

HUMAN DEVELOPMENT: A LONG AND WINDING ROAD. HISTORY, REGULATIONS AND CASE LAW¹

DESARROLLO HUMANO: UN LARGO Y SINUOSO CAMINO. HISTORIA, NORMAS Y
JURISPRUDENCIA

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RESUMEN: Los documentos internacionales se han convertido en un hito para el diseño y contenido de las ideas de desarrollo y desarrollo humano, sin perjuicio de la recepción del derecho al desarrollo en instrumentos regionales de derechos humanos como del efecto relevante que tales textos revelan en las regulaciones constitucionales sobre progreso, desarrollo y/o desarrollo humano. Lo expuesto, sin duda, no obsta a que los jueces se vean desafiados cuando intentan explicar o aplicar estas disposiciones, especialmente cuando enfrentan regulaciones referidas a los derechos económicos, sociales y culturales, en general, y, en particular, al desarrollo humano, sin que se avizore un criterio único al analizar la implementación de las disposiciones sociales, económicas y culturales, y menos aún al estudiar el impacto práctico de las cláusulas de desarrollo humano.

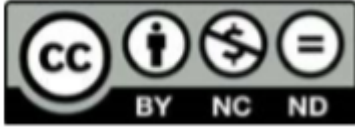
PALABRAS CLAVES: Desarrollo humano – derechos humanos – instrumentos internacionales - regulaciones constitucionales – interpretación judicial

ABSTRACT: International documents have become a milestone for the design and content of the development and human development's ideas, without prejudice to the reception of the right to development in regional human rights instruments as well as the relevant effect that these texts reveal in constitutional regulations on progress, development and/or human development. The foregoing, certainly, does not prevent judges from being challenged when trying to explain or apply these provisions, especially when they face regulations referred to economic, social and cultural rights, in general, and, particularly, to human development, without noticing a unique criterion when analysing the implementation of social, economic and cultural provisions, even less, when studying the practical impact of human development clauses.

KEY WORDS: Human Development – Human rights – International instruments – Constitutional regulations – Judicial interpretation

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PART B: Regulations

I. Human development as a human right: its reception in international documents.

As it was argued in the previous chapter, UN played a main role in the last steps of both the *development* and the *human development* theories. Usually that role resulted in the elaboration of international documents which turned to be milestones in the design and contents of those ideas.

Those regulations have different characteristics, but some of them are especially important since they address the treatment of human development from a particular perspective: they focus on the person and define development as a fundamental human right.

In fact, the origin of those documents can be found in the decision of UN to move forward towards the construction of a universal culture of human rights. That decision led to the organization of various conferences and meetings on that topic and during which several countries agreed to define some of those rights and consequently assumed certain obligations in an international level.

Even though it is true that those documents are, as a general rule, only *declarations* –which are not as effective as conventions and/or treaties– it is nevertheless clear that signatory countries have assumed international responsibilities; the contrary would imply emptying those declarations of all real content. Hence their relevance.

Thus, this chapter will focus on those UN declarations that have emphasized human development as a human right, as well as on some other documents that are their outcome or consequence, such as the reports produced by UNDP, especially the one of the year 2000 called “Human Rights and Human Development”.

II. First documents within UN.

a) Universal Declaration of Human Rights.

UN was founded in 1945, at the end of World War II as an intergovernmental organization whose main aim was to save future generations from the devastation caused by international conflicts. Its main organs were six: the General Assembly, the Security Council, the Economic and Social Council (ECOSOC), the Trusteeship Council, the International Court of Justice, and the UN Secretariat.

Within the ECOSOC the Commission of Human Rights was created. It was a nine-member “nuclear” commission on human rights to recommend a structure and mission for the

permanent Human Rights Commission (HRC). The delegates appointed to this nuclear body would be chosen for their individual merits.

President HARRY TRUMAN had appointed ELEANOR ROOSEVELT to the United States delegation to the United Nations in December 1945, but she received a call from UN Secretary-General TRYGVE LIE, telling her that he had appointed her to the nuclear commission charged with creating the formal human rights commission. Additionally, the representative from China nominated her to chair the commission. All the delegates promptly endorsed his recommendation (BLACK 2008, pp. 34/37). Soon after, the commission faced the tough work of drafting a human rights charter.

The drafting committee was formed by nine members from different countries, cultures and creeds: Charles Malik (Lebanon), Alexandre Bogomolov (USSR), Peng Chun-Chang (China), René Cassin (France), Eleanor Roosevelt (USA), Charles Dukes (United Kingdom), William Hodgson (Australia), Hernan Santa Cruz (Chile) and John P. Humphrey (Canada).

This diversity guaranteed the plurality of ideas, on the one hand, but on the other it turned to be an obstacle when trying to reach a definitive consensus on the text to be adopted and on its effects. LARRALDE holds that the Universal Declaration was the partial result of a complex process, because choosing a juridical form for its text was not a simple question. He recalls that while the United Kingdom wanted to adopt a *convention* on human rights, the United States asserted that it would only support a *declaration* or a *manifesto*. Thus, in its second session in November 1947, the Human Rights Committee tried to reach a conciliatory solution: it was decided that the form would be the one of a non-binding declaration, but that it should be discussed, written and approved immediately (LARRALDE 2009, pp. 23/32).

ELEANOR ROOSEVELT herself expressed at the General Assembly when the final text was to be voted: “In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations” (HANNUM 1994, p. 357).

Given the different ideologies of the members of the Commission, the consensus on the content of the Declaration was not easy to reach, either. In her memoirs ROOSEVELT recalls

some dialogues between CHANG, MALIK and HUMPHREY in these terms: “Dr. Chang was a pluralist and held forth in charming fashion on the proposition that there is more than one kind of ultimate reality. The Declaration, he said, should reflect more than simply Western ideas and Dr. Humphrey would have to be eclectic in his approach. His remark, though addressed to Dr. Humphrey, was really directed at Dr. Malik, from whom it drew a prompt retort as he expounded at some length the philosophy of Thomas Aquinas. Dr. Humphrey joined enthusiastically in the discussion, and I remember that at one point Dr. Chang suggested that the Secretariat might well spend a few months studying the fundamentals of Confucianism!” (ROOSEVELT 1992, p. 316).

In that atmosphere JOHN P. HUMPHREY elaborated the first draft, which was revised by RENÉ CASSIN, who handed the final draft –later known as the Geneva draft– to the Commission. More than 50 Member States participated in the final drafting, commenting on the text or suggesting changes. Finally on December 10th 1948, the General Assembly, meeting in Paris, adopted the Universal Declaration of Human Rights with eight nations abstaining from the vote but none dissenting².

CASSIN himself later held that the Declaration, more than a non-ideological text, was one that combined the essential sources of international human rights law all at the same time, such as the principle of equality, the theory of natural rights and the liberal individualism of Enlightenment. He described the document as a temple erected in the name of man’s dignity and self-government, with the aim of hosting fundamental values as liberty, equality, justice, security and fraternity which, though with different understandings, had been orientating mankind’s juridical conscience for centuries. And he called the attention on the relationship between that Declaration and the French Declaration of the Rights of Man and of the Citizen of 1789, as the basements of the Universal Declaration were the great principles of liberty, equality and fraternity borrowed from the French text of the ends of XVIII century (CASSIN 1951, p. 277).

Turning to the text of the Declaration, social progress was included right from its Preamble in the following terms: “Whereas the peoples of the United Nations have in the

²A/RES/217 (III). Eight countries abstained: Czechoslovakia, Poland, South Africa, Saudi Arabia, Soviet Union, Byelorussian SSR, Ukrainian SSR and Yugoslavia. And two countries did not vote: Honduras and Yemen.

Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom”³.

Besides, the idea of development was also included in article 26.2: “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”.

b) The International Covenant on Economic, Social and Cultural Rights.

While the draft of the Universal Declaration was being composed, the Human Rights Commission began to elaborate another document which would include binding obligations for Member States.

Nevertheless, by the beginning of 1952 it became clear that the document would only focus on civil and political rights, which would be more easily accepted, given that States would comply with its contents by abstention, whereas economic, social and cultural rights impose public functionalities and performances. In fact, within the Commission, great part of the debates centred on the differences among the means needed to comply with those two types of human rights (SAUL – KINLEY – MOWBRAY 2014, p. 4).

This controversy led to the Resolution 543 of UN’s General Assembly which, in 1952 requested “the Economic and Social Council to ask the Commission on Human Rights to draft two Covenants on Human Rights, to be submitted simultaneously for the consideration of the General Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible, particularly in so far as the reports to be submitted by States on the implementation of those rights are concerned”⁴.

³ Preamble, 5th paragraph.

⁴ A/RES/543 (VI)

The drafting of the Covenant on Economic, Social and Cultural Rights began in 1953 within the Commission. It was later discussed within the Third Committee of UN's General Assembly between 1954 and 1956, and was adopted more than ten years later, in December 1966⁵. It finally came into force in 1976.

1) PROGRESS AND DEVELOPMENT IN THE TEXT OF THE COVENANT.

These concepts underlay most of its text as States Parties recognise right from its Preamble that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”⁶. However, in some articles the allusion to those concepts is more specific and direct:

a) Article 1 states: “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”⁷.

b) When referring to the right to work the Covenant states: “The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual”⁸.

c) In article 13 States Parties recognise the right to education and convene that it “shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms”⁹. In order to achieve its fulfilment the same article stipulates that primary education shall be compulsory and available free to all¹⁰; that secondary education in its different forms, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education¹¹; that higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive

⁵ A/RES/2200A (XXI)

⁶ Preamble, par. 3.

⁷ Art. 1.1

⁸ Art. 6.2

⁹ Art. 13.1

¹⁰ Art. 13.2 a

¹¹ Art. 13.2 b

introduction of free education¹²; that fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education¹³; and that the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved¹⁴.

d) States Parties also recognise the right of everyone to take part in cultural life; to enjoy the benefits of scientific progress and its applications; and they undertake to include the necessary steps for the conservation, development and diffusion of science and culture¹⁵.

