National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights

C. Raj Kumar*

ABSTRACT

The article discusses the importance of National Human Rights Institutions (NHRIs) in promoting and protecting economic, social, and cultural rights (ESCRs). Every effort needs to be made by NHRIs to ensure that ESCRs are not neglected by the state. There is need for greater interaction between the NHRIs and state agencies to address the potential violations of ESCRs that the state and nonstate actors may be committing by way of deprivation, discrimination, or neglect.

* C. Raj Kumar teaches at the School of Law, City University of Hong Kong, Hong Kong, China. He is an Honorary Consultant to the National Human Rights Commission in India. He is also the Chief Executive Officer of Legal Education and Research Society (LEARS), an NGO based in New Delhi. He received the following degrees: B.Com. (Madras), LL.B. (Delhi), B.C.L. (Oxford), L.L.M. (Harvard). He was a Rhodes Scholar, University of Oxford, UK; Landon H. Gammon Fellow, Harvard Law School; James Souverine Gallo Memorial Scholar, Harvard University; Visiting Research Fellow, Faculty of Law, Meiji Gakuin University, Tokyo, Japan. He was also a Visiting Researcher, New York University School of Law; Attorney with Weil, Gotshal & Manges, LLP, New York; Consultant and Research Associate, National Human Rights Commission, New Delhi, India. He has held consultancy assignments for the United Nations Development Programme (UNDP) and the United Nations University (UNU). His areas of specialization include international human rights law, law and development, and comparative constitutional law. He has more than seventy publications to his credit and has published widely in law journals in Australia, Hong Kong, Japan, and the United States.

This article grew out of a paper that the author presented at the Second Asian Law Institute Conference held at the Faculty of Law, Chulalongkorn University, Bangkok, Thailand, 26–27 May 2005. The author would like to thank the City University of Hong Kong for awarding him the Start-Up Grant and the Strategic Development Grant, which helped immensely in research. The author also appreciates the assistance of research assistants, Elliot Fung, Yiyan Huang, Vincent Wing Yin Sze, and Fouzia Zafar, in writing this article. The author thanks Professors Michael C. Davis, Stephen P. Marks, and Yogesh K. Tyagi for their useful comments on an earlier version of this article.
their policies or lack of policies. The article argues that the NHRIs need to operationalize their programs, including the processes relating to investigation of allegations of human rights violations and examination of policies and actions by government agencies, in a manner that takes full account of the implementation of ESCRs. This involves at various levels a fundamental reexamination of the role of NHRIs, particularly when the enabling legislation, constitution of a particular country, the courts, and other legal institutions have not previously supported the notion of NHRIs engaging in the promotion and protection of ESCRs.

I. INTRODUCTION

NHRIs\(^1\) have come to occupy a central role in the domestic implementation of both international human rights norms\(^2\) and domestic, constitutional, and other legal obligations. Since the United Nations (UN) started promoting the institution of NHRIs several decades ago, remarkable developments in the formation of NHRIs have occurred in numerous countries. This trend is continuing as governments are increasingly under pressure from the UN, the international community, international and domestic NGOs, and academics to establish human rights commissions.\(^3\)

There have been several reports from leading international NGOs that have systematically assessed the workings and highlighted the drawbacks of NHRIs in selected countries.\(^4\) Academic literature has contributed to the understanding of the role and needed improvements of NHRIs in the protection and promotion of human rights.\(^5\) As for the role of NHRIs, however, much

---


2. See HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 705 (2d ed. 2000) (reviewing the formation of international human rights).


of the focus has been on the protection and promotion of civil and political rights (CPRs). Unfortunately, NHRIs are perceived as institutions that only respond to violations of CPRs. The international community has neglected the obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) with its nearly uniform focus on the International Covenant on Civil and Political Rights (ICCPR); this has contributed to NHRIs’ focused attention to addressing violations of civil and political rights. Of course, enforcement of international law and international human rights norms has generally been weak, but under this already weak enforcement regime, ESCRs are given much less attention than CPRs. This has created a situation in which NHRIs are, at best, institutions that function well only in Malaysia).


7. International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976). Some of the rights the ICESCR guarantees are: self-determination (Article 1); equal rights for men and women (Article 3); work (Article 6); just and favorable conditions of work (Article 7); the rights of workers to organize and bargain collectively (Article 8); social security and social insurance (Article 9) and protection and assistance for the family (Article 10); adequate standard of living, including adequate food, clothing, and housing (Article 11); freedom from hunger (Article 11); the highest attainable standard of physical and mental health, including the right to healthcare (Article 12); education (Article 13); and the right to culture and to benefit from scientific progress (Article 15). This was outlined in Ontario Human Rights Commission (OHRC), Policy and Education Branch, Human Rights Commissions and Economic and Social Rights, available at http://www.ohrc.on.ca/english/consultations/economic-social-rights-paper.pdf.


