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## The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels

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# The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels\*

Bhupinder Chimni

## Abstract

The Sen conception of 'development as freedom' represents a departure from previous approaches to development that focused merely on growth rates or technological progress. Sen however fails to adequately address the social constraints that inhibit the realization of the goal of 'development as freedom.' There is an interesting parallel here with developments in contemporary international law. While contemporary international law incorporates the idea of 'development as freedom' in international human rights instruments, in particular the Declaration on the Right to Development, mainstream international law scholarship has like Sen failed to indicate the constraints in the international system that prevent its attainment. Since Sen is today among the foremost thinkers on the idea of development reviewing the parallels between his conception of development and mainstream international law scholarship is helpful as it offers insights into the limits of both.

**KEYWORDS:** economic development, international law, law and development

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## I. INTRODUCTION

In the literature on development Amartya Sen's conceptualization of *Development as Freedom* radically departs from earlier approaches to "development"-identified with the growth of GNP or technological progress or industrialization - to offer a comprehensive, inclusive and humanistic approach. Sen defines "development" 'as a process of expanding the real freedoms that people enjoy'. This broad definition is offered to draw attention 'to the ends that make development important, rather than merely to some of the means that, *inter alia*, play a prominent part in the process'.<sup>1</sup> The Sen vision with its stress on an integral understanding of development without doubt represents an important advance over previous theorization of "development". But the Sen theory of development is less successful in its analysis of those features of social processes and structures that are critical to the practical realization of the goals of development. Like critical theorists in general Sen 'tends to be better on emancipation *from* than emancipation *to*, and still weaker on how to get from here to there'.<sup>2</sup> The epistemological absences that mark his work prevent him from exploring deep structures of global capitalism crucial to devising and articulating a corresponding strategy to realize the goal of development as freedom.

The principal thesis of this article is that there is a striking parallel between the Sen vision of development and contemporary international law (CIL) discourse on development.<sup>3</sup> It explains why the Sen thinking on development is readily accommodated in CIL. On the other hand, unsurprisingly, it is far from being realized in practice. There is a parallel here between the inadequacies in Sen's theory of development and mainstream international law scholarship (MILS). In thinking and writing about international development law (IDL) MILS like Sen does not identify and interrogate those processes and structures in the international system that prevent the realization of accepted goals of development; its embrace of the fragmentation of social sciences and consequent positivist

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<sup>1</sup> A. Sen, *Development as Freedom* (New Delhi: Oxford University Press, 2000), p. 3.

<sup>2</sup> A. Wendt, "What Is International Relations for? Notes toward a Post-Critical View", in R. W. Jones (ed.), *Critical Theory & World Politics* (2001), p. 207.

<sup>3</sup> Generally speaking the conception of development deployed can influence the understanding of CIL in four ways:

First, it shape's one's view of the substantive content of IDL [International Development Law]. Second, it helps define one's perception of the relationship between the sovereign and other actors in the development process. Third, it influences the degree to which one understands IDL as 'international' as opposed to 'transnational' law. Fourth, it determines one's idea of the role that international human rights law plays in IDL.

D. Bradlow, *Differing Conceptions of Development and the Content of International Development Law*, 21 South African Journal of Human Rights (2005), p. 53.

methodology occludes this possibility.<sup>4</sup> That is to say, MILS neglects the fact that there are deep structures that constrain the pursuit of common good through international law

Since Sen is today a leading thinker on development issues, reviewing the parallels between the Sen theory of development and MILS is helpful as it offers insights into the limits and deficiencies of both. In sustaining this thesis the paper proceeds as follows. Section II identifies the principal features of the Sen theory of development. Section III offers a brief critique of the viability and validity of the Sen theory to elaborate the contention that Sen elides over structural constraints at the national and global levels that inhibit the realization of development as freedom. Section IV draws attention to the parallels between the Sen vision and CIL. Section V looks at the weaknesses that characterize MILS discourse on IDL to argue that these are similar to those that mark Sen's theory of development. Section VI contains some final remarks.

## **II. THE CONCEPT OF DEVELOPMENT AS FREEDOM: KEY FEATURES**

In conceiving “development as freedom” Sen offers a radical view of development.<sup>5</sup> The far reaching conception of development he proposes is constituted of at least seven overlapping features, *including* ways of realizing the aspiration of development as freedom.

*First*, as Sen repeatedly emphasizes, ‘an adequate conception of development must go much beyond the accumulation of wealth and the growth of

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<sup>4</sup> MILS may be defined as ‘an ensemble of methods, practices, and understandings in relation to the identification, interpretation, and enforcement of international law’. Its central feature is ‘an epistemology of law that dictates the fragmentation of social sciences’ excluding ‘a range of social and political practices as falling outside the domain of international law’. B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 *Leiden Journal of International Law* (2004), 1-2.