2) GUIDELINES FOR THE IMPLEMENTATION OF THE COVENANT: LIMBURG PRINCIPLES, MAASTRICHT GUIDELINES AND THE OPTIONAL PROTOCOL.

a) The Limburg Principles.

The implementation of the rights included in the Covenant was not easy. Reality showed that in spite of the huge number of signatory countries¹⁶, delays and omissions in their effectiveness had become the rule, rather than the exception. This led to future studies and works within the international community tending to interpret the contents of the Covenant and to establish the means to make these rights demandable.

Thus, in 1986 a group of experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg and the Urban Morgan Institute for Human Rights met in Maastricht mainly to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights. The product of this meeting were the so-called Limburg Principles which were later recognized by the UN among the fundamental international instruments on economic, social and cultural rights¹⁷.

The main conclusions were the following:

1) Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights, which, together

¹²Art. 13.2 c

¹³Art. 13.2 d

¹⁴Art. 13.2 e

¹⁵ Art. 15

¹⁶ More than 160 countries have signed and ratified the Convention.

¹⁷ UN doc. E/CN.4/1987/17, Annex; and Human Rights Quarterly, Vol. 9 (1987), pp. 122–135.

with the International Covenant on Civil and Political Rights and the Optional Protocol, broaden the Universal Declaration of Human Rights and constitute the International Bill of Human Rights¹⁸.

2) As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights¹⁹.

3) The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization²⁰.

4) Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately²¹.

5) States parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant²².

6) Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities²³.

7) All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant²⁴.

8) At the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant. Legislative measures alone are not sufficient to fulfil these obligations²⁵.

9) The obligation ‘to achieve progressively the full realization of the rights’ requires States 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

¹⁸Pts. 1 and 2

¹⁹Pt. 3

²⁰Pt. 6

²¹Pt. 8

²²Pt. 10

²³Pt. 14

²⁴Pt. 16

²⁵Pts. 17 and 18

efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations²⁶.

10) The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available²⁷.

11) States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services²⁸.

12) Irrespective of differences in their political, economic and social systems, States shall co-operate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences²⁹.

13) Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved³⁰.

14) 'Promoting the general welfare' shall be construed to mean furthering the wellbeing of the people as a whole³¹.

15) A State party will be in violation of the Covenant if it fails to take a step which it is required to take by the Covenant; if it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right; if it fails to implement without delay a right which it is required by the Covenant to provide immediately; if it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet; if it applies a limitation to a right recognized in the Covenant other than in

²⁶Pt. 21

²⁷Pt 23

²⁸Pts. 25 and 28

²⁹Pt. 31

³⁰Pt. 39

³¹Pt. 52

accordance with it; if it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure; if it fails to submit reports as required under the Covenant³².

16) Quantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of the compliance with Covenant obligations. States parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant. Such targets and indicators should, as appropriate, be based on criteria established through international co-operation in order to increase the relevance and comparability of data submitted by States parties in their reports³³.

b) The Maastricht Guidelines.

On the 10th anniversary of the Limburg Principles a new group of experts got together at Maastricht in January, 1997, at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). Its aim was to broaden those Principles, to study the nature and scope of the violations of economic, social and cultural rights and to suggest appropriate responses and remedies.

When drafting these guidelines, experts considered that since the Limburg Principles were adopted in 1986, the economic and social conditions had declined at alarming rates for over 1.6 billion people, while they had advanced also at a dramatic pace for more than a quarter of the world's population. They also stressed that the gap between rich and poor had doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4% of the global income and the richest fifth 85%. Thus, they considered that the impact of these disparities on the lives of people –especially the poor– was dramatic and rendered the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity³⁴.

³²Pt. 72

³³Pt. 79

³⁴Pt. 1

Within that frame of reference, they stated that:

1) It is undisputed that “all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, States are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights”³⁵.

2) As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty³⁶.

3) Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. The obligation to protect requires States to prevent violations of such rights by third parties. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights³⁷.

4) These obligations contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard³⁸.

5) A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant³⁹.

³⁵Pt. 4

³⁶Pt. 5

³⁷Pt. 6

³⁸Pt. 7

³⁹Pt. 11

6) In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case⁴⁰.

7) All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition⁴¹.

c) The optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

One of the main concerns within UN on regarding the implementation of the Covenant was the impossibility for the victims of violations of these rights to present their complaints before the Committee on Economic, Social and Cultural Rights.

Therefore, on December 10th, 2008 –on the 60th anniversary of the adoption of the Universal Declaration of Human Rights– UN General Assembly approved the Optional Protocol to the Covenant⁴² where it was agreed that “Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party”⁴³. The Protocol regulated the procedure for such communications from article 3 onwards.

It was open for signature on September 24th, 2009 and entered into force on May 5th, 2013.

c) The Proclamation of Tehran.

The I International Conference on Human Rights met in 1968, in Tehran, Iran, from April 22nd to May 13th and was attended by representatives of 84 States and by representatives or observers from a number of UN bodies and specialized agencies, regional inter-governmental organizations and non-governmental organizations. The Conference largely adopted as its own the provisional agenda which had been drawn up by the Preparatory Committee, and of which the General Assembly had taken note in resolution 2339 (XXII), and established three Committees in order to deal with the substantive items. On May 13th the Conference

⁴⁰Pt. 13

⁴¹Pt. 23

⁴² A/RES/63/117

⁴³ Art. 2°

unanimously adopted the Proclamation of Tehran. In addition, the Conference adopted 29 resolutions, among them: resolutions on racial discrimination, self-determination and human rights in armed conflict. The texts of the Proclamation and of the resolutions adopted at the Conference were incorporated in the Final Act of the International Conference on Human Rights and transmitted to the General Assembly for further consideration (A/CONF.32/41)⁴⁴.

That Conference was the main UN event during 1968, year designed as the International Year for Human Rights to commemorate the twentieth anniversary of the adoption and proclamation of the Universal Declaration of Human Rights.

Even though the Proclamation of Tehran did not delve into the development issue, it did provide valuable general guidelines, as it proclaimed that:

a) It is imperative that the members of the international community fulfil their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for everyone without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions (pt. 1.).

b) Gross denials of human rights under the repugnant policy of apartheid is a matter of the gravest concern to the international community, thus, the struggle against apartheid is recognized as legitimate (pt. 7).

c) The peoples of the world must be made fully aware of the evils of racial discrimination and must join in combating them (pt. 8).

d) Gross denials of human rights arising from discrimination on grounds of race, religion, belief or expressions of opinion outrage the conscience of mankind and endanger the foundations of freedom, justice and peace in the world (pt. 11).

e) The widening gap between the economically developed and developing countries impedes the realization of human rights in the international community; that makes it all the more imperative for every nation, according to its capacities, to make the maximum possible effort to close this gap (pt. 12).

f) Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon

⁴⁴ http://legal.un.org/avl/pdf/ha/fatchr/fatchr_ph_e.pdf

sound and effective national and international policies of economic and social development (pt. 13).

g) The discrimination of which women are still victims in various regions of the world must be eliminated (pt. 15).

In its final conclusions the Proclamation urged all peoples and governments to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare⁴⁵.

III. Declaration on the Right to Development.

Although the roots of the idea of the right to development can be traced back to the era of decolonization in the '60s, Iqbal claims that it was first formulated by Keba M'Baye in 1972, during an international conference on human rights, and was adopted by the UN General Assembly in 1979⁴⁶.

On that occasion UN reiterated its profound conviction that all human rights and fundamental freedoms are indivisible and interdependent, and that equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights (pt. 3); and emphasized that the right to development is a human right, and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations (pt. 8)⁴⁷.

Since then a general conviction arose within the UN: it had become necessary to prepare an international document that could define, or at least outline, the notion of the *right to development*. But that was not an easy way to go: there were several States, especially those that were considered as *developed*, that were not willing to admit an international responsibility if the UN finally recognized this right. The United States, for example, was always against that idea, and claimed that development was a consequence of a proper handling of economic freedoms, rather than a right in itself.

⁴⁵ https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Proclamation_of_Teheran_Eng.pdf

⁴⁶ Iqbal, K. "The Declaration on the Right to Development and its implementation", in "Political Perspectives", University of Ulster, Londonderry, 2007, Vol. 1, pp. 1 ff.

⁴⁷ <http://www.un.org/documents/ga/res/34/a34res46.pdf>

In spite of those objections, the Declaration on the Right to Development was adopted by the UN General Assembly on December 4th, 1986⁴⁸, by 146 votes to one, with 8 abstentions⁴⁹.

In the prologue of this document signatory States recognize that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom (2nd par.); show their concern at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, *inter alia*, by the denial of civil, political, economic, social and cultural rights, and consider that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of all rights (10th par.); recognize that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development (13th par.); that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States (14th par.); and confirm that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations (16th par.).

Consequently they formally declare that:

a) The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized (Art. 1).

b) The human person is the central subject of development and should be the active participant and beneficiary of the right to development; all human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for

⁴⁸ A/RES/41/128.

⁴⁹ United States voted against accepting the Declaration. The abstentions were from: Germany, Denmark, Finland, Great Britain, Iceland, Israel, Japan and Sweden.

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; thus, States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom (Art. 2).

c) States have the primary responsibility for the creation of national and international conditions and policies favourable to the realization of the right to development, and have the duty to co-operate with each other in ensuring development and eliminating obstacles to development; they should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation (Arts. 3 and 4).

d) Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development (Art. 4).

e) States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights (Art. 6.3).

f) States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices (Art. 8.1).

g) Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels (Art. 10).

