achieve the objectives of the SAU Charter.

As the preceding analysis indicates, intra-regional insecurities are a source of ongoing tension and bilateral conflict.[89] Article X.2 of the SAARC Charter, which stipulated that "[b]ilateral and contentious issues shall be excluded from the deliberations" of the organization, will be abandoned and instead a clause to the effect that "bilateral disputes shall be resolved by peaceful means under the aegis of the SAU Commission and the Governing Council" will be incorporated into the SAU Charter. A member state will be required to bring to the cognizance of the SAU Commission any bilateral or multilateral issues that need peaceful resolution.[90] Initial efforts at dispute resolution will be carried out in the SAU Commission and failure to settle will result in alerting the Governing Council of the SAU. The Governing Council will have the authority to compel the member states to resolve the issue amicably and, in the event of a failure to do so, to urge the disputing states to refer the dispute to international arbitration or to the International Court of Justice. Such a process is necessary because it provides an opportunity for member states to resolve their disputes promptly and through peaceful means, which is essential for the enduring legitimacy of the regional organization.[91]

Mirroring the requirements of Article 42 of the American Convention on Human Rights,[92] the Charter of the SAU will require the member states to submit reports on

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[88] Largely similar to Article IV of the SAARC Charter <http://www.saarc-sec.org/data/docs/charter.pdf> (accessed 4 Feb 2006).

[89] See Chapter 4 of this study; see also Rob Johnson *A Region in Turmoil: South Asian Conflicts Since 1947* (Chicago University Press, Chicago, 2005).

[90] See section 6.10 of this chapter.

[91] Beth V Yarbrough and Robert M Yarbrough "Dispute Settlement in International Trade: Regionalism and Procedural Coordination" in Edward D Mansfield and Helen V Milner (eds) *The Political Economy of Regionalism* (Columbia University Press, New York, 1997) 134–135.

[92] "Article 42 -The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter American Economic and Social Council and the Inter American Council for Education, Science, and Culture, in their respective fields, so that the Commission can watch over the promotion of the rights implicit in the economic,

the status of human rights within each member state to the SAU Sub-Commission on Human Rights.[93] The Sub-Commission will review the Annual Reports on the status of human rights and will make recommendations to the Governing Council in relation to measures in place to promote and protect human rights. In situations of gross violations of human rights, or the establishment of inadequate or dysfunctional mechanisms for the protection of human rights within member states, the Governing Council will have the mandate under the SAU Charter to create an ad hoc committee of "eminent persons" to visit individual member states to evaluate human rights conditions.

The Governing Council will determine the means and methods of coordinating the activities of the SAU, its interactions with the United Nations and other regional and international bodies. The SAU Charter will abandon one of the fundamental debilitating features of the SAARC Charter, namely that it demanded unanimity in decision-making.[94] In terms of the decisions of the Governing Council the SAU will instead align itself with Article 11 of the Constitutive Act of the African Union[95] and state that the decision of the Governing Council will be by unanimous consensus but in the absence of unanimity it will be by a simple majority.

6.9   SAU Secretariat

As stated earlier, the greatest significance of the SAU will lie in its implementation mechanisms. As with the OAS Secretariat[96] and the African Union Commission,[97] so the SAU Secretariat, which is the administrative organ of the regional mechanism, will facilitate the implementation of the objectives of the SAU Charter. The SAU

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social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."
<http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm> (accessed 7 Nov 2007).
[93] See section 6.10.1 of this chapter.
[94] "Article X.1. Decisions at all levels shall be taken on the basis of unanimity." <http://www.saarc-sec.org/data/docs/charter.pdf> (accessed 4 Feb 2006).
[95] <http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm> (accessed 4 Feb 2006).
[96] Article 112 of the OAS Charter.
[97] Article 20 of the Constitutive Act of the African Union <http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm#Article10> (accessed 26 Oct 2006).

Secretariat, similarly to its counterpart in the OAS, will be entrusted with the functions relating to issuing notices to member states convening the Permanent Council, the preparation of rules of procedure, the functions relating to the budget, to being the custodian of documentation relating to the Governing Council proceedings, to being the depository of the SAU treaties and conventions, the preparation of the annual reports of the SAU and the establishment and the maintenance of relations with national and international organisations.

The SAU Secretariat will be headed by a Secretary General who will be appointed for a fixed term of office of four years by the Governing Council on the nomination of member states. Six Deputy Secretaries General will be appointed by the governing Council to assist the Secretary General with the functions of the Secretariat.

The functions of the Deputy Secretaries General will take the form of the Specialised Technical Committees of the African Union.[98] The scope of the functions of the Deputy Secretaries General will essentially be administrative and to provide technical assistance to coordinate policy formulation in the specific areas cited below. Taking into consideration the socioeconomic exigencies of the region, the core areas that would need such technical and administrative coordination would be:

a) Agriculture, Environment Healthcare, Education, Women and Children; Poverty Eradication

b) Industry, Science and Technology, Energy, Information and Communications Technology, Transport, Infrastructure Development, Trade, Foreign Direct Investment , Intellectual Property Rights, Tourism

c) Multilateral and Bilateral Aid, Developmental Loans, Aid and Loan Conditionalities, IFI Policy Negotiation

d) Democracy Consolidation and Intra-Regional Conflict Resolution

e) National Human Rights Enforcement Mechanisms and Assistance with International Human Rights Treaty Ratification

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[98] Article 14 of the Constitutive Act of the African Union <http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm#Article10> (accessed 26 Oct 2006).

The Deputy Secretaries General will coordinate and enhance the work undertaken in each of these areas in consultation with the specialised Sub-Commissions of the regional mechanism. This thesis acknowledges that a certain amount of regional consensus and norm creation has been achieved in areas such as food security, the suppression of terrorism, drug trafficking, trafficking of children, women and prostitution, intra-regional tariff reduction and regional trading by SAARC.[99] The SAU will consolidate these areas of cooperation and make these regimes more efficient.

6.10 South Asian Commission on Human Rights, Development and Democracy (SAU Commission)

The South Asian Commission on Human Rights, Development and Democracy will essentially reflect the mandate and powers of the OAS Permanent Council.[100]

The SAU Commission will also include three Sub-Commissions in the following areas: human rights, democratic governance and developmental policy formulation. It is to be noted that the latter will also be referred to as the Sub-Commission on Good Governance of Globalization. The Commission and the Sub-Commissions will be headed by a Commissioner who will be appointed by the Governing Council of the SAU from a list of candidates nominated by the member states. Following Article 34 of the Inter American Commission on Human Rights, the Commissioners appointed "shall be persons of high moral character and recognized competence in the fields" of

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[99] Agreement on establishing SAARC Food Security Reserve (signed in Kathmandu 4 November 1987); Agreement on SAARC Preferential Trading Agreement (SAPTA) (signed in Dhaka on 11 April 1993); SAARC Regional Convention on Suppression of Terrorism (signed in Kathmandu on 4 November 1987); and Additional Protocol (signed in Islamabad on 6 January 2004); SAARC Convention on Narcotic Drugs and Psychotropic Substances (signed in Malé on 3 November 1990); SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution (signed in Kathmandu on 5 January 2002); SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia (signed in Kathmandu on 5 January 2002); and the SAARC Plan of Action on Poverty Alleviation. The Plan of Action on Poverty Alleviation was recommended by the Third Meeting of the SAARC Finance/Planning Ministers on Poverty Alleviation (Islamabad, 8-9 April 2002) and was approved by the Twelfth SAARC Summit (Islamabad, 4-6 January 2004) <http://www.saarc-sec.org/main.php?t=3.2> (accessed 4 Feb 2006).
[100] Articles 80–90 of the OAS Charter.

human rights, constitutional law and development.[101] The Commissioners will hold office for a period of five years in their personal capacity.

The main function of the SAU Commission will be the maintenance of friendly relations between state parties within SAU. It will also carry out the decisions and the recommendations of the Governing Council unless the implementation of the recommendations is assigned to another specific organ of the SAU. It will facilitate the relations between the SAU and other regional organisations, the UN and affiliated bodies, and the IFIs. In this respect the SAU Commission will be responsible for drafting agreements and memoranda of understanding between the SAU, the UN agencies and the IFIs. Such documents will then be submitted to the Governing Council for approval. The SAU Commission will collate and study the reports submitted by the Sub-Commissions and the Ombudsman Against Corruption and make necessary recommendations to the Governing Council of the SAU.

The Commission will be entrusted with the execution and monitoring of common regional policies and the formulation of regional treaties. While policy initiation will be the responsibility of the Governing Council, the Commission will conduct feasibility studies on the necessity, advantages and disadvantages and the likely repercussions of the proposed policies. The Commission will consult the Civil Society Organizations (CSOs) or NGOs and individual stakeholders and assess the economic, social and political implication of regional policies and advise the Governing Council of the SAU. It will be the responsibility of the Commission to facilitate discussion on the proposed policies and regional treaties at grass-roots level within the member states. With the rejection of Article X.2[102] of the SAARC Charter, the SAU will incorporate the principle of subsidiarity as it operates in the European Union.[103] The adoption of the principle of subsidiarity will enhance the promotion of the regional concerns while it will also safeguard notions of individual sovereignty, the latter having been a concern of member states at the inception of the SAARC. The

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[101] Article 34 of the Inter American Convention on Human Rights.
<http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (accessed 17 Oct 2007).
[102] "X.2 Bilateral and contentious issues shall be excluded from the deliberations" <http://www.saarc-sec.org/main.php?id=10&t=4> (accessed Mar 2006).
[103] <http://europa.eu.int/scadplus/european_convention/subsidiarity_en.htm> (accessed 5 Mar 2006).

justification for the inclusion of a mirror of Article X.2 is mainly to alleviate the insecurities of the smaller member states that feared intimidation by India and to an extent Pakistan given that the SAU will have jurisdiction over bilateral issues.[104]

The two main functions of the SAU Commission will be regional conflict resolution and the monitoring of the activities of the transnational corporations.

6.10.1 Regional Conflict Resolution

The Council will have a specific mandate to resolve issues relating to intra-regional conflicts and the promotion of democracy. The Council's mandate to resolve disputes will largely reflect the mandate of the Permanent Council of the OAS.[105] The Charter of the OAS stipulates that the Permanent Council shall encourage member states to maintain friendly relations. In the event of a dispute between member states the Commission shall "recommend procedures" for the peaceful settlement of the dispute including the setting up of ad hoc committees with the consent of the disputing parties. In the event of a failure to resolve a dispute between member states within a three-year time period, the Commission shall alert the Governing Council for resolution.

After the Commission has referred the dispute to the cognizance of the Governing Council, the Governing Council will urge its resolution by peaceful means. If the endeavours of the Governing Council fail, the dispute will be in the first instance submitted to a Panel of Eminent Persons who shall be drawn from relevant fields and not be restricted to persons from the region.[106] The Panel will determine the course of action to resolve the dispute, whether it is the use of good offices, investigation,

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[104] Padmaja Murthy "Role of Smaller Members in the SAARC Forum" Nov (1998) 22/8 Strategic Analysis November <http://www.ciaonet.org/olj/sa/sa_98mup01.html> (accessed 12 Nov 2007).
[105] Article 84 to Article 90 of the Charter of the OAS.
<http://www.oas.org/juridico/english/charter.html#ch12> (accessed 5 Oct 2006).
[106] The idea of consulting groups of eminent people on sociopolitical issues is not new to the region. See Independent Commission on Dams <http://dams.org/news_events/press291.htm> (accessed 15 Sep 2007).

direct negotiation, mediation, or conciliation. In the event that the dispute is not resolved the option of arbitration or judicial settlement will be made available.

6.10.2 SAU Monitoring Panel on TNC Activity

There is an urgent need for regulation of the activities of TNCs as elaborated in Chapter 4 of this study, for they can intimidate smaller or economically weak countries. As discussed, TNCs exercise an enormous influence over local laws and policies that directly affect human rights, which range from unfair treatment of employees in breach of labour regulations, exploitation of natural resources and the pressuring of governments to quell labour unrests. The conduct of TNCs can also have a dramatic impact on poverty, either by directly undermining human welfare (for instance, limiting a community's access to land or food) or influencing relevant government policies and laws.