<sup>5</sup> Sen (2000), *supra* note 1, p. 5. However, it is often suggested that elements of the Sen conception of development is to be found in the Basic Needs (BN) approach articulated in the 1970s. The BN approach also ‘queried the focus on growth and income as indicators of development. Methodologically, it challenged the dichotomous relationship between means and ends. It put forward the idea that poverty is not an ‘end’ that can be eradicated by the ‘means’ of higher income’, S. M. Rai, *Gender and the Political Economy of Development: From Nationalism to Globalization* (London: Polity Press, 2002), p. 62. But as Stewart and Deneulin point out, ‘...Sen’s capabilities approach has a much stronger philosophical foundation: his approach builds that of Aristotle in arguing that development is about providing conditions which facilitate people’s ability to lead flourishing lives’, F. Stewart and S. Deneulin, *Amartya Sen’s Contribution to Development Thinking*, 37 *Studies in Comparative International Development* 2 (2002), 62.

gross national product and other income-related variables'.<sup>6</sup> It leads to the powerful insight that poverty is 'a deprivation of basic capabilities' rather than simply being a case of having low income.<sup>7</sup> In the Sen conception of development substantive freedoms are thus viewed as '*constituent components* of development'.<sup>8</sup> These freedoms are not merely passive components but are 'very effective in contributing to economic progress'.<sup>9</sup> In other words, 'freedoms are not only the primary ends of development, they are also among its principal means'.<sup>10</sup> In thus moving away from the "traditional" understanding of development as growth or industrialization Sen makes the concept of development relevant to advanced industrialized countries as well.<sup>11</sup>

*Second*, freedom is defined in his vision of development in an integral manner as 'the "capabilities" of persons to lead the kind of lives they value—and have reason to value'.<sup>12</sup> Sen points in this context to the *internal* relationship between different types of freedoms. He thus notes how 'economic unfreedom, in the form of extreme poverty, can make a person a helpless prey in the violations of other kinds of freedom'.<sup>13</sup> Likewise, 'political unfreedom can also foster economic unfreedom'.<sup>14</sup> To put it differently, each type of freedom has its own salience and refracts on all other categories of freedom. None can be privileged over the others. In short, Sen perceives the development process 'in inclusive terms that integrate economic, social and political considerations'.<sup>15</sup>

*Third*, Sen treats 'the freedom of individuals as the basic building blocks' of the development process.<sup>16</sup> His focus on the individual is an important correction to the excessive concentration on the State to realize the goal of development; it is the individual who is the key "agent" to bring about social change.<sup>17</sup> Of particular significance is Sen's emphasis on women's agency: 'Nothing, arguably, is as important today in the political economy of development as an adequate recognition of political, economic and social participation and leadership of women. This is indeed a crucial aspect of "development as freedom"'.<sup>18</sup> Even the

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<sup>6</sup> Sen (2000), *supra* note 1, p. 14.

<sup>7</sup> *Ibid.*, p. 20.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, p.10.

<sup>11</sup> *Ibid.*, p.6.

<sup>12</sup> *Ibid.*, p.18.

<sup>13</sup> *Ibid.*, p. 8.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 18.

<sup>17</sup> *Ibid.*, p. 19.

<sup>18</sup> *Ibid.*, p. 203. See further, B. Agarwal, J. Humpheries, and I. Robeyn (eds), *Capabilities, Freedom and Equality: Amartya Sen's Work from a Gender Perspective* (Oxford University Press, 2006).

argument for social support for individuals is made out by Sen noting that expanding people's freedom can be seen 'as an argument for individual responsibility, not against it'.<sup>19</sup> While Sen sometimes does talk of "group activities", the primary emphasis remains on the individual as an agent of social transformation.<sup>20</sup>

*Fourth*, in conceptualizing "rights" in relation to development Sen articulates a "goal-rights system" that does not privilege either negative or positive liberties but rather assigns significance to both.<sup>21</sup> He rejects both a libertarian view of rights with its blindness to consequentiality of rights and the utilitarian approach that does not sufficiently appreciate the intrinsic value of rights. He argues for 'a consequential system that incorporates the fulfillment of rights among other goals': 'It shares with utilitarianism a consequential approach (but differs from it in not confining attention to utility consequences only), and it shares with a libertarian system the attachment of intrinsic importance to rights (but differs from it in not giving it complete priority irrespective of other consequences)'.<sup>22</sup>

*Fifth*, Sen also treads the middle path on the big debates relating to development: market versus state and efficiency versus equity. He thus for instance rejects a facile critique or defense of markets.<sup>23</sup> He considers the reliance on markets for wealth creation as justified for '...there is plenty of empirical evidence that the market system can be an engine of fast economic growth and expansion of living standards'.<sup>24</sup> On the other hand, he does not neglect the fact that 'markets can sometimes be counterproductive' and therefore 'there are serious arguments for regulation in some cases'.<sup>25</sup> Depending on the forms of market in play (e.g., competitive or monopolistic) market mechanisms may, among other things, result in the waste of social resources and productive capital.<sup>26</sup> In view of the possible downside of markets he underlines 'the need to pay attention simultaneously to efficiency and equity aspects...'.<sup>27</sup> The State has therefore to enter the picture and make provision for public goods such as health

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<sup>19</sup> Sen (2000), *supra* note 1, p. 284.

<sup>20</sup> *Ibid.*, p. 116.

<sup>21</sup> *Ibid.*, p. 212.

<sup>22</sup> *Ibid.*

<sup>23</sup> Sen notes that there are two dimensions to the market. The freedom to enter into market relations is to be distinguished from the idea that 'markets typically work to expand income and wealth and economic opportunities that people have'. *Ibid.*, p. 26.