IV. Vienna Declaration and Programme of Action, 1993.

After the adoption of the Declaration on the Right to Development the UN Commission of Human Rights⁵⁰ began developing different mechanisms to measure its actual impact, including a global consultation⁵¹, and the formation of working groups to evaluate the observance of this right, the obstacles it encountered and to outline the steps that should be taken both locally and internationally in order to achieve its effective respect.

The first working group was created in 1993⁵² and was composed of 15 members⁵³, but could not reach a consensus in order to approve a final report⁵⁴.

Meanwhile, UN organised the II World Conference on Human Rights, which took place in Vienna in June, 1993, and was preceded by a World Forum of non-governmental organizations (NGOs) titled “All Human Rights for Everyone”, that adopted a series of conclusions and recommendations that the World Conference then made its own.

The Vienna Conference was inaugurated by the UN General Secretary, Boutros-Ghali, who identified as the three imperatives of that meeting: the universality inherent to all human rights, deepened by the right to development as a human right; the guarantee regarding the means for its implementation, and the democratization of societies⁵⁵.

Cançado Trindade says that the Vienna Declaration claimed a further strengthening in the interrelationship among democracy, development and human rights in the whole world, advocating on behalf of their universal protection, without imposing conditions⁵⁶.

The document finally adopted by consensus of 171 UN State members on June 25th, 1993⁵⁷, is divided in two parts: the Declaration itself, and the Programme of Action.

In the Declaration the World Conference recognizes and affirms that:

⁵⁰ Nowadays, Office of the High Commissioner for Human Rights.

⁵¹ A/HRC/RES/1989/45.

⁵² A/HRC/RES/1993/22

⁵³ From Tunisia, Romania, Colombia, Australia, France, Russia, Cuba, Pakistan, Kenya, Chile, China, Nigeria, Finland, Malaysia and Bulgaria.

⁵⁴ Report E/CN.4/1996/24 task group on the Right to Development, 5th session.

⁵⁵ UN Press Comunicatiton 6-14-93, pp. 1 ff. in “Documents UN HR/VIE/4”, in: <http://www.un.org/documents>

⁵⁶ Cançado Trindade, A. “Balance de los Resultados de la Conferencia Mundial de Derechos Humanos (Vienna 1993)”, in “Serie: Estudios Básicos de Derechos Humanos”, Instituto Interamericano de Derechos Humanos, San José de Costa Rica, 1994, Vol. III, pp. 17 ff.

⁵⁷ Docum. A/CONF/157/23.

a) All human rights derive from the dignity and worth inherent in the human person, central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in their realization⁵⁸.

b) All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. 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.

In a similar sense, it states that as democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing, the international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world⁵⁹.

c) The right to development, as established in the Declaration on the Right to Development, should be reaffirmed as a universal and inalienable right and an integral part of fundamental human rights. The human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level⁶⁰.

d) The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. Everyone has the right to enjoy the benefits of scientific progress and its applications⁶¹.

⁵⁸ Recital, 2nd. par.

⁵⁹ Arts. 5 and 8.

⁶⁰ Art. 10.

⁶¹ Art. 11.

e) The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community⁶². Extreme poverty and social exclusion constitute a violation of human dignity and urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty⁶³.

Meanwhile, in the Programme of Action the World Conference recommends that priority should be given to national and international action to promote democracy, development and human rights and reaffirms that the universal and inalienable right to development, as established in the Declaration on the Right to Development, must be implemented and realized⁶⁴.

V. UN General Assembly Resolution 58/172, 2003.

A decade after the Vienna Declaration, the UN General Assembly adopted its Resolution 58/172 also titled “The Right to Development” where it reaffirms the objective of making the right to development a reality for everyone, as set out in the UN Millennium Declaration (September 2000)⁶⁵; recalls the contents of the Declarations of 1986 and 1993⁶⁶; recognizes that historical injustices have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparity, instability and insecurity that affect many people in different parts of the world, in particular in developing countries⁶⁷; stresses that poverty eradication is one of the critical elements in the promotion and realization of the right to development and that poverty is a multifaceted problem that requires a multifaceted and integrated approach in addressing economic, political, social, environmental and institutional dimensions at all levels, especially in the context of the millennium development goal of

⁶² Art. 14.

⁶³ Art. 25.

⁶⁴ Par. 66 & 72.

⁶⁵ Recital, 2nd par.

⁶⁶ Recital, 5th & 6th par.

⁶⁷ Recital, 13th par.

halving, by 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger⁶⁸ and expresses regret that the Working Group on the Right to Development, at its fourth session, did not reach a conclusion⁶⁹.

In its core part it stresses that the basic responsibility for the promotion and protection of all human rights lies with the State, and reaffirms that States have the primary responsibility for their own economic and social development, that the role of national policies and development strategies cannot be overemphasized and that States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development and their commitment to cooperating with each other to that end⁷⁰; calls upon States to institute the measures required for the implementation of the right to development as a fundamental human right⁷¹; recognizes that, despite continuous efforts on the part of the international community, the gap between developed and developing countries remained unacceptably wide⁷²; encourages developing countries to build on the progress achieved in ensuring that official development assistance was used effectively to help to meet development goals and targets⁷³; calls upon the UN agencies, funds and programmes, as well as the specialized agencies, to mainstream the right to development in their operational programmes and objectives, and stressed the need for the international financial and multilateral trading systems to mainstream the right to development in their policies and objectives⁷⁴.

VI. Countries attitude within the UN regarding the right to development.

During the '70s and within the framework of the Second Development Decade, UN began using the *basic needs theory* as closely related to the idea of development. Meanwhile, the international economic crisis resulting from the strong increase of the price of petrol in the Middle East, led that international Organization to adopt, in 1974, the "Declaration on the Establishment of a New International Economic Order"⁷⁵.

⁶⁸ Recital, 14th par.

⁶⁹ Recital, 15th par.

⁷⁰ Arts. 6 & 7.

⁷¹ Art. 9.

⁷² Art. 12.

⁷³ Art. 13.

⁷⁴ Art. 27.

⁷⁵ Res 3201 (S-VI), as quoted by Rist, G., pp.143/150.

As from then, the internal gap deepened within the UN between the *developed* countries – led mainly by the US– that linked the idea of development to purely economic data, and the *developing* countries that intended to establish a new international economic order that would allow them to reach both their political and their economic sovereignty.

This reference is important because it explains why UN documents that recognize the right to development as a fundamental human right have been strongly supported by the *developing* countries (mainly those from South America, Africa and South-East Asia) that struggle for an international economic cooperation in order to achieve the actual fulfilment of that human right, and have been opposed to (or even rejected) mainly by the US, which still affirms that international economic activities must be only ruled by a free market within a context of perfect competitiveness.

In between those two groups other *developed* countries (among them: Austria, Belgium, Canada, Denmark, France, Germany, Norway, Sweden and the UK) have changed their first attitude, and have gradually turned to accept these documents⁷⁶.

This gradual support has led UN to continue looking for alternatives that may help reality reflect the contents of those documents.

Given the lack of internal consensus within the working groups, different initiatives have been taken, as for example: the creation of a new working group, the OEWG (Open Ended Working Group), plus the position of Independent Expert and a High Level Task Force, all of them with similar aims, that is to say, to measure the actual evolution of the right to development, the identification of its obstacles and the proposal of means to tackle them.

Nevertheless, the instrument that UN still uses as its main tool towards the fulfilment of the right to development is its Programme for Development (UNDP), which, through its reports and indexes, allows measuring development, detecting national and international inconveniences, and proposing measures to address them.

VII. UNDP's report on Human Development (2000).

As it has already been said the UNDP presented its first report back in 1990.

⁷⁶ Iqbal, K., op. cit., pp. 27/30; Petit de Gabriel, E. “Derecho al desarrollo y deuda externa: una perspectiva nacional”, en “Cuadernos Deusto de Derechos Humanos”, N° 19, Univ. de Deusto Ed., Bilbao, 2002, esp. Pp. 13/17.

Following the ideas of Amartya Sen and Mahbub Ul-Haq, the report affirms that it is all about people and about how development enlarges their choices. It states that development is about more than GNP growth, more than income and wealth and more than producing commodities and accumulating capital. A person's access to income may be one of the choices, but it is not the sum total of human endeavour. Human development is a process of enlarging people's choices. The most critical of these wide-ranging choices are to live a long and healthy life, to be educated and to have access to resources needed for a decent standard of living. Additional choices include political freedom, guaranteed human rights and personal self-respect. Development enables people to have these choices. No one can guarantee human happiness, and the choices people make are their own concern. But the process of development should at least create a conducive environment for people, individually and collectively, to develop their full potential and to have a reasonable chance of leading productive and creative lives in accord with their needs and interests.

Human development is therefore understood as concerning more than the formation of human capabilities, such as improved health or knowledge. It also concerns the use of these capabilities, be it for work, leisure or political and cultural activities. That is why the report concludes that if the scales of human development fail to balance the formation and use of human capabilities, much human potential will be frustrated .

As from then, UNDP successive reports have been addressing different aspects related to human development and in the year 2000, while the UN adopted the Millennium Declaration, the Programme for Development called its annual report: “Human Rights and Human Development”. Its core idea is that the “...promotion of human development and the fulfilment of human rights share, in many ways, a common motivation, and reflect a fundamental commitment to promoting the freedom, well-being and dignity of individuals in all societies...”, and that although “Human development and human rights are close enough in motivation and concern to be compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully”⁷⁷.

According to the report “The idea of human development focuses directly on the progress of human lives and wellbeing. Since well-being includes living with substantial freedoms,

⁷⁷ 2000 UNDP Report, p. 1.

human development is also integrally connected with enhancing certain capabilities—the range of things a person can do and be in leading a life. We value the freedom of being able to live as we would like and even the opportunity to choose our own fate”⁷⁸, and that is precisely because the “...human development approach is concerned, ultimately, with all the capabilities that people have reason to value”⁷⁹.