As the previous discussion indicated there cannot be a meaningful realisation of ESC rights if TNCs are allowed to operate with impunity to national laws. The SAU Commission has a significant role to play in this aspect by formulating guidelines and helping initiate national laws to control the activities of TNCs. The SAU Commission will function as an auditing body to evaluate TNC operations in the region and to monitor whether their activities are within the spirit of the SAU objectives. Violations of SAU objectives by TNCs can be queried by the Commission and disputes will be referred to a Panel of Independent Experts for resolution.

6.11   SAU Sub-Commission for Human Rights

Echoing the Statute of the Council of Europe at Article 3, the SAU Charter will require every member state to accept the "principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental

freedoms…"[107] However, unlike the Council of Europe, the SAU does not have the luxury of stipulating preconditions relating to the rule of law or human rights with regard to prospective member states. In order to prevent backsliding, however, the SAU charter will stipulate that once democracy and the rule of law is established it is a legal obligation to maintain democratic governance and respect for human rights and that no member can derogate from this legal obligation.

The SAU Sub-Commission on Human Rights will be the conventional human rights advocacy and implementation unit of the regional mechanism. It will reflect the role and the function of the OAS Commission on Human Rights, "whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."[108] The SAU Charter shall be explicit in terms of the mandate of the Human Rights Commissions at both regional and national level. The functions of the Sub-Commission on Human Rights will be an amalgamation of that of the Human Rights Commission under the OAS and the European Commissioner for Human Rights, which was introduced to the Council of Europe human rights protection mechanism in 1998, replacing the Human Rights Commission.[109]

Similarly to Article 46 of the Inter American Convention on Human Rights, the SAU Sub-Commission for Human Rights will be empowered to disseminate information on human rights among the people in the region, to promote legislation and constitutional measures to promote human rights among member states, and to monitor human rights implementation in the region.[110] As with the mandate of the Council of Europe Human Rights Commissioner, the SAU Sub-Commission for Human Rights will identify shortcomings in the legislation and practice of member states.

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[107] Articles 3 and 4 of the Statute of the Council of Europe.
<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=001&CM=1&CL=ENG>
(accessed 12 May 2007).
[108] Article 10 of OAS Charter <http://www.oas.org/juridico/english/charter.html#ch15> (accessed 20 Oct 2007).
[109] Office of the Commissioner for Human Rights <www.coe.int> (accessed 20 Nov 2007).
[110] Article 41 - American Convention on Human Rights, OAS Treaty Series No 36 1144 UNTS 123 entered into force 18 July 1978 <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (accessed 20 Oct 2007).

Despite the widespread knowledge and acceptance of international human rights few of the South Asian countries under consideration have constitutional guarantees of human rights.[111] Only India, Sri Lanka, Nepal and the Maldives have independent functional institutions to receive complaints and offer redress on human rights issues.[112] Pakistan has presented a Bill in Parliament to create a National Human Rights Commission in 2005 which is yet to materialise.[113] The restrictive mandate and the implementation of the recommendations of the Commissions are inherent problems in these institutions. The SAU Charter will stipulate that the existing human rights commissions will come within the purview of the SAU Sub-Commission on Human Rights. The national human rights commissions can seek assistance and guidance for effective functioning from the SAU Sub-Commission on Human Rights. The SAU Sub-Commission will draw strength from the existing national commissions, taking advantage of their established legitimacy in cases where they enjoy this (at other times their legitimacy has been contested and functioning threatened), [114] and will initiate processes to establish national human rights commissions in member states that do not yet possess them. As the task of establishing national human rights commissions falls within the purview of the Secretariat, the Sub-Commission for Human Rights will supervise the time-related framework for establishing new commissions and enhancing the competence of the existing commissions.

The initiative for the establishment of a national human rights commission and the administration of the existing human rights commissions will be allocated to the Sub-Commission on Human Rights, a measure that will enhance the legitimacy of the

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[111] See Chapter 2 of this study.

[112] National Human Rights Commission, State Human Rights Commission and Human Rights Court were established in India in pursuance to the Protection of Human Rights Act 1993. The National Human Rights Commission in Nepal was established under the Act of 1997, as an independent autonomous statutory body. Similarly the Human Rights Commission in Sri Lanka was established in March 1997 under the Human Rights Commission Act of 1996. Maldives' Human Rights Commission is the latest addition, created in 2003.

[113] Amnesty International Document - Pakistan: Recommendations for an effective National Human Rights Commission. Recommendations for an effective National Human Rights Commission <http://www.amnesty.org/en/library/asset/ASA33/019/2005/en/339bfc7d-a2f5-11dc-8d74-6f45f39984e5/asa330192005en.html> (accessed 8 Mar 2008).

[114] See n 116 below.

national commissions. Any issues or disputes related to the functions and operations of national human rights commissions and the appointment of commissioners would be resolved by the Sub-Commissioner for Human Rights in consultation with the relevant member state. This is especially relevant in an environment when the national human rights commissions are failing to garner credibility both internationally and nationally.[115]

The SAU Charter will maintain the spirit of the advancements made through judicial activism in the region through public interest litigation. Therefore, affected individuals and interested parties in the form of both individuals and CSOs will have the right to petition the national commission initially and the regional Sub-Commission in an appellate capacity against the violations of human rights enshrined in the SAU Charter.[116] Taking into consideration the nascent procedures relating to advocacy regarding human rights violations within the member states, the SAU Charter will not be as restrictive as Article 46 of the American Convention on Human Rights.[117] The Charter will stipulate that any violation must be brought into the cognizance of the respective national human rights commission irrespective of whether other avenues for rights having been explored or exhausted. Time restrictions in relation to submitting violation petitions will be set aside until the Sub-Commission for Human Rights is satisfied that the people in the region are sufficiently familiarised with rights complaints procedures. The Sub-Commission for Human Rights shall supervise the implementation of the recommendations of the national commissions through a mechanism of biennial reporting. There shall be a right of appeal from the national commissions to the SAU Sub Commission on Human Rights which includes a request for intervention when the recommendation of the national commission is not implemented.

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[115] "Sri Lanka: Human Rights Commission Downgraded" Human Rights Watch (no author given) <http://hrw.org/english/docs/2007/12/18/slanka17581.htm> (accessed 10 Dec 2007).
[116] Similar to Article 44 of the American Convention on Human Rights OAS Treaty Series No 36, 1144 UNTS 123, entered into force 18 July 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
[117] Ibid, Article 46.

The SAU Charter will echo Article 62 of the African Charter on Human and Peoples' Rights, and require state parties to submit every two years a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms guaranteed by the SAU Charter. The Sub-Commission on Human Rights will scrutinise the reports and make recommendations to member states for implementing the Charter rights. Failure to implement these recommendations shall result in the member states being reported to the Governing Council of SAU, who shall call for explanation from the member state. Continuous non-compliance will result in a series of repercussions ranging from a "naming and shaming" campaign to economic sanctions against offending states.

The Organization for Security and Cooperation in Europe (OSCE) has created several mechanisms termed "human dimension" to ensure that member states adhere to the human rights and democracy commitments they have undertaken under the Charter of the OSCE. The SAU Charter will also provide a mechanism based on the Vienna Mechanism of the "human dimension" mechanisms of the OSCE in Europe, which enables participating states, through an established set of procedures, to raise questions relating to the human dimension situation in other OSCE States.[118] Such queries by a member state will be first communicated to the Sub-Commission on Human Rights, which will raise the issue with the member state concerned. Such a provision will assist in the establishment of a normative standard of human rights in the region.

6.11.1 Ratification of, or Accession to, International Treaties

One of the fundamental duties of the Sub-Commission on Human Rights will be to formulate guidelines and policies relating to ratification and the implementation of international human rights treaties. As discussed in Chapter 1 of this study, apart from India, Sri Lanka and Nepal few member states have ratified the core

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[118] <http://www.osce.org/odihr/13497.html> (accessed 19 Oct 2007).

international treaties on human rights[119] or initiated legislation to give effect to these core instruments. Therefore, it is imperative that the Sub-Commission for Human Rights implements strategies that facilitate the ratification of, or accession to, treaties, without which it is impossible to build an enduring culture of human rights within member countries.

As encouraged by the Vienna Declaration and Programme of Action, the Sub-Commission will be entrusted with the task of promoting and encouraging member states to ratify or accede to the international treaties on human rights.[120] The Secretariat, in conjunction with the Sub-Commission for Human Rights, will initiate a programme and a database to monitor the ratification of, or accession to, the human rights treaties and will provide the necessary administrative backing to the member states for such ratification or accession. The Sub-Commission can facilitate the implementation of international human rights treaties at national level by providing expert guidance on establishing mechanisms to give effect to the international treaties.

6.12 SAU Sub-Commission on Democratic Governance

With South Asia's notorious reputation as "one of the most poorly governed regions in the world, with exclusion of the voiceless majority, [and] unstable political regimes",[121] the second Sub-Commission of the SAU will be assigned the role of a democracy watchdog and will be responsible for the implementation of strategies to foster democratic governance in the region. Again, the luxury of stipulating democracy as a precondition to entry is not available to the SAU unlike its European

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[119] "SAARC's Benchmarks Human Rights still a no go area" Human Rights Features HRF/162/07 31 Mar 2007 < http://www.hrdc.net/sahrdc/hrfeatures/HRF162.htm > (accessed 19 Oct 2007). See also Appendix C.
[120] "Article 37. Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities" <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument > (accessed 19 Oct 2007).
[121] *The 1999 Human Development Report for South Asia   The Crisis of Governance* (Oxford University Press, Oxford, 1999); Maya Chadda *Building Democracy in South Asia: India, Nepal, Pakistan* (Lynne Rienner, Boulder, CO, 2000).

counterpart. The OAS Charter [122] also requires adherence to principles of representative democracy as a requirement of membership and indicates repercussions for interruptions of democracy.[123] As explained before, the erratic democratic culture of South Asia makes it impossible for the SAU creating document to stipulate such stringent preconditions. However, it can provide strategies to consolidate the normative quality of the right to democratic governance. In this context, the Sub-Commission will regard the tenets of good governance, as elaborated by Reif to be "a basket of many practices: a professional civil service, elimination of corruption in government, a predictable, transparent and accountable administration, democratic decision-making, the supremacy of the rule of law, effective protection of human rights, an independent judiciary, a fair economic system, appropriate devolution and decentralization of government, appropriate levels of military spending", to be the fundamental manifestations of democratic governance.[124]

It is also important to move beyond the premise that democracy must be a mere aspirational goal and instead initiate time-bound conditions to achieve democratic governance within member states. Stipulations for democratic elections and the creation of legislation related to free and fair election procedures are especially vital in the context of the Maldives, Nepal and Pakistan, where the authenticity of democratic governance is questionable. In the case of Bhutan, which has taken tentative steps towards establishing democratic rule with a constitutional monarchy, the role of the SAU should be one of a facilitator.[125]

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[122] "Chapter II Article 3 of the OAS Charter d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy" <http://www.oas.org/juridico/English/charter.html> (accessed 4 Aug 2005).
[123] Chapter III Article 9 <http://www.oas.org/juridico/English/charter.html> (accessed 4 Aug 2005).
[124] LC Reif "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" Spring (2000) 13 Harvard Human Rights Journal 17.
[125] Bhutan's first national election produces a young crop of lawmakers Reuters Published: January 2, 2008, International Herald Tribune,
<http://www.iht.com/articles/2008/01/02/asia/bhutan.php>(accessed 1 March 2008); "Democratic Bhutan: Sincere promise or a ploy?" Asian Centre for Human Rights Review (no author given, 4 Jan 2006) <http://www.achrweb.org/Review/2006/106-06.htm> (accessed 17 Oct 2007); Somini Sengupta Line Up and Pick a Dragon: Bhutan Learns to Vote New York Times April 24, 2007
<http://www.nytimes.com/2007/04/24/world/asia/24bhutan.html?_r=1&oref=slogin > (accessed 1 March 2008); Bhutan votes in first elections Al Jazeera net.

