

TABLE OF CONTENTS

Abbreviations	xxi
List of authors	xiii
Acknowledgements	xxv

Forewords: <i>Ranganath Misra and Madhukar Hiralal Kania</i>	1
--	---

Significance of the right to development: an introductory view

Subrata Roy Chowdhury and Paul J.I.M. de Waart

1 Development dimension of human rights	7
1.1 Inherent human dignity	8
1.2 Legal force of the right to development	10
2 Claimants	11
2.1 Individuals	12
2.2 States	13
2.3 Peoples	13
3 Duty-bearers	15
3.1 States and international organizations	16
3.2 Non-state actors	16
3.3 International legal community	17
4 Implementing the right to development	18
4.1 Seoul Declaration	19
4.2 Calcutta seminar	20
5 Concluding remarks	21

PART I: THE RIGHT TO DEVELOPMENT: IDEAS AND IDEOLOGY

1.1 Implementing the right to development: programme of action

Oscar Schachter

1 Challenge to the legal mind	27
2 Programme of action	28
3 Conclusion	30

1.2 Right to development: improving the quality of life	
<i>Prabodh Dinkarrao Desai</i>	
1 Elimination of undue principles	31
2 Legal significance for human rights	32
1.3 Development ideology in international law	
<i>Maria Magdalena Kenig-Witkowska</i>	
1 Introduction	35
2 The category of development in international law	36
3 Development ideology and transformations of international law	38
4 Conclusions	41
1.4 The Third World claim to economic self-determination: economic rights of peoples: theoretical aspects	
<i>Anthony Carty</i>	
1 The attitude of Western lawyers to 'group' economic rights	43
1.1 Legal character (Cassese, Crawford)	43
1.2 Liberal legal conceptions (Donnelly)	44
1.3 Liberal economic theory (Burnell)	47
2 Towards economic support for group/peoples' economic rights	49
2.1 Historical assessment	49
2.2 Hypocritical internationalism	50
2.3 Bureaucratic oppression	51
2.4 State-civil society dichotomy	52
2.5 Economic democracy	53
3 Legal theory and economic rights for peoples	54
3.1 Community structured development	54
3.2 Non-state group activity	56
3.3 Human needs-oriented rule of law	59
3.4 Moving away from economic sovereignty	60
1.5 The domestic policy function of a right of peoples to development: popular participation a new hope for development and a challenge for the discipline	
<i>Konrad Ginther</i>	
1 Introduction	61
2 The conceptualization of a people's right to development: popular participation and decentralization	63

2.1	The macro- and the micro-level	63
2.1.1	Origin and macro-level	63
2.1.2	The micro-level/domestic policy function: popular participation between the 'Scylla and Charybdis' of state control and futility	65
2.2	Decentralizing state structures for better 'governance'	66
2.3	Popular participation	67
3	The proclamation of a peoples' right to development, 'mediating structures' and the issue of constitutional orders of developing countries	68
3.1	The proclamation of the right to development	68
3.2	'Mediating structures' and the development of constitutional orders in developing countries	69
3.3	The nature of the developing state: parallelism of state and people, with special reference to the African developing state	70
4	Recent regimes of popular participation: mere rhetoric or a genuine shift in theory and strategy?	73
4.1	The Global Coalition for Africa (GCA) July 1990: a new international regime for monitoring popular participation	73
4.2	The Arusha Conference: the call for an all African regime of popular participation and the practical silence on the African Charter of Human and Peoples' Rights	75
4.2.1	Praise and criticism of the Charter of Arusha	76
4.3	ECs and the OECDs emphasis on decentralization and popular participation	77
5	Conclusions: popular participation a challenge to the discipline	80

1.6 Human rights approach to the right to development: merits and shortcomings

Philip Kunig/German ILA Branch

1	Preliminary remarks	83
2	Conceptual clarity	83
3	Human rights protection clauses	84
4	Right to development as a right of peoples	84

