

[93] HUMAN RIGHTS REALIZATION IN AN ERA OF GLOBALIZATION: THE INDIAN EXPERIENCE

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"Globalization *has* a human face."¹

"Another world is possible."²

I. Globalization: Giving it a Meaning and Context

Globalization, both as a description and a prescription³ has provoked several contradictory responses.⁴ Although the two opening statements [94] amply indicate this contradiction, some illustrations will help in removing any remaining doubts. Globalization demands deregulation⁵ and regulation at the same time.⁶ Whether globalization is about removing borders or strengthening the existing ones is not clear; it has removed borders regarding trade but not regarding several other important issues such as access to life-saving drugs, labor movement, employment, and immigration.⁷ The question of whether

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¹ Jagdish Bhagwati, In Defense of Globalisation x (2004) (emphasis in original). Although Bhagwati has offered a comprehensive defense of globalization, I am neither fully convinced nor do I exactly fit into his trilogy of discontents: someone with "an anti-capitalist, anti-globalisation, and acute anti-corporation mind-set." *Id.* at 4. However, Bhagwati is not alone in expressing an almost unqualified optimism for globalization. While giving the Dr. Charles F. Galway Lecture, Fried observed: "I believe that this globalization of economic activity ... has indisputably been good for the international community, good for people, and consistent with the goals set for economic cooperation by the United Nations." Jonathan Fried, *Globalization and International Law: Some Thoughts for States and Citizens*, 23 *Queen's L.J.* 259, 265 (1997) (emphasis added).

² Slogan of the World Social Forum India, <http://www.wsfindia.org/>. It is also the title of a book based on the World Social Forum entitled *Another World is Possible: Popular Alternatives to Globalization at the World Social Forum* (William F. Fisher & Thomas Ponniah eds., 2003) [hereinafter Fisher & Ponniah].

³ James Petras & Henry Veltmeyer, *Globalization Unmasked: Imperialism in the 21st Century* 11 (2001).

⁴ "Not merely are complex and contradictory events, processes and happenings lumped under this [globalization] rubric, signifying uneven and indeterminate developments, but also theories about globalization bring to us ... a 'whole continent of contested conceptions.'" Upendra Baxi, *The Future of Human Rights* 133 (2002). Braithwaite and Drahos see "globalisation as a contest of principles - a contest, for example, between the principle of harmonisation and the principle of national sovereignty." John Braithwaite & Peter Drahos, *Global Business Regulation* 7, 511-12 (2000).

⁵ Baxi conceives of globalization in terms of three Ds: deregulation, denationalization and disinvestment. Baxi, *supra* note 4, at 139. See also Parmanand Singh, *State, Market and Economic Reforms*, in *Legal Dimensions of Market Economy* 23 (Parmanand Singh et al. eds., 1997) [hereinafter *Legal Dimensions* (Singh et al. eds.)].

⁶ For example, it is necessary to regulate anti-competitive practices. Moreover, corporations also expect states to protect their economic interests and provide general security. In fact, the free market may not deliver the desired results in the absence of some regulation. See, e.g., Joseph E. Stiglitz, *Globalization and Its Discontents* 55-58 (2002) (outlining some of the arguments surrounding privatization).

⁷ One-dimensional globalization contributes to the creation of borders regarding labor movement and immigration. See *Anti-BPO Bill Passed in the US*, *The Economic Times Online*, Jan. 23, 2004, available at <http://economictimes.indiatimes.com/articleshow/440682.cms> (highlighting the move of the U.S. government to ban the outsourcing of contracts). See also Kofi A. Annan, *Managing Migration Better*, *The Hindu*, Jan. 29, 2004, available at <http://www.hindu.com/2004/01/29/stories/2004012901211000.htm>; Baxi, *supra* note 4, at

globalization, which is celebrated and resisted at the same time both in the West and in the "Rest",⁸ is inevitable/irreversible,⁹ or is an example of Western imperialism¹⁰ in an era of [95] neoliberalism¹¹ and therefore reversible, is a moot point.¹² Whether globalization poses a threat to human rights¹³ or gives impetus to their realization is again not settled.¹⁴ Further, globalization is resulting in the alienation of people by bringing them together.¹⁵ There is no consensus on whether the bringing of people closer and thus striving for global homogeneity/uniformity/conformity is a good development, or whether it occurs at the heavy cost of destroying indigenous or local beliefs and culture.¹⁶ Similarly, whether globalization increases or decreases poverty as well as economic disparity is a hotly debated and contested issue.¹⁷ The same could be said about the [96] impact of foreign direct investment by multinational corporations (MNCs)¹⁸ (the drivers of globalization)¹⁹ on development²⁰ and

136-39.

⁸ See Stiglitz, *supra* note 6, at 3-4, 247-49; Noreena Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* 1-5 (2001); Michael Goodhart, *Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization*, 25 *Hum. Rts. Q.* 935, 960-61 (2003).

⁹ For example, Stiglitz suggests that abandoning globalization is "neither feasible nor desirable." Stiglitz, *supra* note 6, at 214. He continues, "We cannot go back on globalization; it is here to stay." *Id.* at 222. See also William H. Meyer, *Activism and Research on TNCs and Human Rights: Building a New International Normative Regime*, in *Transnational Corporations and Human Rights* 33, 50 (Jedrej George Frynas & Scott Pegg eds., 2003) [hereinafter Meyer, *Activism and Research on TNCs*]. Cf. Murray Dobbin, *The Myth of the Good Corporate Citizen: Democracy under the Rule of Big Business* 6, 280 (1998).

¹⁰ See Tony Schirato & Jen Webb, *Understanding Globalization* 15-16 (2003); William K. Tabb, *The Amoral Elephant: Globalization and the Struggle for Social Justice in the Twenty-First Century* 79-98 (2001).

¹¹ For a critique of neo-liberalism, see Noam Chomsky, *Profit over People: Neoliberalism and Global Order* (1999).

¹² The Western hypocrisy regarding the removal of trade barriers is one of the reasons for such a suspicion. See Stiglitz, *supra* note 6, at 6-7, 60-62. See also generally Petras & Veltmeyer, *supra* note 3.

¹³ Henkin writes: "[I]f globalization has begun to threaten state sovereignty, that may sound promising for the human rights movement. But I do not find comfort for human rights in the various forms of globalization." Louis Henkin, *That 'S' Word: Sovereignty, and Globalization, and Human Rights*, *Et Cetera*, 68 *Fordham L. Rev.* 1, 7 (1999). See also Goodhart, *supra* note 8, at 935-36; Eloy Casagrande Jr. & Richard Welford, *The Big Brothers: Transnational Corporations, Trade Organizations and Multilateral Financial Institutions*, in Richard Welford, *Hijacking Environmentalism: Corporate Responses to Sustainable Development* 137-55 (1997) [hereinafter Welford, *Hijacking Environmentalism*].

¹⁴ See Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 *B. C. Int'l. & Comp. L. Rev.* 273, 291-99 (2002); Anne Orford, *The Subject of Globalization: Economics, Identity and Human Rights*, 94 *Am. Soc'y. Int'l L. Proc.* 146, 146-47 (2000).

¹⁵ Ghai, for example, argues that although globalization has facilitated a "greater knowledge of other cultures that produces a sympathetic understanding of diversity," it has also "produced a sense of alienation and powerlessness." Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 *Cardozo L. Rev.* 1095, 1096 (2000).

¹⁶ "Globalization also creates a threat of cultural domination." Ivan Simonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 *Ga. J. Int'l & Comp. L.* 381, 386 (2000). See also Hertz, *supra* note 8, at 13-15; see generally Balmurli Natrajan, *Legitimizing Globalization: Culture and its Use*, 12 *Transnat'l L. & Contemp. Probs.* 127 (2002).

¹⁷ Petras & Veltmeyer, *supra* note 3, at 20-22; Stiglitz, *supra* note 6, at 4-10, 24-25, 86; Hertz, *supra* note 8, at 8, 41-51; John H. Dunning, *The Moral Imperatives of Global Capitalism: An Overview*, in *Making Globalization Good: The Moral Challenges of Global Capitalism* 11, 18 (John H. Dunning ed., 2003); Shelton, *supra* note 14, at 278-79; Janet Dine, *Companies, International Trade and Human Rights* 1-3, 9-10 (2005); International Chamber of Commerce, *Standing Up for the Global Economy: Key Facts, Figures and Arguments in Support of Globalization* (June 17-19, 2004), available at http://www.iccwbo.org/home/statements_rules/statements/2004/Globalization%20paper%202004.pdf [hereinafter ICC, *Standing Up for the Global Economy*].

¹⁸ Despite the difference in terminology of MNCs and transnational corporations (TNCs), I have used MNCs to indicate both. See generally David C. Korten, *When Corporations Rule the World* 125 (1995); Peter

human rights.²¹

What is, however, hardly contested is that globalization has serious implications, both positive and negative, for the realization of human rights everywhere, but more so in developing countries.²² Taking India as an example of a developing country, this article seeks to critically examine how globalization has influenced the project of human rights realization. Even if limited to Indian experience, the task undertaken here is quite ambitious. In this article, therefore, I only aim to begin drawing the sketch on a wide canvas.

So, what is it which affects the lives of all without any discrimination of caste, creed, color, sex, race, religion, language, or economic [97] status?²³ Globalization, including its various dimensions²⁴ - political, economic, social, cultural, and technological - is defined in varied ways.²⁵ Giddens, for example, conceptualizes globalization as something where "local happenings are shaped by events occurring many miles away."²⁶ Another commentator views globalization as "an intense interchange of people, ideas, capital and technology across international space."²⁷ Similarly, for Dunning, globalization means "connectivity of individuals and institutions across the globe."²⁸ Though defined variedly,²⁹ it is not difficult to identify the central tenant of globalization: globalization is about movement across the natural and/or (mostly) man-made borders/barriers in a speedy, efficient way and with minimum restrictions. This movement is ensured through the four Ds: deregulation, denationalization, disinvestment, and digitalization.

Muchlinski, *Multinational Enterprises and the Law* 12-15 (1995); Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* 10-12 (1982).

¹⁹ "Globalization is powerfully driven by international corporations." Stiglitz, *supra* note 6, at 10. The International Chamber of Commerce also acknowledges this: "[Companies] are at the heart of international trade and investment, engaging in business across borders and linking economies together into a more interconnected world." ICC, *Standing Up for the Global Economy*, *supra* note 17, at 3.

²⁰ See Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 *Hum. Rts. Q.* 735, 742-50 (1999); Dine, *supra* note 17, at 23- 26.

²¹ See Sherif H. Seid, *Global Regulation of Foreign Direct Investment* 3-30, 104-10, 125-29, 130-38 (2002); Stiglitz, *supra* note 6, at 67-73. See also William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 *Hum. Rts. Q.* 368 (1996); Meyer, *Activism and Research on TNCs*, *supra* note 9, at 33-52. Cf. Jackie Smith, Melissa Bolyard & Anna Ippolito, *Human Rights and the Global Economy: A Response to Meyer*, 21 *Hum. Rts. Q.* 207 (1999).

²² Anghie offers a critique of the impact of globalization on people in third world countries. Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and The Third World*, 32 *N.Y.U. J. Int'l L. & Pol.* 243 (2000).

²³ Globalization is omnipresent in the sense that it affects the lives of even those who are unaware of it or who do not want to be affected by it.

²⁴ Braithwaite and Drahos identify three distinct kinds of globalization: globalization of firms, markets and regulation. Braithwaite & Drahos, *supra* note 4, at 8. Novak suggests that "Globalization has at least three dimensions: political, cultural, and economic." Michael Novak, *Universal Hunger for Liberty: Why the Clash of Civilizations is Not Inevitable* 24 (2004).

²⁵ "One can be sure that virtually every one of the 2822 academic papers on globalisation written in 1998 included its own definition, as would each of the 589 new books on the subject published in that year." GlobalisationGuide.org, *What is Globalisation?* para. 1, available at [http:// www.globalisationguide.org/01.html](http://www.globalisationguide.org/01.html).

²⁶ Anthony Giddens, *The Consequences of Modernity* 64 (1990), quoted in Richard Peet et al., *Unholy Trinity: The IMF, World Bank and WTO* 1 (2003) [hereinafter Peet et al., *Unholy Trinity*].

²⁷ *Id.* at 28.

²⁸ Dunning, *supra* note 17, at 12.

²⁹ See Shelton, *supra* note 14, at 275-76; McCorquodale & Fairbrother, *supra* note 20, at 736-39; David Kinley, *Human Rights, Globalization and the Rule of Law: Friends, Foes or Family?*, 7 *UCLA J. Int'l L. & Foreign Aff.* 239, 242-44 (2002-03) [hereinafter Kinley, *Friends, Foes or Family?*].

Since the article focuses on the interface of globalization and human rights realization in India, a reference to human rights in this article is taken to mean not only the rights laid down under the Indian [98] Constitution,³⁰ various other statutes³¹ and the international conventions ratified by India,³² but also the rights created by the judiciary.³³

I examine, in Part II, the interaction of the process of globalization and human rights, especially those traits of globalization which could affect human rights in several ways. Part III first tries to locate the position of the three branches of Indian government and then offers a snapshot of some of the emerging human rights themes in India. Part IV suggests some strategies as well as guiding principles which could help in a successful marketing of human rights in an era of globalization. In particular, I argue how the Gandhian Talisma could ensure that the process of globalization is alive to the human rights of all. Part V sums up the position taken in this article.

But before we proceed further, let me offer some signposts for the readers. First, it is often suggested that globalization is not something new.³⁴ I do not disagree with such suggestions as to the historical roots of globalization; in a way, it predates even the human rights movement in its [99] current form. However, I assert that the "globalization of today" has acquired newer, different connotations from the "globalization of yesterday."³⁵ Second, though all the dimensions of globalization, in my view, have some immediate or mediate bearing on the realization of human rights,³⁶ I do not intend or pretend to examine here all such dimensions. Third, in this article I have consciously not engaged the much-hyped but important good governance and capability arguments, simply because globalization presents

³⁰ Articles 12-35 in Part III of the Constitution lay down fundamental rights. Moreover, the directive principles of state policy contained in Part IV, though not justiciable, also have important bearing on the scope of human rights. Mahendra P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directives Principles: A Human Rights Perspective*, 5 SCC J. 1 (2003), available at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm>.