In this regard, the SAU Sub-Commission on Democratic Governance can seek guidance from the Organization for Security and Cooperation in Europe and its Office for Democratic Institutions and Human Rights.[126] The Election and Democratization Section of the OSCE aims to strengthen democratic institutions and civil society under the Moscow Mechanism (1991, amended 1993). The Moscow mechanism enables missions of experts to assist in the resolution of a particular problem relating to democracy, elections or human rights within the member states. The underlying purpose of the Moscow Mission is the creation of a standard whereby the OSCE strives to assist member states dealing with issues of democracy, rather than isolating them and thus precipitating democracy backsliding. The Sub-Commission on Democratic Governance will have the responsibility of assisting governments with the drafting of constitutional documents that enshrine the principles of democracy and the relevant legislation to regulate election procedures. It can locate the necessary expertise in the field by recommending panels of experts in the field of constitutional law to provide assistance to individual governments.[127]

Each member state will submit a mandatory report on the state of democracy within each country every three years. Reporting systems have the benefit of attracting global attention regardingthe status of democracy[128] and will create avenues for public debate. The report will include an evaluation of the progress and consolidation of democratic governance through constitutional and legislative means. The reporting system will be an opportunity to discuss issues such as the reasons for the postponement of elections, dissolution of Parliaments against the constitutional stipulations, amendments to constitutional provisions without following the required procedures and unconstitutional measures such as dismissal of judges or dissolutions

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<http://english.aljazeera.net/NR/exeres/9D86BF7E-CA89-44E8-B2D8-43A7AE5BD731.htm >(accessed 1 March 2008)

[126] <http://www.osce.org/> (accessed 17 Jun 2006).

[127] Panels of independent experts to assist in the drafting of constitutions have been used before, for instance in Iraq, Nepal, Zimbabwe and Fiji.

[128] The advantages of a reporting system have been questioned in the context of the AU regional mechanism where states fail to submit reports: see Makau Mutua "The African Human Rights Court: A Two-Legged Stool?" (1999) 21 Human Rights Quarterly 342–363. Such procedural defects can be overcome with stipulations of mandatory submission and through the supervision of the submissions via the Council of Ministers.

of commissions appointed for the inquiry into bribery and corruption, which are all common occurrences in the region.[129] In an era where concepts of good governance and democracy have gained global currency intentional deficit in these aspects will affect the country's image in the global arena — something which many countries would wish to avoid.

The Sub-Commission on Democratic Governance will also have a responsibility at grass-roots level for the education and promotion of democracy and its intrinsic worth, which will contribute to the consolidation of the normative value of democratic governance. Commenting on the consolidation of democracy in the developing world, Pinkney concedes that "[t]he justification for democracy has never been simply that it offers a better means of material advancement, but unless it can give voters something in return for their votes, no amount of philosophical argument about liberty, human rights, or political choice will ensure its survival. That is the challenge facing both third world governments and Western governments that proclaim a belief in democratic values." [130] Therefore, public education and dissemination of information regarding governance, electoral rights, and election processes are implemented, there is an urgent need to initiate a norm-creating process on democratic governance in the region.

6.12.1 Early Warning System for Democracy Breaches

As reiterated above, consolidation of democracy will form a large part of the SAU's work. As the culture of democracy is weak in the region, the SAU will first embark on an initiative that will encourage the member states to establish democratic governance nationally. Initially for a period of five years democracy backsliding within a state will not result in negative consequences implemented by the regional community. During this initial phase the negative repercussions, which would take

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[129] See Chapters 3 and 4 of this study.
[130] Robert Pinkney *Democracy in the Third World* (Lynne Reiner Publishers, Colorado, 2004) 6.

the form of excluding the delinquent state from agreements and organizations,[131] the denial of visas to high-ranking officials or the withholding of aid and commercial restrictions, will not be resorted to by the SAU until a culture of democracy is initiated and inculcated. Such measures are regarded as unwarranted by this study as international reaction to democracy backsliding has proven to be fickle based on larger political agendas, as proven by the circumstances surrounding Pakistan. The mandate of the Sub-Commission on Democratic Governance will focus on creating a common culture of democracy in the region.

After the democracy consolidation period, the SAU Covenant will stipulate stringent conditions including the above for deterring democratic backslides, as in the OAS Charter and as stipulated by the Commonwealth Organization.[132] The monitoring of democratic backsliding and the responsibility of alerting the Governing Council will be one of the functions of the Sub-Commission on Democratic Governance. It will act as an independent unit with a mandate to monitor the democratic performance of member states and determine if breaches of democracy have taken place. Impartial monitoring of democracy breaches or backsliding in this manner will enhance the legitimacy of the commitment to democratic governance in the region. With regard to monitoring the democracy situation, the SAU Charter will contain articles similar to that of the OAS.[133]

Imitating the Inter American Democratic Charter if a member state is situated in a predicament as stipulated by Article 17, where "the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk," it can alert the SAU Sub-Commission for Democratic Governance for assistance. Similarly, if the Sub-Commission or the Governing Council is informed of an imminent democracy breach by a member state the Sub-Commission can offer necessary assistance to the affected member state.

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[131] Article 21 of the Inter American Democratic Charter.
<http://www.oas.org/charter/docs/resolution1_en_p4.htm> (accessed 12 Nov 2007).
[132] See Chapter 5 of this study.
[133] Articles 17 to 22 of the Inter American Democratic Charter (Adopted by the General Assembly at its special session held in Lima, Peru, on 11 September 2001)
<http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm> (accessed 17 Oct 2007).

6.12.2 Election Monitoring

Election rigging, corruption and violence at elections are all manifestations of dysfunctional democracy[134] and they are an integral part of the current reality of South Asian politics. The recent election in Pakistan of 18th February 2008 is evidence of this predicament[135] where the Human Rights Watch has claimed "[t]here have been numerous complaints of improper government assistance to the ruling party and illegal interference with opposition activities. But the election commission has done nothing significant to address these problems, raising serious questions about its impartiality."[136]

Despite periodic elections many have little faith in the legitimacy of the electoral process.[137] There is an urgent need to create and monitor standards in relation to the whole electoral process commencing with the misuse of governmental resources and funds to finance elections, the abuse of the state apparatus for the benefit of the ruling parties, bribery of governmental officers who handle elections, bribery and voter intimidation, stuffing of ballot boxes and fraud in election results. International NGOs, such as the International Republican Institute,[138] the National Democratic Institute,[139] the OSCE[140] and the Commonwealth Organisation regularly send teams of election observers to countries that request them. The Electoral Observer Missions under the Unit for the Promotion of Democracy undertake such observer missions within the OAS member countries.[141] The SAU Sub-Commission on Democratic

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[134] Neil DeVotta "Illiberalism and Ethnic Conflict in Sri Lanka" January (2002) 13 Journal of Democracy 84–98; Larry Jay Diamond "Is Pakistan the (Reverse) Wave of the Future?" (2000) 11 Journal of Democracy 91–106.

[135] Tariq Ali "Pakistan's plight" *The Nation* (11 Jan 2008) .<http://www.tni.org/detail_page.phtml?act_id=17789&print_format=Y> (accessed 10 Feb 2008);

[136] Brad Adams, Asia director at Human Rights Watch. Pakistan: Election Commission Not Impartial Electoral Machinery Controlled by Musharraf Appointees, Human Rights Watch <http://www.hrw.org/english/docs/2008/02/11/pakist18034.htm> (accessed 1 Mar 2008).

[137] David Dunham and Sisira Jayasuriya *Liberalisation and Political Decay: Sri Lanka's Journey from Welfare State to Brutalised Society* (ORPAS, Institute of Social Studies, October 2001).

[138]< http://www.iri.org/> (accessed 6 May 2007).

[139] <www.ndi.org > (accessed 6 May 2007).

[140]< www.osce.org> (accessed 6 May 2007).

[141] See Chapter 5 of this study.

Governance can be the focal point which co-ordinates international observer missions for election monitoring. Election monitoring missions of the SAU can follow the process of Articles 23, 24 and 25 of the Inter American Democratic Charter.[142]

6.13   SAU Sub-Commission on Good Governance of Globalisation

Pursuant to the need to contextualise development, the SAU will incorporate a policy filtering mechanism, which is envisaged to challenge policy proposals and formulation before they reach the implementation stage. It will echo the World Bank inspection panel but the emphasis will be to encourage only encourage challenges regarding policy formulation before implementation.[143] In this context the mandate of the SAU Sub-Commission on Good Governance of Globalisation (which has also been referred to as Sub-Commission on Development) is to scrutinise policy creation and implementation extending upwards towards monitoring the policy formulation of the international organisations and downwards towards the national governmental policy choices and implementation that affect ESC rights and human development.

Many of the smaller South Asian states do not have the capacity or adequate resources for policy formulation which is truly representative of the needs of the country, or to resist development policies and conditionalities that are imposed on them. The Sub-Commission on Good Governance of Globalisation in this context is designed to be a filtering mechanism for policy formulation enabling stakeholders to evaluate the efficacy of policy. The stakeholders may include national governmental officials and segments of civil society, including individuals and NGOs. The lack of legitimacy in policy formulation due to the absence of public consultation can be avoided if the Sub-Commission on Good Governance of Globalisation has the role of facilitator in the process. The co-ordinating role of the Sub-Commission on Good

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[142] Inter American Democratic Charter (Adopted by the General Assembly at its special session held in Lima, Peru, on 11 September 2001).
<http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm> (accessed 17 Oct 2007).
[143] < http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0 menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html> (accessed 26 Oct 2006).

Governance of Globalisation will reduce allegations of civil society exclusion from participation in policy formulation, particularly the drafting of PRSPs, where public consultation is often reduced to an empty ritual[144] by both IFIs and national governments. Public debate on aid conditionalities and their inclusion into aid packages can help consolidate accountability and transparency in governance and minimise the sense of disenfranchisement experienced by the poor in the region.

The SAU Commission on Good Governance of Globalisation would be vested with quasi-judicial functions to determine disputes in terms of implementing the spirit of the Charter between IFIs, bilateral donors and individual states. Specifically, it would take the form of a "pre-emptive arbitral panel" that would scrutinise the feasibility of specific developmental initiatives, such as the Narmada Dam project or fundamental policy changes like the water privatisation schemes or the health system overhauls that seek private-public partnerships, and which fundamentally affect the wellbeing of millions of people. Such a scrutinising process would enable policies to be evaluated in terms of feasibility at the blueprint stage rather than at the execution stage as often happens presently. Protests and resistance to major developmental projects at implementation stage contribute to an enormous wastage of resources, which could have been utilised elsewhere and prevented both human and environmental catastrophes. [145] The lack of prior public consultation, prior environmental impact assessments and long or short term schemes to address the socioeconomic consequences of massive developmental schemes, is an issue that South Asia needs to address urgently.[146] However, most individual states in the region lack the institutional capacity and the expertise to address these issues nationally.

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[144] See Chapter 4 of this study.
[145] Jayantha Sri Nissanka "Litigation delays development" Sunday Observer (Sri Lanka, Sunday 22 May 2005); Bobby Ramakant "Women Farmers Protest Reliance" SEZ 23 July 2007.
<http://www.thesouthasian.org/archives/2007/women_farmers_protest_reliance.html > (accessed 10 Feb 2008); Amnesty International Public Statement "India: Deaths in West Bengal during protest against new industrial project"
<http://asiapacific.amnesty.org/library/Index/ENGASA200042007?open&of=ENG-2S4> (accessed 10 Feb 2008).
[146] A Aggarwal "Special Economic Zones: Revisiting the Policy Debate" (2006) 41 Economic and Political Weekly 4533–4536.

Similarly, within multilateral institutions the member states of the SAU can seek assistance from the Sub-Commission on Good Governance of Globalisation of the regional union to make decisions and avoid situations where weak states can be coerced into decision-making.[147] A strong regional body that carries the mandate of representing the region's concerns would be able to resist such intimidation. The failed WTO meeting in Cancun in September 2003 where the ad hoc G20 coalition of states was able to unite on the issue of agriculture and resist the outcome favoured by the EU and the USA is an example where strong coalitions can resist policy decisions that adversely affect the developing world.[148]

The justification for a regional mechanism which makes policy formulators answerable will have the following effect elaborated by Etienne Mureinik: [149]

> [A]ny decision-maker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision-maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible justification for the programme that it had chosen … then the programme would have to be struck down … The knowledge that any government programme could be summoned into court for searching scrutiny would force its authors closely to articulate their reasons for dismissing the objections and the alternatives to the programme, and precisely to articulate the reasons that link evidence to decisions, premises to conclusion. The need to articulate those reasons during decision-making would expose weaknesses in the programme that might force reconsideration long before the need arose for judicial challenge.