<sup>24</sup> Sen (2000), *supra* note 1, pp. 26, 112.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, pp. 124-125.

<sup>27</sup> *Ibid.*, p. 120.

or education.<sup>28</sup> In short, in the Sen view ‘the overall achievements of the market are deeply contingent on political and social arrangements’.<sup>29</sup>

*Sixth*, Sen places a lot of faith in public discussion to bring about reforms in society. He believes that social change can be brought about through open arguments.<sup>30</sup> In stressing the need to reach reasoned decisions through public discussion Sen is offering a concept of development that goes beyond technocratic fixes. It *inter alia* draws pointed attention to the need to consult and deliberate with the subjects of social policies.

*Last*, but not least, Sen stresses the importance of democracy to the realization of the goal of development as freedom: ‘developing and strengthening a democratic system is an essential component of the process of development’.<sup>31</sup> The significance of democracy, he stresses, lies in what he calls ‘three distinct virtues’: ‘(1) its intrinsic importance, (2) its instrumental contributions, and (3) its constructive role in the creation of values and norms’.<sup>32</sup> He thus rejects the so-called Asian approach to human rights that privileges economic and social rights over democratic rule.<sup>33</sup>

### III. CRITICAL REFLECTIONS ON SEN CONCEPTION OF DEVELOPMENT

The Sen conceptualization of development as freedom is extremely rich as it sharply focuses on the ends of development and explains both the intrinsic and instrumental significance of human rights and democracy in realizing developmental goals. But while the Sen vision is powerful in terms of elaborating the concept of development it is not as attentive to social structures and processes that inhibit its realization. He tends to avoid dealing with hard questions of power and social conflict. Sen therefore does not advance a theory of practice commensurate with his conception of development. But it is in the world of practice that the internal tensions of any approach to development come to the fore as divergent rights/values clash and seek to be privileged. Propositions that can happily cohabit in the world of books tend to conflict and divorce in practice. The absence of any strategy to achieve the goals of development in Sen’s work somewhat detracts from his theory of development. The following interrelated points of critique may be noted in these respects.

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<sup>28</sup> Sen (2000), *supra* note 1, p. 128.

<sup>29</sup> *Ibid.*, p. 142.

<sup>30</sup> *Ibid.*, pp. 123, 158.

<sup>31</sup> *Ibid.*, p. 157.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, pp.148 *et seq.*

*First*, the Sen theory of development neglects the subject of political economy that offers compelling insights into social processes and structures central to the realization of the goals of development.<sup>34</sup> There is thus little comment in his writings on fundamental social factors such as the ownership of means of production or the constitution and role of dominant social classes. Sen tends to treat the modern state as a neutral actor standing above classes. To be sure, in some writings Sen does recognize the role of “class” and class stratification in terms of sustaining inequalities: ‘class disparities are not only important on their own, but they also tend to intensify the disadvantages related to other forms of disparity’.<sup>35</sup> Yet class cleavages are not assigned adequate significance in relation to either understanding the social world or in obstructing social change. He therefore does not see dominant class interests being reflected in state structures. This absence is surprising because Sen admires and draws on the work of figures such as Adam Smith and Karl Marx who attached deserving significance to it. Smith, for example, was ‘alert to the abuses that could be generated from many sites of institutionalized power’ and perceptively noted that the British State in his time was ‘captured by a coterie of its own transnational companies, merchants, and domestic manufacturers’.<sup>36</sup> Of course Sen is aware of power relationships in society that could hinder rational changes. Thus he talks of ‘groups that obtain substantial material benefits from restricting trade and exchange...Political influence in search of economic gain is a very real phenomenon in the world in which we live’.<sup>37</sup> But this talk of group power is abstracted from its social basis in the ownership of means of production.

*Second*, the balance Sen strikes between the values of efficiency and equity or the institutions of the market and state has an elusive quality. Thus, for instance, insufficient attention is paid to the possibility that ‘a human rights approach may import many market values incompatible with the practical fight for poverty reduction’.<sup>38</sup> A primary reason for this is that his analysis does not seriously explore specifics in the context of real world situations. In simultaneously supporting liberalization of markets and the goals of investing in education and health facilities he tides over the tensions between the two sets of goals.<sup>39</sup> It is not some form of radical incompatibility between the two sets of

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<sup>34</sup> Stewart and Deneulin (2002), *supra* note 5, p. 64.

<sup>35</sup> Sen (2000), *supra* note 1, p. 210.

<sup>36</sup> S. Muthu, *Adam Smith’s Critique of International Trading Companies: Theorizing “Globalization” in the Age of Enlightenment*, 36 *Political Theory* (2008), 186, 197.

<sup>37</sup> Sen (2000), *supra* note 1, p. 112.

<sup>38</sup> A. L. St Clair, “How Can Human Rights Contribute to Poverty Reduction? A philosophical assessment of the *Human Development Report 2000*”, in Lucy Williams (ed.), *International Poverty Law: An Emerging Discourse* (London: Zed Books, 2006), p. 26.