when the legal, constitutional, and governance framework respects the rule of law, promotes good governance, and pursues sound development policies. At worst, NHRIs become institutions that legitimize the functions of the state and do not intervene even when blatant violations of civil, political, economic, social, and cultural rights occur.\textsuperscript{12}

This article first examines the role of NHRIs in the protection and promotion of human rights and how their role is different from that of any other institution that has hitherto existed. In particular, the role and function of NHRIs will be differentiated from those of the state in ensuring that its citizenry is provided with the basic necessities of life and in contributing to the welfare and development of its people. NHRIs are also different from both domestic and international human rights NGOs.\textsuperscript{13} While naming and shaming is one of the strategies that may be uniformly applied by NHRIs and NGOs in highlighting human rights violations, NHRIs have certain unique responsibilities for ensuring good governance. NHRIs are also different from the human rights bodies under the UN system or regional human rights machinery.

Second, this article examines the importance of ESCRs\textsuperscript{14} and the need for these rights to become the cornerstone for the development of underdeveloped countries.\textsuperscript{15} In this regard, it is important to have an integral understanding of CPRs and ESCRs.

Third, this article examines the importance of the institutionalization of human rights and to what extent NHRIs have helped in this endeavor. Thus, it will discuss the functions of NHRIs and how these functions should be performed so that the institutionalization of human rights becomes as much about inculcating a human rights culture in a society as it is about providing redress mechanisms for human rights violations.

Fourth, this article examines the need for the developmentalization of human rights\textsuperscript{16} and what role NHRIs ought to play in this process. In particular, it will address the importance of ESCRs in the general development of the

\begin{itemize}
  \item \textsuperscript{13} For further reading, see Michael Posner & Candy Whittome, The Status of Human Rights NGOs, 25 Colum. Hum. Rts. L. Rev. 269, 272–76 (1994).
  \item \textsuperscript{16} See generally, C. Raj Kumar, Institutionalization of Human Rights in Asia: Developmentalizing Rights to Promote Good Governance, 12 Asia Pacific L. Rev. 143 (2004).
\end{itemize}
human rights discourse and the need for NHRI to change their approach so that both ESCRs and CPRs are given equal importance.\textsuperscript{17}

Finally, the article provides a thematic framework for how NHRI can play a useful role in protecting, promoting, and fulfilling ESCRs.\textsuperscript{18}

II. INSTITUTIONAL PRIORITIES AND NORMS ENFORCEMENT

NHRI are domestic institutions established through a provision in the constitution, legislation, or by way of a presidential decree or executive order.\textsuperscript{19} To some extent, the manner of formation of NHRI also determines their power and functions, as well as their institutional legitimacy, functional independence, and financial autonomy. The protection and promotion of human rights are clearly important functions of the state. While fundamental rights are generally couched in the language of negative rights against the state, the state apparatus ought to function in an active manner that protects the rights and freedoms of its people. In fact, the important wings of the government—the legislature, executive, or judiciary—function with a view toward ensuring the rights and freedoms of people. But there is something fundamental and basic about NHRI that is different from the state and its aforementioned instrumentalities. Unlike other institutions, which are vested with the task of governing a country (legislature and executive) and the administration of justice (judiciary), NHRI’s exclusive mandate is to protect and promote human rights. While various functions of other institutions can ensure the protection and promotion of human rights, this is the core mission and fundamental purpose of NHRI. However, performance assessments of NHRI indicate that NHRI tend to become another arm of the state apparatus, producing less accessible bureaucratic styles of responding to human rights


violations. To distinguish themselves from the state, NHRIs must embrace their founding mission to ensure that human rights become the focal point of governance and development agendas of a country; that all institutions of the government conduct their affairs in conformity to domestic and international human rights norms and constitutional obligations; and that human rights are inculcated in the civic and political culture of a society.

NHRIs must be distinguished from local or international human rights NGOs. There is no doubt that the work of NHRIs has a bearing on the work of NGOs, and vice versa; and they may be working together in protecting, promoting, and fulfilling human rights. NHRIs, unlike NGOs, are born either through an evolved democratic consensus or because of pressure from the international community. NHRIs are expressly formed by the government, but there is no doubt that the greater the independence and functional autonomy of the NHRIs, the better their performance regarding human rights enforcement. Like NGOs, NHRIs may also be monitoring the human rights situation in a country, but they should not be mere reporting and monitoring organizations. While much will depend upon the institutional mandate of the NHRIs, they should exercise their powers in such a manner as to expand the scope of human rights protection. This will entail constant engagement with other wings of the state government so that NHRIs are able to educate and create awareness about human rights, both inside and outside the government. NHRIs are well-situated to provide human rights impact assessments for government policies. This is particularly relevant for responding to violations of ESCRs when goals of development policy may result in violations of ESCRs. Because of the states’ role in the creation of NHRIs, governments may be more receptive to considering the assessment of NHRIs as opposed to those of domestic or international human rights NGOs.

