

# The Emerging Right to Development and its Relationship to First Generation Rights: An Analysis of the “Asian Values” View

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## 1 Introduction

The third generation right to development is among the emerging human rights to have propelled the proliferation of today's international human rights repertoire.<sup>1</sup> At the same time, this new member of the human rights family has sparked a debate between "Asian values" proponents, who claim precedence for the right to development over first generation civil and political rights, and Western liberalists, who aver the primacy of first generation rights over other human rights. The premise of the "Asian Values" view is that the collective *values* of a nation, people or other group are factors worthy of recognition in determining the content and scope of human rights norms. In that regard, we can see a certain parallel with the current debate in the Scandinavian countries and elsewhere regarding the proper place of a given group's religious values and sensibilities in defining the content and reciprocal scope of freedom of religion and freedom of expression.

First generation rights have long occupied pride of place among Western liberal rights thinkers, who have viewed these rights as inherent, inalienable and universal in scope. Since the end of the Cold War, however, voices have been raised in mainly non-Western, particularly East Asian, States that the claimed primacy of first generation human rights is little more than an attempt to accord priority to a (parochially) Western conception of human rights, based on the uniquely Western *liberal* tradition, with its focus on individual-centred rights that precede the community. Since Asian culture values the well-being of the community and does not view the freedom of the individual as an end in itself, it follows that the third generation human right to development may, in the case of conflict with first generation rights, be given precedence.

We thus witness today a challenge to a field of international law which could otherwise have aspired to playing an important role in providing universally recognized norms for an increasingly globalized world. Instead, the individual's right to protection against the excesses of governmental power is now confronted by the claim that the values, goals, interests and indeed *rights* of the community may take precedence over the civil and political rights of the individual. Since each community comprises a myriad of cultural factors unique to it, the rights appertaining to its individual members will necessarily differ between different communities. This approach, best known as "cultural relativism", admits of no *universally* valid individual rights; instead, the scope to be accorded the rights of the individual is relative to and dependent upon each nation's history, religion, political philosophy, stage of development and other aspects of its local "culture".<sup>2</sup>

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1 Portions of this article have previously appeared in *Juridisk Tidskrift*, No. 4 2004/05 pp. 793-810.

2 Cf. Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 *Virginia Journal of International Law* 869, 870 (1984-1985) and *Vienna Declaration and Programme of Action*, Art. 5, *World Conference on Human Rights*, Vienna, 14-25 June 1993. U.N. Doc. A/CONF.157/23 (12 July 1993).

The “Asian values” component of the cultural relativism movement claims that *a State’s present level of development is a legitimate determinant of the scope of its obligation to implement civil and political rights*. That claim is premised on the assumption that implementation of various first generation rights, particularly those rights associated with liberal democracy, could impede the achievement of developmental goals. Allowing the press to criticise public works projects from an environmental protection standpoint, permitting factory workers to demonstrate against policies perceived to result in mass unemployment or permitting competitive elections that could result in a viable political opposition could hamper the goal of providing food, clothing, shelter and an improved infrastructure to a developing country’s population. That argument, perhaps best known under the rubric of “development first”, was launched by the People’s Republic of China in the previous decade and has since won support among various other East Asian governments. In Section 2 of this article, the “development first” argument will be addressed from the point of view of a) its substance and stated rationale; and b) how factors of globalization, such as increased multilateralism, free trade and information technology, can influence the way States frame legal arguments to legitimate human rights practices at home.

The “development first” argument that developmental goals may be accorded priority over civil and political rights is examined in Section 3 from the viewpoint of the third generation right to development. There we inquire into the proper relationship between the right to development and the right of citizens to participate in the decisional processes affecting their development. We argue that such participation, to be meaningful, reasonably presupposes respect for a host of first generation rights.

## 2 The “Development First” Argument

In the present section, we wish to reveal the nature of and apparent rationale for the “development first” argument as presented by some of the “Asian values” movement’s leading advocates. In doing so, we will take as our point of departure that in the field of human rights, as in other evolving fields of international law, the arguments presented by various actors as to what the law is or ought to be reflect prevailing tensions and aspirations in the inter-State system. Claims of legitimacy regarding human rights practices pursued at home will not always be based on a stringent analysis of the formal sources of international law and, after all, those sources will not always suffice to provide authoritative results. The gaps and ambiguities in the formal sources often set into motion a dynamic process of claim and counter-claim among the States themselves as to what the law is, and may ultimately result, as in this case, in a tug-of-war between advocates of “national goals” and “individual rights”. The inter-State discourse which thus ensues will reflect prevailing and countervailing values and interests among the community of States.

We will thus examine the “development first” argument as a quest by East Asian governments spanning a broad ideo-political spectrum to accommodate the demands of a globalized, inter-dependent world. Gone are the days when

naked reliance on the notion of non-interference in internal affairs can be expected to repel outside criticism of domestic human rights practices. Indeed, the prospect of “human rights clauses” in international aid and free trade agreements, the use of information technology to instantly diffuse information about alleged human rights violations and the risk of multilateral sanctions have spurred various governments to devise and proffer new lines of argumentation to legitimate their human rights practices. Thus, a nation’s claimed right to development has come to provide a discursive framework from which to counter outside claims of inadequate protection of first generation rights.