³¹ See, e.g., Trade Unions Act, No. 16 of 1926; India Code (1957), v. 5; The Minimum Wages Act, No. 11 of 1948; India Code (1957), v. 5; Factories Act, No. 63 of 1948; India Code (1951), v. 5; The Maternity Benefit Act, No. 53 of 1961; India Code (1957), v. 5.

³² India has ratified most of the core human rights conventions. See List of [International Labour Organization] Conventions Ratified by India at <http://www.jnu.ac.in/Huriter/treaties.htm>. Also worth noting is the way in which the Indian Supreme Court has utilized the rights laid down under such conventions for strengthening the existing human rights jurisprudence. See *Visakha v. State of Rajasthan*, A.I.R. 1997 S.C. 3011; *D K Basu v. State of West Bengal*, A.I.R. 1997 S.C. 610.

³³ See Mahendra P. Singh, *Shukla's Constitution of India*, 10th ed. 164- 81 (2001).

³⁴ One could, for example, refer to the ancient Indian concept of Vasudeva Kutumbakam (treat the whole world as your family). See also John Feffer, *Challenging Globalization: An Introduction*, in *Living in Hope: People Challenging Globalization* 2-4 (John Feffer ed., 2002); Uché U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the 'New' International Trade Regime*, 20 Berkeley J. Gender, Law & Justice 75, 79-80 (2005); Jonathan Sacks, *Global Covenant: A Jewish Perspective on Globalization*, in *Making Globalization Good*, supra note 17, at 210, 210-11; Simonovic, supra note 16, at 385.

³⁵ Shelton, supra note 14, at 275-76; Bhagwati, supra note 1, at 10-13; Frank J. Garcia, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 Brook. J. Int'l L. 51, 57-58 (1999); Baldev Raj Nayar, *Globalization and Nationalism: The Changing Balance in India's Economic Policy, 1950-2000* 16-20 (2001); ICC, *Standing Up for the Global Economy*, supra note 17, at 4-5.

³⁶ Goodhart suggests that the main worries are associated with the economic aspects of globalization. Goodhart, supra note 8, at 937. Though this suggestion appears prima facie uncontroversial, it is difficult to imagine which type of globalization has no economic dimension; globalization in all its forms is driven primarily by economic considerations.

the most potent challenges to human rights realization in those states which do not have an optimal level of good governance and/or capability. Finally, this article deals with the impact of globalization on the realization of human rights; it does not consider how the human rights discourse facilitates globalization.³⁷

II. Globalization and Human Rights: Friends or Foes?³⁸

Globalization has, undoubtedly, influenced not only the content, nature and realization of human rights but also the mechanism for their enforcement. This being the case, one should ask a more fundamental question first: what is the nature of globalization, both as a concept and as a process? Is it pro- or anti-human rights or is it a neutral phenomenon?³⁹ In my view, globalization as a concept is neither pro- nor anti-human rights; conceptually, globalization could offer opportunities both for the promotion [100] and abridgment of human rights, at the national level as well as internationally.⁴⁰ What is, however, critical is the way in which this conception is operationalized, i.e., the process of globalization. The direction of the way will depend on many factors, including the composition of actors behind it as well as their objectives. The apparent actors are states and state-led international institutions such as the United Nations (UN), World Bank, Organization for Economic Cooperation and Development (OECD), International Monetary Fund (IMF) and the World Trade Organization (WTO).⁴¹ On the other hand, the hidden (and probably more influential)⁴² actors are MNCs⁴³ and their representative organizations.⁴⁴ Besides, arguably, all of us also contribute to globalization in several ways.⁴⁵

³⁷ Orford, *supra* note 14, at 147-48. Pendleton, in fact, goes one step further and argues for an individual human right to globalization. Michael D. Pendleton, *A New Human Right: The Right to Globalization*, 22 *Fordham Int'l L.J.* 2052 (1999).

³⁸ A partial similarity of this sub-heading with the title of Kinley's article is completely co-incidental. Kinley, *Friends, Foes or Family?*, *supra* note 29.

³⁹ Dobbin, for example, argues that "[t]he deceptive neutrality of globalization and its effective use as an ideological tool mask the powerful reality of the domination of the world by a few hundred enormously powerful transnational corporations" Dobbin, *supra* note 9, at 8.

⁴⁰ Dunning argues: "Globalization is a morally neutral concept. In itself, it is neither good nor bad, but it may be motivated for good or bad reasons, and used to bring about more or less good or bad results." Dunning, in *Making Globalization Good*, *supra* note 17, at 12. See also Garcia, *supra* note 35; McCorquodale & Fairbrother, *supra* note 20, at 763.

⁴¹ See Braithwaite & Drahos, *supra* note 4, at 27 (the two authors though argue that nation states had the greatest influence in the globalization of business regulation; *Id.* at 475); Stiglitz, *supra* note 6, at 10. See also Peet et al., *Unholy Trinity*, *supra* note 26.

⁴² Of the largest 100 economies in the world, 51 are MNCs and only 49 are states. Nicola Jagers, *The Legal Status of the Multinational Corporation under International Law, in Human Rights Standards and the Responsibility of Transnational Corporations* (Michael K. Addo ed., 1999). Similarly, 2004 figures show that out of the 100 largest economic entities in terms of their market value, 67 are corporations. Paul Sheehan, *All Aboard the Big Red Juggernaut*, *Sydney Morning Herald*, Jan. 22-23, 2005, at 41. See also Dobbin, *supra* note 9, at 85-121; see generally Korten, *supra* note 18; Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, available at <http://www.globalpolicy.org/soecon/tncs/top200.htm>. Cf. Braithwaite & Drahos, *supra* note 4, at 475.

⁴³ "Globalization is shaped by economic and corporate actors. Chief among these are MNCs." Sukanya Pillay, *And Justice For All? Globalization, Multinational Corporations, And The Need For Legally Enforceable Human Rights Protections*, 81 *U. Det. Mercy L. Rev.* 489, 522 (2004).

⁴⁴ "ICC (International Chamber of Commerce) is the voice of world business championing the global economy as a force for economic growth, job creation and prosperity." ICC, *What is ICC?* para.1, at <http://www.iccwbo.org/id93/index.html>. See also ICC, *Standing Up for the Global Economy*, *supra* note 17; see generally Seid, *supra* note 21, at 138-41; Braithwaite & Drahos, *supra* note 4, at 488-94.

⁴⁵ Warner, for example, observes: "We are, each of us, the agents of globalization because we are the

[101] In order to find out whether the relationship between globalization as a process and human rights is one of friends or foes, I first try to map some of the more significant aspects of the process of globalization which have a direct bearing on the realization of human rights, and then examine the modes in which globalization has affected or could affect human rights.

A. The Process of Globalization: Some Human Rights-Related Aspects

The following aspects⁴⁶ of the process of globalization have a potential to influence human rights jurisprudence.

1. The Changing Role and Position of States

Globalization directly hits at the traditional notion of state sovereignty; "the project of globalization . . . lies in 'rolling back the state.'"⁴⁷ However, in view of ever-changing notions of sovereignty,⁴⁸ one should not lightly assume that states or their sovereignty are withering away,⁴⁹ or that globalization robs states of powers such as that of taxation.⁵⁰ States, in principle, still possess the power of regulation and intervention,⁵¹ but the expectation is that such exercise of power should suit the interests of global [102] capital,⁵² even at the cost of harming the interests of local communities.⁵³ Moreover, states, even democratic ones, might not be able to take an activist position in fulfilling their human rights obligations (particularly to socio-economic rights)⁵⁴ under pressure from external international sources⁵⁵ or MNCs.⁵⁶

consumers." Mark Warner, *Globalization and Human Rights: An Economic Model*, 25 *Brook. J. Int'l L.* 99, 101 (1999).

⁴⁶ Feffer considers growth, free trade, deregulation, TNCs, monopolies, privatization, market fundamentalism, technological advances, dependency, free market, democracy, and transparency as the key features of globalization. Feffer, *supra* note 34, at 6-14.

⁴⁷ Baxi, *supra* note 4, at 139. Hertz also argues that "the state has been stepping back, and the market has been taking over." Hertz, *supra* note 8, at 32. See also Schirato & Webb, *supra* note 10, at 104-20. It is worth noting that this change in the role of states is happening because of decisions taken, voluntarily or otherwise, by states themselves.

⁴⁸ Henkin, *supra* note 13; Danielle S. Petit, *Sovereignty and Globalization: Fallacies, Truth, and Perception*, 17 *N.Y.L. Sch. J. Hum. Rts.* 1139 (2001); Fried, *supra* note 1.

⁴⁹ Sassen argues that there is not a loss of sovereignty but only a reconstitution of it: "It seems to me that rather than sovereignty eroding as a consequence of globalization and supranational organizations, it is being transformed." Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* 30 (1996); see generally *id.* at 1-30.

⁵⁰ Martin Wolf, *Does Globalisation Render States Impotent?*, 5 *Brit. Tax Rev.* 537 (2000).

⁵¹ Dunoff argues that "neither the human rights regime nor the international economic regime is premised upon the withering of the state. To the contrary, both regimes presuppose an activist state." Jeffrey L. Dunoff, *Does Globalization Advance Human Rights?*, 25 *Brook. J. Int'l L.* 125, 129 (1999).

⁵² Dobbin, for example, paints the picture thus: "corporations want more - more cuts to their taxes, more cuts to UI and pension premiums, ever greater cuts to social programs, more repeals of environmental laws and protections for workers' health and safety, and more and better ways to squeeze more from their employees." Dobbin, *supra* note 9, at 2. Dine explains this as "the 'willing capture' of governments." Dine, *supra* note 17, at 27-30.

⁵³ See Baxi, *supra* note 4, at 139-44.

⁵⁴ "[T]he end of the redistributionist 'nation state' complicates the realization and enjoyment of social and economic rights." *Id.* at 135.

⁵⁵ States, for example, have to comply with different conditions, guidelines, or directions coming from bodies such as the WTO, the IMF and the World Bank.

⁵⁶ Surya Deva, *The Sangam of Foreign Investment, Multinational Corporations and Human Rights: An Indian Perspective for a Developing Asia*, *Singapore J. Legal Stud.* 305, 319 (2004) [hereinafter Deva, *The Sangam*].

Given this scenario, it is doubtful whether states can be trusted to promote the human rights of their populace.⁵⁷

2. The Rise in Number and Influence of MNCs

Corresponding to the decay of regulatory states is a rise in the number and influence of MNCs.⁵⁸ In the assessment of Professor Henkin, "[g]iant companies have become largely independent of states, of the states that created them, of the states in which they operate. Some of them are [103] replacing, or at least jostling, the states themselves in the state system."⁵⁹ Another commentator has suggested that both our present and future is "in the hands of large corporations."⁶⁰ However, despite the fact that MNCs of today dwarf many modern states in terms of economic and also political might, their activities by and large are still not subject to concrete, legally binding human rights obligations flowing from either constitutional law⁶¹ or international law.⁶² Not only this, MNCs are also able to influence policy and law making in key areas such as public health, child labor, workers' rights, consumer protection, foreign investment, environmental protection, women's rights, and the rights of indigenous peoples.⁶³

Although it can be argued that the arrival of MNCs in local markets benefits consumers

See also Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 85-110 (2004).

⁵⁷ For example, the percentage of gross domestic product (GDP) allocated for health has dropped from 1.4% in 1991-92 to 0.9% in 2001-02. Siddharth Narrain, *Health, for a Price*, 21 *Frontline*, Feb. 28-Mar. 12 2004, available at <http://www.frontlineonnet.com/fl2105/stories/20040312008112900.htm>.

⁵⁸ There are 63,834 multinational parent corporations with 866,119 foreign affiliates. UNCTAD, *Development and Globalization: Facts and Figures* 45 (2004). From this data, one could imagine the number of total corporations in the world. For example, it is estimated that "[t]he number of active US corporations alone is nearing 5 million." BizStats.com, *Total Number of U.S. Corporations*, para.1, <http://www.bizstats.com/numbercorps.htm>. See also Hertz, *supra* note 8, at 6-8; Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have no Incentive to Define Human Rights*, 11 *Minn. J. Global Trade* 101, 103-04 (2002).

⁵⁹ Henkin, *supra* note 13, at 6.

⁶⁰ Richard Welford, *Introduction: What are we Doing to the World?*, in Welford, *Hijacking Environmentalism*, *supra* note 13, at 3, 6. See also Dobbin, *supra* note 9, at 2.

⁶¹ Although the human rights mandate emanating from most constitutions, including that of India, is directed towards states or state actors, courts in different jurisdiction have tried to subject private corporations to human rights obligations by invoking the doctrine of horizontal effect. See, e.g., *Guerra v. Italy*, (1998) 26 E.H.R.R. 357; *Visakha v. State of Rajasthan*, A.I.R. 1997 S.C. 3011. See also David Kinley, *Human Rights as Legally Binding or Merely Relevant?*, in *Commercial Law and Human Rights* 25, 38-42 (Stephen Bottomley & David Kinley eds., 2002) [hereinafter Bottomley & Kinley]; Danwood M. Chirwa, *Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights under the South African Constitution*, 7 *Mediterranean J. Hum. Rts.* 29, 43-49 (2003). But this process has been neither smooth nor uniform. It is also fraught with many difficulties. See generally Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 *Int'l J. Const. L.* 79 (2003).

⁶² The international framework for MNCs' human rights obligations, whether flowing from the UN, the ILO or the OECD, is voluntary and suffers from deep problems. See Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 *Conn. J. Int'l L.* 1 (2003).