Additionally, NHRIs are different from human rights bodies under the UN system because NHRIs are at the front line of human rights battles at the domestic level. In contrast, the UN Office of the High Commissioner for Human Rights (UNOHCHR), the Human Rights Council, the Human Rights Committee, the UN Sub-Commission on Protection of Human Rights, the various other institutionalized programs under the umbrella of the UNOHCHR, and the Special Representatives, Special Rapporteurs, and Independent Experts all help protect, promote, and fulfill human rights at the international level. If the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights

20. See generally ICHR, Assessing the Effectiveness, supra note 3.
are recognized as important milestones for the human rights movement, the international community has learned that human rights are best monitored, protected, promoted, and fulfilled domestically. NHRIs are created expressly for this purpose.

While the contribution of the UN in formulating international human rights standards and creating international human rights machinery is very useful, as is the work of international human rights NGOs engaged in human rights advocacy, the key element of human rights enforcement happens domestically within a country and, at times, locally within a place. The struggle for human rights worldwide has repetitively demonstrated that the shift from mere normative recognition of human rights to the actual enforcement of human rights is a big leap. It is here that NHRIs play a critical role, as the human rights discourse becomes more inclusive, not merely about international human rights norms; through the work of the NHRIs, the discourse also includes how these norms reinforce and, indeed, empower domestic constitutional obligations and domestic human rights commitments.

In December 1998, the Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 10, which deals with the role of NHRIs in the protection of ESCRs. The CESCR addressed the issue of the progressive and full realization of the ICESCR and recognized that one of the ways this can be achieved is through galvanizing the work of NHRIs. General Comment 10 states that it is essential for full attention to be given to ESCRs in all of the relevant activities of NHRIs. Such activities were identified as including:

a) the promotion of educational and informational programmes designed to enhance awareness and understanding of economic, social and cultural rights both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement;

b) the scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the ICESCR;


26. Id.

27. Id.
c) the provision of technical advice, or by undertaking surveys in relation to economic, social and cultural rights, including when requested by public authorities or other appropriate agencies;

d) the identification of benchmarks at the national level against which the realization of ICESCR obligations can be measured;

e) conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realized, either within the country as a whole or in areas or in relation to communities that are particularly vulnerable;

f) monitoring compliance with specific rights and providing reports to the public authorities and civil society; and

g) examining complaints alleging violations of applicable economic, social and cultural rights standards within the state.\(^\text{28}\)

Significantly, the CESCR also called upon states parties to the ICESCR to ensure that the mandates accorded to all NHRRIs be expanded, if necessary, so that appropriate attention to ESCRs is given.\(^\text{29}\) The NHRRIs themselves have started to take initiatives to recognize the importance of ESCRs in their work. A number of important issues relating to the implementation of ESCRs by NHRRIs were discussed in an International Round Table on National Institutions Implementing Economic, Social and Cultural Rights that was held in New Delhi in December 2005.\(^\text{30}\) While the focus of the New Delhi Round Table was on the implementation of ESCRs in the domestic context, a plan of action was formulated that would help the NHRRIs to deal with ESCRs.\(^\text{31}\) The fundamental problem with the NHRRIs is in regard to the enforcement of human rights and directly related to their institutional status and powers that are granted under the law or policy that established these institutions. This institutional limitation affects the NHRRIs in ensuring the protection and promotion of CPRs and is likely to affect more in relation to ESCRs. One of the ways by which the NHRRIs can attempt to address this issue is to emphasize the indivisibility and interdependence of CPRs and ESCRs, as well

\(^{28}\) Id.

\(^{29}\) Id. For a comprehensive article on the incorporation of international human rights in a few selected constitutions, see Yash P. Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000).

\(^{30}\) The Round Table was a collaborative venture of the National Human Rights Commission of India and the Office of the United Nations High Commissioner for Human Rights (UNOHCHR). The Round Table was attended by representatives of twenty-four NHRRIs from Afghanistan, Albania, Argentina, Burkina Faso, Costa Rica, the Democratic Republic of the Congo, Fiji, Ghana, India, Ireland, Jordan, Kenya, Kyrgyzstan, Mexico, Mongolia, Morocco, Nepal, New Zealand, the Republic of Korea, Senegal, South Africa, Sri Lanka, Thailand, and Uganda. For more information, see *The New Delhi Concluding Statement*, available at http://www.nhri.net/pdf/RT_New_Delhi_Conclusions_011205.pdf.

\(^{31}\) Id. at 5.
as the fact that CPRs cannot be meaningfully realized without due regard to the protection and promotion of ESCRs. NHRIs have enough international support for this obviously attractive position.