### 2.1 *The People’s Republic of China: from “Non-Interference” to “Development First”*

Prior to the foreign relations crisis precipitated by the Tiananmen Square debacle of 1989, China had argued that the treatment of its citizens within its own borders was a matter falling strictly within its domestic jurisdiction and, therefore, for other States to reproach China for human rights violations infringed its sovereign right to non-interference in domestic affairs. In the following, we propose to present factors which have plausibly motivated China, the nation generally credited to be the founder of the “Asian values” movement, to later shift its emphasis from “non-interference” to “development first”.

During the Cold War, international human rights, particularly first generation rights, had become the battle cry of the “free world” in a bid to lend moral legitimacy to its challenge to Soviet expansionism. Despite evidence of repressive practices by non-communist regimes in countries such as Taiwan, Indonesia and South Korea, human rights did not figure prominently in the relations between the United States and those regimes, since strong national leaders were seen as partners in the struggle to contain Soviet influence in East Asia and elsewhere.<sup>3</sup> This was especially evident in the Nixon Administration’s “realistic” worldview, which rejected as an aim of American foreign policy the promotion of human rights in friendly (i.e., non-communist) countries.<sup>4</sup>

And yet, despite its communist credentials, Mao Zedong’s China of the early 1970s was spared much of the human rights scrutiny and criticism directed against members of the Soviet sphere. America’s low-key approach to China on human rights seemed an inevitable consequence of the Sino-American *rapprochement*, which culminated in the landmark Mao-Nixon summit in 1972. China was now an indispensable “ally” in the struggle against Soviet expansionism, an alliance forged against the backdrop of Beijing’s break with Moscow after Soviet intervention in Czechoslovakia, the Brezhnev Doctrine’s

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3 Cf. Margot Light, *Exporting Democracy*, in K.E. Smith & M. Light (eds.), *Ethics and Foreign Policy*, Ch. 5, Cambridge University Press, Cambridge 2001, p. 77.

4 Rosemary Foot, *Rights Beyond Borders*, Oxford University Press, Oxford 2000, p. 44. Cf. James T. H. Tang, *A Clash of Values? Human Rights in the Post-Cold War World*, in “Asian Values’ and Democracy in Asia”, p. 28. Proceedings of a Conference held on 28 March 1997 at Hamamatsu, Shizuoka, Japan, published at “[www.unu.edu/unupress/asian-values.html](http://www.unu.edu/unupress/asian-values.html)”.

implicit threat of future interventions in other socialist countries<sup>5</sup> and China's own border clashes with its latitudinous neighbour. Moreover, the United States was not inclined to press the human rights issue at a time when China was showing signs of moving away from the more "fervent" phases of the Cultural Revolution.

Unlike today, human rights practices in China were not an object of international attention. After all, in the first decades of its existence the People's Republic was an insular country that maintained diplomatic relations with only a few countries. This certainly limited access to reliable and complete information about human rights conditions within the country. Human rights NGOs, in particular, had only limited means of assessing the human rights situation in China which in turn limited those organisations' impact on the China policies of the Western capitals.

Although Jimmy Carter's entry into the White House in 1977 held out the promise of making human rights an integral part of Washington's dealings with all nations - both friends and foes - strategic factors proved too potent, a case in point being Carter's abandonment of his threat to withdraw American troops from South Korea, a threat made in light of Seoul's illiberal human rights practices.<sup>6</sup> Strategic considerations would continue to override the human rights issue in the foreign policy choices of successive U.S. Administrations through the greater part of the 1980s.

In the late 1980s, however, two momentous events with human rights implications occurred in China. Each of these events received widespread publicity in Western countries and would therefore come to alter the Western world's posture on human rights in China. First, there was the Chinese Government's armed response to political unrest in Tibet in 1987-89. That the events in Tibet were successfully able to compete for media attention in the West was in no small measure due to the immense popularity of its Nobel laureate leader, the Fourteenth Dalai Lama, and to the publicity enthusiastically bestowed on the Tibetan cause by Hollywood and its cinema icons.<sup>7</sup>

The second major event of the period was the violent suppression of the pro-democracy movement at Tiananmen Square in June 1989. This incident occurred as the Soviet Union was in the throes of its collapse, the fall of the Berlin Wall being just months away. The Sino-American Cold War alliance was thus rapidly becoming outmoded and could no longer be expected to ensure Washington's acquiescence in questionable human rights practices. What is more, many dramatic phases of the event were televised live to audiences around the world. Western governments would thus be compelled by Tiananmen's staggering "CNN effect" to take a firm stand on China's human rights situation and to be seen by their constituencies as doing so.

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5 Cf. Louis Henkin, *International Law: Politics, Values and Functions*, 216 (IV) Hague Recueil 13, 152 (1989).