<sup>39</sup> P. Patnaik, “Amartya Sen and the Theory of Public Action”, *Economic and Political Weekly*, vol. xxxiii, 7 November 1998, p. 2859

goals that is in issue but the absence of any serious attempt to address possible conflicts. It is for example no accident that that the international community is finding it difficult to realize the unanimously agreed Millennium Development Goals (MDG)<sup>40</sup>; neo liberal globalization cannot deliver on MDGs as its understanding of the relationship between efficiency and equity is parasitic on a fundamentalist vision of markets.<sup>41</sup> To take another example, he does not indicate the kind of policies that would constitute a balanced mix between efficiency and equity in the case of international trade, especially from the perspective of developing countries. He baldly states that global trade and commerce bring with it 'greater economic prosperity for each nation'.<sup>42</sup> Of course he recognizes that there will be losers who need to be protected through social safety nets and employees given opportunities for retraining and acquiring of new skills.<sup>43</sup> But he refuses to engage with policy debates in the world of international institutions (e.g., in WTO) despite the fact that it is a key site for struggle on defining the meaning and practice of "development as freedom".

*Third*, while Sen lays great emphasis on public discussion in shaping social policies he 'refrains from exploring the ways in which the concentration of economic power over the means of producing and diffusing culture might compromise my capability to decide what things I "have reason to value"'.<sup>44</sup> As Evans goes on to explain, while Sen is clear that "informed and unregimented *formation* of our values requires openness of communication and arguments", he does not pursue the question of how distribution of economic power over cultural processes in the modern economy might undermine the processes he advocates.<sup>45</sup>

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<sup>40</sup> For details, see Millennium Development Goals: A gateway to the UN System's Work on MDGs, available at: <<http://www.un.org/millenniumgoals>>, accessed 10 October, 2008.

<sup>41</sup> Shetty notes in the context of the recent global financial crisis:

At a time when \$ 700 billion can be found overnight to bail out the richest bankers in the world and \$ 1000 billion can be spent on one single "war", when sovereign wealth funds in a few rich countries alone are at \$ 2500 billion and growing, it stretches credulity when we are told that the world Can't find an extra \$ 18 billion a year to save lives of millions of children and women and meet the basic needs of the majority of the world's population'.

Salil Shetty, "Robbing the Poor to Pay the Rich", *The Hindu*, 8 October 2008. See also UN, *Millennium Development Goals Report* (New York: UN, 2008); and P. J Nelson, *Human Rights, the Millennium Development Goals, and the Future of Development Cooperation*, 35 *World Development* 12 (2007), p.2041.

<sup>42</sup> Sen (2000), *supra* note 1, p. 240.

<sup>43</sup> *Ibid.*

<sup>44</sup> P. Evans, *Collective Capabilities, Culture, and Amartya Sen's Development as Freedom*, 37 *Studies in Comparative International Development* 2 (2002), 56.

<sup>45</sup> *Ibid.* Evans concludes:

As the global political economy moves with ever greater determination toward the implantation of more thoroughly marketized economic relations, analysts must correspondingly focus more closely on how to prevent market-based power inequalities from undermining "development as freedom." Centralization of power over the cultural

This lapse is only a logical consequence of ignoring deep social structures. Therefore, the distortions introduced into public discussion by the corporate control of means of communication are ignored.

*Fourth*, since Sen views the individual as the key agent of social change he does not explore the role of collective action in the shaping of social policies. He does not sufficiently recognize that ‘public policy that explicitly acknowledges the importance of collective action, public mores that are open to contestation and collective struggles, and focused efforts to stimulate and sustain organizations that transcend primordial and parochial interests are all necessary components in the quest for development as freedom’.<sup>46</sup> The role of old and new social movements in bringing about social change is therefore neglected; the moment of resistance to power structures is not an integral part of his narrative on the process of development. Sen consequently has little to tell us about how to get from here to there i.e. from underdevelopment to development as freedom.

*Fifth*, Sen embraces what Beck has called “methodological nationalism”.<sup>47</sup> He therefore does not sufficiently appreciate that globalization has brought about a fundamental transformation of the international system, with the result that Sen does not attach any particular salience to *global* economic and political structures. This is not an aberration but a part of the nation-state frame deployed that does not take seriously the practices of imperialism or purposefully address the idea of global justice. While critical of Rawls he does not make any exacting effort to go beyond the nation-state frame of justice that Rawls adopted.<sup>48</sup> It follows that the

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flows that shape preferences is a more subtle form of “unfreedom” than those which Sen highlights, but no less powerful for being subtle. Institutional strategies for facilitating collective capabilities are as important to the expansion of freedom as sustaining formal electoral institutions. Indeed, without possibilities for collective mobilization formal elections too easily become a hollow farce.

*Ibid.*, p. 59.

<sup>46</sup> *Ibid.*, p. 57.

<sup>47</sup> According to Beck the “key assumption” of “methodological nationalism”

...is that humankind is split up into a large but finite number of nations, each of which supposedly develops its own unified culture, secure behind the dike of its state-container...The social space that is bordered and administered by the nation-state is assumed to contain all the essential elements and dynamics necessary for a characterization of society...And when the sociological gaze is attuned like this, it has enormous difficulty in perceiving society when it appears outside this framework. The result is that non-nation-state forms of society are overlooked, minimized, or distorted.