III. RELATING ACCESS TO JUSTICE TO THE RULE OF LAW AND DEVELOPMENT

The human rights discourse has come to accept that ESCRs are as important as CPRs; human rights are universal, indivisible, and interdependent. However, the recognition of ESCRs as the equal of CPRs does not ensure that the enforcement mechanism is in place for the protection, promotion, and fulfillment of all these human rights. Article 2 of the ICESCR describes both the type of legal obligations that arise under the Covenant and the necessary implementation mechanisms for states parties.32 States are required to take steps to the maximum of their available resources so that the rights identified in the ICESCR are progressively realized.33 As noted by the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, “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 fulfill their obligations under the Covenant.”34 Similarly, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights notes:

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. 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 fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.35

The Optional Protocol (OP) to the ICCPR empowered the UN Human Rights Committee (UNHRC) to deal with individual grievances arising out of

---

32. OHRC, Human Rights Commissions, supra note 18.
33. Id.
CPR violations. Currently, however, no similar body exists for the ICESCR. In this regard, it may be noted that for over fifteen years the CESCR and NGOs have been working to find ways to develop an optional protocol to the ICESCR that would provide a proper complaint procedure for persons or groups alleging violations of ESCRs. This has the potential to provide greater accountability on the part of the states parties to the implementation of ESCRs. The CESCR completed its consideration of a draft protocol in 1996. In 2001 the UN Commission on Human Rights appointed an Independent Expert for examining the question of a draft optional protocol to the ICESCR, who has submitted several reports. In 2003 the Commission established the open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR. The chairperson concluded in her report that “[t]he working group did not reach consensus on whether to start drafting an optional protocol. Consequently, the Chairperson-Rapporteur recommends a deepening of the rich debates of its first session.”

While the mere absence of international institutional monitoring machinery does not by itself discourage giving ESCRs and CPRs the same importance, this absence does highlight what appears to be the international preference for CPRs over ESCRs.

The difference between CPRs and ESCRs, however, is artificial; this has been proved time and again when it comes to actual enforcement of human rights. A notable example is the work of the Supreme Court of India in expanding the “right to life” provision in the Constitution of India to include the “right to education” and a number of other ESCRs. Issues relating to justiciability had been hindering the Court’s use of the Directive Principles of State Policy for promoting governance. This problem, however, was overcome by an activist judiciary ready and willing to understand the context in which some rights were made justiciable by their appearance in the chapter on Fundamental Rights and others were made nonjusticiable by their presence in the chapter on Directive Principles. It may be argued that the “right to life,” in its narrow conception, is a negative right, whereby the state cannot take away the life of a person without due process of law, while the right to education is a positive right. In reality, however, experience has demonstrated that the so-called dichotomy between these two sets of rights is one of reinforcement and integral recognition so that social justice is achieved.

Similarly, the criticism that ESCRs are merely policy objectives and cannot provide a legal basis for enforcement has been overcome in the South African Constitution and the jurisprudence developed by the South Africa Constitutional Court in a number of cases. The South African Constitution codifies a broad range of ESCRs, including access to adequate housing; general health and reproductive healthcare services; and sufficient food, water, and social security, including suitable social assistance. Article 27(2) of the Constitution mandates that the state “take reasonable legislative and
other measures, within its available resources, to achieve the progressive realization of each of these rights.”

Unfortunately, an overtly legalistic approach to human rights has failed to recognize that access to justice is a critical component of effective legal systems and, as such, should be one of the criteria evaluated in human rights performance assessments. While access to justice in a procedural sense does involve issues relating to *locus standi* and legal aid, the jurisprudential foundations of access to justice rest on the capability of people to approach the courts of law or other governance institutions for seeking justice. ESCRs, if properly enforced, serve as empowering tools that will enable the protection of access to justice as a human right. The citizenry of a state will be able to access the civil and criminal justice systems for the protection of their CPRs better if their ESCRs are protected, promoted, and fulfilled.

The modern understanding of the rule of law includes the supremacy of the law, a concept of justice, restrictions on the exercise of discretionary powers, the need for an independent judiciary, and the protection and promotion of human rights. While scholars continue to debate the exact meaning of the rule of law and societies reinvent themselves on different notions of the rule of law, there is no doubt that countries worldwide have recognized the need for the protection of the rule of law as a fundamental fabric of their society.

Development and the rule of law are intricately linked. The goal of development is the enrichment of lives and freedoms of people worldwide. Development policies have been subject to criticism due to the negative impact of globalization and the consequent marginalization of people. While the human rights discourse is continuously challenging the contemporary development paradigm, the rule of law initiative can provide an important basis for understanding key development issues in parts of Asia

---

and Africa, for example. Further, the implementation of ESCRs will help protect the rule of law. Understanding the meaning of the rule of law in the development context gives recognition to ESCRs. Situating the realization of ESCRs in a broader context will

a. help in the protection of the rule of law and will result in promoting development resulting in social change and social engineering;

b. help in understanding the policies and practices of developing countries with a view to promoting good governance;

c. help in understanding the role and limitations of judiciaries and whether they have been proactive in responding to ESCRs violations and how far legal and judicial reform initiatives have helped in promoting sound development policies; and

d. help in understanding how the relationship between the rule of law and development is relevant for understanding issues relating to poverty and human rights, trade and development, corruption and good governance and also health and human security.