⁶³ As W. Friedmann wrote more than three decades ago, that big corporations "have a direct and decisive impact on the social, economic and political life of the nation is no longer a matter of argument." W. Friedmann, *Law in a Changing Society* 333 (2d. ed. 1972). More recently, see how BHP has influenced the government of Papua New Guinea to enact laws to avert their liability for environmental pollution. Bob Burton, *The Big Ugly at OK Tedi*, 23 *Multinational Monitor* (Jan.-Feb. 2002), <http://multinationalmonitor.org/mm2002/02jan-feb/jan-feb02front.html>. See also Dine, *supra* note 17, at 27-30; Sharon Beder, *Big Business and Greenhouse: A Declaration of Surrender*, *Online Opinion* (Feb. 6, 2006), <http://www.onlineopinion.com.au/view.asp?article=4119>.

and that MNCs could also have some positive impact on [104] human rights,⁶⁴ that has not always been the case.⁶⁵ The involvement of MNCs in human rights violations⁶⁶ and generating environmental hazards is well documented.⁶⁷ Corporations undoubtedly produce wealth, but they also produce risks,⁶⁸ both to humans and to the ecosystem.⁶⁹ Globalization [105] has facilitated the export of risks to those countries that are least capable to handle them.⁷⁰

3. Foreign Direct Investment

At a time when development is squarely related to the flow of foreign direct investment (FDI),⁷¹ it is a challenge for developing countries to create an atmosphere conducive to FDI and at the same time ensure that FDI does not work, directly or indirectly, against local needs or the realization of human rights.⁷² Investment contributes to development, but it is doubtful that states are able to exercise a reasonable amount of control over the two critical aspects of

⁶⁴ Bottomley examines the relationship of corporations and human rights from various perspectives - from corporations as violators to promoters and beneficiaries of human rights. Stephen Bottomley, *Corporations and Human Rights*, in Bottomley & Kinley, *supra* note 61, at 47, 47-68.

⁶⁵ Seid, *supra* note 21, at 120-26.

⁶⁶ The activities of Union Carbide Corporation and Enron Corporation in India, Unocal Corporation in Myanmar, Nike and Reebok in Asia, Shell Oil Company in Nigeria, Texaco in Ecuador, and Freeport-McMarron in Indonesia, to name a few, are living testimonies of this. For a discussion, see Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 *Berkeley J. Int'l L.* 45, 51-53 (2002); Aaron X. Fellmeth, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in the U.S. Courts?*, 5 *Yale H.R. & Dev. L.J.* 241, 244-45 (2002); Ariadne K. Sacharoff, *Multinationals in Host Countries: Can They be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 *Brooklyn J. Int'l L.* 927, 958-64 (1998); John C. Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 *U. Pa. J. Lab. & Emp. L.* 463, 464-65 (2000); Lena Ayoub, *Nike Just Does It and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 *DePaul Bus. L.J.* 395, 400-11 (1999); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 *Berkeley J. Int'l L.* 91, 131-36 (2002). See also Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 *Vand. J. Transnat'l L.* 801, 817-19 (2002); Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), available at <http://www.hrw.org/reports/1999/enron/>; Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, available at <http://www.hrw.org/reports/1999/nigeria/index.htm>.

⁶⁷ Seid, *supra* note 21, at 131-38. See also Jack Doyle, *Trespass Against Us: Dow Chemical & the Toxic Century* (2004); Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 *B. U. Int'l L.J.* 261 (1997); Greenpeace, *Corporate Crimes: The Need for an International Instrument on Corporate Accountability and Liability* (2002), available at <http://www.greenpeaceweb.org/shipbreak/corporatecrimes.pdf>.

⁶⁸ For more on the corporate production of risk, see Frank Pearce & Steve Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (1998). See also Maurice Punch, *Dirty Business: Exploring Corporate Misconduct: Analysis and Cases* 85-212 (1996) (describing cases of corporate deviance).

⁶⁹ For example, Pearce and Tombs examine in detail the threats posed by chemical industries to both humans and the environment. Pearce & Tombs, *supra* note 68, at 125-219.

⁷⁰ "[B]usiness deviance is exported to less regulated societies and business crime disperses to seek out more congenial environments." Punch, *supra* note 68, at 249. Weir and Schapiro also note: "If one country bans your product, move to where sales are still legal. It's just good business." David Weir & Mark Schapiro, *Circle of Poison: Pesticides and People in a Hungry World* 11 (1981).

⁷¹ Seid, *supra* note 21, at 3, 10-12.

⁷² Dependency theorists argue that FDI does not help the home countries which, in many cases, are developing or underdeveloped. See Seid, *supra* note 21, at 17-23. FDI also raises concerns about state sovereignty, especially for developing countries. *Id.* at 102-04.

this process - whose development and at what cost.⁷³ States may, in fact, be ready to barter even their power of regulation in favor of short-term economic gains.⁷⁴ As many developing countries [106] compete for their share of FDI, this often leads to a "race to the bottom" regarding human rights and environmental and labor standards.⁷⁵

Apparently, the International Chamber of Commerce (ICC) - "the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world"⁷⁶ - could not easily concede to the "race to the bottom" argument. So, its "synthesis of research and analysis of globalization"⁷⁷ posits: "In reality, there is no evidence of such a 'race to the bottom' - quite the contrary."⁷⁸ The counter argument presented by the ICC is that companies "are not necessarily attracted to countries with low wages and weak environment protection" or to countries with "the lowest tax levels" and that a great majority of foreign investment from the United States has been in rich, developed countries.⁷⁹ But this argument completely misses the "race to the bottom" hypothesis: the hypothesis typically plays out when several countries with similar levels of development compete with each other for attracting FDI; the race may not even start where competition for FDI is between developed and developing countries.

Moreover, the suggestion made by the ICC that "it is cheaper for [MNCs] to apply the same environmental policy everywhere and to use the same environment-friendly production methods"⁸⁰ is shaky at best. In fact, it runs counter to several case studies in which MNCs were sued for using inferior or outdated technologies in developing countries.⁸¹ There are also instances where products banned in a developed country for being hazardous [107] to health were exported to, or sold in, developing countries simply because local laws did not prohibit their usage.⁸²

⁷³ Whether India could prioritize its investment needs is the key issue. For example, could it seek investment, as a matter of priority, in primary health and education rather than in soft drinks, mineral water and potato chip industries? See also S. S. Singh & Suresh Mishra, *State and Market: A Constitutional Analysis*, in *Legal Dimensions* (Singh et al. eds.), supra note 5, at 13, 15; see generally Deva, *The Sangam*, supra note 56.

⁷⁴ See Kwamena Acquah, *International Regulation of Transnational Corporations: The New Reality* 66 (1986); Steven R. Ratner, *Corporation and Human Rights: A Theory of Legal Responsibility*, 111 *Yale L.J.* 443, 462 (2001); Robert McCorquodale, *Human Rights and Global Business*, in Bottomley & Kinley, supra note 61, at 89, 97-98. See also Stephens, supra note 66, at 57-58; Muchlinski, supra note 18, at 104-07.

⁷⁵ See Seid, supra note 21, at 119-43; Macek, supra note 58, at 104; Clare Duffield, *Multinational Corporations and Workers' Rights*, in *Human Rights, Corporate Responsibility: A Dialogue* 191, 194 (Stuart Rees & Shelley Wright eds., 2000); Mahmood Monshipouri, Claude E. Welch, Jr. & Evan T. Kennedy, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 *Hum. Rts. Q.* 965, 973 (2003); Sacharoff, supra note 66, at 931-32.

⁷⁶ ICC, *Standing Up for the Global Economy*, supra note 17, at 25.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.* at 14.

⁷⁹ *Id.*

⁸⁰ *Id.* at 15.

⁸¹ For example, it is well documented that Union Carbide Corporation did apply inferior standards of safety and technology in its Bhopal plant as compared to its West Virginia plant. Paul Shrivastava, *Bhopal: Anatomy of a Crisis* 42-57 (1987); Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* 18-25 (1993); Kim Fortun, *Advocacy after Bhopal: Environmentalism, Disaster, New Global Orders* 121-31 (2001); Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* 41-43 (2004).

⁸² Asbestos and Dichloro-Diphenyl-Trichloroethane (DDT) are two good examples of this. See Dine, supra note 17, at 12-13; see generally Weir & Schapiro, supra note 70. Cf. Bhagwati, supra note 1, at 186.

4. Technology

"[T]echnology is one of the most prominent of the many areas used to characterize globalization,"⁸³ because it enables "the 'freedom of circulation' of ideas, goods and peoples."⁸⁴ Technology has the potential to shape the nature of human rights⁸⁵ and could have mixed effect on their realization.⁸⁶ The internet, for example, not only enabled the transmission of information to consumers swiftly and in a cost-effective manner, but also allowed non-government organizations (NGOs) to foster partnerships and alliances across the world⁸⁷ to fight against the perception that globalization is against human rights.⁸⁸ But the internet has also raised thorny issues related to, say, the right to privacy. Similarly, other technologies, such as digitalization, biotechnology and human cloning,⁸⁹ do have serious implications for the realization of various human rights.⁹⁰

In sum, though technology could be used to promote human rights, there are reasons to believe, given the economic considerations involved in its production, transfer and dissemination, that the final balance-sheet might [108] paint a gloomy picture as far as the future of human rights is concerned.⁹¹ This is so because it is doubtful whether technology is neutral,⁹² and it may benefit some more than the many.⁹³

5. Governance by Regional or International Treaties

Globalization demands close cooperation among states, especially in areas that facilitate foreign investment and free trade: "The international rules on the protection of foreign investment catalyze international flows of capital. They are an engine of economic globalization."⁹⁴ Increasingly, issues are being regulated and governed by regional or international treaties because "in today's world 'sole source' decision-making is impossible in

⁸³ Schirato & Webb, *supra* note 10, at 46. The authors also caution against equating technology with globalization. *Id.* at 50.

⁸⁴ Schirato & Webb, *supra* note 10, at 56. "The technological base of globalization is provided by breakthroughs in communication and information technologies. People, goods, services, and especially information are circling the globe in a previously unimaginable way." Simonovic, *supra* note 16, at 385.

⁸⁵ Balkin, for example, explains how the right to freedom of speech changes in the digital age. Jack M. Balkin, *How Rights Change: Freedom of Speech in the Digital Age*, 26 *Sydney L. Rev.* 5 (2004).

⁸⁶ See McCorquodale & Fairbrother, *supra* note 20, at 755-63.

⁸⁷ Baxi calls this "cyber-space solidarity." Baxi, *supra* note 4, at 127. See also Seid, *supra* note 21, at 119; Braithwaite & Drahos, *supra* note 4, at 497.

⁸⁸ See Hertz, *supra* note 8, at 145-50. See also Scott Pegg, *An Emerging Market for the New Millennium: Transnational Corporations and Human Rights*, in Frynas & Pegg eds., *supra* note 9, at 1, 10.

⁸⁹ See G.A. Res. 280 (LIX), U.N. Doc. A/RES/59/280 (Mar. 8, 2005).

⁹⁰ See Baxi, *supra* note 4, at 159-64. See also Jayne Kuriakose & Mayank Mishra, *Transgenic Seeds - A Genetic Sham*, 18 *PL WebJour* (2003), <http://www.ebc-india.com/lawyer/articles/746.htm>.

⁹¹ Realizing this, the UN Conference on Science and Technology for Development resolved in 1997 that science and technology should aim at improving the well being of mankind and should be developed and shared equitably. Dhajjai Subhapholsin, *Intellectual Property in Economic Development* 3, WIPO/IP/Del/91/9. A similar concern is visible in the Human Development Report of 1999: "Policies are urgently needed to turn the advances in the new technologies into advances for all of humankind, and to prevent the rules of globalization from blocking poor people and poor countries out of the knowledge economy." UNDP, *Human Development Report: Globalization with a Human Face* 72 (1999).

⁹² See Tabb, *supra* note 10, at 169 ("Technology is not neutral.").

⁹³ See Schirato & Webb, *supra* note 10, at 57-58, 60-61; Deva, *The Sangam*, *supra* note 56, at 312.

⁹⁴ Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War* 140 (2005).

light of global economic realities."⁹⁵ This transfer of governance matters, including human rights, from states to supra-state bodies results in a blurring of the line between municipal and international governance issues.⁹⁶

This process, in addition to resulting in a necessary relinquishment of sovereignty on the part of states, has two other significant human rights implications. First, it limits the leeway and discretion⁹⁷ available to states to react to their respective special human rights or environmental needs.⁹⁸ [109] For example, a member state of the WTO could no longer act, even if demanded by its Constitution, to tackle a health emergency in disregard to the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS)⁹⁹ and the Doha Declaration.¹⁰⁰

Second, the process is undemocratic in operation; Aman terms this as "[t]he democracy problem in globalization."¹⁰¹ Because most of the time treaty obligations are undertaken by the executive branch of government, the people and their representatives are denied the opportunity to have their say in the decision making process.¹⁰² In fact, what Professor Philippe Sands observes with reference to the United Kingdom is quite revealing: "So the dozens of investment-protection treaties which Britain has entered into over the last three decades [1960s to 1990s] have never been scrutinized by an elected, democratic body."¹⁰³

⁹⁵ Fried, *supra* note 1, at 270.

⁹⁶ See Alex Y. Seit, *Globalization and the Convergence of Values*, 30 *Cornell Int'l L.J.* 429 (1997).

⁹⁷ "The very nature of the compromises necessary for individual states to engage in such multilateral forms of governance means that they are not likely always to be able to pursue their own national interests exclusively." Alfred C. Aman, Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 *Ind. J. Global Leg. Stud.* 511, 521 (2005).

⁹⁸ Sands, *supra* note 94, at 122-23, 130-38.

⁹⁹ Marrakesh Agreement Establishing the World Trade Organization Annex 1C, Apr. 15, 1994, 33 *I.L.M.* 1197 (1994).

¹⁰⁰ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 *I.L.M.* 746 (2002), available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm. See also Declaration on the TRIPs Agreement and Public Health, WT/MIN(01)/DEC/2 (Nov. 14, 2001), available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.htm; Surya Deva, *Doha Declaration and Health Concerns of Developing Countries*, 33 *Delhi L. Rev.* 145 (2001). However, the Decision of the General Council on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (Sept. 1, 2003), available at http://www.wto.org/English/tratop_e/trips_e/implem_para6_e.htm provides some leeway to developing countries.

¹⁰¹ "The democracy problem in globalization arises from the disjunction between global economic processes (on the one hand) and local processes of democratic participation (on the other). By disjunction I refer to the exclusion of key stakeholders (or stakeholder communities) from the institutional processes whose outcomes affect them directly." Aman, *supra* note 97, at 517.

¹⁰² The working of Article 73(1)(b) read with Article 253 of the Indian Constitution amply demonstrate this, especially regarding the acceptance of WTO obligations. See also *Maganbhi Ishwarbhai Patel v. Union of India*, A.I.R. 1969 S.C. 783, 807. In fact, the 2002 National Commission to Review the Working of the Constitution has suggested that the parliament should enact a law to control and regulate the treaty making power of the Union executive. 1 Report of the National Commission to Review the Working of the Constitution, P 5.10.3 (2002), available at <http://lawmin.nic.in/ncrcw/finalreport/v1ch5.htm> [hereinafter Report of the N.C.R.W.C.].