U. Beck and J. Willms, *Conversations with Ulrich Beck* (Cambridge, Polity Press, 2004), p.13.

<sup>48</sup> For his critique of Rawls, see Sen (2000), *supra* note 1, pp. 63-65. More recently Sen has addressed the issue of global justice, *albeit* at a very general level. See for instance, A. Sen, *Interdependence and Global Justice*, available at: <<http://www.un.org/esa/documents/GLO-UNGA.pdf>>, accessed 10 October 2008; and *Global Justice*, available at: <[http://www.lexisnexis.com/documents/pdf/20080806034945\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20080806034945_large.pdf)>, accessed 10 October 2008.

role of powerful states and transnational social classes in shaping the discourse and practice of development are overlooked. There is instead a naïve optimism that as soon as the weight of good argument is brought to bear on power in the global arena it will yield to it. In this regard also Smith was more forthcoming. His critique of international (trading) companies accompanied ‘his broader analysis of modern institutions’ and of international relations that saw gross inequalities in the power of nations.<sup>49</sup> Smith believed ‘that only a greater equality of political power among nations throughout the world ...would help to bring about some semblance of moral equity and international justice...’.<sup>50</sup>

In sum, Sen is the classic liberal who has faith in the institutions of the market and State to deliver even under a capitalist dispensation. His notion of democracy is also ‘an idealistic one where political power, political economy, and struggle are absent’.<sup>51</sup> His liberal humanism therefore remains problematic.

#### **IV. THE SEN VISION AND CONTEMPORARY INTERNATIONAL LAW: THE PARALLELS**

How does the Sen understanding of “development as freedom” fare in the world of international law? CIL has with only little hesitation (either in the form of hard or soft law) accepted the Sen understanding of development as freedom. In the past few decades the Sen vision of development as freedom has come to be translated into an apposite language of principles and norms and incorporated in CIL.

*First*, the critical importance that Sen rightly attaches to democratic rule and values has come to be widely accepted by the international community of states. The norm of free and fair elections or the ‘right to democratic governance’ is today an integral part of CIL.<sup>52</sup> Indeed, the right to democratic governance is viewed a crucial part of international human rights law. The prescription that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives’ (Article 21 (1) of the Universal Declaration of Human Rights),<sup>53</sup> that earlier merely expressed an aspiration, is now an established norm of CIL.

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<sup>49</sup> Muthu (2008), *supra* note 36, 186.

<sup>50</sup> *Ibid.*, p. 205.

<sup>51</sup> Stewart and Deneulin (2002), *supra* note 5, 64.

<sup>52</sup> T. Franck, *The Emerging Right to Democratic Governance*, 86 *American Journal of International Law* (1992), p.46; and S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2000), p. 37 *et seq.*

<sup>53</sup> Article 25 of ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

*Second*, the intimate relationship between democracy and development that Sen affirms has also come to be recognized in CIL. The influential Vienna Declaration and Program of Action on Human Rights, 1993 (VDPA) adopted by the World Congress on Human Rights noted that ‘democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing’. The VDPA goes on to note that ‘while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights’.

*Third*, the Sen view of the integral relationship between civil and political rights and economic, social and cultural rights also represents the understanding of the international community of states and international law scholars today. The VDPA, for instance, notes that ‘all human rights are universal, indivisible, and interdependent and interrelated’. In other words, all categories of human rights proceed hand in hand. The Sen “goal-rights” view of rights is thus also part of CIL. Both negative and positive freedoms are an integral part of international human rights law. These are embodied *inter alia* in the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

*Fourth*, Sen’s concern for promoting development has been made a part of international human rights law through recognizing a right to development (RTD).<sup>54</sup> A Declaration on the Right to Development (DRD) was adopted by the

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- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
  - (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors

<sup>54</sup> RTD can be traced to the UN Charter and human rights instruments like the ICESCR that incorporates provisions in relation to RTD. Article 55 of the UN Charter requires the organization *inter alia* to promote ‘higher standards of living, full employment, and conditions of economic and social progress and development; ...’. Significantly, under Article 56, ‘all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55’. Thus, Article 11 (1) requires that State parties ‘recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’. There are several provisions in the Covenant that appear to place an international obligation on developed State parties to grant assistance to developing countries to help realize the right to development. ICESCR calls upon member States to ‘take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation’, *albeit* ‘based on free consent’ (emphasis added). Article 11(2) *inter alia* provides that State parties ‘recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed...’. Article 22 authorizes the UN Economic and Social Council (ECOSOC) to draw the attention of other UN bodies to ‘the advisability of international measures likely to contribute to the effective progressive implementation’ of the ICESCR. Finally, Article 23

UN General Assembly (UNGA) in 1986 by a vote of 146 to one (U.S) with 8 abstentions (Denmark, Federal Republic of Germany, Finland, Iceland, Israel, Japan, Sweden and the U.K) that recognized a RTD. In the least, what this means is that, as the independent expert on RTD has noted, 'every State having recognized the right to development is obliged to ensure that its policies and actions do not impede enjoyment of that right in other countries and to take positive action to help the citizens of other States to realize that right'.<sup>55</sup>

*Fifth*, the RTD has, as in the Sen vision, a focus on the individual. The DRD conceives of the right to development (RTD) as an individual right. Article 1(1) of the DRD explicitly states that 'the right to development is *an inalienable human right* by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'. Article 2 (1) further emphasizes that it is the "human person" who is the central subject of development. The issue whether RTD is a human right can be said to have been effectively settled by VDPA which reaffirmed that "the right to development, as established in the Declaration on the Right to Development, *as a universal and inalienable right and an integral part of fundamental human rights*".<sup>56</sup>

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commits State Parties to 'international action for the achievement of the rights' recognized in the ICESCR.