Linking the concepts of human rights and human development, the document points out that human rights assessment “...involves a reorientation of factual concentration which can broaden and enrich human development accounting...” and that by “...adding the perspective of change and progress in conceptual and practical reasoning about human rights, human development can help to deepen the understanding and broaden the usefulness of the human rights approach”⁸⁰.

Finally it concludes, as other UN documents do, that “All rights for all people in every country should be the goal of this century”, above all because “The world today has the awareness, the resources and the capacity to achieve this goal on a worldwide scale. It is time to move from the rhetoric of universal commitment to the reality of universal achievement”⁸¹.

VIII. International Labour Organization’s (ILO) Conventions and Recommendations.

The ILO was born in 1919, after World War I. It has 187 Member States and it is the only tripartite U.N. agency, since it brings together governments, employers and workers, to set labour standards, develop policies and devise programmes promoting decent work for all women and men⁸².

This Organization has always played a key role in the reception and evolution of the ideas of progress, development and human development. Such was the case, for example, of the *basic needs theory* which was adopted by the ILO in 1976 during UN’s Tripartite World Conference on Employment, Income Distribution and the International Division of Labour.

From the many conventions that have been approved within the ILO, some of them refer directly to progress and/or human development, such as Convention N° 122 on Employment

⁷⁸ P. 1.

⁷⁹ P. 1.

⁸⁰ Pp. 21/24.

⁸¹ P. 112.

⁸² <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>

Policy; Convention N° 131 on Minimum Wage Fixing; Convention N° 142 on Human Resources Development; Convention N° 156 on Workers with Family Responsibilities; Convention N° 159 on Vocational Rehabilitation and Employment of Disabled Persons; and Convention N° 169 on Indigenous and Tribal Peoples.

IX. The right to development in regional charters on human rights.

Countries belonging to UN have not shown the same level of enthusiasm when it comes to the clear acknowledgement of human development as a fundamental human right. Therefore it is not surprising that regional systems of protection of human rights have echoed that attitude. And although it is quite clear that those charters have been making significant improvements in recognizing a larger quantity of human rights, the truth is that when it comes to human development, only the regional systems from *developing* countries are the ones which explicitly decide to include this right.

a) Europe.

In spite of there being in that continent countries with very different degrees of development, regional documents on the protection of human rights follow the tendency led by the economically powerful ones, and are reluctant to include human development as a human right worthy of being protected.

The complicated web of European regional regulations –which includes the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (that mainly recognized civil and political rights⁸³), the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers (both aimed at recognizing social rights), the 2000 Charter of Fundamental Rights of the European Union (which came into force together with the Treaty of Lisbon in 2007 and that receives and updates the rights contained in previous documents), as well as their amendments and additional protocols– does not recognize the right to development.

The closest provisions are the ones from the European Social Charter which, after establishing that “Everyone has the right to protection against poverty and social exclusion”⁸⁴,

⁸³ Life (Art. 2); liberty and security (Art. 5); fair trial (Art. 6); privacy (Art. 8); conscience and religion (Art. 9); expression (Art. 10), among others, and prohibits torture (Art. 3), slavery, servitude and forced labour (Art. 4) and discrimination (Art. 14).

⁸⁴ Part I, Art. 30.

and that “Everyone has the right to housing”⁸⁵, states: “With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake: a) to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; b) to review these measures with a view to their adaptation if necessary”⁸⁶. Similarly, in Article 31 we read: “With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1) to promote access to housing of an adequate standard; 2) to prevent and reduce homelessness with a view to its gradual elimination; 3) to make the price of housing accessible to those without adequate resources”.

However, we have to bear in mind that according to the provisions of the Charter itself, the first rule must be considered as “...a declaration of the aims which it (the country) will pursue by all appropriate means...”⁸⁷, and that the second one has a mere relative binding force, because each of the Parties undertakes to consider itself bound “...by at least six of the following nine articles of Part II of this Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20” (note that article 30 is not included in the list); and by “...an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs”. Given these provisions the Parties can choose not to undertake the obligation to protect people against poverty and social exclusion.

The Community Charter of the Fundamental Social Rights of Workers deals with this item in its Recital, where the signatory countries recognize the need to promote better living and working conditions for workers “so as to make possible their harmonization while the improvement is being maintained”⁸⁸. However the subject is addressed from the rules of the internal market considered as “the most effective means of creating employment and ensuring maximum well-being in the Community”⁸⁹. In fact, the Charter states that the “...completion

⁸⁵ Part I, Art. 31.

⁸⁶ Part II, Art. 30.

⁸⁷ Part III, Art. A, 1) a.

⁸⁸ Par. 1.

⁸⁹ Par. 4.

of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained...’’⁹⁰.

Lastly, although the Charter of Fundamental Rights of the European Union points out that the Union “...seeks to promote balanced and sustainable development...’’⁹¹, and that to that end “...it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments...’’⁹², nothing is said in its articles, which recognize civil, political, social and environmental rights in their classic formulations.

Nevertheless some authors are optimistic, given a broader interpretation of human rights in the European system, due to the jurisprudence of the Courts of Luxemburg and of Strasbourg. Anderson and Murphy, for example, think that case-law from the latter seem to suggest the will to rethink the effective level of protection of these rights. According to them “If the Strasbourg Court uses the Charter to revise the Convention and the Convention interpretation in turn influences the Charter the result may be ongoing improvement in the level of protection’’⁹³.

b) Africa.

By the middle of the 20th century the countries that had been former colonies began to play a core role in the formulation of a new idea of development.

One of the most significant milestones was the Bandung Conference held in 1955 with representatives from 29 Asian and African countries. It was the most important step towards the Non-Aligned Movement and towards the beginning of collective claims from these States in the fields of politics and development.

As from then specialists from Asia and Africa dedicated their best efforts to pursue a reformulation of the concept of development that should transcend mere economic considerations and thus begin focusing on the effective protection of peoples’ rights both in international regulations and finances.

⁹⁰ Art. 7.

⁹¹ Introduction, 3rd par.

⁹² Introduction, 4th par.

⁹³ Anderson, D. & Murphy, C. “The Charter of Fundamental Rights: history and prospects in post-Lisbon Europe”, European University Institute, Florence, 2011, p. 19.

In Asia, Amartya Sen and Mahbub Ul-Haq were the main architects of the idea of *human development* and the ones in charge of introducing it into UN scenario through UNDPs annual reports.

Meanwhile in Africa efforts were focused on trying to lay out a normative system of a broad protection of human rights. That is why, among other examples, African countries have always been the first ones to support UN documents that recognized the right to development.

Regionally speaking, the system of recognition and protection of human rights is designed in the African Charter on Human and Peoples' Rights, also known as Banjul Charter, adopted on July 27th, 1981, during the XVIII Assembly of Heads of State and Government of the Organization of African Unity held in Nairobi, Kenya, and that came into force in October, 1986.

In this Charter signatory States declare they are “Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”⁹⁴ and consequently establish that “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”⁹⁵, that “States shall have the duty, individually or collectively, to ensure the exercise of the right to development”⁹⁶, and that “All peoples shall have the right to a general satisfactory environment favourable to their development”⁹⁷.

c) The Arab system.

The first Arab system of human rights was included in the Arab Charter on Human Rights, 1994, but never came into force because none of the signatory States ever ratified it. Ten years later a revised version of that document was adopted by the League of Arab States in Tunis and came into force in 2008, when it was ratified by seven countries⁹⁸.

⁹⁴ Preamble, 7th par.

⁹⁵ Art. 22, par. 1.

⁹⁶ Art. 22, par. 2.

⁹⁷ Art. 24.

⁹⁸ Today the ratifying States are: Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen.

It is a scheme of recognition and protection of basic human rights⁹⁹ that has been objected since it includes regulations that do not meet international standards such as death penalty on minors under certain circumstances¹⁰⁰ and the equating of racism with Zionism¹⁰¹, among other items¹⁰².

Besides, it does not recognize third-generation rights; working and social security rights are quite limited, and the right to development is not even mentioned. That is why it is considered quite a precarious system that still has a long way to go in different aspects.

d) Asia and Oceania.

Although from Bandung onwards several Asian countries participated actively in different movements within UN that tried to make the economic concept of development change into that of *human development*, Asia does not have a binding charter on human rights.

Nevertheless, some efforts must be mentioned, above all those headed by various NGOs that have reached at least partial progresses in that field. Bangkok Declaration on Human Rights, for instance, was adopted in 1993 by 110 NGOs from the Pacific region. In that document it was affirmed that cultural practices that abolish or despise universally recognized human rights shall not be tolerated.

Furthermore, the so-called Asian Charter on Human Rights was the result of an initiative carried out in Kwangju, South Korea, by more than 200 ONGs that, on occasion of the 50th anniversary of the Universal Declaration on Human Rights, exchanged ideas and designed a project in charge of Yash Ghai, under the direction of a committee of intellectuals of Asian people and representatives from the Asian Human Rights Commission.

Besides, since 2001 the Association of Asian Parliamentary for Peace is preparing a Charter on Human Rights for Asian Nations¹⁰³.

⁹⁹ Life, liberty, security, due process, privacy, property, work and social security, education, among others (Arts.5 and ff.).

¹⁰⁰ Arts. 6 & 7.

¹⁰¹ Recital. par. 5.

¹⁰² Few months after it came into force, the then UN High Commissioner for Human Rights, Louise Arbour, issued a statement saying that her office “*does not endorse these inconsistencies*” and stressed “*Moreover, to the extent that it equates Zionism with racism, we reiterate that the Arab Charter is not in conformity with General Assembly Resolution 46/86, which rejects that Zionism is a form of racism and racial discrimination*” (<https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official>).

¹⁰³ Ávila Hernández, F. “Derechos Humanos y Cultura en el Siglo XXI: las áreas declaratorias de derechos”, in “Cadernos PROLAM/USP (ano 4-vol. 2)”, University of Sao Paulo, 2005, pp. 77/101.