6 Abba Eban, *The New Diplomacy: International Affairs in the Modern Age*, Random House, New York 1983, p. 67.

7 Cf. Patrick French, *Tibet, Tibet*, Alfred A. Knopf, New York 2003, pp. 27-28.

Initially, China sought to repel Western governments' criticism of the Tiananmen episode with reference to the principle of sovereignty and non-interference in domestic affairs as enshrined in U.N. Charter Article 2(7).<sup>8</sup> While China did successfully use its leverage as a major purchaser of Western technology to fend off the threat of economic sanctions, it did not escape arms embargoes imposed by the European Community and the United States.<sup>9</sup> Although unable to muster the votes necessary in the U.N. Commission on Human Rights for a condemnatory resolution,<sup>10</sup> certain concessions were extracted from China. In addition to releasing high-profile dissidents, China agreed to receive visits from the U.N. High Commissioner for Human Rights and to sign and eventually accede to the two major human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>11</sup>

Itself a member of the U.N. Commission on Human Rights, China had in 1998 criticized the alleged failure of the Indonesian government to protect ethnic Chinese targeted by rioters in Jakarta and Solo. Moreover, China has itself become a regular critic of the human rights record of the United States, in pointed response to the U.S. State Department's largely critical reports on human rights in China.<sup>12</sup> Against this background, the credibility of the non-interference argument had come to wane and a notable shift in China's reaction to Western criticism of its human rights record occurred.<sup>13</sup>

Generally speaking, blunt assertions of State sovereignty tend to go against the very fabric of the traditionally acknowledged conception of human rights as being universal. Indeed, if state sovereignty and its non-interference corollary are carried to their logical extremes, then all talk of *international* human rights would be rendered nugatory. After all, an absolutist view of state sovereignty opens the door for as many different applications of human rights standards as

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8 Foot, *supra*, note 4, p. 186. According to Toe Zaw Latt: "Human rights norms in many ways contradict realist notions of state sovereignty and legitimacy, and have had a powerful impact on a post Cold War understanding of sovereignty – a notion that allows for increasing intervention in the internal affairs of states on human rights grounds." The author cites Cambodia, Rwanda, the Balkans and East Timor as examples. "Throwing Water at the Sun: The Question of Human Rights Change in Burma" at note 45. Published at "members.tripod.com/~thadoe\_aung/vision/water1.html" (2002).

9 The arms embargoes remain in force to this day.

10 Foot, *supra*, note 4, p. 121.

11 *Id.*, p. 231. At present, China is a party to the Economic, Social and Cultural Rights Covenant and has signed, but not as yet acceded to, the Civil and Political Rights Covenant.

12 See e.g., *The Human Rights Record of the United States in 2008*, published by the Information Office of the State Council of the People's Republic of China, 27 Feb. 2009.

13 *Cf.* Foot, *supra*, note 4, pp. 232-233. This is not to say that China entirely abandoned the "sovereignty card". See statement by China delegate at Bangkok Conference: "To wantonly accuse another country of abuse of human rights and impose the human rights criteria of one's own country or region on other countries or regions are tantamount to an infringement upon the sovereignty of other countries and interference in the latter's internal affairs..." Quoted in Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 *Buffalo Journal of International Law* 215, 227 (1995).

there are States. China's once exclusive reliance on sovereignty thus proved untenable for a nation seeking to accommodate the pressures of the post-Cold War political landscape. Moreover, since the turn of the millennium, China's emergence as a major player in a host of multilateral contexts - ranging from its membership in the World Trade Organisation, its avowal since 9/11 to counter international terrorism, its key role in seeking to defuse the threat of nuclear conflict on the Korean peninsula - would not be consistent with strict adherence to arguments based on state sovereignty. As Beijing-based international law scholar Li Zhaojie avows:

Today, in trying to deflect international concerns and criticisms about the violation of universally accepted norms of human rights in any country, the argument that the issue falls exclusively within a country's domestic jurisdiction--a typical argument based on the Westphalian concept of state sovereignty--has proven unwarranted in contemporary international law. . .<sup>14</sup>

Instead of perpetuating the position that no State is entitled to criticize another State on account of how the latter treats its own population – which after all only serves to beg the question whether breaches of human rights obligations did indeed occur – China would thus come to argue that its practices comported well with human rights, albeit with *its* conception of the same. The previous reliance on non-interference, which does not fare well in a post-Cold War globalized world driven by trade, information technology and environmental challenges, would thus give way to a new line of argumentation. Today, in the realm of human rights, China asserts a right to be different from the liberal West, citing as a matter of priority a need to develop as a nation in a manner linked to its own cultural framework: “Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights”.<sup>15</sup>

## 2.2 “Development first”: A People’s “Universal” Right

China has thus de-emphasized its “non-interference” position and instead seeks to legitimate its human rights practices by adopting the mainstream, universalist *language* of human rights. In so doing, China now speaks in terms of its view of human rights, which stresses collective rather than individual rights, as representing a *universal* conception of human rights:

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14 Li Zhaojie, *Cultural Relativity and the Role of Domestic Courts in the Enforcement of International Human Rights*, in E.P. Mendes & A-M Traeholt (eds.), *Human Rights: Chinese & Canadian Perspectives*, p. 186, The Human Rights and Research Centre, Ottawa 1997.

15 Government White Paper, *Human Rights in China*, *Preface*, Information Office of the State Council of the People's Republic of China, Nov. 1991. Reproduced at “www.china.org.cn/e-white”. According to Onuma Yasuaki: [A] major reason for . . . publishing this [White Paper] was to ward off criticism of the human rights situation in China”. *Asian Concepts of Human Rights*, in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, Nijhoff, The Hague/Boston/London 1997, p. 64.