<sup>55</sup> Cited in B. S. Chimni, "Development and Migration", in T. Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (The Hague: T.M.C. Asser Press, 2003), p. 259.

<sup>56</sup> How is RTD to be realized? Article 3 of DRD *inter alia* states:

1. States have the primary responsibility for the creation of national *and international conditions* favorable to the realization of the right to development.  
.....
3. States have the *duty to co-operate* with each other in ensuring development and *eliminating obstacles to development*. States should realize their rights and fulfill their duties in such a manner as to *promote a new international economic order ...* as well as to encourage the observance and realization of human rights (Emphasis added).

Article 4 goes further and states:

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective *international co-operation is essential* in providing these countries with appropriate means and facilities to foster their comprehensive development (Emphasis added).

Finally Article 10 states:

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

*Sixth*, international economic law attempts in the manner of Sen to seek a balance between the values of efficiency and equity and the institutions of the market and State in order to promote development in the poor world. Indeed, all international economic institutions endorse pro-poor developmental measures (for instance, the World Bank). They are thus committed to the goal of providing basic health and education facilities to all. International institutions also attempt to respond to the gender and sustainable development agendas. The MDG adopted by the international community reflects the consensus in the international community on these issues.

*Seventh*, CIL also recognizes and insists that international law making must take place on the basis of dialogue and discussions. The Vienna Convention on the Law of Treaties, 1969 (VCLT) rules out the use of coercion against the representatives of States in the conduct of negotiations. Thus, for example, Article 52 of VCLT states: ‘A Treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations’.

In sum, the principles and norms of CIL appear to be aligned with the Sen understanding of “development as freedom”. However, accomplishing the goal of development as freedom is another matter. Powerful states and social classes in the international system are doing little to further its goals. It is now clear that the goals of MDG are not going to be accomplished in the set time frame.

## **V. SEN AND MAINSTREAM DISCOURSE OF INTERNATIONAL LAW: SHARED DEFICIENCIES**

In these contexts MILS can be subjected to the same critique as Sen. MILS like Sen is, in the absence of engagement with the political economy of global capitalism, unable to offer serious analysis or effective answers for the failure to realize RTD. MILS neglects the very questions that Sen avoids addressing –the role of dominant classes or the impact of social and economic power on public discourse. The result is that while MILS is on the face of it committed to RTD, its refusal to address structural constraints to its realization leads to the very theoretical impasse as in Sen. In the case of MILS the epistemological absences flow from the belief in the fragmentation of social sciences that occludes the analysis of the global economic factors which obstruct the implementation of IDL. The faith in the fragmentation of social sciences prevents MILS from analyzing deep global structures. MILS therefore, among other things, fails to explore the internal tensions and contradictions between different categories of human rights, especially within a global system in which power privileges a particular reading of the regime of rights. The parallels between the silences in the

Sen theory of development and MILS understanding of international development law deserves further elaboration.

*First*, MILS does not assign full significance to the fact that the global capitalist economy is so dominated by the developed industrialized world that CIL essentially codifies their interests<sup>57</sup>. Like Sen MILS treats the State as a neutral actor that seeks to realize “national interests” rather than the interests of dominant social classes through the instrument of international law. The story of CIL that MILS narrates has therefore no place for the history of exploitation and oppression.

*Second*, while MILS is committed to the norm of democratic governance, its understanding is confined to the conduct of free and fair elections and a minimal commitment to human rights. The norm of democratic governance is thus limited to the construction of low intensity democracies. MILS like Sen does not seriously address the extent and implications of social fractures (class, race, gender) that characterize contemporary societies. Consequently, it also disregards the fact that meaning of “self” in the principle of self-determination (the foundation on which the norm of democratic governance rests) is determined by dominant social groups and classes. Subaltern groups and classes have to struggle to have their understanding of “self” accepted. As Knop for instance notes in the context of the gender divide, ‘the contest over the application of self-determination in international law’ ‘has been a place where women have challenged their figuration as unequal members of the self and unequal participants in the process of self-determination’.<sup>58</sup>

*Third*, MILS does not sufficiently recognize that good arguments do not play a key role in international negotiations. Thus, for example, WTO negotiations tend to violate some fundamental tenets of deliberative democracy.<sup>59</sup> The various agreements are negotiated by a small club of countries –in the infamous Green Room meetings- to the exclusion of most third world countries. Furthermore, developing countries ‘fear the consequences of expressing their objections publicly, and hence choose the alternative option of remaining silent’.<sup>60</sup> A variety of threats and pressures are used by powerful states to ensure that their negotiating positions are accepted.<sup>61</sup> Where exclusion and coercion do not come

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<sup>57</sup> B.S. Chimni, “Marxism and International Law: A Contemporary Analysis”, *Economic and Political Weekly*, 6 February 1999, pp.337-349.