PART II: DEVELOPMENT AS A PRINCIPLE OF
INTERNATIONAL AND HUMAN RIGHTS LAW

2.1 Principles and instruments for implementing the right to development within the European Community and in the Lomé IV states	
<i>Pieter VerLoren van Themaat and Nico Schrijver</i>	
1 Introductory remarks	89
2 Principles and legal instruments of the right to development within the European Community	91
2.1 The general basic principles and instruments of substantive law in the EEC treaty	92
2.2 The implementation of the right to development on the basis of the new title on economic and social cohesion (Articles 130a-130e)	94
2.3 The interrelationship between substantive law instruments and the institutional framework for the implementation of the right to development	96
3 Principles and legal instruments of the right to development in the Lomé IV Convention	97
3.1 Background	97
3.2 Economic development in the ACP states	99
3.3 Objectives and principles underlying the EEC-ACP co-operation	100
3.4 General basic principles underlying the Lomé IV Convention	101
3.5 Institutional structure	102
3.6 The areas and instruments of ACP-EEC Co-operation	102
3.7 Major innovative elements and appraisal of Lomé IV	105
4 Some comparative and more general conclusions	108
2.2 Recent developments in international development law	
<i>Paul Peters</i>	
1 Introductory remarks	113
2 Investment	114
2.1 Investment treaties	115
2.2 The Calvo doctrine, CERDS and the ILA's Seoul Declaration	116
2.3 BITs v CERDS	117
2.4 Dispute settlement	118
3 Analysis of treaty materials	119

3.1	State practice	120
3.2	Arbitration between host country and investor	121
3.3	Paradigms	122
3.4	ICSID and alternatives	125
3.5	Restricted scope of international arbitration	127
3.6	Exhaustion of local remedies	131
3.7	Eligible disputes	133
4	Conclusions	134

2.3 Right to development as a right to equal resources

Manimuthu Gandhi

1	NIEO and sharing of resources	139
2	Common heritage of mankind and resource access	140
2.1	State level	140
2.2	Reciprocating states regime	141
3	Distribution of resources at the individual level	141

2.4 Evolving right to development as a principle of human rights law

Rajendra Kumar Nayak

1	International law and development	145
2	Justice and development	147
3	Human rights law and right to development: the case of India	149
4	Enforceability of the right to development	151
5	Economic development and human rights	152
6	Concluding remarks	153

2.5 Peoples and individuals as subjects of the right to development

Tatjana Ansbach

1	Introductory remarks	155
2	Peoples as subjects of the right to development	156
2.1	Equality of opportunity for development	156
2.2	Responsibility for development	157
2.3	Lack of equilibrium	159
2.4	Restructuring international economic relations	160
3	Individuals as subjects of the right to development	161
3.1	Interrelationship of human rights	161
3.2	Popular participation	162
3.3	Right to development a human right?	163
3.3.1	Substantive equality	164
3.3.2	Minorities	165

2.6 The right to development and refugee protection

Shamsul Bari

1	Introduction	167
2	The need for a structural approach	168
3	Four phases of international response to the global refugee problem	170
3.1	Phase one: institutionalization of exile	171
3.2	Phase two: concept of temporary asylum	171
3.3	Phase three: linking refugee aid to development	173
3.4	Phase four: the structural approach phase	174
4	Conclusion	177

2.7 Uprooted people and development

Jagdish Narain Saxena

1	What is development?	179
2	Who is a refugee?	180
3	Relationship between refugees and development	181
3.1	Poverty of asylum state	181
3.1.1	Impact of refugees on country of asylum	182
3.1.2	Voluntary repatriation	183
3.2	Temporary refuge	184
4	Attempts of a development approach to uprooted people	185
5	Concluding remarks	188

2.8 Implementing the right to development: the perfection of democracy

Paul J.I.M. de Waart

1	Development, democracy and human rights	191
1.1	Development and democracy	192
1.2	Development and human rights	193
1.3	Democracy and human rights	196
1.4	Charter for Development	197
2	Self-determination in the context of the right to development	198
2.1	Prohibition of secession	199
2.2	Right to development of peoples	200
2.3	Right of states to development assistance	201
3	Implementing the right to development	202
3.1	Guidelines for priorities	203
3.2	Development of indicators of progress	205
3.3	Human rights reports	207