¹⁰³ Sands, *supra* note 94, at 121. The situation in the U.S. was not much different. *Id.* at 141. However, Sands adds that this "unfortunate situation may now be changing." *Id.* at 121.

[110] 6. (Over-)Reliance on Free Markets

Globalization relies heavily on free markets,¹⁰⁴ market forces, and the principle of economic efficiency. These could promote human rights in several ways,¹⁰⁵ but markets could also work against the realization of human rights. In fact, in view of a deep normative conflict between trade law, which underpins the market, and human rights law,¹⁰⁶ it cannot be said with certainty whether free market philosophy will provide enough space for human rights to flourish. Besides, markets are full of pitfalls¹⁰⁷ and so it may be necessary, not only for the promotion of human rights but also for the sustainability of markets, that state intervention supplement market principles.¹⁰⁸

7. The Culture of Consumerism

Consumerism is another important facet of globalization, for it helps in creating and sustaining markets for goods and services.¹⁰⁹ Corporations strive hard and compete fiercely to increase their profits and capture more market share. Since consumerism is increasingly used as a device for "market-creation,"¹¹⁰ the interests of consumers are the obvious casualties.¹¹¹ Consumers' choices are molded, sometimes even in total disregard to their health and safety, through, for example, the use of famous personalities or women in sexually explicit advertisements.¹¹² Since the culture of [111] consumerism, something incompatible with sustainable development,¹¹³ dictates life's priorities not on the basis of rational and free decision making but on corporate interests, this poses a serious challenge to the realization of human rights.

8. The Role of the Media and NGOs

Media, civil society organs such as NGOs, and public-minded citizens have all assumed a greater role in global governance. They influence policy and law-making decisions at both municipal and international levels.¹¹⁴ The revolution in information technology has further facilitated their contributions. Although both NGOs and media have played significant parts

¹⁰⁴ In fact, Warner takes an extreme position when he argues for "a general presumption in favor of free markets that can be trumped by other values if the objectives of the other values cannot demonstrably be served better by market-based solutions subject to a principle of least trade/competition restrictiveness." Warner, *supra* note 45, at 110.

¹⁰⁵ See Garcia, *supra* note 35, at 58-59.

¹⁰⁶ *Id.* at 63-76.

¹⁰⁷ See Stiglitz, *supra* note 6, at 55.

¹⁰⁸ See generally Seid, *supra* note 21, at 25-26; Peet et al., *Unholy Trinity*, *supra* note 26, at 33-34.

¹⁰⁹ "Globalisation is ... fuelled by the consumerist, individual culture which operates at citizen level." Dine, *supra* note 17, at 7.

¹¹⁰ See McCorquodale & Fairbrother, *supra* note 20, at 735.

¹¹¹ See Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 *Geo. Int'l Envtl. L. Rev.* 707, 718-19 (2006) [hereinafter Deva, *An Analysis of Asymmetries*].

¹¹² Natrajan, *supra* note 16, at 127-30; Ashish Kothari, *Environment and the New Economic Policies: 1991-96*, in *Legal Dimensions* (Singh et al. eds.), *supra* note 5, at 57, 63.

¹¹³ See Richard Welford, *Environmental Strategy and Sustainable development: The Corporate Challenge for the Twenty-First Century* 5-19 (1995) [hereinafter Welford, *Environmental Strategy*].

¹¹⁴ Rajagopal, who articulates a theory of resistance in international law, argues that "[c]oncerted social movement action has driven several recent international legal developments." Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 *Colum. J. Transnat'l L.* 397, 399 (2003).

in the promotion of human rights,¹¹⁵ there is an iota of skepticism about their role. For example, NGOs' dependence on donations¹¹⁶ and lack of transparency and accountability in their functioning,¹¹⁷ as well as the polarization of media in certain corporate hands,¹¹⁸ are matters of some concern, especially if seen from the perspective of developing countries.

B. What of Human Rights is, and Could be, Affected by Globalization?

I argue that globalization has influenced, and could continue to influence, the future of human rights in several respects. Some of those courses are chartered below.

[112] 1. Content and Nature

Globalization has the potential not only to change the nature of human rights but also to provide impetus to the evolution of new rights. Biotechnology and human cloning, for example, could change the contours of several existing human rights and might in fact also press for the recognition of new human rights. Though at this stage it is difficult to predict with certainty those who will derive benefit out of a change in the nature and production of human rights,¹¹⁹ there are, for instance, already strong arguments for according trade-related interests the status of human rights.¹²⁰

2. Prioritization

Certain human rights that form the backbone of the free market economy are bound to become more important. For this reason, intellectual property rights and investment rights are gaining more grounds than, for example, the right to health, the right to environment or the right of indigenous people to preserve their culture.¹²¹ In fact, the recognition and effective protection of these "trade-related, market-friendly human rights"¹²² are increasingly being presented as a precondition for reduction of poverty, fulfillment of the Millennium Development Goals or the effective realization of human rights generally. It is, however,

¹¹⁵ See generally Braithwaite & Drahos, *supra* note 4, at 497-501. Baxi also explores the employment of various techniques such as reportage, lobbying, and global direct action to ensure that human rights survive in a market economy. Baxi, *supra* note 4, at 127-28.

¹¹⁶ See Baxi, *supra* note 4, at 121-25. For a Marxist critique of the role played by NGOs, see Petras & Veltmeyer, *supra* note 3, at 128-38.

¹¹⁷ Warner, *supra* note 45, at 112; Bhagwati, *supra* note 1, at 43-48.

¹¹⁸ See Dionne Bunsha, Media Becoming Propaganda Vehicle for Corporates, *The Hindu*, Jan. 19, 2004, available at <http://www.thehindu.com/2004/01/19/stories/2004011902161200.htm>; Hertz, *supra* note 8, at 133-41.

¹¹⁹ See Baxi, *supra* note 4, at 67-76. Ochoa also cautions us against the creation and use of alternative language to describe human rights while negotiating with MNCs and international economic institutions. Christiana Ochoa, Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse, 23 *B. C. Third World L.J.* 57 (2003).

¹²⁰ See, for example, Ernst-Ulrich Petersmann, Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 *European J. of Int'l L.* 621 (2002). *Contra* Philip Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 *Eur. J. Int'l L.* 815 (2002).

¹²¹ See Zhuang Pinghui, Cultural Heritage Losing Out to Economic Reform, *South China Morning Post* (Mar. 18, 2006), at A6.

¹²² Baxi, *supra* note 4, at 132. Baxi argues that the Universal Declaration of Human Rights is "supplanted by [a paradigm] of trade-related, market-friendly human rights." *Id.* (emphasis in original). See also *id.* at 144-46, 149-52.

critical to note that this prioritization inter se human rights is not dictated by the interests of humans, but by market forces.

3. Bearers

Humans are no longer the sole bearers of human rights; human rights are invoked by, or on behalf of, several non-human entities such as [113] corporations,¹²³ other corporate bodies and even animals.¹²⁴ Out of these, the most notable case is of corporations which, though skeptical to accept human rights obligations, have shown little hesitation in invoking human rights to serve their business interests.¹²⁵ Reliance is often placed on the "aggregate theory" or "real entity theory," as opposed to the "fiction theory," of corporate personality to assert more and more (human) rights, which are in turn invoked to resist state regulation.¹²⁶

4. Violators

Various non-state actors, primarily corporations, are emerging as potential human rights violators, which may act either independently or in complicity with states.¹²⁷ But it could be suggested that there is nothing novel about this: the involvement of corporations in human rights abuses can be traced back to the activities of the British East India Company,¹²⁸ a time when even the notion of human rights in its present form was unknown. One should, however, note that modern corporations¹²⁹ and their [114] roles in human rights violations differ significantly from their ancestors.¹³⁰ The net result is a situation where a state-centric human rights enforcement mechanism tries, rather unsuccessfully, to tame stateless actors.

5. Enforcement

Traditionally, courts have been the dominant instrument of human rights enforcement.

¹²³ See *Autronic AG v. Switzerland*, 12 Eur. Ct. H.R. 485 (1990); Michael K. Addo, *The Corporation as a Victim of Human Rights Violations*, in Addo ed., *supra* note 42, at 190. Cf. Stephen Bottomley, *Corporations and Human Rights*, in Bottomley & Kinley, *supra* note 61, at 61-65.

¹²⁴ Peter Singer, *Animal liberation* (2d. ed. 1995); Paola Cavalieri, *The Animal Question: Why Non-human Animals Deserve Human Rights* (Catherine Woollard trans., 2001). See generally Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 *Colum. L. Rev.* 209 (2005).

¹²⁵ Mayer examines in detail, and questions the legitimacy of, the successful use of the American Bill of Rights by corporations as a shield against government regulation. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577 (1990). See also Baxi, *supra* note 4, at 147-49 (explaining how the human rights discourse has been utilized by the proponents of global capital).

¹²⁶ Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 *Comm. L. & Pol'y* 63, 67 (2005).

¹²⁷ Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 *Hastings Int'l & Comp. L. Rev.* 339 (2001) (pointing out three types of corporate complicity: direct, indirect and silent).

¹²⁸ See, for example, Donald C. Dowling, Jr., *The Multinational's Manifesto on Sweatshops, Trade/Labour Linkage, and Codes of Conduct*, 8 *Tulsa J. Int'l & Comp. L.* 27, 52 (2000); Mike Marqusee, *Whitewashing the Past*, *The Guardian*, May 24, 2002, available at <http://www.guardian.co.uk/comment/story/0,721164,00.html>. See also Stephens, *supra* note 66, at 49.

¹²⁹ See Arvind V. Phatak, *Evolution of World Enterprises* 6 (1971). To me, one of the most significant differences "in an era of neo-colonization, is that states and MNCs seem to have exchanged their places [from the time of British East India Company acting as the agent of a colonial state]; now many states are more than willing to act as agents of MNCs." Surya Deva, *From 3/12 to 9/11: Future of Human Rights?*, *Econ. & Pol. Wkly.* Vol. 5198, 5200 (Dec. 4- 10, 2004).

¹³⁰ There is a difference not only in the nature of the human rights violated but also in the *modus operandi* of such violations and the places where such violation are occurring. See also Ratner, *supra* note 74, at 443.

Globalization has influenced this traditional enforcement mechanism in the past and continues to influence it in at least two important ways. First, increasingly supra-national judicial bodies are being established as supplementary to the municipal system in addressing human rights abuses. Although the process began after World War II and has continued since then,¹³¹ it gained momentum after the end of the Cold War and various regional and international courts or tribunals have been established in the last two decades.¹³² Most notable among these is the establishment of the International Criminal Court under the Rome Statute to deal with egregious human rights violations such as genocide, crimes against humanity and war crimes.¹³³

Second, globalization has also facilitated what I call the "social enforcement" of human rights: the enforcement is social because "it occurs within the informal vistas of society, by societal organs and through social [115] sanctions."¹³⁴ Various societal organs such as the media, NGOs, consumers, investors, shareholders, trade or labor unions, and other public-minded social activists are getting involved in the promotion of human rights. The critical point of departure is that these social participants do not always rely on state-run judicial mechanisms to enforce human rights; instead they rely more on their own advocacy, public campaigns and coercive techniques such as "naming and shaming."

In view of the above analysis, three preliminary conclusions could be offered. First, though globalization as a concept is not inherently anti- or pro-human rights, the same cannot be said about globalization as a process. In view of the nature and motive of the actors involved, the process of globalization is widely seen more as a foe than a friend of human rights. Second, as globalization offers opportunities both for the promotion and abridgment of human rights, at national levels as well as internationally, at a given point in time, the relation of globalization with human rights will ultimately depend on how effectively human rights activists are able to utilize those opportunities qua other competing actors. Third, it is highly unlikely that any one interested constituency will have a long-lasting monopoly over the process of globalization so as to derive benefits out of it. Although, to date, the process is primarily driven by something other than the human rights of all (and, in particular, of the poor, oppressed, illiterate masses), this may change in future.

III. Human Rights Realization in an Era of Globalization: The Indian Experience

In this part, I intend to first locate the position of all three branches of the Indian state vis-à-vis human rights in an era of globalization and then take the readers on a quick tour of some of the emerging human rights themes. Needless to say, this examination is only illustrative of

¹³¹ In addition to the well-known mechanisms under the UN fold, see, for example, the European Commission on Human Rights (1954), the European Court of Human Rights (1959), the Inter-American Commission on Human Rights (1959) and the Inter-American Commission on Human Rights (1979).

¹³² See, for example, the African Commission on Human and Peoples' Rights (1987), the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). The WTO Dispute Settlement Mechanism (1995) also has some implications for human rights and environmental rights. This mushrooming of courts has, however, brought its own problems. See Benedict Kingsbury, Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?, 31 N.Y.U. J. Int'l L. & Pol. 679, 679 (1999), and other articles in that special issue.

¹³³ Rome Statute of the International Criminal Court, art. 5, § 1, July 1, 2002, U.N. Doc. A/CONF.183/9.

¹³⁴ Surya Deva, Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations, 8 Newcastle L. Rev. 87, 109 (2004). See generally id. at 109- 14.

my arguments and not exhaustive in any manner.

A. Stating the Position of the Indian "State"

The role of states in the process of globalization is critical to the realization of human rights, but their role is complex and full of difficult choices. For example, although the realization of both globalization and human rights demands state intervention, there is no consensus on when [116] and to what extent states should intervene.¹³⁵ In fact, there is a divergence on what globalization proponents/actors and human rights activists would like states to regulate or deregulate. Critics even argue that states might not be serious on their own to act and enforce human rights obligations against corporations.¹³⁶ Below is a discussion of how the Indian state has fared on this front.

1. Executive-Legislature¹³⁷

Since the early 1990s when the Indian government launched what is now known as the new economic policy (NEP), there has been a debate not only about the constitutionality and propriety of the policy but also its effects.¹³⁸ Although it is reasonable to suggest that liberalization was the need of the hour, the government did not consistently ensure that the realization of human rights, especially for the poor populace, remained an important variable at the time of law making or policy formulation.