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[147] Chossudovsky provides a typical example of intimidation at the time of formulating policy for the adoption of the WTO – the Marrakesh meeting in which the governments were literally coerced into accepting the creation of the WTO without any deliberation at national level. "In other words, the process of actual creation of the WTO following the Final Act of Uruguay Round is blatantly 'illegal'. Namely a 'totalitarian' intergovernmental body has been casually installed in Geneva, empowered under international law with the mandate to 'police' country level economic and social policies, derogating the sovereign rights of national governments… . Moreover, the articles of WTO are not only in contradiction with pre-existing national and international laws, they are also at variance with The Universal Declaration of Human Rights. Acceptance of the WTO as a legitimate organisation is tantamount to an 'indefinite moratorium' or repeal of the Universal Declaration of Human Rights" Michel Chossudovsky "World Trade Organisation (WTO): An illegal organisation that violates the Universal Declaration of Human Rights"
<http://www.derechos.org/nizkor/doc/articulos/chossudovskye.html > (accessed 16 Feb 2005)
[148] Amrita Narlikar and Diana Tussie "The G20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO" (2004) 27 The World Economy 947–966.
[149] Etienne Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) African Journal of Human Rights 464–474, 471.

Therefore, the scrutiny of policy prior to implementation will help in the creation of a culture of accountability within the governments of member states that would require the governments to justify their socioeconomic policies and priorities. Such a culture will provide the impetus to develop consistent policy that encourages wise investments and conserves resources necessary for sustainable development, and will also enhance transparency and accountability in governance.

6.13.1 Pre-empting Human Rights Violations

Mary Robinson reiterates the versatility of human rights commissions at national level and comments that they are a vital part of the "preventive strategies" that could be utilised to consolidate ESC rights regime, for:[150]

> [i]n the context of ESC rights I have become increasingly convinced of the necessity to focus on *preventive* strategies. This has convinced me of the importance of creating strong, independent national human rights institutions to provide accessible remedies, particularly for those who are most vulnerable and disadvantaged. Frequently these institutions are 'human rights commissions', … It is precisely their capacity to contribute substantially to the realization of individual human rights which makes independent institutions so significant.

As the South Asian regime will focus on preventive strategies for human rights violations, the Sub-Commission on Good Governance of Globalisation will have the mandate to appoint inspection panels to inquire into potential human rights violations.[151] Such a situation may arise as a result of commencing developmental projects or policy changes that affect ESC rights, for instance the World Bank-funded

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[150] Mary Robinson "Human Rights: Challenges for the 21st Century" First Annual Dag Hammarskjöld Lecture (1 Oct 1998) (emphasis added), quoted in LC Reif "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" Spring (2000) Harvard Human Rights Journal 13.
[151] See Inspection Panels of World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL> (accessed 19 Jan 2007) and a discussion on its viability in the contemporary form in Chapter 3 of this study.

Sardar Sarovar dam project in India or the the Arun III Hydroelectric Dam Project in Nepal.[152]

As elaborated in Chapter 4 of this study the success of the World Bank's Inspection Panel has only been in "raising the internal profile and legitimacy of the broader package of minimum safeguard policies but it has not led to more targeted or institutionalised pro accountability reforms, such as credible sanctions for non compliant managers or staff."[153] Under anticipatory breach of human rights interested parties shall have the capacity to alert the Sub-Commission on Good Governance of Globalisation of potential occurrences of rights violations as a result of development policy implementation. This mechanism is aimed at preventing governments from embarking on action programmes that have the potential to violate human rights without conducting impact assessments.

The mandate of the Sub-Commission on Good Governance of Globalisation to investigate anticipatory breaches of human rights violations is to report on the anticipatory breaches to the SAU Governing Council. The Governing Council will have the mandate to act on the recommendations of the Sub-Commission and require policy changes or demand alterations of the proposed development schemes on the basis of potential human rights violations.

6.14   SAU Office of the Ombudsman Against Corruption

The SAU Office of the Ombudsman Against Corruption will be a separate organ of the SAU and will be on a par with the SAU Commission. The SAU Charter articles relating to corruption will reflect the regimes created by the 1996 Inter American

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[152] Lori Udall, World Bank Inspection Panel Independent Expert, USA. Prepared for Thematic Review V 4:
Regulation, Compliance and Implementation Options. For further information see
<<http://www.dams.org/>
[153] Jonathan A Fox "The World Bank Inspection Panel: Lessons from the First Five Years" 1 July 2000 Center for Global, International and Regional Studies Reprint Series Paper CGIRS-Reprint-2005-7.
<http://repositories.cdlib.org/cgirs/reprint/CGIRS-Reprint-2005-7> (accessed 5 Oct 2007).

Convention against Corruption,[154] the 1997 EU Convention on the Fight Against Corruption involving officials of the European Communities or officials of Member States of the European Union [155] and the European Council Civil Law Convention on Corruption.[156]

However, taking into consideration the social and political reality of the subcontinent and the need to create a regional normative framework against corruption, the SAU will create the post of a Regional Ombudsman Against Corruption[157] with an overarching mandate to deal with national governments directly regarding allegations of bribery, corruption and administrative irregularities. The purview of this office shall be determined by a SAU Covenant while the office of the Ombudsman will have great flexibility and a considerable amount of independence to determine the procedures and the means of executing this mandate. The Ombudsman will be appointed for a five-year term by the SAU Council of Ministers and will have the capacity to entertain petitions alleging corruption from both individuals and interested parties from within member states.

The Office of Ombudsman is a familiar concept to South Asia in the form of *Lokayukta* and the *lok pal* and the office has a long history pre-dating the colonial period.[158] As opposed to the creation of a judicial body to combat corruption the Ombudsman will have several advantages. A quasi-judicial body in the form of an ombudsman is more suited to a region where the people of several member countries are unfamiliar with, and lack the resources for, lengthy and complex judicial proceedings, especially at regional level. Prosecution for corruption in South Asia is often cumbersome, expensive and detrimental to the person making the complaint.

In his traditional role the Ombudsman is the repository of grievances against the malfunctioning of governance, of which corruption is one significant aspect. The

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[154] <http://www.oas.org/juridico/English/treaties/b-58.html> (accessed 26 Oct 2006).
[155] <http://europa.eu/scadplus/leg/en/lvb/l33027.htm> (accessed 26 Oct 2006).
[156] <http://conventions.coe.int/treaty/en/Treaties/Html/174.htm> (accessed 26 Oct 2006).
[157] A comparable office exists under the South African Constitution.
[158] India, Pakistan, Sri Lanka and Bangladesh have varied versions of the classical ombudsman with varied mandates.

SAU Ombudsman Against Corruption will accept allegations of corruption and malpractice of government officials from both individuals and interested parties. The Ombudsman will carry out independent investigations into allegations of corruption and inform the national governments of the outcome. The SAU Office of the Ombudsman Against Corruption will be mandated to coordinate the national institutions initiated to combat corruption in the region. While national institutions dealing with allegations of corruption exist in most of the member states,[159] mechanisms to ensure protection for persons exposing corruption (legal protection for whistle blowers) is very much an alien concept in South Asia.[160] It will be the responsibility of the SAU Office of the Ombudsman Against Corruption, in conjunction with the SAU Commission on Development, Democracy and Human Rights to initiate programmes to encourage legislation to combat corruption and consolidate, and ensure the functioning of, the existing mechanisms to combat corruption in the region.

6.15   Role of the Non-Governmental Organisations in the New Regional Mechanism.

A wide range of Non-Governmental Organizations (NGOs) both indigenous and transnational operate in a majority of the South Asian countries. Chapter 4 observed that civil society activism is still at embryonic stages in the region but the NGOs that are active perform a valuable role as observers and critics of public policy and are seeking an equitable developmental ideology.[161] As Breen observes, "within the liberal paradigm of international law, international NGOs have been described as

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[159] Central Vigilance Commission of India <http://cvc.nic.in/cvc_back.htm>; Anti Corruption Commission of Bhutan <http://www.anti-corruption.org.bt/july17.php>; Sri Lanka's Commission to Investigate Allegations of Bribery or Corruption (CIABOC) <http://www.icac.org.hk/newsl/issue23eng/button5.htm>; Anti-Corruption Commission of Bangladesh <http://www.lcgbangladesh.org/corruption/index.php>; Commission for the Investigation of Abuse of Authority (CIAA) <http://www1.oecd.org/daf/ASIAcom/countries/nepal.htm.> (accessed 12 May 2007).
[160] M Raja "Victories in India's war on corruption" *Asia Times* (29 June 2006). <http://www.atimes.com/atimes/South_Asia/HF29Df03.html> (accessed 20 Oct 2007).
[161] James A Paul "NGOs and Global Policy-Making" June (2000) Global Policy Forum <http://www.globalpolicy.org/ngos/analysis/anal00.htm>; and G Clarke "Non-Governmental Organizations (NGOs) and Politics in the Developing World" (1998) 66 Political Studies 36–52.

helping to bridge the gap between law and policy, thereby becoming useful citizens of the global community."[162] This observation is especially relevant in the South Asian context where the civil society role in policy formulation is dysfunctional. The NGOs perform a useful function of evaluating the viability of policy and developmental schemes and of disseminating information to the public, including public education on the negative impacts of policy and developmental schemes.

Many of the NGOs have a strong involvement in human rights and developmental issues. Therefore, the endorsement of NGOs often contributes to the legitimacy of policy changes and developmental projects. The United Nations recognises the valuable function the NGOs play in creating standards relating to human rights and has stipulated that:[163]

Article 71   The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

It is on this basis that the UN Charter allocates a special consultative role to NGOs in relation to human rights issues, which is exercised through the Economic and the Social Council (ECOSOC).[164] The consultative relationship with the NGOs is to "secure expert information or advice from organisations having special competence, and…. To enable international, regional, sub regional and national organisations that represent important elements of public opinion to express their views."[165]

Taking into consideration the valuable role the NGOs play in relation to both policy formulation and human rights standard setting, the SAU will enable the NGOs operating in the region to contribute towards achieving the objectives of the regional mechanism. It will be the responsibility of the SAU Secretariat to accord observer

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[162] Claire Breen "Rationalising the Work of the UN Human Rights Bodies or Reducing the Input of NGOs? The Changing Role of Human Rights NGOs at the United Nations" (2005) 5 Non State Actors and International Law 101–126 (Breen).
[163] <http://www.un.org/aboutun/charter/ > (accessed 20 Nov 2007).
[164] Breen, above n 161.
[165] ECOSOC resolution 1996/31, 49 UN.ESCOR Supp.(No1) UN DOC E/1996/31(1996) quoted in Breen, above n 161.

status to the regional NGOs and CSOs on the basis of established criteria determined by the Secretariat, which will follow the guidelines formulated by the African Union on the same issue.[166] South Asian Regional NGOs will have the opportunity to submit an application to be granted observer status in regional organisation. In making the application for observer status the NGOs will be required to abide by the "Guidelines for the Participation of NGOs in the SAU Process", which will be drafted along similar lines to the Guidelines for the Participation of Civil Society Organizations in OAS Activities.[167]

As discussed in Chapter 5 of this study the innovative procedures relating to Social Action Litigation are recognised by this study as a creative means of expanding the avenues available for the vindication of human rights. Using the conceptual innovations of Social Action Litigation, the SAU Charter will enable the NGOs who have been granted observer status to alert the national human rights commissions and the SAU Sub-Commission on Human Rights about violations of rights protected under the SAU Charter. This process will be analogous to the American Convention on Human Rights Article 44,[168] The European Convention on Human Rights Article 25,[169] and Article 55 of the African Convention on Human and Peoples' Rights.[170] A similar process is also available in the European Social Charter's collective complaints process as observed by Wouters: "The 1995 Additional Protocol to the European Social Charter Providing a System of Collective Complaints includes as sources of such complaints those international NGOs in consultative status with the Council of Europe listed for this purpose, as well as national NGOs if the State in