Locally speaking there are human rights commissions in Australia, New Zealand, Fiji, Indonesia, Philippines, India, Nepal, Malaysia, Sri Lanka, Mongolia, Thailand and South Korea, but they have not yet been able to agree on an international document that recognizes and protects human rights. That is why that part of the Globe does not have regional provisions in force regarding the right to development.

e) America.

America is a continent that has always had two very different groups of countries: the *developed* ones and the *developing* States. This peculiarity, that can also be found in Europe, has led to a quite different reaction towards documents that recognize economic, social and cultural rights, broadly speaking, and the right to development in particular.

However most of the countries in that region have signed and ratified an important number of international binding texts that follow the trend led by UN. Among those, there are two main regional documents that seek to structure the recognition and protection of human rights.

The first one is the American Declaration of the Rights and Duties of Man that was adopted at the IX International Conference of American States in Bogota, Colombia, in 1948¹⁰⁴.

The Conference met on March 30th, 1948. Ten years earlier, the VIII Conference held in Lima had chosen the city of Bogota as the future venue, and had set 1943 as the year in which it should be held. A series of circumstances but, above all, World War II, prevented its realization. Nevertheless during that period of time a series of meetings took place: one in Panama in 1939, a second one in La Habana in 1940 and the third one in Rio de Janeiro in 1942.

A new date was scheduled for 1946 and was postponed once again until 1948, date in which it was finally inaugurated in spite of a local intense political and social upheaval caused by the assassination of the leader of the Liberal Party, Jorge Eliécer Gaitán in Bogotá.

Within that context the American Declaration began to be prepared. This Declaration has a high historical value because it was the first one of its type to address the issue of human

¹⁰⁴ Representatives from Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, the United States, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela were present at the Conference. Byron Price attended on behalf of UN, representing its Secretary-General.

rights, and as from the beginning it refers to *progress* in these words: “The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness”¹⁰⁵.

And further on it establishes, among other fundamental rights, that every person “has the right to an education, which should be based on the principles of liberty, morality and human solidarity. Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education”¹⁰⁶; as well as “the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries...”¹⁰⁷.

The other core document that has to be mentioned within the American regional system is the American Convention on Human Rights, known as Pact of San Jose, that was adopted in that city in Costa Rica on November 22nd, 1969, as a corollary of the Inter-American Specialized Conference on Human Rights, and came into force on July 18th, 1978, when it received the required number of ratifications¹⁰⁸.

This Pact has an important provision in its Article 26 titled Progressive Development which establishes: “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

¹⁰⁵ Recital, par. 1.

¹⁰⁶ Art. XII

¹⁰⁷ Art. XIII

¹⁰⁸ The ratifying countries are Argentina, Barbados, Bolivia, Brasil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Both Trinidad & Tobago and Venezuela have abandoned the Convention in 1998 and 2012, respectively, and are thus outside its system.

forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”.

The referral to the Protocol of Buenos Aires is important because the original text of the Charter had not included regulations on these topics. Buergenthal, Norris and Shelton argue that that document had very few provisions concerning human rights and that all of them were drafted in general terms. The most relevant reference to these rights was in article 5, j) in which signatory countries reaffirmed and proclaimed as a principle of the Organization the fundamental rights of the individual without distinction as to race, nationality, creed or sex. However these authors point out that the Charter did not determine which were those *fundamental rights of the individual*, nor established a mechanism to promote or to protect them¹⁰⁹.

In the same sense, Gomez-Robledo Verduzco sustains that the OAS Charter was too laconic in its economic and social aspects, being that the reason why an updating had become necessary, updating that finally took place in 1967, at the Third Extraordinary Conference, where the Protocol of Buenos Aires was adopted. This Protocol came into force on February 27th, 1970, when it was ratified by 2/3 of the signatory States of the Charter of Bogota¹¹⁰.

Those amendments include the approach to various aspects of human rights related to progress and development, which are those referred to in Article 26 of the Pact of San Jose.

Among the most relevant provisions are the following:

a) The *Economic Standards* contained in Articles 29 to 42. They essentially establish that signatory States are committed to:

a.1) A united effort to ensure social justice in the hemisphere and dynamic and balanced economic development for their peoples, as conditions essential to peace and security¹¹¹.

a.2) Mobilize their own national human and material resources through suitable programs, as fundamental conditions for their economic and social progress¹¹².

¹⁰⁹ Buergenthal, T., Norris, R and Shelton, D. “La Protección de los Derechos Humanos en las Américas”, Instituto Interamericano de Derechos Humanos San José de Costa Rica, Civitas, Madrid, 1990.

¹¹⁰ Gomez-Robledo Verduzco, A. “La Carta de la OEA y los Protocolos de Buenos Aires, Cartagena de Indias, Washington y Managua”, in “Boletín Mexicano de Derecho Comparado”, N°84, Sept-Dec. 1995, Nueva Serie Año XXVIII, Instituto de Investigaciones Jurídicas de la UNAM, Mexico City, 1995, pp. 1157/1161.

¹¹¹ Art. 29

¹¹² Art. 30

a.3) To dedicate every effort to accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles in order to achieve certain basic goals, among them: substantial and self-sustained increase in the per capita national product; equitable distribution of national income; stability in the domestic price levels, compatible with sustained economic development and the attainment of social justice; fair wages, employment opportunities, and acceptable working conditions for all; and rapid eradication of illiteracy and expansion of educational opportunities for all¹¹³.

a.4) To cooperate with one another, in the broadest spirit of inter-American solidarity, as far as their resources may permit and their laws may provide¹¹⁴.

a.5) To make every effort to avoid policies, actions, or measures that have serious adverse effects on the economic or social development of another Member State¹¹⁵.

a.5) To join together in seeking a solution to urgent or critical problems that may arise whenever the economic development or stability of any Member State is seriously affected by conditions that cannot be remedied through the efforts of that State¹¹⁶.

a.6) To make individual and united efforts to bring about the following aims, recognizing the close interdependence between foreign trade and economic and social development: reduction or elimination of tariff and non-tariff barriers; maintenance of continuity in their economic and social development by means of improved conditions for trade, improved international financial cooperation, and diversification of exports and expansion of export opportunities¹¹⁷.

a.7) To promote improvement and coordination of transportation and communication in the developing countries and among the Member States in order to accelerate their economic development, regional integration, and the expansion and improvement of the conditions of their commerce¹¹⁸.

b) The *Social Standards*. They establish that Member States "...convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic

¹¹³ Art. 31

¹¹⁴ Art. 32

¹¹⁵ Art. 34

¹¹⁶ Art. 35

¹¹⁷ Art. 37

¹¹⁸ Art. 39

development and true peace...” agree to dedicate every effort to the application of the certain principles and mechanisms. Among them: the right of all human beings, without distinction as to race, sex, nationality, creed, or social condition, to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security; the incorporation and increasing participation of marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system; and the encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community¹¹⁹.

c) The *Educational, Scientific, and Cultural Standards* which determine, mainly, that Member States:

c.1) Will give primary importance within their development plans to the encouragement of education, science, and culture, oriented toward the over-all improvement of the individual, and as a foundation for democracy, social justice, and progress¹²⁰.

c.2) Will cooperate with one another to meet their educational needs, to promote scientific research, and to encourage technological progress; and consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples¹²¹.

c.3) Will exert the greatest efforts to ensure the effective exercise of the right to education¹²², the eradication of illiteracy¹²³, and the development of science and technology¹²⁴.

X. National regulations.

The characteristics of regional provisions have had relevant effects on national regulations. Different constitutions around the world have gradually incorporated in their texts the concept of human development, or similar ideas related to progress and development, broadly speaking.

The progress of these regulations is quite diverse because of the legal formula they use, on the one hand, and because most of them regulate the hierarchy of international documents

¹¹⁹ Art. 43, a) & f)

¹²⁰ Art. 45

¹²¹ Art. 46

¹²² Art. 47

¹²³ Art. 48

¹²⁴ Art. 49

differently, on the other. Those countries that recognize the supremacy of international law over national provisions are more inclined to reflect in their constitutions the international commitments undertaken regarding these items.

The aim of this paragraph, then, is to outline these constitutional regulations that refer to progress, development and/or human development.

a) Angola.

The Constitution of the Republic of Angola (2010) establishes the fundamental tasks of the Angolan State and determines as one of them the promotion of "...sustained improvements of Angolan human development indexes"¹²⁵.

b) Argentina.

The Constitution of that country was amended for the last time in 1994, precisely by the time when Amartya Sen and Mahbub Ul-Haq's ideas were being echoed within the UN-PNUD through the reception of the *human development theory* in its reports.

In fact, while discussing the text that should be adopted, different representatives expressly mentioned the need to include in the Constitution either the basic needs theory (mainly Rawl's ideas), or the capabilities approach, in order to have constitutional provisions that would reflect the international obligations that Argentina had undertaken when signing different UN and regional documents.

Thus, the Constitution of that country establishes that:

a) Congress shall have power to "provide whatever is conducive to human development, to economic progress with social justice, to the productivity of the National economy, to the generation of employment, to the professional development of workers, to the protection of the value of money, to research and scientific and technological development..."¹²⁶.

b) Congress shall have power to "recognize the ethnic and cultural pre-existence of indigenous Argentine peoples. To guarantee respect for their identity and their right to bilingual and intercultural education; to recognize the legal standing of their communities, and the possession and community property over lands they have traditionally occupied, and to regulate the transfer of other lands fit and sufficient for human development..."¹²⁷.

¹²⁵ Art. 21, o)

¹²⁶ Art. 75, subsect. 19

¹²⁷ Art. 75 subsect. 17

c) The Provinces and the City of Buenos Aires “may maintain social security agencies for public employees and professionals, and may promote economic progress, human development, the creation of employment, education, science, knowledge, and culture”¹²⁸.

d) All inhabitants “enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations, and have the duty to preserve the environment...”¹²⁹.

c) Bolivia.