<sup>58</sup> K. Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, 2002), p. 277.

<sup>59</sup> B. S. Chimni, *WTO, Democracy and Development: A View from the South*, 40 *Journal of World Trade* 1 (2006), 13-19.

<sup>60</sup> *Ibid.*, p. 7

<sup>61</sup> An Action Aid document lists some:

into play MILS uses a formalistic understanding of international law making (“sources” of international law) to deny “hard law” status to texts arrived at through communicative action. Thus MILS characterizes the DRD as a soft law instrument that imposes no binding obligations on the developed world. This assertion is maintained despite good arguments and evidence to the contrary. For instance, the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 3 has stated that international cooperation for development and thus the realization of economic, social and cultural rights *is an obligation* placed upon all States.<sup>62</sup> The view of CESCR gains in strength and validity when account is taken of other international law texts that embody in one form or another RTD.<sup>63</sup> But MILS does not take cognizance of this growing evidence.

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\* the threat of aid budgets being cut or essential loans being blocked if a country maintains its opposition to the richer countries or, conversely, the promise of extra aid, loans or debt relief if the country will drop that opposition

\* the threat of a loss of trade preferences by countries opposing the ‘consensus’ position, especially the cancellation of market access preferences for key exports from developing countries – a powerful weapon against countries which rely on the EU or USA as their principal export markets

\* personal attacks on delegates who defend their own country’s position in opposition to that of the richer countries. There are instances of strong developing country negotiators being removed from their posts at the WTO after phone calls to their governments complaining of their opposition, with threats of more widespread retaliation

Action Aid, *WTO Democracy and Reform* (2003), available at: <[www.actionaid.org](http://www.actionaid.org)>, p. 3.

<sup>62</sup> It observed:

The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.

Cited in Chimni (2003), *supra* note 55, p. 258.

Progressive scholars like Judge Bedjaoui contend that ‘the right to development is, by its nature, so incontrovertible that it *should* be regarded as belonging to *jus cogens*.’ M. Bedjaoui, *Towards a New International Economic Order* (New York: Holmes and Meir, 1979), p. 182. But MILS contests such characterization. For instance, according to a standard textbook of international law, the fact that the Declaration failed to attract the support of all developed states, and embodies ‘a puzzling compromise text’ leading to ‘resulting uncertainty as to both the meaning of the Declaration and whether it was intended to state law’, ‘argues against regarding the Declaration as evidence that the right to development is a part of present customary international law’, D. J. Harris, *Cases and Materials on International Law* (6<sup>th</sup> edn, London: Sweet and Maxwell, 2005), p. 724.

<sup>63</sup> These include the Declaration on Permanent Sovereignty over Natural Resources (1962), the Declaration on Social Progress and Development (1969), the Declaration and Program of action on a New International Economic Order (1974), the Charter of Economic Rights and Duties of States (1974), ILA’s Seoul Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order (1986), the Limburg Principles

*Fourth*, the MILS understanding of nature and character of international institutions has a family resemblance with the Sen assumption about State and international organizations. International institutions are like States essentially seen as neutral actors that promote the common good through decisions adopted by debate and discussion. The goals set by these institutions are taken at face value; thus the international institutions like the World Bank are seen as critical agencies to promote third world development. The fact that international institutions are dominated by powerful actors and are used to realize parochial interests is not given serious consideration.<sup>64</sup> The matter is viewed simply about progressively improving the operation and functioning of international institutions.

*Fifth*, like Sen MILS does not pay attention to collective action or social movements. Baxi has noted of Sen that “the conspicuous absence of any reference to these discourses in Sen remains puzzling if only because an ethical theory of human rights insisting on unobstructed discussion must at least accord the same dignity of discourse to statements made outside the intergovernmental or state auspices and in fact quite often opposed to these”.<sup>65</sup> The absence is equally puzzling in MILS. The struggle of social movements to give progressive meaning to international law texts is assigned little value. MILS is also unmoved by the protests of the poor and marginal in the third world against unjust international laws such as the Agreement on Trade Related Intellectual Property Rights (TRIPS) or the structural adjustment policies of international financial institutions (IFIs).<sup>66</sup> More generally, the story of resistance is not an integral part of the narrative of international law. There is a troubling silence here.

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(1987), Rio Declaration on Environment and Development (1992), Vienna Declaration and Program of Action (1993), Cairo Declaration of the International Conference on Population and Development (1994), the North Atlantic Free Trade Agreement (NAFTA) (1994), the Copenhagen Declaration of the World Summit for Social Development (1995), the Beijing Platform for Action of the Fourth World Conference on Women (1995), Lome Convention IV (1995), Declaration of the South Summit (2000), United Nations Millennium Declaration (2000), the Brussels Declaration on Least Developed Countries (2001), and the Monterrey Consensus on Financing for Development (2002).

<sup>64</sup> B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 *European Journal of International Law* 1 (2004), 2-3.

<sup>65</sup> U. Baxi, *Human Rights in a Post-Human World* (Oxford University Press, 2007), p. 46.