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[166] "Criteria for Granting Observer Status and for a System of Accreditation Within the AU" July 2005 <http://www.africa-union.org/summit/JULY%202005/Observer%20Status%20Criteria%20as%20adopted%20-%20July%202005.doc> (accessed 23 Jan 2007).
[167] <http://www.civil-society.oas.org/Pages/Registration_1_ENG.htm>(accessed 16 Oct 2006).
[168] < http://www.oas.org/juridico/English/charter.html> (accessed 26 Oct 2006).
[169] <http://www.hri.org/docs/ECHR50.html> (accessed 26 Oct 2006).
[170] Article 55 ACHPR does not place any restrictions on who can submit cases to the Commission. This provision simply notes: "Before each session, the Secretary of the Commission shall make a list of the communications other than those of States Parties to the present Charter". The Commission has interpreted this provision as giving locus standi to the victims themselves and to the victims' families as well as NGOs and others acting on their behalf <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed 26 Oct 2006).

question has made a declaration to this effect when becoming a party to the Additional Protocol."[171]

Though the SAU Charter proposed in this thesis does not have a justiciable human rights mechanism comprising a Regional Court, the status of the *amici curiae* accorded to the NGOs in Court proceedings of the European Court of Human Rights under the Council of Europe's Convention on Human Rights will be operative in relation to the NGOs who support the complainants of human rights violations through the Sub-Commission on Human Rights as well as complainants of bribery and corruption to the SAU office of the Ombudsman Against Corruption.[172]

6.16   Conclusion

This introduction to this chapter summarized the argument from the first five chapters of the thesis. For a more condensed distillation of all six chapters, with meta comments as to themes, the reader is also referred to the separate Conclusion that follows this chapter. The task of the present section is to encapsulate the main points of the current chapter, albeit in the greater context of those chapters that preceded it.

Following the introduction, in the next sections this study illustrated that a regional mechanism even *in principle* was legitimate within the terms of the United Nations and the global human rights regime. Numerous citations from UN documents showed that a regional mechanism was not only compatible with the rights regime but in places expressly contemplated by it. This legitimised the initiative of creating a regional mechanism for South Asia — the SAU, on lines proposed in the preceding sections. The specifics were derived partly from the models used in the Council of

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[171] Jan Wouters and Ingrid Rossi "Human Rights NGOs: Role, Structure and Legal Status" 2001 Working Paper No. 14, Institute for International Law, KU Louven 9 November 2001; see also Additional Protocol to the European Social Charter Providing for a System of Collective Complaints Strasbourg <9.XI.1995 http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm> (accessed 26 Oct 2006).
[172] See Articles 34 and 36 of the European Convention on Human Rights <http://www.hri.org/docs/ECHR50.html> (accessed 26 Oct 2006).

Europe, the African Union, the Commonwealth, and the Organization of American States, but were devised with special sensitivity to the needs of South Asia.

The SAU was to be constituted by a Charter with the following objectives: (a) Good governance of globalisation and development in the region; (b) Promotion of regional solidarity and territorial integrity and intra-regional conflict resolution; (c) Consolidation of democratic governance based on transparency, accountability and promotion of popular participation in governance; (d) Consolidation of national mechanisms to combat corruption and foster a culture free from corruption; (e) Promotion and protection of human rights in accordance with universal human rights principles, and eradication of poverty; and (f) Creation of avenues to challenge policy formulation by both national governments and global institutions; maintenance of sustainable environments, and promotion of self-reliance, traditional knowledge systems and indigenous livelihoods.

Notably as regards (e) above, the human rights to be implemented and made justiciable were to incorporate ESC rights in accordance with the Limburg principles. The continuation and expansion of Social Action Litigation would also be encouraged with relaxation of rules as to standing, for instance, using a quasi-judicial jurisdiction.

These Charter objectives were to be achieved by a structure derived partly from the best and most relevant practices identified from the other models in Chapter 5, particularly the OAS, and outlined as follows, "from top down": at the apex, a non-politicized Governing Council under a rotating Presidency; beneath that, a Secretariat; and beneath the Secretariat, at equal status with each other, the SAU Commission and the Office of the Ombudsman Against Corruption. The Commission would have three Sub-Commissions as described below, but the recapitulation, for the purposes of this concluding section, begins with the Council.

The Council would have the mandate to oversee the other organs, to formulate policy based on the Charter and to monitor the SAU's progress towards the Charter

objectives. The Governing Council would also be alerted if the Commission failed to resolve disputes between members, whereupon it would have authority to compel member states to resolve the issue amicably on "pain" of referral to international arbitration or the International Court of Justice. So as to avoid paralysis, decision-making of the Council would not require unanimity (as under the SAARC), though it would naturally seek it in the first instance. The Governing Council would additionally have the mandate under the SAU Charter to create an ad hoc committee of eminent persons to visit individual member states to evaluate human rights conditions. The SAU Secretariat would service the other organs and would also, among other things, accord observer status to the regional NGOs and CSOs on the basis of criteria of its own devising.

The SAU Commission would have its own existence separate from its three Sub-Commissions to be outlined below. In its own capacity it would, inter alia, be responsible for drafting agreements and memoranda of understanding between the SAU, UN agencies and the IFIs, before those documents went to the Council for approval. The Commission would also have the power to query violations of SAU objectives (including the protection and promotion of widely defined human rights) by TNCs, with disputes to be referred to a Panel of Independent Experts.

The three Sub-Commissions would be (with equal status and here listed in no order) those on Democracy, Human Rights and Good Governance of Globalization. The latter objective has also been described as the promotion of (equitable, human-centred) development.

The Sub-Commission on Human Rights would be empowered to disseminate information on human rights among the people in the region, to promote legislation and constitutional measures to promote human rights among member states, and to monitor human rights implementation in the region.[173] This Sub-Commission would both encourage the creation of national human rights commissions where none

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[173] Article 41 - American Convention on Human Rights, OAS Treaty Series No 36 1144 UNTS 123 entered into force 18 July 1978 <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (accessed 20 Oct 2007).

existed and monitor the operation of such mechanisms in countries which had them. A right of appeal would lie from national commissions to the Sub-Commission. The Sub-Commissioner on Human Rights would be mandated to settle disputes with the national commissions. The implementation of the human rights mechanism was to be gradual and realistically staged. Eventually a comprehensive court would be created, but this was considered premature at present.

Salient points of the Sub-Commission on Democracy were its early warning mechanism for breaches, its role in receiving three-yearly reports on the state of democracy in each country, and its additional function of monitoring elections. The Charter would, relevantly, build in the condition of a legal obligation to prevent back-sliding in regard to democracy.

Meanwhile, the mandate of the SAU Sub-Commission on Good Governance of Globalisation would be to scrutinise policy creation and implementation extending upwards towards monitoring the policy formulation of the international organisations and downwards towards the national governmental policy choices and implementation that affect ESC rights and human development. It would thus act as a policy filtering mechanism. This Sub-Commission would also have the mandate to monitor and report on apparent and potential breaches of human rights, most relevantly ESC rights.

The Ombudsman Against Corruption was seen to have precedents not only in the European and Inter-American systems but also in traditional offices in South Asia itself. It was to have an overarching mandate to deal with national governments directly regarding allegations of bribery, corruption and administrative irregularities. The purview of this office was to be determined by a SAU Covenant but would the Ombudsman would have great flexibility and a considerable amount of independence to determine the procedures and the means of executing this mandate. The Ombudsman would be appointed for a five-year term by the SAU Council of Ministers and will have the capacity to entertain petitions alleging corruption from both individuals and interested parties from within member states.

After this summary of the proposed regional praxis, several points should now be noted so as to locate Chapter 6 in the wider context of the thesis. Chapter 6 sets out one, vital but not exclusive, level of "prescription" to the ills besetting the seven countries studied in South Asia. It does so on the basis of a "diagnosis", as it were, made in the first four chapters and applying the evidence collected in Chapter 5 as to the best and most appropriate approaches used elsewhere. The mechanisms of the new autochthonous regional praxis thus represent one creative response that applies the critical thinking that has gone before. The scope of this critical thinking was necessary in order to analyze the multiple, complex causes and dynamics of the present problems facing these seven countries of South Asia with the necessary understanding of their civilizational backgrounds and traditions, and their modern history. These backgrounds and histories have included idiosyncrasies of the individual states, their regional commonalities, and their place in the larger South-North context, all of which have been shown to be relevant context.

More broadly, contextualization has been a key theme overarching the whole thesis, which balances general but relevant principle with specific but important detail. Most obviously the study has recognized the need to *contextualize* rights. It has also noted that one flaw of the neo-liberal approach taken by the IFIs has been its assumption that "one size fits all", ignoring the significant differences of context.

The place of the present chapter in context is thus as follows. It sets out what can be seen as a *multi-pronged* response to the seven countries' problems at the *regional level*. Both the prongs and the level of operation are consonant with the context of the rest of the thesis, as follows. To start with the "prongs", three of these are most conveniently represented by the three Sub-Commissions of the SAU, on human rights, democracy and development (or good governance of globalization) respectively. These promote three key values that the thesis has expressly espoused elsewhere. The governance of globalization is also ensured by the steps as spelt out above which were to be taken to confront the IFIs, as well as South Asia's bilateral or multilateral

partners and the TNCs. Moreover, the need to actively *govern globalization* has been a recurring theme of the thesis, heralded by the opening words of its title.

The fourth main prong of the SAU can be represented by the Ombudsman Against Corruption. This thrust, too, is consonant with the rest of the thesis. It can properly be seen as shoring up the rule of law which is necessary for functional *democracy*, as well as preventing the diversion of resources from *development* and the erosion of *human rights*. The other key prong can be seen as being the promotion of pacific settlements to bilateral and national conflicts. This fits with the espousal by the thesis of the need for both peace and security, as evoked by the words earlier quoted from Kofi Annan.

Finally, the place of *regionalism* needs to be recalled. Like the multiple prongs of this regional mechanism, the mechanism's very nature as a regional entity is compatible with the rest of the study. Regionalism was seen to be both compatible with, and complementary to, the *global* tier of the universal human rights regime, with the mixed status of the latter as so-called hard and soft international law. The mechanism of the SAU has sought to give that regime, where dismissed as soft or purely political and aspirational, more and harder bite, thus notably making rights of all kinds justiciable and holding IFIs and TNCs accountable to them, for instance. The regional mechanism has in the same breath indicated its relationship to the malign neo-liberal influences of the global economic regime (so far more powerful than the rights regime), which consists precisely of the IFIs as prime public agents but feeds directly into the operation of their private epiphytes, the TNCs.

Finally, regionalism fits with the ability and responsibility of governments to act at a *national* level, for their own peoples, rather than in obsequious deference to stakeholders in global neo-liberalism. National commissions of human rights are thus encouraged, for instance, as are other domestic legislative mechanisms to implement treaties and to regulate the operations of TNCs. Thus, in a post-Westphalian world of abridged sovereignty, the states nevertheless retain more capacity than they might have realized to resist hegemony and to craft their own destinies, especially by

forming alliances along the lines of the SAU proposed. As such, a regional mechanism does not do away with states' authority, but allows them strength in numbers. The enshrining of that regime in law rather than relying on market economics or pure politics maximizes its strength.

CONCLUSION

"And what is the argument for the other side? Only this that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything, which has not been done before we, shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both"[1]

This study was a journey in search of a pragmatic but just solution, through law, to the empirical and theoretical poverties of human rights, democracy and development — poverties that disenfranchise, dehumanise and segment the people of South Asia. Guided thus by the quest for justice, but mindful also of the vital need for efficacy as well as legitimacy, the study has applied a broad range of tools to deal with the study's widely varying intellectual tasks. These tasks have consisted of the following: documenting the material and other poverties of South Asia; analyzing their geo-historical origins and their interrelationship, their causes and dynamics; interrogating greed and the neglectful, dysfunctional or exploitative use of power in all its manifestations, indigenous as well as imperialist; dissecting the failed regional response that is the SAARC; analysing and evaluating alternative regional and cross-regional paradigms along with the overarching global mechanism of universal human rights; and, finally, formulating a new, specific, legitimate and effective regional mechanism ready to use alongside the global rights regime to address this multidimensional poverty.