Some examples will help make this clearer. First, the government did not adequately control the direction of foreign investment and made bad policy decisions in terms of investment prioritization.¹³⁹ This results, for example, in a situation where people in villages have access to Pepsi or Coca-Cola but not to safe drinking water, adequate food, health care, electricity, roads or schools.¹⁴⁰ Second, the amendments proposed by the government [117] in laws related to foreign investment, trade unions, contract labor, factories, industrial disputes, and monopolistic practices, have negative impacts on human rights, especially the human rights of laborers and women workers.¹⁴¹ Third, the government's decision to bypass

¹³⁵ Stiglitz argues that in order to achieve efficiency, trade liberalization should be done "in the right way and at the right pace" (Stiglitz, *supra* note 6, at 53) and that it should only be a means to "more equitable and sustainable growth." *Id.* at 53-54.

¹³⁶ "[S]tates will do as little as possible to enforce health and safety laws. They will pass them only when forced to do so by public crises or union agitation, strengthen them reluctantly, weaken them whenever possible, and enforce them in a manner calculated not to seriously impede profitability." Pearce & Tombs, *supra* note 68, at 286 (quoting Laureen Snider, *The Regulatory Dance: Understanding Reform Processes in Corporate Crime*, 19 *Int'l J. Soc. L.* 209, 220 (1991)).

¹³⁷ I consciously link the Indian executive and legislature because the parliamentary system enshrined in the Indian Constitution allows this.

¹³⁸ See, e.g., *Legal Dimensions* (Singh et al. eds.), *supra* note 5; Mahesh V. Joshi, *Economic Reforms in India: A Critical Evaluation* (1997). See also *The State, Development Planning and Liberalisation in India* (Terence J. Byres ed., 1997); *India's Economic Reforms and Development: Essays for Manmohan Singh* (Isher Judge Ahluwalia & I.M.D. Little eds., 1998).

¹³⁹ See McCorquodale & Fairbrother, *supra* note 20, at 742-50.

¹⁴⁰ See generally *The Feel Good Factory*, 21:5 *Frontline* (Feb. 28-Mar. 12, 2004), available at <http://www.frontlineonnet.com/fl2105/fl210500.htm>. See also Thomas Friedman, *The World is Flat: A Brief History of the Globalized World in the 21st Century* 376-78 (2005).

¹⁴¹ See Usha Ramanathan, *Business and Human Rights - The India Paper*, I.E.L.R.C. Working Paper 2001-02, available at <http://www.ielrc.org/content/w0402.pdf>. The issue of government permission to establish special economic zones (SEZs) is the latest bone of contention. See *SEZ: Farmers Plan Satyagraha*, *The Hindu*, Sept.

parliamentary authority to undertake international obligations on important issues is another area of great concern, as it directly gets at the root of parliamentary democracy.¹⁴² Fourth, the government has shown undue leniency, and thus sent a wrong signal, to foreign corporations regarding their human rights responsibility by not vigorously pursuing the extradition of Warren Anderson, the ex-CEO of Union Carbide Corporation, against whom criminal proceedings are pending before a court in relation to the Bhopal gas tragedy.¹⁴³ Fifth, when it was alleged by an NGO that the soft drinks manufactured by Pepsi and Coca-Cola contained toxic pesticides, the government swiftly banned their sale within Parliament¹⁴⁴ but left the health of ordinary consumers at the mercy of corporate misinformation. A Joint Parliamentary Committee investigated the matter and suggested framing appropriate guidelines, which have not been implemented to date.¹⁴⁵ Consequently, not much has changed even as recent test reports confirmed the presence of high level of [118] pesticides in soft drinks.¹⁴⁶ Nevertheless, the central government has not yet taken any remedial action¹⁴⁷ and corporate bodies have come out to defend involved corporations in contending that any blanket ban on the sale of soft drinks will adversely affect the investment climate.¹⁴⁸

These and other similar examples, however, should not suggest that the government has been totally oblivious to the impact of globalization on its constitutional obligations to realize the human rights of all peoples, especially those of the impoverished. For example, the government launched a social security scheme for the unorganized sector,¹⁴⁹ amended the Constitution to provide for free and compulsory primary education,¹⁵⁰ released a charter on "corporate responsibility for environmental protection,"¹⁵¹ made the environmental clearance mandatory for new and large urban projects,¹⁵² enacted legislation to guarantee 100 days of

28, 2006, available at <http://www.hindu.com/2006/09/28/stories/2006092808341200.htm>.

¹⁴² Though the Constitution empowers the executive to enter into international treaties, it seems that this provision has been improperly utilized by various governments.

¹⁴³ See Union Carbide, Bhopal Information Center, Opinion of the Attorney-General of India: Extradition of Mr. Warren Anderson, Aug. 6, 2001, <http://www.bhopal.com/opinion.htm>. In fact, the government had made an application before the court to dilute the charge to death by "rash or negligent act" from "culpable homicide not amounting to murder." V. Venkatesan, A Rap for the CBI, 19 Frontline, para. 9 (Oct. 12-25, 2002), available at <http://www.hinduonnet.com/fline/fl1921/stories/20021025004408900.htm>. The court, however, rejected this request. *Id.*

¹⁴⁴ No More Soft Drinks in Parliament, The Hindu, Aug. 7, 2003, available at <http://www.thehindu.com/2003/08/07/stories/2003080706730100.htm>.

¹⁴⁵ See Parliament of India, Report of Joint Committee on Pesticide Residues in and Safety Standards for Soft Drinks, Fruit Juice and Other Beverages, available at <http://parliamentofindia.nic.in/ls/jpc/jpc-prsfb.htm>.

¹⁴⁶ Pesticide Levels in Soft Drinks Too High, The Hindu, Aug. 3, 2006, available at <http://www.thehindu.com/2006/08/03/stories/2006080315670100.htm>.

¹⁴⁷ Some state governments though have "partially" banned the sale of soft drinks within their jurisdiction. Government Clamps Down on 12 Brands of Soft Drinks, The Hindu, Aug. 10, 2006, available at <http://www.hinduonnet.com/2006/08/10/stories/2006081013180100.htm>.

¹⁴⁸ Action on Cola Companies Dangerous: Chambers, The Hindu, Aug. 11, 2006, available at <http://www.hindu.com/2006/08/11/stories/2006081106941700.htm>; India Inc Slams Kerala's Ban on Colas, The Indian Express, Aug. 11, 2006, available at <http://www.indianexpress.com/story/10307.html>.

¹⁴⁹ Social Security Scheme for Unorganised Sector Launched, The Hindu, Jan. 24, 2004, available at <http://www.thehindu.com/2004/01/24/stories/2004012402351300.htm>.

¹⁵⁰ India Const. art. 21A: amended by the Constitution (Eighty-sixth Amendment) Act, 2002. See also India Const. art. 51A(k): amended by the Constitution (Eighty-sixth Amendment) Act, 2002 (imposing a fundamental duty on parents and guardians to offer education opportunities to their children or wards); India Const. art. 45: amended by the Constitution (Eighty-sixth Amendment) Act, 2002.

¹⁵¹ See A Charter to Protect the Environment, The Hindu, Mar. 14, 2003, available at <http://www.thehindu.com/2003/03/14/stories/2003031401591300.htm>.

¹⁵² See Environmental Clearance must for New Big Urban Projects, The Hindu, Oct. 29, 2003, available at <http://www.thehindu.com/2003/10/29/stories/2003102901591300.htm>.

wage employment per year to every rural household,¹⁵³ and recently decided to ban the employment of children as domestic servants or as helpers in restaurants, hotels, teashops, etc.¹⁵⁴

[119] 2. Judiciary

The Indian judiciary, by and large, has been active and vigilant in safeguarding human rights, more so since the late 1970s. In fact, well before the adoption of NEP, the Supreme Court foresaw the unfolding of the impacts of liberalization and privatization on fundamental rights.¹⁵⁵ At a more general level, the judiciary is aware of the effects of globalization on the Constitution and constitutionalism. The judiciary perceives itself as an organ with a key role to play in the emerging scenario and it argues for an economic interpretation of the Constitution.¹⁵⁶ Courts have been constantly approached to redress a specific human rights violation or to offer a principled policy guideline.¹⁵⁷ The judiciary has addressed issues such as: the constitutionality of the government's privatization¹⁵⁸ and disinvestment policies,¹⁵⁹ defacing of rocks by painted advertisements,¹⁶⁰ pollution of rivers,¹⁶¹ relocation of industries out of Delhi,¹⁶² lack of access to food,¹⁶³ deaths due to starvation,¹⁶⁴ use of environment-friendly fuel in Delhi buses,¹⁶⁵ prohibition of smoking in public places,¹⁶⁶ employment of children in hazardous industries,¹⁶⁷ rights of children and bonded labors,¹⁶⁸ extent of [120] the right to strike and bandh,¹⁶⁹ right to health¹⁷⁰ and education,¹⁷¹ sexual harassment in the workplace,¹⁷² and female foeticide and infanticide through modern technology.¹⁷³

www.thehindu.com/2003/10/29/stories/2003102900991000.htm.

¹⁵³ National Rural Employment Guarantee Act No. 42 of 2005; India Code (2005).

¹⁵⁴ Children Can't be Hired in Eateries or as Domestic Help, *The Hindu*, Aug. 2, 2006, available at <http://www.hindu.com/2006/08/02/stories/2006080204341300.htm>. Critics, however, doubt if such a law could make any difference. See Amrit Dhillon, Labor Pains, *South China Morning Post*, Aug. 15, 2006, at A14.

¹⁵⁵ See, e.g., *M. C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086.

¹⁵⁶ *State of Punjab v. Devans Modern Breweries Ltd.*, [2003] 4 L.R.I. 647, PP 320-47.

¹⁵⁷ See Shubhankar Dam & Vivek Tewary, *Polluting Environment: Is a "Polluted" Constitution Worse than a Polluted Environment?*, 17 *J. of Env'tl. L.* 383 (2005) (critiquing the over-indulgence shown by the Indian Supreme Court in environmental matters).

¹⁵⁸ *Delhi Science Forum v. Union of India*, (1996) 2 S.C.C. 405.

¹⁵⁹ *Balco Employees Union v. Union of India*, A.I.R. 2001 SC 350; *Centre for Public Interest Litigation v. Union of India*, A.I.R. 2003 S.C. 3277.

¹⁶⁰ See SC's 5-cr Message: You Can't Get Away, *The Indian Express*, Sept. 24, 2002, available at http://www.indianexpress.com/full_story.php?content_id=10061.

¹⁶¹ *Almitra H. Patel v. Union of India*, A.I.R. 2000 S.C. 1256.

¹⁶² *M.C. Mehta v. Union of India*, (1996) 4 S.C.C. 351.

¹⁶³ *PUC v. Union of India*, 2001 7 S.C.A.L.E. 484; *PUC v. Union of India*, 2004 5 S.C.A.L.E. 128.

¹⁶⁴ *Kishen Pattanayak v. State of Orissa*, (1989) Supl.(1) S.C.C. 258.

¹⁶⁵ *M. C. Mehta v. Union of India*, A.I.R. 2002 S.C. 1696.

¹⁶⁶ *Murli Deora v. Union of India*, (2001) 8 S.C.C. 766.

¹⁶⁷ *M. C. Mehta v. State of Tamil Nadu*, A.I.R. 1997 S.C. 699.

¹⁶⁸ *Narendra Malava v. State of Gujarat*, 2004 10 S.C.A.L.E. 12; *PUC v. State of Tamil Nadu*, 2004 5 S.C.A.L.E. 690.

¹⁶⁹ *CPM v. Bharat Kumar*, A.I.R. 1998 S.C. 184; *T K Rangarajan v. State of Tamil Nadu*, A.I.R. 2003 S.C. 3032.

¹⁷⁰ *Parmanand Kataria v. Union of India*, A.I.R. 1989 S.C. 2039; *Paschim Banga Khet Mzdoor Samity v. State of West Bengal*, (1996) 4 S.C.C. 37; *Kirloskar Brothers Ltd. v. ESIC*, (1996) 2 S.C.C. 682, 688; *Air India Stat. Corp. v. United Labour Union*, (1997) 9 S.C.C. 377, 409.

¹⁷¹ *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666; *Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 S.C.C. 645.

¹⁷² *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011; *Apparel Export Promotion Council v. A. K. Chopra*,

In most cases, the judiciary has not disappointed the victims of human rights violations or the human rights activists. Moreover, the Supreme Court has also tried to establish a balance between the need for development and the protection of human rights.¹⁷⁴ Although in the majority of such cases the Court could reach equilibrium, doubts could be raised about some. For example, serious questions can be raised in relation to a decision wherein the Apex Court held, in unequivocal terms, that there is no fundamental, legal or moral right to strike.¹⁷⁵ It is also suggested that in recent years even the Supreme Court has been influenced by liberalization and corporate business interests at the cost of human rights;¹⁷⁶ its attitude has been less than sympathetic toward recognizing and protecting rights of the impoverished and vulnerable sections of society, such as slum dwellers,¹⁷⁷ and people displaced by the construction of dams.¹⁷⁸ At a more general [121] level, the following observation of the Supreme Court in *Devans Modern Breweries* also reflects its support of liberalization and its skeptical attitude towards socialist policies: "Socialism might have been a catchword from our history. It may be present in the Preamble of our Constitution. However, due to the liberalization policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away."¹⁷⁹

In sum, it could be argued that all three branches of government have been conscious of their constitutional responsibility to uphold human rights; even so, their approaches leave much to be desired. On several occasions, they seem to have been swayed by the argument that economic prosperity will automatically lead to a better realization of human rights at all levels. They have also fallen into the traps laid by international institutions and global corporate actors. However, it could be said that this is not unique to the Indian state; human rights policies of other states have been not only inconsistent but based on economic interests as influenced by corporate actors.¹⁸⁰ But this is hardly adequate justification for the unsatisfactory performance of the Indian state.

A.I.R. 1999 S.C. 625.

¹⁷³ *CEHAT v. Union of India*, A.I.R. 2001 S.C. 2007; *CEHAT v. Union of India*, A.I.R. 2003 S.C. 3309.

¹⁷⁴ *Vellore Citizens Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715; *Narmada Bachao Andolan v. Union of India*, [2000] 4 L.R.I. 696; *AP Pollution Control Board-II v. Prof. M V Nayudu*, (2001) 2 S.C.C. 62; *Goa Foundation, Goa v. Diksha Holdings (P) Ltd.*, A.I.R. 2001 S.C. 184. See also Supreme Court Directive to Courts on Development Activities, *The Hindu*, Jan. 23, 2004, available at <http://www.thehindu.com/2004/01/23/stories/2004012305831200.htm>.