IV. RECOGNIZING NHRI AS AGENTS OF CHANGE

The debates over the performance and effectiveness of NHRI have highlighted a number of issues relating to their formation, functions, institutional legitimacy, and the core values of the institutions themselves. In all of these debates, however, seldom has the institutionalization of human rights been cast as institutionalizing the human rights culture and values in a society. NHRI should be key actors in pursuing change where human rights ought to become the central theme of the governance agenda. This aspect of institutionalization has been given little consideration.

The role of NHRI as agents of change can ensure that the government, domestic and international NGOs, and civil society are able to partner with NHRI in pursuing the governance agenda. NHRI are, as discussed earlier, the only domestic institutions exclusively mandated with the protection, promotion, and fulfillment of human rights. NHRI are thus able

63. ICHRP, Assessing the Effectiveness, supra note 3.
to empower civil society activism, leading to greater government transparency and accountability. Expanding the work of NHRIs would ensure that they can monitor matters essentially arising out of a lack of transparency and accountability within the governance system. Democratic governance would thus not merely be the citizenry electing politicians to public office, but would encompass citizens actually having a say in the governance process, including political participation through consultative processes for policy implementation. Its positive effects on the human rights situations may be appreciated in light of some glaring cases of human rights violations. Displacement, one of the major types of ESCRs violations, occurs when mega projects that affect people's lives are implemented without proper consultation. This is an example of how human rights and development are seemingly in conflict with each other. NHRIs could, however, provide a forum to ensure that all affected parties can come together, thus alleviating the perceived conflict.

Corruption is a major issue in developing countries and can be a serious impediment to democratic governance, especially when corruption affects CPRs and ESCRs. Corruption should thus be perceived as a human rights issue by NHRIs. The response to corruption in the form of legislation and public policy initiatives when couched in the language of rights can help provide a right to corruption-free governance. For example, the right to information has been used in developing countries to provide greater transparency and accountability relating to the government's policies, in particular with regard to the use of public funds.

Importantly, NHRIs need active support from the media and NGOs to perform their functions. The objective of NHRIs should be to develop a broad level of consensus on human rights issues so that both CPRs and ESCRs are given due recognition not only at the normative level but also at the level of enforcement, thus promoting constitutionalism and sound political culture. For this to happen, NHRIs need to engage in imparting education at all levels. The education of the citizenry should go hand in hand with the education of the government machinery at all levels.

Thus, development of a human rights culture can significantly help in the protection of the rule of law and promotion of development policies. Additionally, a human rights culture can help in ensuring that good governance is the basis for development.

V. HUMAN DEVELOPMENT, HUMAN SECURITY, AND NHRIs

The developmentalization of human rights, which insists on a rights-based approach to development, requires a deep understanding of both CPRs and ESCRs. The 1986 Declaration on the Right to Development is a first step in linking a human rights-based approach to development to the governance agenda. Domestically, NHRIs should be key players in the process of developmentalization of human rights. They can follow the example set by the South African Human Rights Commission (SAHRC), which is explicitly mandated to monitor ESCRs. The SAHRC is required to investigate, report, and carry out research so as to ensure conformity to ESCRs. On an annual basis, the SAHRC must request that the concerned instrumentalities of the state provide it with information regarding what steps have been taken towards the realization of economic, social, and cultural rights.

The South African Constitution expressly mandates that the SAHRC request organs of the state to provide it with information on the measures that they have taken towards the realization of the rights in the Bill of Rights.

79. Kjærøm, supra note 33.
80. Id.
concerning housing, healthcare, food, water, social security, education, and the environment. For example, the right to housing was the specific focus of the South African Constitutional Court’s decision in the *Grootboom* case. In this landmark case, the Constitutional Court specifically mandated the SAHRC to monitor the state’s compliance with the judgment under its general investigative and monitoring powers. This is a very useful approach adopted by the South African Constitutional Court and is worth emulating by other courts that are faced with litigation relating to ESCRs. It empowers NHRIs, as they will be performing the tasks of monitoring the enforcement of ESCRs through a court’s mandate as opposed to taking cognizance of ESCRs themselves.

The issue of national security poses a particular human rights conundrum, implicating both CPRs and ESCRs. After 11 September 2001, a number of countries passed various forms of antiterrorism laws with a view to protecting national security. These laws have on numerous occasions violated domestic and international human rights norms and have, indeed, intruded into civil liberties. NHRIs are ideally suited to intervene in these matters as they can engage with the government to ensure that national security legislation does not violate civil liberties.

NHRIs should be pioneers in developing domestic human rights discourses. This would require being kept abreast of important discussions taking place worldwide in the field of human rights and taking steps to determine how to integrate these matters into the domestic legal, constitutional, and institutional framework. National security will remain a key human rights issue in a number of countries worldwide, and the potential consequences for human rights and civil liberties are obvious. The UN Secretary General’s famous report, *In Larger Freedom*, focused on the relationship between security, development, and human rights in the international context.