From the traditional legal toolkit the study has drawn particularly on human rights jurisprudence, legal history, constitutional law, public international law, comparative law and law and economics. However, where necessary it has also relied on other disciplines such as history, philosophy, political economy, and cultural and religious studies. An interdisciplinary approach was regarded as necessary to formulate an intellectually integrated and pragmatic legal praxis for South Asia in the high-speed swirling together of many sociopolitical, legal and economic currents irrespective of national borders that is the reality of the globalised world.

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[1] Lord Denning in *Packer* v *Packer* [1953] 2 AER 127, 129.

As the world's most populous region with its greatest wealth being the people, the seven South Asian countries examined in this study have, for decades, exploited their most valuable resource and deprived them of their basic material necessities, responsible governance and human rights, rendering them impoverished. Sen's observation that poverty is multidimensional has been crucial to this thesis; it relates to any severe, inequitable and avoidable limitation of human capability. Material impoverishment is nevertheless the most pervasive form, and brings with it many other dimensions. It is in this spirit that the thesis has framed wider denials of capability as "poverties". Hence, the study has focussed on the poverty of functional democracy, the poverty of equitable development, and the poverty of justice itself.

In examining the process of entrenching the structures of poverty, Chapter 1 of this study traced the evolution of the universal paradigm of human rights from the ancient Greco-Roman times through its Western trajectory to its contemporary (post-World War II) character, which is based originally on individualism and a right against the state. This chapter also reiterated that notions of human dignity and obligations of the rulers towards the ruled were present in the South Asian subcontinent's own political and religious culture. The South Asian rights culture in fact received a boost through the exposure to the Western human rights discourse, particularly through the quest for self-rule independent from colonial rule, and social reformers in the early twentieth century relied on the egalitarian articulations of the Western rights discourse to discourage the repressive features and rights violations of the subcontinent's own societies. The chapter concluded with the observation that, despite the elaborate constitutional proclamations and several mechanisms to institute national human rights, adherence to values of human rights is extremely low in South Asia. Social Action Litigation, which has emanated from a pro-active judiciary, primarily in India, has expanded the methods of addressing injustice in society. However, the very need for such action is symptomatic of the dysfunctional mainstream methods that are in place to safeguard the rights of the people, and it can only partially compensate for the dysfunctionality of such methods. This study observes the assertions of cultural relativism which dismisses the universal *legitimacy* of the mainstream paradigm of human rights but does so motivated more often by sociopolitical reasons rather than

an altruistic desire to substitute with an alternative *relevant* vision of human rights. However, such critique has created a space within the mainstream paradigm to explore alternative means of vindicating the developing world's concerns in relation to human rights against the backdrop of neo-liberal globalization.

Solow, a Nobel prize winner for Economics, is said to have exclaimed that globalization is a marvellous excuse for many things[2] and Chapter 2 explored the theoretical enunciations of the phenomenon and its manifestations. This chapter traced the historical stages of globalization and the manner in which the phenomenon contributed, during the colonial era, to the exploitation of previously self-sustaining people, particularly the destruction of their livelihoods and the integration of these communities to the global trading system and its capital markets, but at only the lowest rung.

Though this study maintains that globalization is a content-neutral phenomenon, Chapter 2 highlighted how a particular version of it — the neo-liberal version — was promoted by the IFIs, especially under the Washington Consensus from the late 1970s, as a panacea for the woes of the developing world. This version or brand was also sold as being both its best and its only viable form, through the assertion that "There Is No Alternative". The iniquitous operation of this particular version of globalisation has exacerbated conditions of social marginalisation and material poverties, diminishing the orthodox role of the state under the inherited Westphalian model. The conditions of exploitation created by neo-liberal version of globalisation have provided an impetus for consolidated global activism, resulting in "globalization of the movement against globalization".[3] Chapter 2 stressed the need to build upon this resistance even further and to advocate alternative terms of engagement for South Asia if the benefits of globalisation are to be enjoyed by its people.

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[2] Quoted in Tomy Joseph "Human Rights and Poverty – The case of Musahars" in SN Chaudry (ed) *Human Rights and Poverty in India Vol 4* (Concept Publishing Company, New Delhi, 2005) 289.
[3] John Powll *United States Globalization as the Newest Expression of Racial Subordination: International and Intranational Evidence* (International Council on Human Rights Policy, Geneva, 2001) 8.

The poverty of development, particularly the inequitable manifestation of globalization that created effectively a global apartheid system, was the focus of Chapter 3. That is, the inherent inequity of neo-liberal globalization has contributed to the emergence of "new kinds of ethnic and racial minorities, and the persistent and growing inequalities between the 'haves' and the 'have-nots' in a global economy".[4] The chief public agents of the new version of the global apartheid were identified as the IFIs, and their policy instruments identified as SAPs and PRSPs. These policies mainly benefited the developed world and the TNCs, which were described as neo-liberalism's private agents and as the epiphytes of the IFIs. The concomitant withdrawal of the state from economic activities and its assumption of the role of a mere facilitator of the liberalisation process, was accompanied by cuts in the welfare system, and the elimination of subsidies, on the strength of the policy prescriptions of the IFIs. This, in turn, avoidably weakened the capacity of the states identified in this study, and many other developing states, to create policies that would not only benefit their own populations, but, perhaps more importantly, would not result in the complete abandonment of the already marginalised. The result of the IFI's policies was to entrench the structures of poverty within the state whilst TNCs benefited from the newly globalised environment, which welcomed their presence in South Asia through relaxed taxation, labour law and intellectual property law regimes.[5]

The impact of neo-liberal globalisation on governance was the focus of Chapter 4. This chapter discussed how the process of recipient states' re-addressing of accountability to IFIs in terms of creation and implementation of policy has resulted in the abdication of the traditional, and proper, accountability of governments in South Asia to their own peoples. Images of "legislatures failing to legislate, governments rules by ordinance and the need for consensus and bargaining that was ignored in Parliament"[6] were invoked to reiterate the democratic deficit in the region. The accompanying political dysfunctionality has prompted militant reactions by

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[4] Rodolfo Stavenhagens *Structural Racisms and Trends in the Global Economy* (International Council on Human Rights Policy, Geneva, 1999) 2.

[5] Vandana Shiva "Food Rights, Free Trade and Fascism" in Matthew J Gibney (ed) *Globalizing Rights* (Oxford University Press, Oxford, 2003) 91.

[6] Samina Ahmed "The Fragile Base of Democracy in Pakistan" in Amita Shastri and AJ Wilson (eds) *The post Colonial States of South Asia Democracy Development and Identity* (Palgrave, New York, 2001) 64.

various groups within South Asia, which has in turn led to cycles of violence compromising the very human rights that were in many cases legally "guaranteed" by states' constitutions. Chapter 4 also explored the efficacy of the existing regional mechanism, the SAARC, to deal with the many poverties of South Asia. The chapter concluded that in many ways the SAARC has outlived its purpose, and that a new regional arrangement to deal with the contemporary exigencies of South Asia was urgently needed.

It was with this purpose in mind that Chapter 5 sought "best practice" aspects of other regional mechanisms that have emerged to deal with issues that afflict other specific regions. This chapter examined firstly the Council of Europe which has created a regime of last resort in protecting the human rights of the people of the European member states. In the Americas, the study concentrated on the efficacy of the mechanisms which the OAS has established to consolidate and promote democratic governance. The subsequent analysis of the African system was aimed at evaluating the efficacy of a regional mechanism that operated against the backdrop of neo-liberal globalisation, pervasive poverty, poor governance and ineffective developmental endeavours. Finally, the Commonwealth initiative of consolidating democracy was discussed as an attempt at creating a normative standard of democratic governance within member states, which shared a common colonial history rather than geographic proximity.

This thesis has reiterated that, unless there is a challenge to how the dominant paradigm perceives development, democracy and poverty, there will be no opportunities for alternative and more effective paradigms of poverty eradication and human development to emerge. The praxis that was advocated in Chapter 6 harnessed the pressures from the marginalised and the exploited to reformulate the mainstream development discourse. It attempted to build an alternative paradigm that locates the endeavours of development within a human, social and political context that is relevant to South Asia. The proposed praxis addressed the development discourse to the needs of the marginalised and disenfranchised segments of society in South Asia and aimed to formulate policies that will be specific and sensitive to the needs of each

state. These policies were contrasted against-the neo-liberal "one-size-fits-all" approach, which is supposed to be optimal for all sectors of all countries at all times, and yet in fact favours overwhelmingly the interests of the already economically privileged West. The praxis soughtto resurrect democratic governance on a national basis with such governance being based upon principles of responsible and responsive administration under the rule of law and which would realise the constitutional guarantees of human rights.

Stiglitz highlights that the neo-liberal version of globalization has inherent traits which advantage the developed world, when he makes the observation that: "Globalization has enhanced the opportunities for success, but it has also posed new risks to developing countries. The rules of the game have been designed for the most part by the advanced industrial countries, or more accurately, by special interests in those countries, for their own interests, and often do not serve well the interests of the developing world, and especially the poor."[7] Yet the rules of globalization, as Stiglitz himself implies, and as Vandana Shiva explicitly observes elsewhere,[8] are not "god-given", nor is it true that there is no alternative; rather, the rules can be challenged and to a large extent rewritten. The praxis advocated in Chapter 6 is in many respects a challenge to the neo-liberal articulations of globalisation by rewriting rules.

Broadly speaking, the tools identified by this study as being the best to eradicate the poverties of South Asia have been a plural, tolerant democracy under the rule of law; equitable development; and the universal human rights paradigm. These features have been shown to reinforce each other. The mechanism of instituting all of them is wise use of law, given the insufficiency of bare economics and the fact that politics is both too easily manipulated and not sufficiently enforceable. Continuing to speak broadly, human rights as a legally enforceable minimum also guards against both majoritarian abuse of democracy, and the beguiling charms of utilitarianism, in that rights draw a line underneath both; rights mark a point beyond which neither a tyrannous

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[7] Joseph E Stiglitz **"Development Policies In A World Of Globalization"** Paper presented at the seminar New International Trends for Economic Development on the occasion of the fiftieth anniversary of the Brazilian Economic and Social Development Bank (BNDES), Rio de Janeiro, 12–13 September 2002. http://www.gsb.columbia.edu (accessed 26 May 2006).
[8] See n 1 of Chapter 2.

democratic majority nor a seductive argument in favour of net social utility gains is allowed to go.

A further overarching or meta theme to emerge from the study is that the role of the state remains crucial. The study holds the governments of South Asia accountable for bowing to the will of the IFIs. It argues that they have abdicated responsibility and power, which, with better guidance and greater courage, they could have utilised to challenge the dictates of the IFIs. However, this thesis continues to hold states to account even though the extent of sovereignty in a globalized world has been abridged in ways that the Westphalian system did not envisage. It is still the state that formulates laws, structures its own government, and in free association with other states jointly forms the global and regional architecture that has been discussed in order to buttress all those values. At the same time, civil society including NGOs, will also partake in and enrich dialogue within such states in the manner that a plural democracy inherently relies on, fosters, and thrives on. The new regional mechanism proposed in Chapter 6 envisages the creation of a collective power base, the resolve, the confidence and the accountability of these eight states to redefine their terms of engagement with neo-liberal hegemony.

This thesis attempted to address the "vast gap between theories of socio-political change and the realities on the ground; between the developments in international law and the realization of those rights where people live and work; between the formal institutions of democracy and the deeper realization of democratic rights; between the commitments and pronouncements of our political and developmental leaders and the achievement of dignity and justice" through a legal praxis that advocated a regional collaborative endeavour.[9] Nevertheless, such remedial measures, however well designed and instituted, will be futile if the states and the peoples of the region are unwilling to take control of the future trajectory of South Asia.

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[9] Smitu Kothari "Reflections on 50 years of Development" (2007) 50 Development 4–32, 18.