The Political Constitution of the Plurinational State of Bolivia (2009) includes among the essential purposes and functions of the State the following: “To guarantee the welfare, development, security and protection, and equal dignity of individuals, nations, peoples, and communities, and to promote mutual respect and intra-cultural, inter-cultural and plural language dialogue”¹³⁰.

And it establishes as an exclusive jurisdiction of the autonomous departamental and municipal governments “To plan and promote human development”¹³¹.

d) Brazil.

Right from its Preamble the Constitution of the Federative Republic of Brazil¹³² expressly refers to development in the following words: “We, the representatives of the Brazilian People, convened the National Constituent Assembly, to institute a democratic state destined to ensure the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society...”.

Then, all along its articles it reaffirms the idea, particularly when regulating aspects related to education and culture. Article 205, for example, says: “Education, right of everyone and duty of the National Government and of the family, shall be promoted and encouraged with the cooperation of society, seeking the full development of the individual, his preparation for the exercise of citizenship and his qualification for work”. In the same vein, article 216-A establishes: “The National System of Culture, organized as a collaborative regime, in a decentralized and participative form, institutes a process of joint development and promotion

¹²⁸ Art. 125.

¹²⁹ Art. 41

¹³⁰ Art. 9, subsect 2

¹³¹ Art. 300, subsec. 2; Art. 302, subsec. 2.

¹³² Constitution of 1998, with subsequent amendments.

of public policies of culture. These democratic and permanent policies (...) have the objective of promoting human, social and economic development with full exercise of cultural rights”.

e) Colombia.

The Colombian Constitution has incorporated development through its subsequent amendments, usually when regulating economic or social items. But it has specifically included it in article 16, as follows: “All individuals are entitled to the unrestricted development of their identity without limitations other than those imposed by the rights of others and legal order”.

And it also establishes that “...family, society, and State have the obligation to assist and protect children in order to guarantee their harmonious and integral development and the full exercise of their rights”¹³³.

f) Chile.

The Political Constitution of the Republic of Chile (text of 1980, with several amendments) regulates constitutional rights and duties in its Chapter III, and within that framework, it stipulates in its article 19, paragraph 10: “Education is directed to the full development of the individual at the different stages of his life”.

g) Dominican Republic.

This Constitution establishes the orientation and foundation of the economic regime on these terms: “The economic regime is oriented towards the search for human development. It is based on economic growth, redistribution of wealth, social justice, equity, social and territorial cohesion and environmental sustainability in a framework of free competition, equality of opportunities, social responsibility, participation and solidarity”¹³⁴.

h) Ecuador.

This country has included the concept of development in various provisions. Some examples are:

Article 3 which, among the duties of the State mentions “Planning national development, eliminating poverty, and promoting sustainable development and the equitable redistribution of resources and wealth to enable access to the good way of living”, as well as “Promoting equitable and mutually supportive development throughout the territory by building up the process of autonomies and decentralization”.

¹³³ Art. 44.

¹³⁴ Art. 217

Article 27: “Education will focus on the human being and shall guarantee holistic human development, in the framework of respect for human rights, a sustainable environment, and democracy; education shall be participatory, compulsory, intercultural, democratic, inclusive and diverse, of high quality and humane; it shall promote gender equity, justice, solidarity and peace; it shall encourage critical faculties, art and sports, individual and community initiatives, and the development of competencies and capabilities to create and work.

Education is indispensable for knowledge, exercise of rights and building a sovereign country and it is a key strategy for national development”.

Articles 44, 69 and 381, as they stipulate that State, society and family must first and foremost promote full development of children and adolescents, and that the State must protect, promote and coordinate physical exercise, including sports, physical education and recreation, as an activity that contributes to health, the formation and integral development of persons.

Besides *human development* is incorporated in article 59, that recognizes the collective rights of the coastal back-country people (montubios) in order to guarantee “...their process of full, sustainable and durable human development...”, and in its Transitory Provisions that establish that the State “...shall guarantee the funding of the social services provided by the Solidarity Fund, especially those ensuring free maternity and child care services, as well as the resources earmarked by this institution for human development programs currently being implemented, until their completion”¹³⁵.

i) Iran.

The Constitution of the Islamic Republic of Iran contains the concept of human development in its extensive Preamble, as it prays: “...during the course of human development towards perfection, each individual will himself be involved in, and responsible for the growth, advancement, and leadership of society...”.

j) Morocco.

The Constitution of the Kingdom of Morocco determines that the State works “...for the realization of a lasting human development, likewise to permit the consolidation of social

¹³⁵ 30th Transitory Provision.

justice and the preservation of national natural resources and of the rights of future generations”¹³⁶.

Besides, it adds: “...regional and territorial organization is based on the principle of free administration, cooperation and solidarity. It assures the participation of the populations concerned in the management of their affairs and favours their contribution to a complete and lasting human development”¹³⁷.

Lastly, its article 142 stipulates the creation of a fund aimed at the promotion of social improvements that may absorb the deficits in matters of human development, infrastructure and equipment.

k) Nicaragua.

The Constitution of the Republic of Nicaragua includes human development in three provisions, as follows:

a) “The State recognizes the individual, the family, and the community as the origin and the end of its activity, and is organized to achieve the common good, assuming the task of promoting the human development of each and every Nicaraguan, inspired by Christian values, socialist ideals, practices based on solidarity, democracy and humanism, as universal and general values, as well as the values and ideals of Nicaraguan culture and identity”¹³⁸.

b) “Family is the fundamental nucleus of society and has the right to protection by the latter and the State. The individual, the family, and the community are the major elements of the human development plan of the Nation”¹³⁹.

c) “The principal function of the State in the economy is to achieve sustainable human development in the country; to improve the living conditions of the people and to realize a more just distribution of wealth in pursuit of a good life”¹⁴⁰.

l) Papua New Guinea.

The Constitution of the Independent State of Papua New Guinea asserts that the first goal for every person is “...to be dynamically involved in the process of freeing himself from every form of domination or oppression so that each man or woman will have the opportunity to

¹³⁶ Art. 35

¹³⁷ Art. 136

¹³⁸ Art.4

¹³⁹ Art. 70

¹⁴⁰ Art. 98

develop as a whole person in relationship with others...”, and it accordingly calls for everyone to be involved in the endeavours “...to achieve integral human development of the whole person for every person and to seek fulfilment through his or her contribution to the common good”¹⁴¹.

m) Paraguay.

The Constitution of the Republic of Paraguay mentions human development on occasion of regulating environmental items. Its article 7 states: “Preservation, conservation, re-composition and improvement of environment, as well as its conciliation with full human development, constitute priority objectives of social interest. These purposes shall orient the legislation and the pertinent governmental policy”.

Apart from that provision, as most constitutions do, it refers to development when regulating educational aspects. Article 73 establishes that the aim of complete and permanent education is, among others, the full development of human personality.

n) Peru.

In Peru the Political Constitution adopted in 1993 and subsequently amended, includes the concept of development in various articles. Among them, article 2 that recognizes the right of every person to “life, identity, moral, psychical and physical integrity, free development and well-being”¹⁴², and to “peace, tranquillity, enjoyment of leisure time and rest, as well as to a balanced and appropriate environment for the development of his life”¹⁴³.

Besides, it states that the aim of education “...is the full development of the human being”¹⁴⁴.

o) Suriname.

The people of the Republic of Suriname assure right from the Preamble of the Constitution “...the will to determine our economic, social and cultural development in full freedom...”. Consequently, it states that “The Suriname Nation shall determine in full freedom its economic social and cultural development”¹⁴⁵ and that the concern of the State is

¹⁴¹ Preamble, Par. 1

¹⁴² Subsect. 1.

¹⁴³ Subsect. 22.

¹⁴⁴ Art. 13

¹⁴⁵ Art. 1

aimed at the “The sharing of everyone in the economic, social and cultural development and progress”.

On the other hand, article 25 recognizes that “Labour is the most important means of human development and an important source of wealth”; and when regulating the economic system it stipulates: “In order to promote the socioeconomic development towards a socially just society, a development plan shall be determined by law, taking into consideration the national and socioeconomic goals of the State”¹⁴⁶.

p) Tajikistan.

According to article 1 of its Constitution, “Tajikistan is a social State the policy of which is aimed at providing conditions that ensure dignified life and free human development”.

q) Venezuela.

The Constitution of the Bolivarian Republic of Venezuela establishes among other essential purposes of the State: “the protection and development of the individual and respect for the dignity of the individual”¹⁴⁷. Thus, it stipulates that the “State shall protect families as a natural association in society, and as the fundamental space for the overall development of persons”¹⁴⁸.

Furthermore, article 112 states: “All persons may devote themselves freely to the economic activity of their choice, subject only to the limitations provided for in this Constitution and those established by law for reasons of human development, security, health, environmental protection or other reasons in the social interest”; and article 299 provides: “The economic regime of the Bolivarian Republic of Venezuela is based on the principles of social justice, democratization, efficiency, free competition, protection of the environment, productivity and solidarity, with a view to ensuring overall human development and a dignified and useful existence for the community”.

r) Other constitutional concepts around the world.

In addition to the texts that have just been reviewed other constitutions around the world introduce similar concepts.

¹⁴⁶ Art. 40

¹⁴⁷ Art. 3

¹⁴⁸ Art. 75

In Austria, for example, the Constitution mentions the optimal intellectual, mental and physical development of children and juveniles whilst regulating education¹⁴⁹; Belgium recognizes the right of every child to benefit from measures and facilities which promote his or her development¹⁵⁰; Bulgaria guarantees life, dignity and rights of the individual and undertakes the responsibility to create conditions conducive to the free development of the individual and of civil society¹⁵¹; in Canada its Constitution Act (1867, and subsequent amendments) establishes that Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to promoting equal opportunities for the well-being of Canadians and furthering economic development to reduce disparity in opportunities¹⁵²; Finish public authorities must support families and others responsible for providing for children so that they have the ability to ensure their wellbeing and personal development¹⁵³; Germany recognizes the right of every person to the free development of his or her personality as long as that does not violate other people's rights nor offends the constitutional order or moral law¹⁵⁴; article 3 of the Italian Constitution provides that "It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person"; the Constitution of Portugal includes these ideas in various provisions, among them, in those that recognize the right of every person to his or her development, the development of his or her personality, sustainable development, development of children and youngsters, etc.¹⁵⁵; Spain includes the free development of personality as one of the main foundations of political order and social peace, establishes the full development of human personality as an aim of education and recognizes the right to an environment suitable for development¹⁵⁶; Switzerland includes provisions referred to sustainable development, development of children and juveniles and economic development, as well¹⁵⁷.