<sup>66</sup> On the Agreement on TRIPS, see for instance, J. Bhagwati, *In Defense of Globalization* (Oxford University Press, 2004), pp.182-185; J. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton, 2002). On the negative implications of structural adjustment policies of IFIs on the human rights of third world peoples, see D. L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 *Harvard Human Rights Journal* (2002), 206-207; S. Narula, *The Right to Food: Holding Global Actors Accountable under International Law*, 44 *Columbia Journal of Transnational Law* (2006), 711 *et seq.*; and The Structural Adjustment Participatory Review International Network, *Structural Adjustment: The SAPRI Report: The Policy Roots of Economic Crisis, Poverty and Inequality* (London: Zed Books, 2004).

*Sixth*, MILS like Sen does not seriously engage with the idea of global justice. The creation of a just world is not seen as the task of international law. It is believed that in the absence of some form of global sovereignty the Rawlsian principles of justice or any other theory of distributive justice, since these anticipate some form of a Global State, is not applicable.<sup>67</sup> As Alston observes, the question of international distributive justice ‘seems to be curious anathema to the vast majority of international law scholars and practitioners’.<sup>68</sup> He aptly goes on to comment that ‘such an aversion is neither defensible nor sustainable given the central importance of questions of distribution and patent injustice which generates and flows from existing patterns of distribution’.<sup>69</sup> But unfortunately methodological nationalism carries the day with MILS as well, however indefensible it is perceived to be by critics.

## **VI. CONCLUDING REMARKS**

The Sen conceptualization of “development as freedom” marks a sharp break from earlier notions of development that neither clarified the ends of development nor assigned critical significance to the values of democracy and rights to achieve the goals of development. The robustness of the Sen vision is reflected in the fact that it has been accepted and incorporated by the international community of States in CIL. On the other hand, the very fact that the international community has readily accepted the Sen vision of development hints at the problems that mark it. The latter does not proceed from clarifying the concept of development to analyzing the social processes and structures that prevent its realization. The stress on a dialogic resolution of developmental problems overlooks the critical role of economic and social power in shaping public discourse and the framing of solutions to social problems; Sen does not sufficiently appreciate that at the global level different forms of coercion is the order of the day.<sup>70</sup> Finally, the

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<sup>67</sup> B.S. Chimni, *A Just World under Law; A View from the South*, 22 *American University International Law Review* 2 (2007), 212.

<sup>68</sup> P. Alston, *Remarks on Professor B.S. Chimni’s A Just World under Law: A View from the South*, 22 *American University International Law Review* 2 (2007), 230.

<sup>69</sup> *Ibid.*

<sup>70</sup> What can however be done to strengthen deliberative democracy in multilateral negotiations and institutions? A significant difficult but practical step that can be taken in the direction of establishing deliberative democracy is to amend the Vienna Convention on the Law of Treaties, 1969 in two ways: first, it should (at present it does not) cover all aspects and phases of the process of negotiations including pre-negotiations and agenda setting. Second, it must be amended to expressly rule out the use of economic coercion or political pressures in negotiations. A non-binding Declaration in relation to use of economic coercion was adopted and forms a part of the

methodological nationalism that frames his theory of development excludes serious engagement with the ideas of global democracy and global justice. The epistemological and ontological silences and absences in Sen's work are reassuring to social forces and states seeking to maintain the status quo. On the other hand, the normative commitment to RTD is used to legitimize existing global arrangements. It explains why MILS is comfortable with the Sen theory of development. This does not take anything away from the enormous merit of the Sen conceptualization of development as freedom. It only points to how the dominant classes and States can co-opt the most radical of discourses to its own ends.

If the situation has to change a coalition of key third world States (such as Brazil, China, India, and South Africa) have not merely to offer a structural critique of existing global political economy but also use their collective power, in coalition with other developing countries, to compel changes that facilitate the realization of the goal of "development as freedom".<sup>71</sup> In this regard global social movements (both old and new) have to play a crucial role in ensuring that the ruling elite in developing countries do not simply endorse the various normative and institutional proposals on international economic relations emanating from the developed countries led by the United States. In short what is needed is a *complex internationalism* of States and global social movements to usher in reforms in international economic relations and law that can help fulfill the aspiration of peoples of the third world for "development as freedom".

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Final Act of the Conference of Law of Treaties. It now needs to be turned into a binding obligation and extended to political pressures. See Chimni (2006), *supra* note 59, pp. 17-18.

<sup>71</sup> The category "developing countries" or "third world" is amenable to "new forms of collective action" that can play an effective role in shaping ongoing policy debates and effectively intervening in international forums. This flexibility has been successfully deployed for example in the ongoing Doha Round of Trade Negotiations. There has been 'cognitive and institutional adaptation' that is a result of reflection upon past failures, particularly the failure of the intractable positions in the pursuit of a new international economic order. See A. Hurrell and A. Narlikar, *A New Politics of Confrontation? Brazil and India in Multilateral Trade Negotiations*, 20 Global Society (2006), 415-433. More recently, the G-20 summit on the global financial crisis in November 2008 saw states like India and China being carefully heard by developed countries. The prevailing global financial crisis offers an opportunity to developing countries to advance a new architecture for international economic relations.

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