Appendix B

The Mahabharata, Book 12: Santi Parva: Section LXV

"Indra said, 'Kshatriya duties, O king, which are possessed of such energy, which include in their exercise all other duties, and which are the foremost of all duties, should be observed by persons that are, like thee, so high-souled and so employed in seeking the good of the world. If those duties are not properly discharged, all creatures would be overtaken by ruin. The kings possessed of compassion for all creatures, should regard these to be the foremost of his duties, reclaiming the land for cultivation and fertilizing it, performance of great sacrifices for cleansing himself, a disregard for begging, and protection of subjects. Abandonment (gift) is said by the sages to be the foremost of virtues. Of all kinds of abandonment, again, that of the body in battle, is the foremost. Thou hast seen with thy eyes how the rulers of the earth, ever observant of *Kshatriya* duties, having duly waited upon their preceptors and acquired great learning, at last cast off their bodies, engaged in battle with one another. The *Kshatriy*a, desirous of acquiring religious merit, should, after having gone through the *Brahmacharya* mode, should lead a life of domesticity which is always meritorious. In adjudicating upon ordinary questions of right (between his subjects), he should be thoroughly impartial. For causing all the orders to be observant of their respective duties, for the protection they afford to all, for the diverse contrivances and means and the prowess and exertion (with which they seek the accomplishment of their objects).

Bhishma said, 'The protection of all creatures is regarded as the highest duty of the *Kshatriya*. Listen now to me, O king, as to how the duty of protection is to be exercised. A king conversant with his duties should assume many forms even as the peacock puts forth plumes of diverse hues. Keenness, crookedness, truth, and sincerity, are the qualities that should be present in him. With thorough impartiality, he should practise the qualities of goodness if he is to earn felicity. He must assume that particular hue or form which is beneficial in view of the particular object which he seeks to accomplish. 2 A king who can assume diverse forms succeeds in accomplishing even the most subtle objects. Dumb like the peacock in autumn, he should conceal his counsel. He should speak little, and the little he speaks should be sweet. He should be of good features and well versed in the scriptures. He should always be heedful in respect of those gates through which dangers may come and overtake him, like men taking care of breaks in embankments through which the waters of large tanks may rush and flood their fields and houses. He should seek the refuge of Brahmanas crowned with ascetic success even as men seek the refuge or loudly rivers generated by the rain-water collected within mountain lakes. That king who desires to amass wealth should act like religious hypocrites in the matter of keeping a coronal lock. 3 The king should always have the rod of chastisement uplifted in his hands. He should always act heedfully (in the matter of levying his taxes) after examining the incomes and expenses of his subjects like men repairing to a full-grown palmyra for drawing its juice. 4 He should act equitably towards his own subjects; cause the crops of his enemies to be crushed by the tread of his cavalry, march against foes when his own wings have become strong; and observe all the sources of his own weakness. He should proclaim the faults of his foes; crush those that are their partisans; and collect wealth from outside like a person plucking flowers from the woods.

The Mahabharata Kisari Mohan Ganguli, tr.[1883-1896] http://www.sacred-texts.com/hin/m01/index.htm (accessed 28 May 2006).

Appendix C

Ratifications of UN Human Rights Treaties by Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka

Country	Convention	Status	Signature Date	EIF Date	Rec. of Instr.
Afghanistan					
	CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	Ratification	04/02/85	26/06/87	01/04/87
	CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	No Action			
	CCPR-International Covenant on Civil and Political Rights	Accession		24/04/83	24/01/83
	CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CED-Convention for the Protection of All Persons from Enforced Disappearance	No Action			
	CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Ratification	14/08/80	04/04/2003	05/03/2003
	CEDAW-OP-Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	No Action			
	CERD-International Convention on the Elimination of All Forms of Racial Discrimination	Accession		05/08/83	06/07/83
	CESCR-International Covenant on Economic, Social and Cultural Rights	Accession		24/04/83	24/01/83
	CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No Action			
	CPD-Convention on the Rights of Persons with Disabilities	No Action			
	CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action			
	CRC-Convention on the Rights of the Child	Ratification	27/09/90	27/04/94	28/03/94
	CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Accession		24/10/2003	24/09/2003
	CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	Accession		19/10/2002	19/09/2002
Bangladesh					
	CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	Accession		04/11/98	05/10/98

	CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	No Action			
	CCPR-International Covenant on Civil and Political Rights	Accession		06/12/2000	06/09/2000
	CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CED-Convention for the Protection of All Persons from Enforced Disappearance	No Action			
	CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Accession		06/12/84	06/11/84
	CEDAW-OP-Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	Ratification	06/09/2000	22/12/2000	06/09/2000
	CERD-International Convention on the Elimination of All Forms of Racial Discrimination	Accession		11/07/79	11/06/79
	CESCR-International Covenant on Economic, Social and Cultural Rights	Accession		05/01/99	05/10/98
	CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Signature only	07/10/98		
	CPD-Convention on the Rights of Persons with Disabilities	Signature only	09/05/2007		
	CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action			
	CRC-Convention on the Rights of the Child	Ratification	26/01/90	02/09/90	03/08/90
	CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Ratification	06/09/2000	12/02/2002	06/09/2000
	CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	Ratification	06/09/2000	06/10/2000	06/09/2000

Bhutan

	CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	No Action			
	CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	No Action			
	CCPR-International Covenant on Civil and Political Rights	No Action			
	CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CED-Convention for the Protection of All Persons from Enforced Disappearance	No Action			
	CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Ratification	17/07/80	30/09/81	31/08/81
	CEDAW-OP-Optional Protocol to the	No Action			

	Convention on the Elimination of All Forms of Discrimination against Women				
	CERD-International Convention on the Elimination of All Forms of Racial Discrimination	Signature only	26/03/73		
	CESCR-International Covenant on Economic, Social and Cultural Rights	No Action			
	CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No Action			
	CPD-Convention on the Rights of Persons with Disabilities	No Action			
	CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action			
	CRC-Convention on the Rights of the Child	Ratification	04/06/90	02/09/90	01/08/90
	CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Signature only	15/09/2005		
	CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	Signature only	15/09/2005		

India

	CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	Signature only	14/10/97		
	CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	No Action			
	CCPR-International Covenant on Civil and Political Rights	Accession		10/07/79	10/04/79
	CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
	CED-Convention for the Protection of All Persons from Enforced Disappearance	Signature only	06/02/2007		
	CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Ratification	30/07/80	08/08/93	09/07/93
	CEDAW-OP-Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	No Action			
	CERD-International Convention on the Elimination of All Forms of Racial Discrimination	Ratification	02/03/67	04/01/69	03/12/68
	CESCR-International Covenant on Economic, Social and Cultural Rights	Accession		10/07/79	10/04/79
	CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No Action			
	CPD-Convention on the Rights of Persons with Disabilities	Signature only	30/03/2007		
	CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action			
	CRC-Convention on the Rights of the Child	Accession		11/01/93	11/12/92

CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Ratification	15/11/2004	30/12/2005	30/11/2005
CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	Ratification	15/11/2004	16/09/2005	16/08/2005

Maldives

CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	Accession		20/05/2004	20/04/2004
CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	Ratification	14/09/2005	22/06/2006	15/02/2006
CCPR-International Covenant on Civil and Political Rights	Accession		19/12/2006	19/09/2006
CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	Accession		19/12/2006	19/09/2006
CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
CED-Convention for the Protection of All Persons from Enforced Disappearance	Signature only	06/02/2007		
CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Accession		31/07/93	01/07/93
CEDAW-OP-Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	Accession		13/06/2006	13/03/2006
CERD-International Convention on the Elimination of All Forms of Racial Discrimination	Accession		24/05/84	24/04/84
CESCR-International Covenant on Economic, Social and Cultural Rights	Accession		19/12/2006	19/09/2006
CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No Action			
CPD-Convention on the Rights of Persons with Disabilities	No Action			
CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action			
CRC-Convention on the Rights of the Child	Ratification	21/08/90	13/03/91	11/02/91
CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Ratification	10/05/2002	29/01/2005	29/12/2004
CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	Ratification	10/05/2002	10/06/2002	10/05/2002

Nepal

CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	Accession		13/06/91	14/05/91
CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	No Action			

CCPR-International Covenant on Civil and Political Rights	Accession			14/08/91	14/05/91
CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	Accession			14/08/91	14/05/91
CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	Accession			04/06/98	04/03/98
CED-Convention for the Protection of All Persons from Enforced Disappearance	No Action				
CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Ratification	05/02/91		22/05/91	22/04/91
CEDAW-OP-Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	Signature only	18/12/2001			
CERD-International Convention on the Elimination of All Forms of Racial Discrimination	Accession			01/03/71	30/01/71
CESCR-International Covenant on Economic, Social and Cultural Rights	Accession			14/08/91	14/05/91
CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No Action				
CPD-Convention on the Rights of Persons with Disabilities	No Action				
CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action				
CRC-Convention on the Rights of the Child	Ratification	26/01/90		14/10/90	14/09/90
CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Signature only	08/09/2000			
CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	Ratification	08/09/2000		20/02/2006	20/01/2006

Pakistan

CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	No Action				
CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	No Action				
CCPR-International Covenant on Civil and Political Rights	No Action				
CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	No Action				
CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	No Action				
CED-Convention for the Protection of All Persons from Enforced Disappearance	No Action				
CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Accession			11/04/96	12/03/96
CEDAW-OP-Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	No Action				
CERD-International Convention on the	Ratification	19/09/66		04/01/69	21/09/66

Elimination of All Forms of Racial Discrimination				
CESCR-International Covenant on Economic, Social and Cultural Rights	No Action			
CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No Action			
CPD-Convention on the Rights of Persons with Disabilities	No Action			
CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action			
CRC-Convention on the Rights of the Child	Ratification	20/09/90	12/12/90	12/11/90
CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Signature only	26/09/2001		
CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	Signature only	26/09/2001		

Sri Lanka

CAT-Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	Accession		02/02/94	03/01/94
CAT-OP-Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment	No Action			
CCPR-International Covenant on Civil and Political Rights	Accession		11/09/80	11/06/80
CCPR-OP1-Optional Protocol to the International Covenant on Civil and Political Rights	Accession		03/01/98	03/10/97
CCPR-OP2-DP-Second Optional Protocol to the International Covenant on Civil and Political Rights	No Action			
CED-Convention for the Protection of All Persons from Enforced Disappearance	No Action			
CEDAW-Convention on the Elimination of All Forms of Discrimination against Women	Ratification	17/07/80	04/11/81	05/10/81
CEDAW-OP-Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	Accession		15/01/2003	15/10/2002
CERD-International Convention on the Elimination of All Forms of Racial Discrimination	Accession		20/03/82	18/02/82
CESCR-International Covenant on Economic, Social and Cultural Rights	Accession		11/09/80	11/06/80
CMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Accession		01/07/2003	11/03/96
CPD-Convention on the Rights of Persons with Disabilities	Signature only	30/03/2007		
CPD-OP-Optional Protocol to the Convention on the Rights of Persons with Disabilities	No Action			
CRC-Convention on the Rights of the Child	Ratification	26/01/90	11/08/91	12/07/91
CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Ratification	21/08/2000	08/10/2000	08/09/2000
CRC-OP-SC-Optional Protocol to the	Signature	08/05/2002		

	Convention on the Rights of the Child on the sale of children child prostitution and child pornography	only			

Source United Nations Human Rights
http://www.unhchr.ch/tbs/doc.nsf/newhvstatbytreaty?OpenView (accessed 8 March 2008)

Appendix D

Organizational Structure and the functions of the IFIs.

The World Bank

The World Bank is an affiliated specialised agency of the United Nations, situated in Washington, D.C, which currently has 183 state members[1]. All members of the World Bank are automatically members of the International Monetary Fund. The Bank was created for the purpose of facilitating economic, industrial and infrastructure growth by providing loan assistance to the countries that were affected by World War II.[2]

Although the rebuilding of post-war economies was the primary mandate of the Bank's work, the Bank's focus has expanded beyond post-conflict rehabilitation and infrastructure development to include the provision of both short and long-term funding for natural disasters, humanitarian emergencies and Third World development.[3] The creditors of the World Bank are not restricted to sovereign states but under government guarantees and assurances the Bank has the mandate to extend its loan facilities to private investors as well. The operation of the loan schemes to both the public and private sector are aimed at facilitating productive investment, encouraging foreign trade, and streamlining and easing of international debt repayment.