Nobody shall place his own rights and interests above *those of the state and society*, nor should he be allowed to impair *those of others and the general public*. This is a *universal* principle of all civilized societies.<sup>16</sup>

The above statement is significant because it rather clearly claims a priority of the rights and interests of collectivities, i.e., the State, society and the general public, over the rights and interests of individuals. It does not deny that individuals do indeed possess rights (this is inferable from the reference to the “rights of others”), only that these rights, when competing with collective rights, are subsidiary. In that regard, it expresses the very antithesis of the classical liberal position on rights, the notion that human beings are born free and equal and enjoy an *a priori* right to be treated as such.

According to a 1991 government white paper, under the Chinese conception of human rights, civil and political rights, deemed essentially individual rights, are, at China’s present state of national development, subsidiary to a claimed “*people’s right to subsistence*”, termed “the most important of all human rights, without which the other rights are out of the question”.<sup>17</sup> The right to subsistence, though not defined in the white paper, apparently covers a right to food, clothing and possibly the satisfaction of other basic needs for maintaining life. More recently, the right to subsistence has been merged into a “*people’s right to subsistence and development*”, which would seem to bring it into the fold of the “right to development” position argued by China and other “Asian values” States in various international fora.<sup>18</sup>

The claimed primacy of the right to subsistence/development has not been argued with reference to a “socialist view” of human rights or that of any other specific political ideology or system. In fact, it is billed as a “simple truth ... for any country or nation”.<sup>19</sup> No doubt, for China to couch its conception of human rights in Marxian terms would probably not have appealed to the increasing numbers of post-Cold War market-oriented States who have come to occupy a much larger place in the international arena (see section 2.3, below).

### 2.3 *From Beijing to Bangkok and Beyond: “Development First” Resonates Outside China*

China’s collectivist conception of human rights, including its emphasis on “development first”, was to win considerable support regionally.<sup>20</sup> This was evident when forty-six Asian governments convened at the Bangkok

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16 Statement by China’s delegate to the Bangkok Conference, quoted in Davis, *supra*, note 13, p. 227. [Emphasis added.]

17 *Human Rights in China*, *supra*, note 15, Section I, first unnumbered paragraph.

18 “China’s basic stand on the development of human rights is: placing top priority on people’s rights to subsistence and development”: *White Paper: China’s Efforts and Achievements in Promoting the Rule of Law*, Information Office of the State Council, Feb 28, 2008: “xinhuanet.com”.

19 *Human Rights in China*, *supra*, note 15, Section I, first unnumbered paragraph.

20 Cf. Pitman B. Potter, *The Right to Development: Philosophical Differences and Political Implications* in Mendes & Traeholt (eds.), *supra*, note 14, p. 98.



Conference, a regional prelude to the 1993 World Conference on Human Rights in Vienna. The notion that a nation's level of (economic) development could be determinative of the scope of its international human rights obligations<sup>21</sup> found at least implicit support in the regional conference's final document, the Bangkok Declaration, among whose signatories were many of the region's clearly non-socialist States, including East Asia's economic "tigers", save Japan.<sup>22</sup> The Bangkok Declaration made several references to a nation's right to "freely pursue" its development in economic and other spheres, citing the right to self-determination but also a right to development as such.<sup>23</sup> Although acknowledging that human rights are universal, they were to be considered in the "context of a dynamic and evolving process of international norm-setting" in which "national and regional particularities" were to be borne in mind. More recently, a place for regional relativism was acknowledged in the Terms of Reference of the planned ASEAN human rights body: "To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds".<sup>24</sup>

The above-cited references to the collectivist goal of development and the endorsement of a relativistic view of human rights have, despite their high level of abstraction, decided implications for the "Asian values"-liberalist divide on human rights. This is apparent from various post-Bangkok statements made by prominent "Asian values" proponents. Western liberalism's emphasis on the rights of the individual, for example, came to be equated by none other than Lee Kuan Yew, Singapore's long-serving Prime Minister, as a prescription for anarchy. In citing the United States as an admonishing example of the liberal model, Lee decried that:

[A]s a total system, I find parts of [American society] totally unacceptable: guns, drugs, violent crime, vagrancy, unbecoming behavior in public – in sum the breakdown of civil society. The expansion of the right of the individual to behave or misbehave as he pleases has come at the expense of orderly society. In the East the main object is to have a well-ordered society so that everybody can have maximum enjoyment of his freedoms. This freedom can only exist in an ordered state and not in a natural state of contention and anarchy.<sup>25</sup>

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21 Errol P. Mendes, *Asian Values and Human Rights: Letting the Tigers Free* (1996), Human Rights Research and Education Center, University of Ottawa, published at "www.uottawa.ca".

22 See Report of the Regional Conference for Asia of the World Conference on Human Rights, U.N. Doc. A/CONF.157/ASRM/8. See also *Bangkok NGO Declaration on Human Rights* (1993), reproduced in Fernand de Varennes (ed.), *Asia-Pacific Human Rights Documents and Resources*, Vol. 1, , Nijhoff, The Hague/Boston/London 1998, p. 147 ff.

23 Paragraphs 6, 12 and 17.

24 Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, section 1.4: "www.asean.org." Adopted 20 July 2009.