¹⁴⁹ Art. 14, subsection. 5 A.

¹⁵⁰ Art. 22 *bis*

¹⁵¹ Art. 4, subsection. 2.

¹⁵² Part III, Art. 36, subsection. 1 a) and b)

¹⁵³ Chapter 2, Section 19.

¹⁵⁴ Art. 2, subsection. 1

¹⁵⁵ Arts. 3, 26 subsection. 1, 66, subsection. 2, 69 subsection. 1, etc.

¹⁵⁶ Arts. 10, subsection. 1, 27 subsection. 2 and 45 subsection. 1, among others

¹⁵⁷ Arts. 2 subsection. 2, 11 subsection. 1, 41 subsection. 1, 67 subsection. 1, 89 subsection. 3, 93 subsection. 2, 100 subsections. 1 and 2, etc.

All in all, in line with what happened in a global level due to UN's work, and in certain regional levels as well, locally speaking more than 170 Constitutions all around the world have included in their texts concepts linked to the ideas of prosperity, progress, development broadly speaking and human development, in particular.

PART C: Case Law

I. Introduction.

Once a concept is included in a regulatory body one of the most complex issues consists in putting it into practice, job that implies a previous step: its legal interpretation. That is because the study of the meaning and scope of a regulation supposes its interpretation, understood as the action aimed at recognizing or giving a legal significance to a certain text, in order to determine the legal conduct that is forbidden, mandatory or allowed.

And since regulatory bodies include clauses that differ in their structure and scope, that job is not an easy way to go.

Authors and judges are challenged by this task when trying to explain or apply these provisions, especially when they face regulations referred to economic, social and cultural rights, in general, and, particularly, to human development. However neither authors nor judges seem to have been able to agree on one unique criterion when analysing the implementation of social, economic and cultural provisions, even less, when studying the practical impact of human development clauses.

At this point a clarification must be made: given the scope of the present work, the analysis of the role that judges should play when interpreting constitutional clauses will be intentionally avoided. The evolution from the paradigm of the Constitutional State of Law to the Social Constitutional State of Law and the corresponding development of case law regarding the extent of judicial review (both constitutional and conventional) has produced – and is still producing– different theories that try to explain the role that judges are called to play in modern democracies¹⁵⁸.

¹⁵⁸In “Marbury v. Madison” (1803) MARSHALL had already argued: “It is emphatically the province and duty of the judicial department to say what the law is”. A century later, CHARLES EVANS HUGHES, said in a similar sense: “We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution” (Speech before the Chamber of Commerce, Elmira, New York (3 May 1907); published in *Addresses and Papers of Charles Evans Hughes*,

But even if that is a fascinating topic for investigation and debate, as it has been said, it would exceed the aim of this study. That is the reason why the starting point for the present chapter is the discretionary assertion that for a specific case, it is the judge the one who determines the meaning and legal scope of a constitutional clause; thus the relevance of reviewing case law.

In the following paragraphs, then, this work will focus on the little case law that has somehow dealt with development clauses.

II. National case law.

Although the concepts of *development* and *human development* are included in various constitutional clauses, judges have not yet managed to build a case law line on the topic.

In France, for example, the Conseil Constitutionnel has repeatedly quoted the Preamble of the 1946 Constitution which established that “The Nation shall ensure to the individual and to the family the conditions necessary to their development”, but has not gone much further in the interpretation of that development clause¹⁵⁹.

In Italy, its Corte Costituzionale has used the word *development* from a strictly biological aspect, mainly when referring to reproductive rights¹⁶⁰.

The UK Supreme Court, in turn, has used the concept of *development* in different ways, for example when referring to children’s *emotional development*¹⁶¹; or to *infrastructure developments*¹⁶².

Governor of New York, 1906–1908 (1908), p. 139). However, JEFFERSON himself criticized this point of view and strongly objected the scope of judicial attributions fearing that their expansion would lead to judicial despotism. He repeatedly claimed “The Constitution (...) meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch”; or “To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps. Their maxim is *boni judicis est ampliare jurisdictionem*, and their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign” (IRWIN, FRANK -ed.-, *Letters of Thomas Jefferson*). More recent arguments against judicial review can be read in BELLAMY, *Political constitutionalism. A republican defense of the constitutionality of democracy*, among many others.

¹⁵⁹ For example: Décision n° 2018-768 QPC (March 21st, 2019); Décision n° 2015-517 QPC (January 22nd, 2016); Décision n° 2011-169 QPC (September 30th, 2011), among others.

¹⁶⁰ Sent. N° 84/2016 (ECLI:IT:COST:2016:84), among others.

¹⁶¹ In the matter of B (a child) [2013] UKSC 33, June 12th 2013

But in “R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills (Respondent)”¹⁶³ the Court tried to establish how *developmental needs* should be defined and covered. The case dealt with the distribution of European Structural Funds among the regions of the United Kingdom, and it arose out of the complaint of a number of local authorities in Merseyside and South Yorkshire about the way in which it was proposed to distribute funds allocated to the United Kingdom for the years 2014 to 2020. The appellants said that they should receive more and other regions correspondingly less¹⁶⁴.

The question was how to calculate the allocation of the funds within a Member State. According to the Court “...under the 2013 Regulation the calculation of national allocations by the Commission depended on a precise formula based primarily on regional GDP *per capita*, whereas the allocation of the funds within a Member State are based on criteria that are qualitative and altogether wider. Developmental needs in the respects covered by the ‘thematic objectives’ cannot be measured simply by reference to general measures of poverty such as GDP *per capita*. The Secretary of State cannot therefore have been obliged to replicate the methodology of the Commission or to employ some other GDP-based formula in his decision about how to allocate the funds among the regions of the United Kingdom, provided that he respected the thematic objectives and that his proposals were agreed by the Commission in the Partnership Agreement”¹⁶⁵(...) “There is no provision which expressly limits the freedom of a member State when deciding how to distribute its allocated funds between regions (...) it appears clear that a member State is not required to base the distributions of its allocated funds between regions solely by reference to their relative stages of economic development, let alone to their GDP *per capita*. Further, the ‘thematic objectives’ referred to in article 9 of the 2013 Regulation have to be taken into account”¹⁶⁶.

In this opportunity the Court seems to have preferred a broad definition of *developmental needs*, one which goes beyond GDP *per capita* general measures.

¹⁶² Aberdeen City and Shire Strategic Development Planning Authority (Appellant) v Elsick Development Company Limited (Respondent) (Scotland) [2017] UKSC 66, October 25th2017

¹⁶³ February 25th2015 (Hilary Term [2015] UKSC 6)

¹⁶⁴ Pt. 1

¹⁶⁵ Pt. 36

¹⁶⁶ Pt. 75

In South America, Argentina's Supreme Court has shyly echoed the introduction of the *human development clause* in its 1994 Constitutional Reform, in article 75, subsection 19. In "Aquino"¹⁶⁷ the Court recalled the origins of social justice and affirmed "...the so-called new progress clause, introduced in the national Constitution in 1994 is a clear proof of the renewed impulse that the delegates to the constitutional reform convention gave towards social justice, given the text of article 75, subsection 19". In a similar way in "Torrillo"¹⁶⁸, when referring to labour rights, it stated: "what counts is human development and economic progress with social justice". Later on, in "Badaro"¹⁶⁹ the Supreme Court stressed that article 75, subsection 19 *imposes* Congress to provide whatever is conducive to human development and to economic progress with social justice; hence it stressed that the Legislative branch must legislate and promote positive incentive measures that shall ensure the full enjoyment of human rights.

III. Regional Courts' case law.

As it happens with national case law, regional courts have not yet elaborated sound case law on human development regulations, in spite of the many international documents that have incorporated the concept.

a) Inter-American Court of Human Rights.

Although this Court has not analysed the concept of human development, it has nevertheless come close to the topic when referring to aspects somehow related to it.

In "Instituto de Reeducción del Menor vs. Paraguay" the Court studied the violation of children's rights in detention cases. Within that context it affirmed that articles 6 and 27 of the Convention on the Rights of the Child include in the right to life the obligation of the State to ensure to the maximum extent possible the survival and development of the child. And it added that the Committee on the Rights of the Child has interpreted the word *development* in a broad, holistic sense, involving physical, mental, spiritual, moral, psychological and social aspects. So a State has, regarding children deprived of liberty and thus, under its custody, the

¹⁶⁷ "Aquino, Isacio c/ Cargo Servicios Industriales S.A. s/ accidentes ley 9688", CSJN Sept. 21st., 2004 (Fallos de la Corte Suprema de Justicia de la Nación 327:3753).

¹⁶⁸ "Torrillo, Atilio Amadeo y otro c/ Gulf Oil Argentina S.A. y otro s/daños y perjuicios", CSJN, March 31st., 2009 (Fallos de la Corte Suprema de Justicia de la Nación 332:709).

¹⁶⁹ "Badaro, Adolfo Valentin c/ ANSeS s/reajustes varios", CSJN, August 8th., 2006 (Fallos de la Corte Suprema de Justicia de la Nación 329:3089).

obligation to provide health assistance and education to them, to be certain that the detention will not destroy their life projects¹⁷⁰.