---

Domestically, NHRIs should take a leadership role in this debate, as a number of issues relating to terrorism and human rights are currently addressed in a manner that does not take into consideration all aspects of the problem.\textsuperscript{89} NHRIs are best suited to understand the relationship between CPRs and ESCRs, not only from a legal standpoint but also from a practical, implementation standpoint.

VI. THE WAY FORWARD\textsuperscript{90}

NHRIs should expand their role within the human rights discourse so that the developmentalization of human rights and development becomes integral to their work. For this integration to take place, NHRIs must overcome at least six challenges posed by the human rights and development discourse.

A. The Theoretical and Substantive Challenge

Human rights have become part of constitutions and have been interpreted by judiciaries worldwide, with varying degrees of enforcement and implementation. However, there is no serious contemporary challenge to the concept of human rights; but their importance and relevance for humanity need to be better understood. The need for protecting and promoting human rights in order to preserve the rule of law and the ideals of constitutionalism is also generally recognized. But as far as development and, more importantly, the relationship between human rights and development are concerned, a need for greater clarity and much greater understanding remains. NHRIs ought to be contributing to the development of this increased understanding.

Amartya Sen, in his introductory chapter to the \textit{UNDP Human Development Report 2000}, observed:

The basic idea of human development—that enriching the lives and freedoms of ordinary people is fundamental—has much in common with the concerns expressed by declarations of human rights. The promotion of human development and the fulfillment 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.\textsuperscript{91}

\textsuperscript{89} Moreover, narrow perceptions of security fail to recognize within the governance agenda the threats due to infectious diseases such as SARS.


The dichotomy prevailing between CPRs on the one hand and ESCRs on the other is increasingly recognized as adversely affecting development. Hence, there is a need to formulate integrated governance policies based on human rights and development. This notion of developmentalizing rights is relevant, for example, in the Asian region, as the human rights discourse in Asia has been polarized due to the critique of human rights as being contrary to “Asian values.”

The familiar debates surrounding the universalism and cultural relativism of human rights coupled with the continuing challenges posed by varying degrees of democratic deficits prevalent in numerous countries in Asia create a situation ripe for NHRI intervention. The challenges posed by benevolent dictatorship and soft authoritarianism in East Asia to democratization and human rights can, to some extent, be met with notions of developmentalization of rights.

Developmentalization of rights is not without its critics. Balakrishnan Rajagopal, for example, notes that development and human rights have a problematic and contradictory relationship. His argument is that human rights and international law have provided doctrines “that enable the violence of development [to] continue legitimately even as they control and order the resistance to that violence.”

To illustrate, he discusses the mass eviction and deportation of 33 million development refugees from their homes due to development projects such as dams by the Indian government, simply seen as the “social cost” of development projects.

Thus, the integral understanding of human rights and development is a complex process that involves at various levels the reexamining of existing notions of rights, jurisprudential foundations, legal and constitutional frameworks, and their implementation process. NHRI should be mindful of this and should ensure that human rights and development remain the focal point of discourse relating to good governance, bearing in mind that “rights claims are the tool, not the end of social and political struggle.”

B. The Institutional Challenge

Institutionalization of human rights has assumed significance in light of emerging notions of rights-based approaches to development and gover-
nance. The advent of the institutionalization of human rights as an effective enforcement apparatus to ensure human rights are respected, protected, and promoted at the domestic level has helped monitor violations within countries. Institutionalization of human rights is a fairly broad term and encompasses understanding the need for human rights to become the focal point of governance both at the international and domestic levels. At the international level, institutionalization of human rights includes the human rights work of various institutions established under the UN and human rights treaties, including the UNHRC under the ICCPR.

Domestically, this work falls to the NHRIs. These institutions take a variety of forms, but the core idea behind them is that enforcement of human rights takes place at the domestic level. Therefore, capacity-building and norms-enforcement at the domestic level through the establishment of independent NHRIs is important. Another form of the internal approach to institutionalization of human rights is the role played by other institutions, for example, the judiciary’s role in interpreting the constitutions and other laws of the state. Liberal constitutional rights ensure that human rights are institutionalized by becoming part of the political culture of a society.

In any case, there is a clear and noticeable trend worldwide that the institutionalization of human rights is gaining universal acceptance. However, there is continuing resistance and differing degrees of agreement in certain countries and regions of the world when it comes to the methods and processes that should be used to achieve this institutionalization. As for the effectiveness of institutionalization of human rights, there have been mixed results in different regions. The legitimacy of these institutions is at its best when all or most members of the regional human rights machinery are well represented in the institution. Any institutionalized method of protection of human rights is effective only if the society has domestic protection of constitutional rights in place. Therefore, constitutionalism often appears foundational to a serious domestic commitment to human rights. NHRIs can play a necessary supplemental role to the well-established constitutional system, the rule of law, and legislation to ensure the protection of rights and freedoms.