¹⁷⁵ *T K Rangarajan v. State of Tamil Nadu*, A.I.R. 2003 S.C. 3032.

¹⁷⁶ The Bhopal settlement is a very good example of this. Jamie Cassels, *Multinational Corporations and Catastrophic Law*, 31 *Cumb. L. Rev.* 311, 330 (2000). See also *Legal Dimensions* (Singh et al. eds.), supra note 5, at 30-31.

¹⁷⁷ J. Venkatesan, *Supreme Court Dismisses PIL against Demolition of Jhuggis*, *The Hindu*, May 13, 2006, available at <http://www.thehindu.com/2006/05/13/stories/2006051321780100.htm>. See also Usha Ramanathan, *Demolition Drive*, 40 *Econ. & Pol. Weekly.*, July 2, 2005, at 2908; Usha Ramanathan, *Illegality and Exclusion: Law in the Lives of Slum Dwellers*, I.E.L.R.C. Working Paper 2004, available at <http://www.ielrc.org/content/w0402.pdf>.

¹⁷⁸ See *SC Declines to Stop Work on Dam Height*, *The Hindu*, May 9, 2006, available at <http://www.hindu.com/2006/05/09/stories/2006050908131300.htm>; Ramaswamy R. Iyer, *Abandoning the Displaced*, *The Hindu*, May 10, 2006, available at <http://hindu.com/2006/05/10/stories/2006051005821100.htm>.

¹⁷⁹ *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 S.C.C. 26, 148.

¹⁸⁰ See Hertz, supra note 8, at 71-77, 93-101; Peet et al., supra note 26, at 15.

B. A Snapshot of Emerging Human Rights Themes

1. Article 12: Who is Now Subject to Fundamental Human Rights?

The efficacy of any human rights regime depends, *inter alia*,¹⁸¹ upon two interdependent variables: what is protected and against whom. In [122] the Indian context, the judiciary remains responsive to changing needs and has considerably extended the ambit of both what (Parts III and IV)¹⁸² and against whom (Article 12).¹⁸³ Nevertheless, there are doubts as to whether the definition of "state" under Article 12 as well as its judicial extension through the "instrumentality or agency" test could bear the strains put by the modern mantras of liberalization, disinvestment and free market economy.¹⁸⁴ The test of "instrumentality or agency" faced its first major challenge in 1986 in the form of *M C Mehta v. Union of India*.¹⁸⁵ Although the Apex Court made some bold observations, it did not answer the question whether Shriram, a private company manufacturing fertilizers and chemicals, could be considered an "authority" for the purposes of Article 12.

Arguably, this case gave a fair indication of what was in store in the coming years. Since then, it seems that the Supreme Court has found it difficult to apply the test of "instrumentality or agency" in view of the continuous withdrawal of the state from public services. For example, the Court has enforced fundamental rights against private individuals,¹⁸⁶ granted relief to the petitioner without going into the question of whether the violator of the fundamental right was the state,¹⁸⁷ and made general observations that even private corporate actors would be subject to the mandate [123] of both fundamental rights and directive principles.¹⁸⁸ This approach, though defensible jurisprudentially, has not received

¹⁸¹ The extent to which human rights are recognised, protected and enforced depends largely on the nature and scope of the rights protected in the first instance, the constitutional position of the legislation enacted to secure these rights in the second, and the manner in which rights are upheld and enforced in the third.

Jonathan L. Black-Branch, *Parliamentary Supremacy or Political Expediency?: The Constitutional Position of the Human Rights Act under British Law*, 23 *Statute L. Rev.* 59 (2002).

¹⁸² See Singh, *Shukla's Constitution of India*, *supra* note 33, at 164- 81. See also M.P. Jain, *The Supreme Court and Fundamental Rights, in Fifty Years of the Supreme Court of India: Its Grasp and Reach* (S. K. Verma and Kusum eds., 2000); S. P. Sathe, *Judicial Activism in India* (2002).

¹⁸³ *Rajasthan State Elec. Bd. v. Lal*, (1967) 3 S.C.R. 377; *Singh v. Bhagtram Sardar Singh Raghuvanshi*, (1971) 3 S.C.R. 619; *Shetty v. Int'l Airport Auth. of India*, A.I.R. 1979 S.C. 1628; *Som Prakash Rekhi v. Union of India*, A.I.R. 1981 S.C. 212; *Ajay Hasia v. Khalid Mujib*, A.I.R. 1981 S.C. 487; *All India Sainik Schs. Employees Ass'n v. Sainik Schs. Soc'y*, A.I.R. 1998 S.C. 88; *Food Corp of India Workers Union v. Food Corp. of India*, 1996 S.C.A.L.E. 218; *UP State Coop. Land Dev. Bank Ltd. v. Chandra Bhan Dubey*, A.I.R. 1999 S.C. 753; *Pradeep Kumar Biswas v. Indian Inst. of Chem. Biology*, (2002) 5 S.C.C. 111.

¹⁸⁴ Surya Deva, *Concept of "State" in the Era of Liberalisation and Withering State - An Analysis*, in *Constitutional Jurisprudence and Environmental Justice: A Festschrift Volume in the Honour of Prof. A. Lakshminath* 175 (D.S. Prakasa Rao ed., 2002).

¹⁸⁵ A.I.R. 1987 S.C. 1086.

¹⁸⁶ See *Bodhisattwa Gautam v. Subhra Chakraborty*, A.I.R. 1996 S.C. 922; *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011; *Apparel Exp. Promotion Council v. Chopra*, A.I.R. 1999 S.C. 625.

¹⁸⁷ See *Gautam*, A.I.R. 1996 S.C. 922; *Mr.X v. Hospital Z*, 2002 8 S.C.C. 296; and *Mehta v. Nath*, (2000) 6 S.C.C. 213.

¹⁸⁸ *Kirloskar Brothers Ltd. v. Employees State Ins. Corp.*, 1996 S.C.A.L.E. 1. Again, in *Air India Statutory Corporation v. United Labour Union*, (1997) 9 S.C.C. 377, the Court observed that: "It is axiomatic, whether or not industry is controlled by Government or public corporations ... or private agents, juristic persons, their constitution, control and working would also be subject to the same constitutional limitations in the trinity, viz., Preamble, Fundamental Rights and the Directive Principles."

unqualified praise from all quarters.¹⁸⁹

However, despite facing difficulties in applying the instrumentality test in the past, the Court has remained largely wedded to it even if doing so produced absurd results. To give an example, by a vote of 3:2 the Supreme Court in *Zee Telefilms Ltd. v. Union of India*¹⁹⁰ held that the Board of Control for Cricket in India (BCCI) is not "state" within the meaning of Article 12. It may be worthwhile to mention here that BCCI is a registered society that has a complete monopoly in conducting and regulating the game of cricket in India. Its aims and objects include the control and promotion of the game of cricket, framing of laws for cricket in India, and selection of teams to represent India in matches abroad. Furthermore, the disciplinary committee of the BCCI has "full power and authority to summon any person(s) and call for any evidence it may deem fit and necessary and make and publish its decision including imposing penalties if so required." However, the majority did not find all these factors sufficient to conclude that the BCCI is an instrumentality or agency of state.¹⁹¹ Apart from taking refuge in the slippery slope and floodgate arguments, the majority reasoned that the BCCI is not "financially, functionally or administratively dominated by or is under the control of the government." Also, neither the monopoly enjoyed by the BCCI was conferred or protected by the government, nor were its so-called public functions authorized by the government.

The above analysis demonstrates that the shrinking territory of "against whom" poses a major challenge for the realization of human rights in India in an era of globalization.¹⁹² Even gains, if any, made by expansive judicial interpretation of rights are nullified by the ever-narrowing sphere of [124] the "state" against which the majority of such rights could be invoked. For instance, the affirmative action provisions¹⁹³ are non-existent as far as private corporations are concerned.¹⁹⁴ Similarly, how effective will the protection offered by Article 19(1)(c) be against a private corporation that seeks to include an agreement not to form or join an association or trade as part of a labor contract?

This is an issue which attracts the attention of scholars in other jurisdictions as well, especially as they focus on the horizontal application of human rights.¹⁹⁵ One can also wonder if this matter could be dealt with more appropriately and in a more comprehensive manner by legislative bodies. Most likely, the National Commission to Review the Working of the Indian Constitution had this in mind when it recommended the insertion of an explanation in Article 12 providing that "other authorities shall include any person in relation

¹⁸⁹ See, e.g., Arun Shourie, *Courts and their Judgments - Premises, Perquisites, Consequences* 68 (2001).

¹⁹⁰ (2005) 4 S.C.C. 649.

¹⁹¹ For a critical discussion, see Mahendra P. Singh, *Fundamental Rights, State Action and Cricket in India*, 13 *Asia Pac. L. Rev.* 203 (2006).

¹⁹² Rai argues: "[I]f the private sector is continued to be treated as immune from constitutional restraints, it would virtually amount to leaving the entire corporate sector as a protected island where constitutional writs cannot run." Anil K. Rai, *Concept of State and Fundamental Rights* 155 (1996).

¹⁹³ India Const. arts. 15(4), 16(4)-(4)(B).

¹⁹⁴ The private sector is not very keen to take on board policies of affirmative action or "broad base employment." Sushma Ramchandran, *India Inc., Liberalization, and Social Responsibility*, *The Hindu*, Apr. 25, 2006, available at <http://www.thehindu.com/2006/04/25/stories/2006042504140800.htm>.

¹⁹⁵ M. Hunt, *The "Horizontal Effect" of the Human Rights Act*, (1998) PL 423; Gavin Phillipson, *The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?*, 62 *Modern L. Rev.* 824 (1999); Ian Leigh, *Horizontal Rights the Human Rights Act and Privacy: Lessons from the Commonwealth?*, 48 *Int'l & Comp. L.Q.* 57 (1999); Tushnet, *supra* note 61.

to such of its functions which are of a public nature."¹⁹⁶ Yet, to date, this recommendation has remained just that.

2. Liberalization and Directive Principles

Given that the policies promoting liberalization, including privatization and disinvestment, are constitutional and here to stay,¹⁹⁷ it remains to be considered the way in which they impact the constitutional obligations of the Indian state to promote human rights - whether as the directive principles of state policy, or as "directive fundamental rights."¹⁹⁸ Can the Indian [125] government still establish a just social order by minimizing or eliminating inequalities,¹⁹⁹ ensuring that there is no concentration of wealth or means of production,²⁰⁰ securing maternity benefits in the private sector,²⁰¹ or protecting the environment and wild life?²⁰² Regarding the plethora of rights created by the judiciary by way of importing directive principles into fundamental rights, it is not clear how the government plans to ensure that globalization does not unreasonably affect, for example, the right to livelihood²⁰³ or the right to shelter.²⁰⁴

On a positive note, however, the government must be commended for enacting the National Rural Employment Guarantee Act of 2005.²⁰⁵ The Act seeks to "provide to every household whose adult members volunteer to do unskilled manual work not less than one hundred days of such work in a financial year in accordance with the Scheme made under this Act."²⁰⁶ The Act also makes provision for "unemployment allowance" in case of failure to provide employment.²⁰⁷ Notably, the "Panchayats at district, intermediate and village levels shall be the principal authorities for planning and implementation of the Schemes made under this Act."²⁰⁸ Although it is still too early to evaluate the working of this legislation, it shows that the Indian government is not totally ignorant of its obligations towards ensuring decent livelihood, social security and decentralization of governance.

¹⁹⁶ Report of the N.C.R.W.C., *supra* note 102, P 3.5, (emphasis added).

¹⁹⁷ See Delhi Science Forum, (1996) 2 S.C.C. 405; Balco Employees Union, A.I.R. 2001 S.C. 350; Center for Pub. Interest Litigation, A.I.R. 2003 S.C. 3277. See also Mahendra P. Singh, *Constitutionality of Market Economy*, in Legal Dimensions (Singh et al. eds.), *supra* note 5, at 3.

¹⁹⁸ "Directive fundamental rights" refers to those rights which arise by reading directive principles into fundamental rights.

¹⁹⁹ India Const. art. 38.

²⁰⁰ *Id.* at art. 39. See also Legal Dimensions (Singh et al. eds.), *supra* note 5, at 28-29.

²⁰¹ India Const. art. 42.

²⁰² *Id.* at art. 48A. See also Kothari, *supra* note 112.

²⁰³ *Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1886 S.C. 180; *Delhi Tranp. Corp. v. D.T.C. Mazdoor Congress*, A.I.R. 1991 S.C. 101.

²⁰⁴ *Gauri Shankar v. Union of India*, (1994) 6 S.C.C. 349; *Shiv Sagar Tiwari v. Union of India*, (1997) 1 S.C.C. 444.

²⁰⁵ The National Rural Employment Guarantee Act, No. 42 of 2005; India Code (2005) v. 48. See also C Rammanohar Reddy, *Development with Dignity*, *The Hindu*, Mar. 25, 2006, available at <http://www.thehindu.com/2006/03/25/stories/2006032505601100.htm> (reviewing Amit Bhaduri, *Development with Dignity: A Case for Full Employment*, 2005).

²⁰⁶ *Id.* § 3(1).

²⁰⁷ *Id.* § 7(1).

²⁰⁸ *Id.* § 13(1).

3. The Right to Information

The flow of information to and from consumers of democracy is vital because it enables participation in decision making, ensures transparency [126] in governance, helps in fighting injustice and facilitates the realization of other human rights. Understanding the significance of the right to information and following the global trend, the government enacted the Right to Information Act.²⁰⁹ The Act confers on all citizens a right to seek information under the control of public authorities within a specified timeframe²¹⁰ on payment of a reasonable fee.²¹¹ The Information Officer may reject a request for information on certain well-recognized grounds,²¹² but in such a case the Officer "shall communicate to the person making the request (i) the reasons for such rejection; (ii) the period within which an appeal against such rejection may be preferred; and (iii) the particulars of the appellate authority."²¹³ The Act received a good response from stakeholders until the government proposed an amendment that sought to curtail the right of the public to access "file notings."²¹⁴

One might contend that, in this case, globalization served as the impetus to the realization of the right to information in that the developments taking place elsewhere had influenced the Indian government to enact a specific law. One may concede this, yet at the same time this legislation highlights the growing dichotomy between the rights and responsibilities of corporations. For example, although corporations could access a plethora of information by invoking the provisions of this statute, most corporations would not be subject to an obligation to provide information to their stakeholders about their affairs.²¹⁵

Similarly, the globalization of various technologies has enabled the rapid flow of information in an inexpensive manner, and has thus contributed to the protection of human rights. However, we still need to guard [127] against monopolization and manipulation of information, and also ensure that a wider population becomes part of the "information society."²¹⁶

4. The Right to Education and the Question of Quality and Affordability

How is globalization going to affect access to a reasonable quality of primary and higher

²⁰⁹ Right to Information Act, No. 22 of 2005; India Code (1995) v. 25. This legislation replaced the erstwhile Freedom of Information Act, No. 5 of 2003.