25 Fareed. Zakaria, "Culture Is Destiny: A Conversation with Lee Kuan Yew", 73 *Foreign Affairs* 109, 111 (1994).

Malaysian Prime Minister Mahathir Mohamad, himself a key advocate of “Asian values”, challenged the Universal Declaration of Human Rights on the ground that it accorded excessive rights to the individual<sup>26</sup> and was “formulated by the superpowers, which did not understand the needs of poor countries”.<sup>27</sup> Dr. Mahathir’s successor, Abdullah Badawi, had in his earlier capacity as Malaysia’s Foreign Minister expressed a view of human rights which encapsulates the main features of the “Asian values” position:

[M]easures in protecting and promoting human rights . . . should take into account local peculiarities such as the political situation, the level of socio-economic development, cultural practices, religious beliefs. A balanced and holistic approach to promoting human rights in all its aspects should be the objective of *all countries, but at a speed and phase comfortable to them.*<sup>28</sup>

Badawi had thus not by any means dismissed civil and political rights as a Western liberal parochialism, indeed he called for the promotion of human rights “in all its aspects”. He had even affirmed the universality of human rights by acknowledging that human rights promotion “should be the objective of *all countries*”. The point on which Badawi has differed from the West is in the reference to promoting human rights “at a speed and phase comfortable to them”. As with China’s “development first” approach, Badawi reserved the option to give priority to developmental goals over individual rights:

Many developing countries have a large number of citizens living in poverty. The government’s responsibility should therefore be . . . to ensure its citizens have proper meals, roofs over their heads, adequate educational opportunities, health services. *In this context*, a country facing internal civil or political strife *would establish priorities* different from another country undergoing economic and financial difficulties. One should not presume that citizen’s rights to free expression have priority over economic, cultural or religious rights. Additionally, individual countries should be allowed to decide whether in promoting human rights, they should give *priority to individual over community or society rights.*<sup>29</sup>

The right to development, which had figured so prominently at the Bangkok Conference, found its way into the final document of the World Human Rights Conference in Vienna, which, significantly, endorsed that right as “universal”

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26 Thomas M. Franck, *Are Human Rights Universal?*, 80 *Foreign Affairs* 191, 196 (2001).

27 Quoted in *Individual supreme? Or country and community come first?*, *Asiaweek*, 31 Oct. 1997. And see Franck, *supra*, note 26, p. 196. Actually, Mahathir’s statement is not borne out by the record of those countries taking part in the drafting process. The majority of the Human Rights Commission were non-Western countries and 4 of the 6 members of the Commission’s drafting group for the Universal Declaration were developing and East European Countries, including China and the Philippines. Bertrand G. Ramcharan, *The Universality of Human Rights*, 53 *International Commission of Jurists, The Review* 105, 106-107 (1994).

28 *Malaysia’s stance*, *Asiaweek* 31 Oct. 1997. [Emphasis added.]

29 *Ibid.* [Emphasis added.]

and “inalienable”,<sup>30</sup> epitaphs which had long been reserved for first generation rights, at least by liberal rights thinkers.

Predictably, any attempt to reach global support for a final document in Vienna giving absolute priority to first generation rights was not forthcoming. Instead, the conference delegates adopted a compromise text stating that *all* human rights were universal, indivisible, interdependent and interrelated; although acknowledging the significance of national and regional particularities, human rights were to be promoted “regardless of [States’] political, economic and cultural systems”:

All human rights are universal, indivisible and 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.<sup>31</sup>

By declaring that *all* human rights are universal, the Declaration begs the question of the relative priority between the various rights generations. The Declaration does not thus lay the path for universal respect for first generation rights, as could have been hoped by Western liberalists. Nor does it address an important facet of the “Asian values” position, i.e., that a right to development may be given priority over first generation rights. What is more, differing conceptions of human rights may well explain why so many countries, even such steadfast collectivists as China, could endorse universality.<sup>32</sup>

In summary, various East Asian governments have come to claim that each nation’s specific “cultural” context defined the relative priority to be accorded the various generations of human rights. Although agreement was reached in Vienna on the “universality of all human rights”, this formulation has not been understood by leading “Asian values” proponents as excluding a “temporal” priority for the right to development, itself viewed as a human right. The right to development can be given priority over civil and political rights, since promotion of the latter can in certain societal contexts negate realisation of the former. In contrast, the liberal position holds that first generation rights are the “inalienable” rights of each individual and, inherent in the very concept of these rights is that they precede society and cannot thus be traded off for such “collective” rights as the right to development.

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30 Vienna Declaration and Programme of Action, *supra*, note 2, para. 10. A similar formulation was contained in the Bangkok Declaration, para. 17.

31 Vienna Declaration and Programme of Action, *supra*, note 2, para. 5.

32 Melanne Andromecca Civic, *A Comparative Analysis of International and Chinese Human Rights Law – Universality versus Cultural Relativism*, 2 Buffalo Journal of International Law 285, 321-322 (1995-96): “[W]hen Chinese delegates declared acceptance of the Universality principle, they were saying, ‘all rights that we recognize to be rights are universal’”.

### 3 An *A Priori* Conflict between the Right to Development and First Generation Rights?

In the previous section, we sought to identify factors related to the external relations of “Asian values” States, particularly China, which could plausibly have motivated those States to propound a “development first” discourse and to claim that developmental considerations could claim primacy over first generation rights. It may be recalled that implicit support for that claim was declared in the Bangkok Declaration’s references to a right to development. In the present section, we seek to demonstrate that there is no *a priori* conflict between the right to development and first generation rights, and that the proper exercise of the right to development indeed presupposes the exercise of a host of first generation rights, in particular those rights enabling popular participation in the framing of development policies.