The Court also approached children's right to development, especially in what has to do with the right to education and the protection of handicapped children, in "Furlon y familiares vs. Argentina"¹⁷¹; it came close to the subject, as well, when deciding on the boundaries of economic progress as a consequence of the right to sustainable development of indigenous communities¹⁷²; and on the right to work as a means for physical and spiritual development of human beings¹⁷³.

On August 19th, 2014, the Court ruled on children's rights once again, this time by a Consultative Opinion regarding children's rights in a migration context and/or in need of international protection. In that opportunity it stated that when adopting migration policies for people under 18 years old States shall prioritize a human rights' approach from a perspective that takes into account children's rights in a transversal way and, especially, their protection and full development which must prevail over any consideration of nationality or migratory status, so as to ensure the full realization of their rights¹⁷⁴.

b) European Court of Human Rights.

This Court has not elaborated the idea of human development until now.

One case in which there was a slight approach to the subject was "Scea Ferme de Fresnoy v. France" where the Court analysed the competences of the State to protect historic monuments and, quoting the Convention on the Value of Cultural Heritage for Society adopted on 27 October 2005, held that the conservation of cultural heritage and its sustainable use have human development as their goal¹⁷⁵.

In some other cases the Court used the expression *human development* but only from a strictly biological point of view, when describing the process of formation of human life¹⁷⁶.

c) African Court on Human and Peoples' Rights.

Until 2017 the African Court had not elaborated on the concept of human development.

¹⁷⁰ IACHR, decision of September 9th, 2004, serie C, n° 112, par. 161.

¹⁷¹ IACHR, decision of August 31st, 2012, serie C, n° 246.

¹⁷² IACHR, 06/27/2012, "Pueblo Indígena Kichwa de Sarayaku vs. Ecuador", serie C, n° 245.

¹⁷³ IACHR, 11/04/2006, "Trabajadores Cesados del Congreso vs. Perú", serie C, n° 158.

¹⁷⁴ IACHR, OC-21/14, par. 68.

¹⁷⁵ ECHR, 12/01/2005, n° 61093/00.

¹⁷⁶ ECHR, 07/08/2004, "Vo v. France", n° 53924; ECHR, "Parrillo v. Italy", 08/27/2015.

Nevertheless, some resolutions adopted in that continent by the African Commission on Human and Peoples' Rights under article 22 of the African Charter, which included the right to development, are interesting.

In 1994 the Commission, concerned about the situation of human rights in Africa due to the persistent wars and the consequences they had on the African population, issued its res. 14, in which it affirmed that the continuous belligerent situation prevented the fulfilment of human development¹⁷⁷.

Likewise, in the year 2000 the Commission appealed to the Somali members of the civil society, the people of Somalia, traditional and political leaders in Somalia to adhere to the peaceful settlement of their differences and to give priority to the national interest of maintaining the unity and integrity of Somalia, convinced that paying attention to the right to development, civil and political rights and the right to national and international peace and security, necessitated the existence of a democratically elected government by all people in that country¹⁷⁸.

Later on, in 2011, the Commission noted with concern that there were numerous World Heritage sites in Africa that had been inscribed without the free, prior and informed consent of the indigenous peoples in whose territories they were located and whose management frameworks were not consistent with the principles of the UN Declaration on the Rights of Indigenous Peoples. It showed particular deep concern regarding the World Heritage Committee at its 35th session, when, on the recommendation of International Union for the Conservation of Nature (IUCN), it inscribed Lake Bogoria National Reserve on the World Heritage List, without obtaining the free, prior and informed consent of the Endorois through their own representative institutions, and despite the fact that the Endorois Welfare Council had urged the Committee to defer the nomination because of the lack of meaningful involvement and consultation with the Endorois. Thus, the Commission emphasized that the inscription of Lake Bogoria on the World Heritage List without involving the Endorois in the decision-making process and without obtaining their free, prior and informed consent

¹⁷⁷ ACHPR, res. 14/94 on the situation of human rights in Africa.

¹⁷⁸ ACHPR, res. 46/00 on the peace and national reconciliation process in Somalia.

contravened the African Commission's Endorois Decision and constituted a violation of the Endorois' right to development under Article 22 of the African Charter¹⁷⁹.

In 2017 the African Court elaborated a landmark judgement on the expulsion of the Ogiek people, a Kenyan hunter-gatherer community, from their ancestral lands in the Mau forest.

In the case, the Applicant contended that the Respondent has violated the Ogieks' right to development by evicting them from their ancestral land in the Mau Forest and by failing to consult with and/or seek the consent of the Ogiek Community in relation to the development of their shared cultural, economic and social life within the Mau Forest. The Applicant stated that the Respondent failed to recognise the Ogieks' right to development and as indigenous people, with the right to determining development priorities and strategies and exercising their right to be actively involved in developing economic and social programmes affecting them and, as far as possible, to administering such programmes through their own institutions. They contended that failure on the part of the Respondent to give effect to these facets of the right to development, constituted a violation of Article 22 of the Charter¹⁸⁰.

The Respondent argued that it had not violated the right to development of the Ogieks. It argued that the Applicant had to show specific instances where development had taken place without the involvement of members of the Ogiek Community, or where development had not taken place at all, or where members of the Ogiek Community had been discriminated against in enjoying the fruits of development¹⁸¹.

The Court quoted article 22 of the African Charter and reiterated that the term "peoples" in the Charter comprises all populations as a constitutive element of a State. These populations, it emphasized, are entitled to social, economic and cultural development being part of the peoples of a State. Accordingly, "the Ogiek population, has the right under Article 22 of the Charter to enjoy their right to development"¹⁸².

The Court considered that Article 22 of the Charter should be read in light of Article 23 of the UNDRIP which provides as follows: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular,

¹⁷⁹ ACHPR, res. 197/11 on the protection of indigenous peoples' rights in the context of the World Heritage Convention and the designation of lake Bogoria as a world heritage site.

¹⁸⁰ ACHPR, "African Commission on Human and Peoples' Rights v. Republic of Kenya", May 26th, 2017, pt. 202.

¹⁸¹ Pt. 205.

¹⁸² Pt. 208.

indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions"¹⁸³.

It recalled the Ogieks had been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted and that the evictions had adversely impacted on their economic, social and cultural development. They had also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them¹⁸⁴. Therefore, the Court held that the Respondent had violated Article 22 of the Charter¹⁸⁵.

¹⁸³ Pt. 209.

¹⁸⁴ Pt. 210.

¹⁸⁵ Pt. 211.

CLOSING WORDS

More than 30 years have gone by since UN adopted the Declaration on the Right to Development. Since then, considerable efforts have been made, nationally and internationally speaking, in order to fulfil the right to human development.

And although some numbers show that progress in that field has been achieved in certain areas, they also indicate that there is still an enormous job to be done.

As Fukuda-Parr, Lawson-Remer and Randolph state “Despite a general trend of gains in (some) index values, more than half of the global population continues to live in countries where rights fulfilment falls below 70 percent of what is feasible –a dismal performance in respecting, protecting, and fulfilling universal human rights guaranteed under international law (...) Sadly some countries (...) area actually performing worse today than they did thirty years ago” (FUKUDA-PARR, LAWSON-REMER & RANDOLPH, 2015, p. 103).

In the same sense, as it has been said, the Millennium Development Goals 2015 Report held that although some relevant advances had been achieved, “The world’s poor remain overwhelmingly concentrated in some parts of the world. In 2011, nearly 60 per cent of the world’s one billion extremely poor people lived in just five countries. Too many women continue to die during pregnancy or from childbirth-related complications. Progress tends to bypass women and those who are lowest on the economic ladder or are disadvantaged because of their age, disability or ethnicity. Disparities between rural and urban areas remain pronounced”, for that reason it also concluded that despite many successes, the poorest and most vulnerable people were being left behind, and that “looking ahead to the next fifteen years, there is no question that we can deliver on our shared responsibility to put an end to poverty, leave no one behind and create a world of dignity for all” (MDGs Report 2015, p.3).

Four years later, the 2019 Human Development Report, titled “Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century” held that demonstrations sweeping across the world signal that, despite unprecedented progress against poverty, hunger and disease, many societies are not working as they should. And it concluded that the connecting thread, is inequality.

“Just as the gap in basic living standards is narrowing for millions of people, the necessities to thrive have evolved. A new generation of inequalities is opening up, around education, and around technology and climate change -- two seismic shifts that, unchecked, could trigger a ‘new great divergence’ in society of the kind not seen since the Industrial Revolution. In countries with very high human development, for example, subscriptions to fixed broadband are growing 15 times faster and the proportion of adults with tertiary education is growing more than six times faster than in countries with low human development (...) Just as the gap in basic living standards is narrowing, with an unprecedented number of people in the world escaping poverty, hunger and disease, the abilities people will need to compete in the immediate future have evolved. A new gap has opened, such as in tertiary education and access to broadband—opportunities once considered luxuries that are now considered critical to compete and belong, particularly in a knowledge economy, where an increasing number of young people are educated, connected and stuck with no ladder of choices to move up. At the same time, climate change, gender inequality and violent conflict continue to drive and entrench basic and new inequalities alike. As the Human Development Report sets out, failure to address these systemic challenges will further entrench inequalities and consolidate the power and political dominance of the few. What we are seeing today is the crest of a wave of inequality” (HDR 2019, p. iii).

So, despite the efforts that have been made, despite every idea that has helped shaping the concept of human development as a fundamental right, inequalities still jeopardise its fulfilment.

We are already deep in the XXI century.

What happens next comes down to choice. And making the right choice will determine the future of millions of people who cannot yet understand what we talk about when we talk about human development, because they do not even meet their basic needs.

So making that choice starts with a commitment to tackling the complexity of human development and fulfilling people’s fundamental rights everywhere. No matter how hard it may seem. No matter how tough the job might be.

Nobody ever said fulfilling human development was an easy path to go.

After all, it is –as it has always been– a complicated journey down a long and winding road.

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