²¹⁰ In ordinary cases, the requested information is to be provided expeditiously and not later than within thirty days of the request. However, "where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request." *Id.* § 7(1).

²¹¹ See *id.* § 7(6) (The information is to be provided free of charge if the request of information is not honored within the specified time.).

²¹² *Id.* § 8.

²¹³ *Id.* § 7(8).

²¹⁴ A Big Step Backwards, *The Hindu*, Jul. 24, 2006, available at <http://www.thehindu.com/2006/07/24/stories/2006072402421000.htm>; Hazare Seeks Sonia's Intervention to 'Save' RTI Act, available at <http://www.hinduonnet.com/holnus/002200608101861.htm>.

²¹⁵ Right to Information Act 2005 § 2(h).

²¹⁶ Jill McGivering, India's Digital Divide, *BBC News*, May 25, 2003, available at http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/2932758.stm. However, in order to overcome the "digital divide" and increase cyber connectivity, the Indian government is taking several measures, including introducing e-governance and establishing Community Information Centers. See also Meera Srinivasan, Information System Aims to Bridge Rural-Urban Divide, *The Hindu*, Feb. 8, 2006, available at <http://www.hindu.com/2006/02/08/stories/2006020808350100.htm>.

education which serve as a ladder to the realization of other human rights? The Constitution now requires the Indian state "to provide free and compulsory education to all children between the age of six to fourteen years,"²¹⁷ but the manner is still determined by state law. In view of the fact that the government is not spending a significant part of its GDP on primary education, it is really a matter of conjecture how one of the Millennium Development Goals - achieving universal primary education by 2015- is to be realized. Similarly, though "excellence" in professional education has a role to play in a country's economic development,²¹⁸ it is most likely that only those students belonging to a selected class will be able to participate, given that private professional institutions are free to fix their fees.²¹⁹ In sum, though globalization has opened or widened the vista of obtaining higher education, even abroad, it has also highlighted the already gloomy picture of primary education for, say, girls in remote villages. After all, it does not appear that many corporations will come forward to spend on or invest in providing quality primary education.

[128] 5. Yes to Commercial Speech, but No to Strikes, Bandhs and Demonstrations

It is not difficult to identify how globalization is molding freedom of speech and expression in India. As commerce and advertising became more and more important, the Supreme Court considered it desirable to recognize commercial speech as a fundamental right under Article 19(1)(a).²²⁰ On the other hand, as strikes, bandhs and demonstrations seem to disrupt business and other activities, the Court has not accepted them as part of freedom of speech and expression, even in exceptional cases.²²¹ These judgments, which directly strike at people's movements against globalization and its forces, not only seek to deny a rightful place to strikes, bandhs and demonstrations in "responsible governance"²²² but also fail to consider those situations as part of a fundamental constitutional duty.²²³

6. The Right to Health, Access to Water and a Clean Environment

Privatization coupled with the gradual retreat of the state from public services also makes it more difficult for people to have access to health care or other basic necessities such as water. As the government-run health facilities deteriorate, private health centers mushroom by exploiting the poor health of poor people.²²⁴ The government hospitals and health centers

²¹⁷ India Const. art. 21A: amended by the Constitution (Eighty-sixth Amendment) Act, 2002.

²¹⁸ See *Islamic Academy of Education v. State of Karnataka*, [2003] 3 L.R.I. 483, P 195.

²¹⁹ See *TMA Pai Foundation v. State of Karnataka*, (2002) 8 S.C.C. 481; *Islamic Academy of Education*, supra note 218, PP 6, 59. It is important to notice that even government-aided institutions such as the Indian Institute of Managements opposed the government's move to reduce the applicable fees. See Rediff.com, *The IIM Controversy*, at <http://www.rediff.com/money/iim04.htm>.

²²⁰ *Tata Press Ltd. v. M.T.N.L.*, A.I.R. 1995 S.C. 2438, overruling *Hamdard Dawakhana v. Union of India*, A.I.R. 1960 S.C. 554).

²²¹ For a ruling of the Calcutta High Court prohibiting processions and rallies on weekdays, see *Muzzling Democratic Expression*, *The Hindu*, Oct. 8, 2003, available at <http://www.thehindu.com/2003/10/08/stories/2003100802191000.htm>.

²²² Rajiv Dhavan, *The Right to Strike*, *The Hindu*, Aug. 22, 2003, available at <http://www.thehindu.com/2003/08/22/stories/2003082201051000.htm>.

²²³ India Const. art. 51A: amended by the Constitution (Eighty-sixth Amendment) Act, 2002, inter alia, asserts that every citizen has a fundamental duty "to cherish and follow the noble ideals which inspired our national struggle for freedom," and "to protect and improve the natural environment." It can be reasonably argued that the citizens will only be performing their duties if they take resort to strikes, bandhs and demonstrations to oppose government policies which run counter to the above objectives.

²²⁴ See Narrain, supra note 57.

that continue to operate in villages and remote areas struggle with rampant corruption in the form of siphoning funds and medicines. Also, despite the fact that Indian villages are increasingly connected to nearby towns and cities through roads and other means of communication, instead of attracting qualified doctors to health centers in these villages, the increased connection has a negative effect on their location preferences. As a result [129] of these and other factors, the right of access to adequate health facilities, especially for women and children, remains more rhetoric than reality.

Irrespective of whether or not wars in this century will be fought over water,²²⁵ the current trend of privatizing water resources brings its own disquiet. It results in "aqua robbery" by corporations²²⁶ and thereby denies the local population a basic natural right of access to water for the purposes of drinking, irrigation or earning a livelihood. It may be pertinent here to refer to two current examples. First, the Coca-Cola plant in Plachimada, Kerala faces continuous protests and potential closure for being the source of environmental contamination and unreasonable extraction of groundwater.²²⁷ Second, three case studies from the state of Chhattisgarh indicate how the "commodification" of water endangers the livelihood of many people who depend heavily on rivers and other common natural water sources.²²⁸

Globalization has not only created more opportunities for environmental pollution but has also enabled the export of hazardous waste and contaminated materials to developing countries, including India.²²⁹ These [130] developing countries are the least capable to refuse such export and contain the harm.²³⁰

7. Tribal Rights and Sustainable Development

Although the Indian Constitution contains ample provisions that protect the special

²²⁵ In 1995, the Vice President of the World Bank, Ismail Serageldin, stated: "If the wars of this century were fought over oil, the wars of the next century will be fought over water." Vandana Shiva, *Water Wars: Privatization, Pollution and Profit*, at ix.

²²⁶ Justice V. R. Krishna Iyer, *The Right to Water*, *The Hindu*, Jan. 28, 2004, available at <http://www.thehindu.com/2004/01/28/stories/2004012802471000.htm>; see also *Water Privatisation to be a Key Issue in Election*, *The Hindu*, Jan. 23, 2004, available at <http://www.thehindu.com/2004/01/23/stories/2004012305921200.htm>; Vandana Shiva & Kunwar Jalees, *Ganga: Common Heritage or Corporate Commodity?* (2d ed. 2005), available at <http://www.vshiva.net/>.

²²⁷ In fact, the plant has to shut down its operations for several months in view of continuing protests of local community as well as orders of Panchayat, the court and the pollution board. D Rajeev, *India: Everything Gets Worse with Coca Cola*, Aug. 21, 2005, available at <http://www.corpwatch.org/article.php?id=12590>; *Facing Imminent Defeat, Coca-Cola Tries to Set Terms in India*, available at <http://www.indiaresource.org/news/2006/1005.html>. See P. Venugopal, *Tests Confirm Toxicity in Sludge from Coke Plant*, *The Hindu*, Aug. 7, 2003, available at <http://www.thehindu.com/2003/08/07/stories/2003080703061300.htm>.

²²⁸ Rifat Mumtaz, Manshi Asher & Amitabh Behar, *Rivers for Sale: Common Property in Peril*, http://nation.ittefaq.com/artman/publish/article_25311.shtml. See also NGOs: *Water a Fundamental Right*, *The Hindu*, Feb. 8, 2006, available at <http://www.hindu.com/2006/02/08/stories/2006020803511400.htm>.

²²⁹ See *Greenpeace Hails SC Ruling on Dumping of Hazardous Waste*, *The Hindu*, Oct. 29, 2003, available at <http://www.thehindu.com/2003/10/29/stories/2003102901011000.htm>. See also the controversy surrounding the dismantling of *Clemenceau*, the French Navy's former flagship, in Gujarat. Vaiju Naravane, *Troubled Voyage*, 23 *Frontline*, Jan. 28-Feb. 10, 2006, available at <http://www.flonnet.com/fl2302/stories/20060210007400900.htm>.

²³⁰ See Tim Johnson, *E-waste Dump of the World*, *The Seattle Times*, Apr. 2, 2006, available at http://seattletimes.nwsources.com/html/nationworld/2002920133_ewaste09.html.

interests of tribal populations,²³¹ there are real fears that their concerns might not get adequate attention under the free market economy. To address some of these concerns, the government has prepared the Scheduled Tribes (Recognition of Forest Rights) Bill.²³² The Bill "aims to compensate the 'historical injustice' done to forest-dwelling tribes that were denied their traditional rights to forest lands and resources."²³³ Although the Bill is hailed and considered as an important step toward recognizing certain vital rights of tribal people,²³⁴ it has not received support from all stakeholders.²³⁵ In view of the lack of consensus, the fate of the Bill is still undecided.

However, even if the Bill were adopted, it would not address all the issues that confront tribal peoples. For example, it is not clear how the policies of general or accumulative development could adequately take into account the rights of tribal people or other disadvantaged sections of [131] society.²³⁶ The displacement of tribal populations and the lack of adequate compensation from the construction of large dams results in the severance of ties with their past history and culture.²³⁷ Unfortunately, the struggle, both inside and outside the courts, led by Narmada Bachao Andolan against the construction of the dam on the Narmada River does not present a promising picture for future resistance.²³⁸ Nevertheless, resistance to globalization is expected to continue in India and elsewhere.²³⁹

Globalization policies also promote a culture of consumerism and change people's lifestyles, habits, and cultures. These changes, when combined, have an adverse effect on sustainable development. Vandana Shiva offers a powerful example of unsustainable development by juxtaposing the ancient Indian culture of offering free water to the public with the sale of water in plastic bottles:

The culture of commodification is at war with diverse cultures of sharing, of receiving and giving water as a free gift. The unsustainable, nonrenewable, and polluting plastic

²³¹ India Const. arts. 15(4), 16(4)-16(4)(B), 46, 244(1)-244(2), 275(1), 330, 332, 338(A), 339, 342, 371(A)-371(D), 371(G). The Indian government though has not yet ratified ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

²³² Ministry of Tribal Affairs, Press Information Bureau, Government of India, Tribal Bill on the Anvil, Aug. 22, 2005, available at http://pib.nic.in/release/rel_print_page1.asp?relid=11453.

²³³ Ashish Kothari & Neema Pathak, Forests and Tribal Rights, 22 *Frontline*, May 21-June 3, 2005, available at <http://www.flonnet.com/fl2211/stories/20050603001508800.htm>.

²³⁴ Jayati Ghosh, Saving Forests and People, 22 *Frontline*, June 18-July 1, 2005, available at <http://www.flonnet.com/fl2213/stories/20050701004711800.htm>.

²³⁵ See, for example, Sheela Barse, A Bill that Takes Away More than It Gives, *The Hindu*, July 1, 2005, available at <http://www.thehindu.com/2005/07/01/stories/2005070103401200.htm>.

²³⁶ "If you are to suffer, you should suffer in the interest of the country." Jawaharlal Nehru, speaking to villagers who were to be displaced by the Hirakund Dam, as quoted by Arundhati Roy in *The Greater Common Good*, 16 *Frontline*, May 22-June 4, 1999, available at <http://www.frontlineonnet.com/fl1611/16110040.htm>. See also Suprio Dasgupta, Tribal Rights in Free Market Economy, in *Legal Dimensions* (Singh et al. eds.), supra note 5, at 113; Deva, *The Sangam*, supra note 56, at 314-17.

²³⁷ Roy, supra note 236 (pointing out that "[a] huge percentage of the displaced are tribal people (57.6 per cent in the case of the Sardar Sarovar Dam)."). See also Sarah C. Aird, China's Three Gorges: The Impact of Dam Construction on Emerging Human Rights, 8 *Human Rights Brief* 24, 25 (2001); Three Gorges Dam Nears Completion, *China Daily*, Apr. 18, 2006, available at http://www.chinadaily.com.cn/china/2006-04/18/content_569977.htm; see generally Angela R. Riley, Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities, 14 *Kan. J.L. & Pub. Pol'y* 155 (2004).

²³⁸ *Narmada Bachao Andolan v. Union of India*, (2000) 10 S.C.C. 664.

²³⁹ See generally ILO, *A Fair Globalisation: Creating Opportunities for All 3* (2004), available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

culture is at war with civilizations based on soil and mud and the cultures of renewal and rejuvenation. Imagine a billion Indians abandoning the practice of water giving at Piyaos [free water offering stands] and quenching their thirst from water in plastic bottles. How many mountains [132] of plastic waste will it create? How much water will that dumped plastic destroy?²⁴⁰

IV. "Marketing" Human Rights in an Era of Globalization: Some Strategies and Guiding Principles

As it looks doubtful, on the basis of the above analysis, whether the market and its principles alone could ensure the effective protection of human rights,²⁴¹ there is an acute need to look for new strategies which could ensure a successful marketing of human rights in an era of globalization.²⁴² Henkin asserts that human rights "advocates must learn to use the state system against threats posed by various forms of globalization."²⁴³ However, we might need to do more than this. Perhaps, it is also imperative to push for some changes in the capitalist-led globalization movement which undoubtedly requires reforms.²⁴⁴ But how do we go about this? Stiglitz, for example, suggests global collective action on the part of international institutions.²⁴⁵ But again, the real issue is whether these institutions will do just that? I argue, instead, that those who suffer adversely from globalization have more incentives to act. However, as such sufferers' potential to act is generally dormant,²⁴⁶ they will require impetus from others to help locate actors, identify the real issues and the policies responsible for the harmful trend, develop strategies to challenge the status quo, [133] and offer alternatives. Despite their respective shortcomings and limitations, I see the media, NGOs, human rights activists, socially conscious consumers and investors, and public-minded citizens as potential catalysts.²⁴⁷

I briefly mention three strategies and four guiding principles that might help in ensuring that human rights are neither sidelined nor hijacked by market forces. The three strategies are: (i) questioning the inhuman presence; (ii) institutionalizing resistance,²⁴⁸ and (iii) developing advocacy for alternatives. First of all, the existing inhuman decisions and

²⁴⁰ Shiva, *supra* note 225, at x.