The Bank's operations are similar to those of a commercial bank in that it is self-sustaining and has managed to maintain a profit on its lending activities. Its other area of operation includes the Economic Development Institute, which is entrusted with the training of officials of the member countries in relation to issues of economic development. An affiliated agency of the Bank is the International Finance Corporation, which was established in 1956. The IFC's main function is to invest in private enterprises without governmental assurances or guarantees. The International Development Association, another affiliated agency of the Bank established in 1960, also extends credit on less stringent terms to developing countries. The late 1980s saw harsh criticism of the Bank's lending policies particularly to developing countries to finance development projects with scant regards to environmental issues.[4] The environmental fund created in 1990 that provides low interest loans for developing countries is a result of that criticism. The World Bank Group also includes the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes.[5]

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[1] http://www.worldbank.org/ (accessed 17th July 2007)
[2] World Bank Reports 1947 - 1969 see also Jessica Einhorn, "The World Bank's Mission Creep From *Foreign Affairs*, September/October 2001 http://www.foreignaffairs.org/20010901faessay5567/jessica-einhorn/the-world-Bank-s-mission-creep.html (accessed 16th June 2006).
[3] http://web.worldbank.org (accessed 16th June 2006).
[4] Cheryl Payer *The World Bank: A Critical Analysis* (New York, London, Monthly Review Press, 1982) 15-52.
[5] See the World Bank's publication, World Bank Operations: Sectoral Programs and Policies (1972); E. S. Mason and R. E. Asher *The World Bank since Bretton Woods* (1973); C. Payer *The*

The International Monetary Fund (IMF)

The Bretton Woods Conference also included discussion of the need to create mechanisms to stabilise foreign currency exchange rates, regulate the international monetary system and to eliminate currency restrictions relating to trade in goods and services, which in turn would promote global trade.[6] The result of these concerns was the creation of the IMF, which was originally envisaged to foster steady economic growth and full employment by offering unconditional loans to states that were in dire financial crisis.[7] The IMF's statutory purposes included promoting the balanced expansion of world trade, the stability of exchange rates, the avoidance of competitive currency devaluations, and the orderly correction of a country's balance of payments problems. To serve these purposes, the IMF monitors economic and financial developments and policies, in member countries and at the global level, provides policy advice to its members and makes short-term loans available to member countries with balance of payments problems. It is also a resource provider for governments and central banks in terms of technical assistance and training in its areas of expertise.[8]

The articles of agreement of the IMF also provide a supervisory role[9] to the IMF over its members. This in effect means that the IMF monitors the exchange rate policies in order to guide the international monetary system and to ensure its smooth operation. The economic policies of a country are scrutinised to see whether they would enhance sustainable economic growth and financial stability. The effectiveness of these surveillance schemes was severely tested in the Mexican debt crisis of 1994 and again in the South East Asian financial crisis in 1996/97.[10] The preventive mechanisms that the IMF is said to wield in the event of an impending crisis proved impotent on both occasions.[11]

The governing structure of the IMF is similar to that of the World Bank.[12] The Executive Directors are responsible for the conduct of the general operations of

World Bank: A Critical Analysis (1982); S. Please *The Hobbled Giant: Essays on the World Bank* (1984).

[6] Leland B. Yeager International Monetary Relations: Theory, History, and Policy (New York, Harper & Row, 1966).

[7] Article I of the Articles of Agreement sets out the IMF's main responsibilities: promoting international monetary cooperation; facilitating the expansion and balanced growth of international trade; promoting exchange stability; assisting in the establishment of a multilateral system of payments; and making its resources available (under adequate safeguards) to members experiencing balance of payments difficulties.

[8] Articles of agreement IMF.

[9] Surveillance operations of the IMF see Articles of Agreement of the IMF.

[10] Graham Bird 'The IMF and Developing Countries: A Review of the Evidence and Policy Options' 1996 International Organization 50 3 477-513.

[11] This aspect is elaborated further in the section relating to the South Asian economic dilemma created by SAPs.

[12] A Board of Governors is at the helm, which usually constitutes the Finance Ministers of the member countries. Of the Executive Directors, "five Executive Directors are appointed by the members with the five largest numbers of shares (currently the United States, Japan, Germany, France and the United Kingdom). The other Executive Directors are elected by the other members. In IFC and IDA, Executive Directors and Alternates of the Bank serve ex-officio as Executive Directors and Alternates of IFC and IDA (as long as the country that appoints them, or any one of the countries that have elected them, is also a member of IFC and IDA). Members of

the Bank and the Fund and exercise all the powers delegated to them by the Board of Governors under the Articles of Agreement. The eight countries that make the most contributions to the funds of the Bank and the Fund are able to nominate their own directors on to the Boards with other countries being represented on the Board on a 'block' basis.[13] The power of the Board of Directors is exercised through a unique voting system in both institutions. Unlike the UN voting system of one member one vote, this voting system is determined on the basis of the financial contributions made by each country to each institution.[14]

With almost identical governing structures, the management and control of both the IMF and World Bank is securely vested with the developed world.[15] Therefore, the philosophy and operations of these institutions reflect the ideological leanings of the western world.[16]

2.1.3 The World Trade Organisation (WTO)

The WTO is the global institution that was created to facilitate trade between diverse trading partners, from producers to ultimate consumers. Though the idea of an institutional mechanism to regulate global trade was discussed during the Bretton Woods Conference, the lack of enthusiasm for a third international organisation resulted in the General Agreement on Tariffs and Trade (GATT) of 1947.[17] The GATT treaty served as the regulatory framework for international trade among the 23 member countries in the ensuing years. However, with the complexity of global trade the absence of an institutional structure and formal dispute resolution mechanisms were felt acutely amongst the members of the GATT treaty. Formal discussions to resolve issues were recommenced in 1984 through the Uruguay Round negotiations, which ultimately resulted in the

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the MIGA Board of Directors are elected separately. Elections for Executive Directors are held every two years, normally in connection with the Bank's Annual Meetings. Over the years, it has been customary for election rules to ensure that wide geographical and balanced representation be maintained on the Board of Executive Directors. An increase to the number of elected Executive Directors requires a decision of the Board of Governors by an 80% majority of the total voting power. Before November 1, 1992, there were 22 Executive Directors, 17 of whom were elected. In 1992, in view of the large number of new members that had joined the Bank, the number of elected Executive Directors was increased to 19. The two new seats, Russia and a new group around Switzerland, brought the total number of Executive Directors to its present level of 24," http://web.worldbank.org/. The IMF also has a similar governing structure.

[13] The ridiculousness of the governing structure of both the Fund and the Bank are revealed by the fact that the director appointed by the USA can individually wield a vote of 17%, where as the 2 directors representing sub-Saharan Africa on the IMF board wields 4.43% of votes between them.

[14] Since the United States is the largest donor country, it wields roughly 17% of the vote of the IMF. In fact the world's seven largest industrialised countries make up 45% of the vote at the IMF.

[15] The voting power in both organizations is synonymous with economic power with the 30 odd OECD states controlling 63.55% of the IMF votes and 61.58% of the World Bank votes. The G8 states alone can claim ownership to 48.18% and 45.71% of the IMF and Bank votes respectively. http://www.thirdworldtraveler.com/IMF_WB/IMF_WB_Facts.html (at 17th August 2006)

[16] Ute Pieper and Lance Taylor *The Revival of the Liberal Creed: The IMF, the World Bank, and Inequality in a Globalized Economy* Working Paper No. 4 January 1998 (Center for Economic Policy Analysis, New School for Social Research http://www.newschool.edu/cepa (at 17th August 2006)

[17] The Bretton Woods Conference discussed the idea of creating the International Trade Organisation (ITO) under the aegis of the UN. Its mandate was to deal with issues of trade, tariffs, international investments and commodity agreements. But several signatories to the treaty including the USA did not ratify it.

establishment of the WTO in January 1995. The creation of the WTO was essentially an implementation of the General Agreement on Tariffs and Trade (GATT), which focussed on the trade of goods. However, as a result of the Uruguay Round intellectual property rights, government procurement, and investment measures also came within the scope and purview of the WTO, vesting the institution with immense powers to influence and control the global finance and trade.[18]

The decision-making organ of the WTO is the Ministerial Conference comprising trade ministers of member countries, which meets every two years. The decision-making of the WTO is by the consensus of the general membership, which stands at 150 states[19] and therefore 95% of the world trade comes under the auspices of the WTO. The daily operations are in the hands of the General Council that comprises national representatives of member states. The General Council is entrusted with the management of the dispute resolution process of the WTO. In its capacity as the Dispute Settlement Body (DSB) it encourages the consultation between member states when a dispute arises. If direct consultation fails, the DSB appoints a dispute panel to resolve the issues and the panel is vested with the mandate to report back to the DSB. If the dispute is not resolved and the complaint is upheld, the DSB may be requested by the complainant to suspend its obligations and allow retaliation.

The General Council is also in charge of the scrutiny and evaluation of national trade policies.[20] The budget of the WTO is funded by the contributions of member countries who contribute according to the share of world trade based on trade in goods, services and intellectual property rights. The General Council also overseas the work of the Council for Trade in Goods, which monitors policy trading practices including anti- dumping and unfair trade practices, the Council for Trade in Services, which monitors the Uruguay Round agreement on trade in services, and the The Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Council monitors the agreement on intellectual property rights that were reached during the Uruguay Round and supervises members' compliance. The other functions of the WTO includes the administration of WTO trade agreements, the provision of a forum for trade negotiations, provision of technical assistance and training for developing countries and cooperation with other international organisations.[21]

The operations of the WTO are based on principles of reciprocity and non-

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[18] John H. Jackson 'Fragmentation or Unification among International Institutions: The World Trade Organization' 1999 New York University International Journal of Law and Politics 31 4 826-827.

[19] At present there are 31observer governments and seven international organisation observers http://www.wto.org/.

[20] Scrutiny of the national trade policies is termed Trade Policy Review Mechanism (TPRM). The TPRM process was created under the Uruguay Round agreements to enable the scrutiny of national trade policies. The TPRM examines the trading policies of the four countries with the largest shares of world trade which are reviewed every two years, the next 16 largest traders are reviewed every four years. Countries with a lesser share in world trade are scrutinized every six years and the others as and when it is warranted by the WTO. TPRM acts as a watch dog to evaluate whether a country is pursuing market friendly trade policies that would enhance global trade.

[21] http://www.wto.org/ (at 16th June 2006).

discrimination.[22] The principle of reciprocity comes into operation when trade barriers between countries are mutually reduced to foster intra-state trade. Non-discrimination, in principle, refers to the policy between member states that benefit from tariff reductions on goods and services that are made available to all member states. In this sense, the principle of non-discrimination is an extension of the principle of reciprocity which spreads the benefits of the reduction of trade barriers to all the members of the WTO.[23] Deviation from the two fundamental policies of the WTO is permitted in the circumstance where a country allows preferential treatment for the developing countries. The WTO working culture also encourages open information on all rules and regulations, pre-negotiated limitations on trading barriers and an elaborate dispute resolution mechanism.

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[22] Article I of the GATT.
[23] http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (at 26th June 2006).

Appendix E

Comparative Growth Rates of Developing Economies Average Annual Rates 1960-88

Country	Industrial Production		GDP	
	1960-1980	1980-1988	1960-1980	1980-1988
South Korea	15.2	12.6	8.8	10.1
Taiwan	12.8	7.2	9.6	7.4
Singapore	12.1	4.5	9.2	6.9
Hong Kong	10.3	7.5	9.9	7.4
Thailand	10.3	6.6	7.4	6.5
Indonesia	8.9	5.1	5.9	5.7
Pakistan	8.0	7.2	4.4	6.3
Malaysia	9.6*	6.1	7.9*	4.6
India	4.6	7.6	3.5	5.4
Bangladesh	6.1	4.9	5.8*	3.5
Sri Lanka	5.3	4.4	5.2	3.9
Mayanmar	4.2	7.3*	3.5	3.3*

* - 1970-1980

Source: *The Economist* May 4, 1991, Survey page 7

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