3.4 Human rights impact assessments	208
4 Concluding remarks	209

2.9 Indian constitutional jurisprudence on human rights: creating national conditions for development

Ajit Kumar Sengupta

1 Introductory remarks	213
2 Right to equality	214
2.1 Right to equality of all people	214
2.1.1 Sex	214
2.1.2 Equality before the law	215
2.1.3 Education	216
2.1.4 Remuneration	217
2.1.5 Exploitation	217
2.2 Right to equality of Indian people	218
2.2.1 Non-discrimination	218
2.2.2 Equality in matters of employment or appoint- ment.	220
2.2.3 Abolishment of untouchability.	220
3 Freedoms	221
3.1. Freedoms of all peoples	221
3.1.1 Freedom of religion	221
3.1.2 Culture and education	223
3.2 Freedoms granted to Indian people	224
3.2.1 Restrictions	224
3.2.2 Limitations	224
4 Protection of environment	225
5 Directive principles of state policy	225
5.1 Pollution	226
5.2 Free legal service	227
5.3 Welfare of workers	227
5.4 Protecting the poor	228
6 Concluding remarks	228

PART III: SHAPING DEVELOPMENT IN SPECIFIC
AREAS OF INTERNATIONAL LAW

3.1 Intergenerational equity: substratum of the right to sustainable development	
<i>Subrata Roy Chowdhury</i>	
1 Threshold problem	233
2 Sustainable development: definition and dimensions	234
2.1 Principles in a nutshell	234
2.2 Reduction of poverty a precondition for development	236
3 Meeting essential human needs	236
3.1 Sustainable population	237
3.2 Sustainable employment	237
3.3 Need for a nutritionally adequate diet	237
3.4 Need for energy	238
3.5 Other linked basic needs	239
4 Towards a legal framework for rights and obligations	240
4.1 Schachter's twin principles of equity	241
4.2 Minimal need-based standard	241
4.3 Entitlement/legitimate expectations standard	241
4.4 Sen's theory of entitlements and metarights	242
4.5 Environmental policies in Indian constitution	243
4.6 Weiss's perspective of intergenerational equity	244
4.7 Substantive equality: ILA's Seoul declaration	244
4.8 Obligation erga omnes	244
4.9 Theory of trust	245
4.10 Evaluation of some divergent reflections the identity of beneficiaries	246
4.11 Contingency/identity problem	247
4.12 Pragmatic approach	248
5 International environmental law: role of equity	248
5.1 Economic development	248
5.2 Global climate change and ozone depletion	249
5.3 Liability for environmental damage	251
6 The World Court and the development of environmental law	252
7 Conclusions	256

3.2 Sustainable development: a normative framework for evolving a more just and humane international economic order	
<i>Kamal Hossain</i>	
1 Development and environment	259
2 Quest for international economic order	260
3 New framework to tackle chronic problems	261
4 Guideposts for a sustainable future	264
3.3 Environment and food production	
<i>Sushil Kumar Mukherjee</i>	
1 Introductory remarks	267
2 Indian experience	267
2.1 Growth with social justice	268
2.2 National Commission on Agriculture	269
3 Development – environment nexus	270
3.4 Environmental implications of the principle of sustainable development and their realization in international law	
<i>Harald Hohmann</i>	
1 Eco-development: conservation as integral part of development	273
2 Planning and management of the environment	275
3 Co-operation, transfers and funding	277
4 Intergenerational equity and optimum sustainable yield	281
5 Realization of the precautionary principle	283
6 Concluding Remarks	284
3.5 International protection of intellectual property: a German proposal	
<i>Meinhard Hilf and Thomas Oppermann</i>	
1 Expanding protection of intellectual property	287
1.1 ILA Seoul Declaration	287
1.2 GATT Uruguay Round	288
2 Improvement of rules	289
2.1 Legal principles	289
2.2 Towards a minimum standard	290
3. German proposal	291
Annex	292