The two key issues relating to NHRIs and ESCRs that need to be confronted when it comes to responding to the institutional challenges relating to human rights and development are how much the institutionalization

98. See Kumar, Institutionalization of Human Rights in Asia, supra note 16.
99. See Kumar, National Human Rights Institutions, supra note 19.
100. See Michael C. Davis, Constitutionalism and Economic Development in Asia: Do Domestic Institutions Matter, in Human Rights and Development, supra note 90.
of human rights (both international and domestic) will help in deepening the linkages between rights and development, and whether such linkages should move beyond human rights and development to other areas, such as trade.102

C. The Challenge of Poverty

Poverty is probably the most important human rights and development issue facing both developed and developing countries. The recognition of poverty as a serious global human rights issue is recent and coincides with the greater acceptance of ESCRs as enforceable rights, rather than mere policy objectives.103 As noted by Jean Dreze and Amartya Sen:

The point is not so much that there is no law against dying of hunger. That is of course, true and obvious. It is more that the legally guaranteed rights of ownership, exchange and transaction delineate economic systems that go hand in hand with some people failing to acquire enough food for survival. . . . In seeking a remedy to this problem of terrible vulnerability, it is natural to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival.104

In September 2000, world leaders at the United Nations Millennium Summit agreed to a set of time-bound measurable goals and targets for combating poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women.105 These goals, known as the UN Millennium Development Goals (MDGs), have identified as primary the eradication of extreme poverty and hunger.106 Specifically, the goal is to reduce by half the proportion of people living on less than a dollar a day and to reduce by half the proportion of people who suffer from hunger.107 All the members of the United Nations have pledged to meet these goals by the year 2015.108 It is, however, very unlikely that these targets will be met. It is obvious that


106. Id.

107. Id.

108. Id.
NHRIs must be key partners in working with other governance institutions toward realizing the ESCRs that are part of the MDGs.

What remains to be seen is how far human rights-based approaches to understanding and responding to poverty can help in its eradication. Human rights approaches focus on the empowerment of the people as a core strategy in ensuring that the governance system is reformed to include issues that affect people’s lives, including poverty. Transparency in governance and accountability of administration are key issues in human rights approaches that target poverty, as corruption and maladministration affect the implementation of sustainable policies aimed at eradicating poverty. NHRIs should be focusing on these issues when preparing to address the implications of violations of ESCRs. This part of the mandate of NHRIs will necessarily involve working closely with government agencies and NGOs. NHRIs have to rise up to face this challenge so as to avoid institutional overlaps and functional duplication in them taking cognizance of human rights violations occurring as a result of poverty and deprivation.

D. The Challenge of Corruption

The problem of corruption in developing countries is manifested in the malfunctioning of institutions responsible for governance. There is no doubt that corruption creates a vicious atmosphere of disrespect for law and undermines the effective functioning of democratic institutions. As a consequence, CPRs and ESCRs of people are violated. This situation has undermined the democratic foundations of the state. The rule of law is protected only when there is a predictable legal system that responds to problems in a reasonably fair, nondiscriminatory, and effective manner. Because the best antidote to corruption is public vigilance backed by strong and transparent institutions, all legal, institutional, judicial, and constitutional measures intended to combat corruption should be oriented toward empowering the citizenry.

There are two facets of empowerment that the developing countries’ NHRIs ought to initiate to promote effective anticorruption strategies. First, the people need to be empowered by providing a right to corruption-free governance. NHRIs can help in promoting the development of such a right. This should be supplemented by providing forums and institutions that work to ensure the protection and promotion of this right. Access to justice remains a priority for the enforcement of this right. Once the lead is taken by NHRIs, it is possible for the judiciary and other institutions to

develop mechanisms so that access for victims of corruption is available and remedial measures are quick and effective. Secondly, institutions that are already working in the field of anticorruption need to be empowered so that political or other interference does not creep into the system and affect anticorruption work. For this to happen, transparency, institutional autonomy, and functional independence of the anticorruption institutions become mandatory. This role can be effectively performed by NHRI s as they can engage with other institutions. Of course, political will must exist at the highest level of the government so that anticorruption becomes an important policy of the government, both in terms of words and deeds.

Corruption has enormous negative consequences for development. The development of states depends in large measure on the economic policies and social consequences of these policies. Corruption affects both of these aspects in a number of ways. For example, corruption impedes economic growth, discourages foreign investment, and diverts resources for infrastructure development, health and other public services, education, and antipoverty programs. In essence, corruption poses serious challenges for governance, as states cannot achieve the goals of development without ensuring corruption-free governance. Due to corruption, resource allocation suffers from inefficiency and inequity. The state cannot fulfill its core mandate of providing for its citizens, and social and economic development is crippled. Underlining the importance of the global anticorruption treaty, UN Secretary General Kofi Annan noted, “Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.”

The successful experiences of Singapore and Hong Kong in Asia in ensuring corruption-free governance is valuable. However, for good governance to become an effective strategy for national growth and progress in a broader sense, anticorruption efforts should not violate human rights. Moreover, the right to good governance needs to be institutionalized; effective institutions such as human rights commissions and anticorruption institutions must be created with the necessary checks and balances to provide for institutional accountability and oversight. The basic idea behind the right to good governance and the rights-based approaches to development is to bring what was hitherto in the venue of political discourse to the development discourse by the recognition of corruption as a human rights issue.