²⁴¹ "[T]he free market, to date, has failed to bring about equitable distributions of income, it has failed to protect the Third World and it has done little to protect the planet." Welford, *Environmental Strategy*, *supra* note 113, at 5. See also Richard Welford, *Introduction: What are we Doing to the World?*, in Welford, *Hijacking Environmentalism*, *supra* note 13, at 8.

²⁴² Baxi poses the question thus: "Is the contemporary human rights mode of resistance to globalization historically adequate to retrieve the human rights movement from the market?" Baxi, *supra* note 4, at 166 (emphasis in original).

²⁴³ Henkin, *supra* note 13, at 7.

²⁴⁴ Stiglitz argues that "Globalization today is not working for many of the world's poor. It is not working for much of the environment. It is not working for the stability of the global economy." Stiglitz, *supra* note 6, at 214. But the issue, for Stiglitz, is not to backtrack on globalization but to ensure that we can make it work. *Id.* at 222. See also Peet et al., *Unholy Trinity*, *supra* note 26, at 223.

²⁴⁵ Stiglitz, *supra* note 6, at 222-24. Stiglitz also emphasizes the need for transparency and effective participation in governance of the international institutions. *Id.* at 224-29. See also Dobbin, *supra* note 9, at 280-308.

²⁴⁶ There could be several reasons for such a dormant state, e.g., lack of information, mystification of real issues, or unavailability of resources.

²⁴⁷ See Braithwaite & Drahos, *supra* note 4, at 623-28; Hertz, *supra* note 8, at 114-23, 126-30, 173-82, 202-04; McCorquodale, *supra* note 74, at 109- 13.

²⁴⁸ Resistance should be built both within and outside the boundaries of a given legal system.

policies, whether taken at the domestic, regional or international level, need to be questioned in an assertive manner. Such a questioning should not be driven merely by emotions or perceptions but by rational analysis and empirical data.²⁴⁹ [FN249] The information and technology revolution should help in expanding and sustaining a wider orbit of resistance in an efficient manner.

Second, it is important to institutionalize the current global but scattered resistance to the process of globalization.²⁵⁰ Commonalities amongst various political, social, economic, religious and cultural movements must be found and networked. This process should not only help resistance groups in learning from each other's experiences but also enable them to mobilize resistance against far-reaching decisions taken beyond national borders. Finally, equally critical is to develop advocacy groups who could offer alternatives to policy formulators and decision makers. It would be desirable to have a pool of committed researchers who could canvass such alternatives.

These three strategies should try to promote and be guided by the following principles: (i) sustainable development as a way of life; (ii) the duty of humanity/fraternity; (iii) the corporate culture of human rights; and (iv) the Gandhian Talisma.

First, there is an urgent need to promote sustainable development as a way of life for everyone, at all times, and everywhere. As "infinite growth with a finite pool of resources is impossible,"²⁵¹ it is necessary to [134] reexamine how development or economic growth is defined.²⁵² Development devoid of, or at the cost of, human rights, even of the ignored few, should definitely not be an acceptable option.

Second, it should be considered how the duty of humanity/fraternity, if inculcated among the people, could strengthen the spread of the human rights movement. Although the human rights discourse is centered on the individual and individuality, human rights are often relevant in the context of other human beings in the society.²⁵³ Therefore, rather than focusing merely on one's rights, a feeling of mutual concern and respect for others should result in better protection and realization of the human rights of all. Globalization should, in fact, make people realize why it is important to look beyond the "self."

Third, efforts must be made to develop and promote a corporate culture of human rights,²⁵⁴ simply because corporations are key player of globalization and do possess

²⁴⁹ Bhagwati, among others, contend that those who oppose (the goodness of) globalization are driven by passion and emotions rather than reasoning. Bhagwati, *supra* note 1, at 265.

²⁵⁰ See generally Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

²⁵¹ Welford, *Hijacking Environmentalism*, *supra* note 13, at x.

²⁵² For example, an aggregate growth does not truly reflect an improvement in the lives of all the people. Stiglitz, *supra* note 6, at 79; Kinley, *Friends, Foes or Family?*, *supra* note 29, at 255. See also Deva, *The Sangam*, *supra* note 56, at 314-17; Petras & Veltmeyer, *supra* note 3, at 122-27. But see Brian Griffiths, *The Challenge of Global Capitalism: A Christian Perspective*, in *Making Globalisation Good* (Dunning ed.), *supra* note 17, at 159, 169-70.

²⁵³ "Human rights are not premised on the protection of an atomistic individual. They are premised on the protection and development of an individual situated within the context of a wider society." Mark Freeman & Gibran Van Ert, *International Human Rights Law* 29 (2004).

²⁵⁴ Welford, argues that "[t]he culture of every organisation and each part of it needs to consider sustainable development." Welford, *Environmental Strategy*, *supra* note 113, at 203. See also *id.* at 42.

significant potential to promote the realization of human rights.²⁵⁵ However, developing such a culture - which would signify a paradigm shift from "business or human rights" to "business for human rights" - would not be easy. Most likely, a start can be made by changing the "dominant corporate culture which believes that natural resources are there for the taking and that environmental and social problems will be resolved through growth, scientific advancement, technology transfer . . . , [135] free trade and the odd charitable hand-out."²⁵⁶ Several efforts, including reform of company law,²⁵⁷ are already gaining momentum to make corporations (more specifically, corporate executives and shareholders) realize this.

Finally, the policies and decisions that underpin globalization should not be tested on the touchstone of the greatest happiness of the greatest number,²⁵⁸ nor should aggregate statistics and averages guide everything.²⁵⁹ Furthermore, contrary to what Professor Bhagwati suggests,²⁶⁰ inequalities hardly bring hope; they should not be acceptable and are never tolerated for long.

Since globalization and the free market are considered to bring all-around positive changes, the appropriate test should be to evaluate whether the proposed decision would help, in the first place, those which need such help most. Finally, this is the reason that I argue that in view of divergent stands and competing arguments on globalization, the relevant policies should be guided by the Gandhian Talisma:

[136] Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest [woman] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to [her]. Will [she] gain anything by it? Will it restore [her] a control over [her] own life and destiny? In other words, will it lead to swaraj for the hungry and spiritually starving millions?²⁶¹

²⁵⁵ Lodge and Wilson propose that a new institution, the World Development Corporation, is established to use corporate potential in reducing poverty. George C. Lodge & Craig Wilson, *Multinational Corporations: A Key to Global Poverty Reduction - Part II*, YaleGlobal Online, Jan. 5, 2006, available at <http://yaleglobal.yale.edu/display.article?id=6672>. See also Deva, *An Analysis of Asymmetries*, *supra* note 111.

²⁵⁶ Richard Welford, *Introduction: What are we Doing to the World?*, in Welford, *Hijacking Environmentalism*, *supra* note 13, at 7.

²⁵⁷ For example, the Australian Parliamentary Joint Committee on Corporations and Financial Services is inquired into the issue of corporate responsibility and Triple-Bottom-Line reporting. Similarly, Clause 156(3) of the Company Law Reform Bill, introduced in the House of Lords on Nov. 1, 2005, also imposes a duty on directors to take into account the interests of the wider community while promoting the success of the company. *Company Law Reform Bill 2005 (UK)* § 156(3), 390(4), available at <http://www.publications.parliament.uk/pa/ld200506/ldbills/034/2006034.pdf>.

²⁵⁸ Fox aptly describes what trade does: "Trade impacts economic welfare and human welfare. It generally increases aggregate economic welfare but disproportionately advantages the best off." Eleanor M. Fox, *Globalization and Human Rights: Looking Out for the Welfare of the Worst Off*, 35 *N.Y.U.J. Int'l L. & Pol.* 201, 210 (2002).

²⁵⁹ "In aggregate statistics the poor become invisible." Dine, *supra* note 17, at 2, quoting World Bank Development Report 2000-01.

²⁶⁰ "Yet another way in which inequality becomes acceptable is if those who are at the bottom of scale feel that they can also make it: inequality is accepted because it excites not envy but aspiration and hope. Capitalism's inequalities then become tolerable, not because the rich deny themselves self-indulgence but because they make the poor fancy that these prizes may come to them someday too." Bhagwati, *supra* note 1, at 66.

²⁶¹ Mahatma Gandhi, *Last Phase*, Vol. II (1958), at 65, available at <http://www.mkgandhi.org/quotes1.htm>. Even Amartya Sen, who proposed the three parameters of reach, range and reasons to test the efficacy of economic reforms, seems to argue along similar lines: "The reforms should be even-handed - all sections of society should

To put it more simply, before initiating any action, the following question should be asked: Are the proposed changes going to bring any positives for the most disadvantaged sectors of society? If not, the proposed changes should be harnessed until they satisfy the Gandhian measure. Otherwise, the least advantaged would legitimately continue to deny any value in the globalization process.

V. Conclusion: Whether Another World is Possible?

In this article I have tried to demonstrate, with reference to the Indian experience, that globalization has, and will have, a mixed impact on the realization of human rights. The negative effects, though, seem to arise and to be experienced more strongly in developing and under-developed countries. This is understandable as well explainable for it is reasonable to argue that globalization as a concept is not anti-human rights, yet concepts hardly remain neutral when they are put into operation. Therefore, it would be pretentious to argue that globalization as a process retains its neutrality even when it interacts with actors, both human to inhuman, most of which pursue the agenda of the West and not of the "Rest."

However, as the fault, in my view, does not lie in globalization but in the way it is run,²⁶² it is important for human rights activists to bear in mind that their resistance is directed towards the "way" and not toward [137] globalization per se.²⁶³ Globalization could, in fact, help in the realization of human rights. However, what is needed is that the process of globalization is harnessed to suit the interests of human rights. Needless to say, the primary onus is on the architects and actors of globalization who present globalization as a panacea for everything and everyone.²⁶⁴ Corporations, those frequent targets of anti-globalization protesters,²⁶⁵ and are themselves fighting a battle to regain public trust. Corporations should not feel content by merely shifting the responsibility of harnessing globalization and establishing its legitimacy to the states.²⁶⁶

It is also likely that in the future the language of human rights will be invoked more frequently to fight the part of globalization that is perceived as unfair and unjust.²⁶⁷ At the same time, global actors will also try to mold human rights to serve their economic interests. This will happen because of the power and status acquired by human rights in relatively

benefit from them, most of all those at the bottom of the heap. Reformers should see what reforms were doing to the most disadvantaged." Special Correspondent, Amartya Sen Moots Three Tests for Reforms, *The Hindu*, Jan. 28, 2004, available at <http://www.thehindu.com/2004/01/28/stories/2004012811671200.htm>.

²⁶² Stiglitz also makes a similar claim: "The problem is not with globalization, but with how it has been managed." Stiglitz, *supra* note 6, at 214.

²⁶³ In fact, it is argued that "many of the social movements that appear to resist globalisation actually resist the kind of globalization." Peet et al., *Unholy Trinity*, *supra* note 26, at 3.

²⁶⁴ "[M]illions of people around the world are waiting to see whether globalization can be reformed so that its benefits can be more widely shared." Stiglitz, *supra* note 6, at 250.

²⁶⁵ George C. Lodge & Craig Wilson, *Multinational Corporations: A Key to Global Poverty Reduction - Part I*, *YaleGlobal Online* (Jan. 2, 2006), available at <http://yaleglobal.yale.edu/display.article?id=6657>.

²⁶⁶ "It is the responsibility of governments to ensure that such transformation is accompanied by socially-oriented measures that help people adapt, especially those who lose out from the initial phases of the process. Governments also need to better explain the rationale behind the global economy as a force for positive change." ICC, *Standing Up for the Global Economy*, *supra* note 17, at 5.

²⁶⁷ Goodhart argues that "universal human rights are the best tools available for effective political resistance to and reform of globalisation." Goodhart, *supra* note 8, at 963.

recent time.²⁶⁸ The success of such competing attempts, however, would depend upon the seriousness and vigor shown and the nature of strategies employed by stakeholders to pursue their respective agendas.

[138] In sum, though difficult, another world, in which the human rights of all - even of the voiceless and forgotten - are realized, is possible.²⁶⁹ I have argued that one way of ensuring this is to be guided by the Gandhian Talisma while taking decisions which operationalize globalization. In fact, only after the least advantaged can taste the promised benefits, could one legitimately claim that globalization has a human face or that it is an "indisputably" good thing, not just for the selected few but for everyone. Till then the struggle, by peaceful Gandhian means or otherwise,²⁷⁰ will continue unabated and globalization will also continue to hit "road bumps."²⁷¹

²⁶⁸ "Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance." Louis Henkin, *The Age of Rights* ix (1990). Rajagopal also refers to "the emergence of a new political culture of legitimacy in the form of human rights" Rajagopal, *supra* note 250, at 135. Cf. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *Harv. Hum. Rts. J.* 101 (2002).

²⁶⁹ Fisher & Ponniah, *supra* note 2. See also Joseph E. Stiglitz, *Making Globalization Work* 3-24 (2006).

²⁷⁰ See *Non-Violent Struggles are Being Ignored, Says Arundhati Roy*, *The Hindu*, Apr. 3, 2006, available at <http://www.thehindu.com/2006/04/03/stories/2006040303411300.htm>.

²⁷¹ Pranab Bardhan, *Globalization Hits Road Bumps in India*, *Yale Global Online* (Oct. 3, 2006), available at <http://yaleglobal.yale.edu/display.article?id=8246>.