#### 3.1 *The Right to Development and its Bearers: “Peoples” and “Every Human Being”, not States*

The right to development embraces a broad spectrum of human development. One implication of the multifaceted character of this right is that its proper implementation is not simply measurable in growth statistics or other economic data. Although economic development is certainly an important aspect of the right to development, that right is by no means limited to the development of a nation’s economy, a fact sometimes overlooked by “Asian values” proponents.<sup>33</sup> The 1986 U.N. Declaration on the Right to Development<sup>34</sup> won wide support among nations at all levels of development,<sup>35</sup> and, therefore, its definition of the right to development would seem a natural starting point for any analysis of the said right: according to Article 1.1, development refers to economic but also social, cultural and political development.<sup>36</sup>

Certain proponents of “Asian values” tend to view the right to development as inuring to *States* or primarily to States.<sup>37</sup> Such an interpretation does not however find support in the International Law Association’s Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order (the Seoul Declaration). In fact, the Seoul Declaration represented an important break with the view previously held by proponents of the New World Economic Order that the right to development was

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33 See *Progress in China’s Human Rights Cause in 2003*, Information Office of the State Council, March 2004: “www.china.org.cn/e-white”, citing mainly economic progress under the rubric of the People’s Rights to Sustenance and Development (although progress in the field of public health is also cited.). And see Potter, *supra*, note 20, p. 102-103.

34 G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

35 The Resolution was adopted by a vote of 146 to 1 (United States) and 6 abstentions.

36 The full text of Art. 1.1 appears below in this Section 3.1.

37 Cf. Jiang Wenran, *Human Rights and Development: The Chinese Experience in an International Context*, in Mendes & Traeholt (eds.), *supra*, note 14, p. 347.

a right of States;<sup>38</sup> under Principle 6, the right to development is a human right, possessed by peoples but also by individuals, who are entitled to freely participate in the developmental process:

By virtue of the right to development as a principle of human rights law, *individuals and peoples* are entitled to the results of the *efforts of States*, individually and collectively, to implement Articles 55 and 56 of the U.N. Charter in order to achieve a proper social and international order for the implementation of the human rights set forth in the Universal Declaration of Human Rights, through a comprehensive economic, social and political process based upon *their free and active participation*.<sup>39</sup>

It would therefore appear more accurate today to assert with regard to the right to development that States are the bearers of *duties rather than rights*. Firstly, each State has a duty to make the fruits of development efforts available to its own population. Secondly, States possessing the requisite resources have a duty to co-operate with each other and with less developed States to promote development within the latter.<sup>40</sup> Under U.N. Charter Article 56, Member States are duty-bound to co-operate with the Organisation to promote conditions of economic and social development; side by side with that obligation is a duty to co-operate in furthering universal respect for human rights. Development and human rights thus constitute two inter-dependent pillars in promoting the United Nations' overriding goals of international stability and well-being.<sup>41</sup>

That the right to development is a human right enjoyed by peoples but *also* by individuals is confirmed in Article 1.1 of the Right to Development Declaration; moreover, a right to participate in the developmental process is recognized as is the close *de facto* link between development and the realisation of all human rights, thus including first generation rights:

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

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38 Subrata Roy Chowdury & Paul J.I.M de Waart, *Significance of the right to development: an introductory view* in S.R. Chowdury, Erik M.G.Denters & P.J.I.M. de Waart (eds.), *The Right to Development in International Law*, Nijhoff, Dordrecht/Boston/London 1992, p. 11.

39 ILA Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order (Seoul Declaration 1986), Principle 6 (2) [Emphasis added.]

40 Chowdury & de Waart, *supra*, note 38, p. 13. A recent example of such co-operation at the multilateral level is the Food Aid Convention, London, signed 13 April 1999, entry into force 1 July 1999.

41 U.N. Charter, Art. 55. See also Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, U.N.G.A. Resolution 2625 (XXC), 24 Oct. 1970, principle entitled "The duty of States to co-operate with one another in accordance with the Charter", final clause.

The above sources reveal that the bearers of the right to development are not States but rather their populations and individual members. We are reminded that it is in the nature of human rights, of which the right to development is one, that rather than being borne *by* States, they are claimable *against* States. There is nothing to indicate that the right to development is (or should be) an exception in that regard. Moreover, the right to development presupposes a right to participate in policies of development and to exercise all human rights, including relevant first generation rights.

### 3.2 *The Right to Development as “Implying the Full Right to Self-Determination”*

Article 1.2 of the Right to Development Declaration explicitly links the right to development with the right to self-determination:

The human right to development . . . implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The right to self-determination, acknowledged as a principle of international law under the U.N. Friendly Relations Declaration, entitles all peoples to determine various aspects of their collective destiny, including their developmental goals. Perhaps the right to self-determination is best known for its role in dismantling colonialism, i.e., by ensuring a culturally discrete population a right of independent political status vis-à-vis foreign powers.<sup>42</sup> Ultimately, it is the population of the territory in question which decides, through referendum or other public medium of free expression, its own political status. This participatory feature of the so-called external aspect of self-determination has been aptly called “the very *sin qua non* of all decolonization”.<sup>43</sup>

The linkage between the respective rights to development and self-determination also appears in the Friendly Relations Declaration, which recognizes the right of all peoples to freely determine their economic, social and cultural development without outside interference.<sup>44</sup> Also this aspect of self-determination presupposes the right of every citizen to participate in the shaping of developmental policies at all domestic levels of decision-making.<sup>45</sup> Such a right of participation is especially significant for a State’s minority populations who are entitled to take part in public affairs on a non-discriminatory basis. This

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42 Cf. Ove Bring, *FN-stadgan och världspolitik*, 4th ed., Norstedts Juridik, Stockholm 2002, p. 19.