3.6 International protection of intellectual property in the context of the right to development: comment on the German proposal	
<i>Milan Bulajić</i>	
1 Introductory remarks	297
2 German proposal	298
3 Deadlock in the review of the Paris Convention for the Protection of Industrial Property in the interest of developing countries	299
4 Negotiations on a draft International Code of Conduct on the Transfer of Technology	301
5 Negotiations on trade-related aspects of intellectual property rights	304
6 China's burgeoning patent business: a promising exception	307
7 Concluding remarks	309
3.7 Transfer of technology: a matter of principles	
<i>Umesh Chandra Banerjee</i>	
1 A more cordial North-South dialogue	311
1.1 Restructuring the legal environment	311
1.2 Access to information	312
1.3 Indigenous technological capacity	313
3.8 Hard patent regime completely unjustifiable	
<i>Bhupinder Singh Chimni</i>	
1 Introduction	315
2 Justification efforts	315
2.1 Desert based justifications	315
2.2 Utilitarian justification	318
2.2.1 Paradox of patents	320
2.2.2 Recognition of multiple ends	322
2.3 Disclosure price	323
2.3.1 Imitation no easy task	324
2.3.2 The 'cons' of a hard patent regime	325
3 Uruguay Round: priority of capital over rights	326
3.1 Patentable subject matter	327
3.2 Product and process patents	328
3.3 Duration of patents	329
3.4 Compulsory licences	330
4 Concluding remarks	333

3.9 International duty of care in the field of technology

Rangachari Muralidharan

1	International minimum standards	335
1.1	Transfer of technology	335
1.2	Reasons for international transfer of technology	336
2	International duty of care in transfer of technology transactions	338
2.1	Treaty law	338
2.2	Customary international law	340
2.3	Principles of law recognized by civilized nations	340
2.4	Judicial decisions	341
3	Concluding remarks	342

3.10 Monetary law developments in the 1990s

David Flint

1	Introduction	343
2	The economic context	343
3	Law and policy context	344
4	Convergence in international financial law	347
5	Capital adequacy	348
6	The implications for developing countries	350

3.11 The financial facilities of the IMF: development dimensions

Alangar Jayagovind

1	Introduction	353
2	Basic postulates of the Fund Agreement	354
3	Development dimensions	355
3.1	Extended Fund Facility	357
3.2	Compensatory Financing Facility	358
3.3	Buffer Stock Financing Facility	358
3.4	Trust Fund	359
4	Quotas in the IMF	359
5	Conclusions	360

3.12 The IMF in the 1990s: structural adjustment through co-operation

Erik Denters

1 The international plane, failure of policies	363
2 The national plane, structural adjustment	365
3 Microeconomic adjustment in Fund supported programs	367
4 Three arguments for systematically including microeconomic variables as performance criteria	370
5 Fund-Bank competition: avoiding differing policy advice	373
6 Co-operation with UN-agencies	375
7 The Fund's new role	377

3.13 Human rights, prohibition of political activities and the lending-policies of Worldbank and International Monetary Fund

Marc Cogen

1 Introduction	379
2 The Articles of Agreement of Fund and Bank	380
3 The doctrine of political non-intervention of the Bank	381
3.1 Comments of writers	381
3.2 Evolving opinions of World Bank officials	382
3.3 Summary 1	383
4 The doctrine of political non-intervention of the Fund	384
4.1 The first controversy on the IMF's authority	384
4.2 Joseph Gold's writings on the prohibition of political activities.	385
4.3 Implicit extension of the doctrine's application	386
4.4 Summary 2	386
5 The need for a doctrine of human rights in IMF and World Bank	387
5.1 Arguments for applying generally accepted human rights standards in IMF and World Bank lending policies	387
5.2 Human rights criteria as part of lending criteria	391
5.2.1 Economic, social and cultural rights	391
5.2.2 Summary 3	394
5.2.3 Civil and political rights	394
6 Conclusion and recommendation	395

3.14 Internationalizing US Chapter 9 Insolvency: economic problems in need of legal conceptualization <i>Kunibert Raffer</i>	
1 Introductory remarks	397
2 Domestic Chapter 9 procedures in the US	398
3 The framework of an international Chapter 9	401
3.1 International proceedings	402
3.2 List of tasks	403
4 The need for an international Chapter 9	408
Epilogue: elements for an ILA Declaration on the Right to Development (Calcutta Declaration) <i>Subrata Roy Chowdhury and Paul J.I.M. de Waart</i>	411