E. The Challenge of Globalization and the Role of International Economic Institutions

Globalization is a process that has affected lives worldwide in one way or the other. The contemporary debate regarding the impact of economic globalization and its effect on marginalization of peoples in developing countries recognizes profound implications for human rights and development. In the domestic context, institutions such as NHRIs cannot shy away from assessing the human rights implications of domestic and international policies that are formulated to give effect to dictates of the World Bank, multinational corporations (MNCs), and the World Trade Organization (WTO). According to Joseph Stiglitz,

What is needed are policies for sustainable, equitable, and democratic growth. This is the reason for development. Development is not about helping a few people get rich or creating a handful of pointless protected industries that only benefit the country’s elite. . . . Development is about transforming societies, improving the lives of the poor, enabling everyone to have a chance at success and access to health care and education.

The NHRIs need to develop proper policies within their institutional mandates in order to respond to human rights violations that occur because of policies adopted by governments on account of the functioning of the MNCs and international economic institutions. NHRIs cannot simply deny that they have jurisdiction to take cognizance of these cases, particularly when issues relating to ESCRs are at stake. There is also an issue relating to social expectations that are generated by institutions such as the NHRIs that seek responses to human rights violations.

F. THE CHALLENGE OF ENSURING HUMAN SECURITY

The state must be protected from both national and international threats. National security strategies are increasingly designed with the belief that passing stringent laws that grant the executive, including law enforcement authorities, greater discretionary powers help thwart terrorists and other in-

ternal and external threats. However, the contemporary worldwide efforts that focus on protecting the state from its citizens can significantly affect human rights and civil liberties. States facing national and international terrorist threats and other problems must seriously examine their entire government system, particularly the impact of their domestic and foreign policies on their own people and people of other states. This consideration has recently implicated a broader notion of human security.

The UN Secretary General’s report, In Larger Freedom, emphasized the need to understand security from a holistic perspective and, most importantly, to appreciate freedom from human rights and development perspectives. He argued, “Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change.” Discussing the relationship of terrorism to other problems that affect humanity, Kofi Annan observed:

While poverty and denial of human rights may not be said to ‘cause’ civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development.

The report further emphasized that the world community will not be able to enjoy development without security, will not enjoy security without development, and will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed. The report is indeed a positive development in providing a thematic framework for understanding security in a much wider context. However, it is not clear how the report can provide a meaningful challenge to the existing discourse on the “war on terror,” which seems to undermine human rights and international law while it seeks to achieve certain national security objectives.

120. See In Larger Freedom, supra note 88.
121. Id.
123. See Jones, supra note 119, at 92.
Most NHRIs have experience in examining the CPRs that are implicated on account of antiterrorism laws. But to examine issues relating to terrorism from the standpoint of development and human security is quite necessary for the NHRIs; and in this regard, little work has been done. This framework arises due to the emphasis on ESCRs in the functioning of NHRIs. The problem of terrorism, both its causes and consequences, cannot be meaningfully understood without a thorough examination of ESCRs. Given their institutional status and the support that they can potentially garner from both the state and nonstate actors, NHRIs are important institutions, well-suited to address these problems. To be effective in this, NHRIs must maintain objectivity and professionalism in their functioning.

VII. CONCLUSION

NHRIs have an important role to play in the promotion and protection of ESCRs. This institutional role of NHRIs is affected due to the lesser recognition of ESCRs as human rights in most parts of the world. It is imperative for the international community to understand the need for focusing on ESCRs, thereby accepting a holistic perspective on human rights and development. Valuing ESCRs does not mean any abdication of the protection and promotion of CPRs, as some advocates of “Asian values” have urged, but rather furthers both sets of rights. Accepting a holistic perspective will inevitably lead to an understanding of the importance of the right to development, as it will result in increasing human capabilities for the fulfillment and enjoyment of other ESCRs and CPRs. Third world social movements need to be recognized as an independent constituency in international law, particularly when development policies have significant impact on the human rights. This emphasis on the need for an integral understanding of human rights and development does not suggest that the gains attained in CPRs are any less significant. Instead, such an understanding simply recognizes that the process of marginalization of people due to poverty and unemployment because of the neglect of ESCRs ultimately threatens the other values of democracy.

NHRIs worldwide need to develop a focus on ESCRs. This focus can be developed by adopting an international and comparative approach to the work of NHRIs. A few NHRIs have started to take cognizance of ESCRs violations. Many other NHRIs need to develop capacities and jurisprudence relating to ESCRs. Transnational conversations among NHRIs in a region or among other regions of the world are helpful to understand how issues relating to ESCRs have been addressed. NGOs, the media, and the wider civil society will have an important role to play in helping the NHRIs to ensure that the development process is based on human rights.