43 Judge Singh, *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12 at p. 81. Cited in Robert McCorquodale, “The Individual and the International Legal System” in Malcolm D. Evans (ed.), *International Law*, Ch. 9, Oxford University Press, Oxford 2003, p. 315.

44 Friendly Relations Declaration, “The Principle of equal rights and self-determination of peoples”.

45 General Recommendation XXI, “Right to Self-Determination”, 48th session, 1996, para. 4, reproduced in U.N.G.A. Fifty-first session, Supp. no. 18 (A/51/18).

has been confirmed by the U.N. Committee on the Elimination of Racial Discrimination,<sup>46</sup> which links the non-discrimination aspect of the right to self-determination with the obligation of States in the Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (c), to guarantee to everyone “political rights, in particular the right to participate in elections . . . , to take part in the Government as well as in the conduct of public affairs at any level”. This aspect of self-determination, i.e., the right to freely pursue development, thus presupposes respect for the right of non-discrimination, itself a first generation right.

That the right to self-determination, including its developmental aspect are integrally linked to first generation rights is also confirmed by Article 1 of the International Covenant on Civil and Political Rights (ICCPR), which declares that all peoples have the right to self-determination, including the right to “freely pursue their economic, social and cultural development”.<sup>47</sup> Although couched in terms of the rights of “peoples”, the placement of this right in a convention on “civil and political rights” in itself indicates a close interplay between the freedom to pursue development and the enjoyment of the Convention’s other rights.<sup>48</sup>

### 3.3 *A Right of Participation: Linking Development to Democracy*

As is inferable from the previous section, even if we were to acknowledge that the right to development is a collective right, there is no support for equating the collectivity with the State and, moreover, the right to development itself presupposes the participation of the public. In the present sub-section, we will query whether further support for a right of participation can be found in the concept of democracy itself.

The 1948 Universal Declaration of Human Rights refers explicitly to democracy but only by way of limiting the purview of rights derogations. Thus, under Article 29.2, national limitations on the rights catalogued in the Declaration shall, *inter alia*, “meet the just requirements of morality, public order and the general welfare *in a democratic society*”. Generally speaking, drafting delegates often disagreed on the exact meaning of the concepts that came to be included in the Universal Declaration. Deliberately vague and general formulations were thus often resorted to in the name of compromise,<sup>49</sup> the term democracy being one such instance. The Declaration’s sparing reference to democracy was evidently due to the differing interpretations accorded to the concept by States representing widely disparate political

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46 *Ibid.*

47 An identical article is contained in the second generational International Covenant on Economic, Social and Cultural Rights.

48 *Cf.* Colin Warbrick, *States and Recognition in International Law*, in Evans (ed.), *supra*, note 43, p. 215.

49 Åshild Samnøy, *The Origins of the Universal Declaration of Human Rights* in Gudmundur Alfredsson & Asbjørn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Nijhoff, The Hague/Boston/London 1999, p. 15.

systems.<sup>50</sup> Actually, the impetus for including “in a democratic society” was provided by none other than the Soviet Union, which defined democracy in direct contradistinction to Fascism and Nazism.<sup>51</sup> We can to this day note major differences in how democracy is conceived in the constitutional frameworks of various political cultures. The Constitution of the People’s Republic of China, for example, charters an oxymoronic “people’s democratic dictatorship”, “led by the working class and based on the alliance of workers and peasants, which is in essence the dictatorship of the proletariat”.<sup>52</sup> This can be contrasted with the Swedish Constitution, which proclaims that “democracy is founded on the free formation of opinion and on universal and equal suffrage. It shall be realised through a representative and parliamentary polity and through local self-government.”<sup>53</sup>

Democracy *per se* thus received a less than clear position in the Universal Declaration, and, as mentioned, only appeared as a “limitation on a limitation” of rights rather than as a right in itself. On the other hand, the Universal Declaration does proclaim an important *element* of democracy, namely, a right “to take part in the government . . . , directly or through freely chosen representatives” in Article 21.1. What is more, an explicit requirement of holding elections on the basis of equal and universal suffrage is contained in section 3, which proclaims that “the will of the people shall be the basis of the authority of the government”. Similarly, Article 25 of the ICCPR ensures to every citizen “the right and opportunity ... [t]o take part in the conduct of public affairs, directly or through freely chosen representatives”.

Despite the above-cited references to the right of the people to participate in the political process, the Universal Declaration is as such a non-binding resolution of the U.N. General Assembly and the binding force of the ICCPR is limited to the State Parties. Of the ten Member States of the Association of Southeast Asian Nations (ASEAN), only Cambodia, Indonesia, Thailand, Vietnam and the Philippines have ratified or acceded to the ICCPR. On the other hand, there may be grounds for regarding the right of participation as customary law. In the past, at least, rights linked to democracy may have seemed an unlikely candidate as customary law rights. Oscar Schachter, for one, writing in the 1980s, cited the non-democratic systems of many if not most of the world’s States as militating against the conclusion that the right of participation had achieved the status of customary law.<sup>54</sup> Arguably, though, the end of the Cold War, which has resulted in the introduction of democracy in many quarters of the world, not least in East Asia,<sup>55</sup> allows us today to speak of an increasing

50 Cf. Allan Rosas, *Article 21*, in Alfredsson & Eide, *supra*, note 49, p. 438.

51 Torkel Opsahl & Vojin Dimitrijevic, *Articles 29 and 30*, in Alfredsson & Eide (eds.), *supra*, note 49, p. 635.

52 Preamble and Art. 1.

53 The Instrument of Government, Ch. 1, Art. 1, sec. 2.

54 Oscar Schachter, *International Law in Theory and Practice*, 178 (V) Hague Recueil 13, 337 (1982).

55 The U.N. Security Council has affirmed democracy through free and fair elections in Cambodia and in other countries. See Rosas, *supra*, note 50, p. 447.



international tendency towards democratic rule, with a concomitant increase in state recognition of the right of participation.<sup>56</sup>

The U.N. Human Rights Commission, whose membership reflected a wide cross-section of human, legal and political cultures, affirmed that democracy, development and human rights are interdependent and mutually reinforcing and that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and on their full participation in all aspects of their lives.<sup>57</sup> Needless to say, in order for such participation to be meaningful, it should be *informed* participation. That will in turn require the exercise of a host of first generation rights, including the freedom to receive and impart information about the consequences of proposed developmental policies.<sup>58</sup> Such a requirement seems to merit special significance regarding those most tangibly affected by developmental policies at the local level.

Finally, recalling the “development first” argument, there is no evidence that democratic institutions and public participation counteract development. Economist Amartya Sen sees no contradiction between democracy, including its package of participatory rights, and the promotion of economic development. More particularly, Sen counters the “Asian values” claim that the unprecedented economic upswing enjoyed by various East Asian countries is attributable to a restrictive implementation of civil and political rights. Instead, Sen cites empirical evidence supporting the thesis that the high level of economic success was linked to increased openness to international trade and the improvement of various infrastructures; in other words, policies wholly consistent with respect for first generation rights. Moreover, Sen’s research reveals that it is the very implementation of first generation rights, particularly those linked to free public expression, which strengthen society’s protection against crises as diverse as famine, epidemic and financial debacle: “[p]olitical and civil rights, especially those related to the guaranteeing of open discussion, debate, criticism, and dissent, are central to the process of generating informed and considered choices”.<sup>59</sup> It is widely believed that the Asian financial crisis of 1997 was in no small measure due to a lack of public insight in the workings of financial systems (a warning example to be unheeded by the global markets in the decade to follow).<sup>60</sup>

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56 Cf. Rosas, *supra*, note 50, p. 432.

57 Interdependence between democracy and human rights, Commission on Human Rights resolution 2003/36, 23 April 2003. The Commission was replaced in 2006 by the U.N. Human Rights Council.

58 Cf. U.N. Office of the High Commissioner for Human Rights, “Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights”, Geneva, 25-26 Nov. 2002, seminar paper by Shadrack Gutto, p. 3-11; and Tatjana Ansbach, *Peoples and individuals as subjects of the right to development* in Chowdury *et al.* (eds.), *supra*, note 38, p. 162.

59 Amartya Sen, *Democracy as a Universal Value*, 10 *Journal of Democracy* 3, 16 (1999).

60 See e.g., Prakob Chirakiti, *Developing Democratic Institutions and Processes in Thailand*, in Uwe Johannsen & James Gomez (eds.), *Democratic Transitions in Asia*, Select Publishing, Singapore 2001, p. 67.

### 3.4 *Human rights are “Indivisible, Interdependent and Interrelated”*

That the right to development does not *a priori* exclude first generation rights has already appeared above in the Vienna Declaration’s reference to human rights being indivisible, interdependent and interrelated (section 2.3). A similar provision is found in the U.N. resolution on the Right to Development (Art. 6). These formulations thus confirm that the third generation right to development is not at odds with first generation rights but on the contrary reinforces the latter. In fact, some commentators go so far as to ask whether the right to development has any independent basis of existence, since it is itself a synthesis of individual human rights. In that connection, Konrad Ginther asks rhetorically whether “we need for the creation of institutions of ‘popular participation’ a ‘peoples’ right to development’ distinct from classical human rights of individuals such as the right freely to form associations, to express opinions or to move freely to any place of one’s choice?”<sup>61</sup>

## 4 **Concluding Remarks**

The “Asian values” claim to place the interest in national development before respect for first generation rights is not borne out by an examination of the right to development as it has come to expression in various international instruments. The right to development certainly has a collective (though not statist) component but its exercise presupposes popular participation in the political process of development. Such a right of participation can only be meaningful if those who will reap the fruits but also bear the burdens of development are able to exercise their civil and political rights. What is more, empirical evidence suggests that the open society attainable through many first generation rights does not impair, but indeed strengthens, national development.

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61 Konrad Ginther, *The domestic policy function of a right of peoples to development: popular participation a new hope for development and challenge for the discipline* in Chowdury *et al* (eds.), *supra*, note 38, p. 81.