

Realising Socio-Economic Rights under Emerging Global Regulatory Frameworks: The Potential Impact of Privatisation and the Role of Companies in China and India

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Introduction

The present system of human rights as an international project lies fractured almost from the time of its establishment in the wake of the horrors of war and conflict between 1914 and 1945.¹ The core premises lie in the structural premises of a new international order established through the United Nations system. Important core premises of that structure created a presently unresolved contradiction in the international project of human rights.² First, authority over people and things was to be centred in states. Second, states were to be defined in terms of territory and the ability to control specifically demarcated geographic spaces. Third, the legitimacy of states within their territories was to be recognised and protected by the community of states, organised within an institutional structure. Fourth, all states were to be accorded equal rights within the community of states, but subject to the leadership of the most powerful states organised as a council of security. Fifth, while territory was protected, the governments of states were not; each was subject to increasingly stringent standards meant to determine the legitimacy of government (and thus the obligation of people to respect its power and of other states to recognise its authority). Sixth, this community of states was empowered to develop normative standards that would (eventually) serve as the framework for a binding and common culture of conduct that each state would be bound to protect.³

Taken as a whole, the foundation for the human rights order contained the possibilities of both harmonization around core norms, and fracture around interpretation, implementation and coherence among the state actors.⁴ This system has neither been completely implemented, nor has it been free of controversy or intense resistance. Nevertheless, the basic ideas – that authority is organised through states that hold

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¹ A.R. Harrington, 'Don't Mind the Gap: The Ride of Individual Complaint Mechanisms Within International Human Rights Treaties', *Duke Journal of Comparative & International Law*, 2012, vol. 22, 153, at 155.

² See L.C. Backer, 'God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century', *Mississippi College Law Review*, 2008, vol. 27, 101.

³ D. Moore, 'Reconciling Normative Dissonance in Canada and New Zealand: Comparing Juridical and Political Paths to Children's Rights Implementation', *University of Toronto Faculty of Law Review*, 2010, vol. 68, 33, at 33-35.

⁴ See, L.C. Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity', *Tilburg Law Review*, 2012, vol. 17(2):177-199.

political power and that states together create globally significant substantive standards – have been a powerfully influential structure that guides much of the discourse of rights.⁵

The initial project was targeted to aspirational goals but set the framework within which most subsequent activity in the human rights discourse took place. The culmination of those efforts resulted in the adoption of the Universal Declaration of Human Rights (UDHR).⁶ However, the development of a normative structure for human rights in the form of the UDHR and its attempted articulation as international law (binding on states alone) produced fracture. The UDHR's catalogue of rights was divided. On the one side were grouped what became civil and political rights, which were eventually memorialised in the International Covenant on Civil and Political Rights (ICCPR).⁷ On the other were economic, social and cultural rights, eventually memorialised in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸

While almost every state eventually subscribed in one form or another to the UDHR, the same cannot be said for the ICCPR or the ICESCR.⁹ Most states have acceded to the ICCPR, but not all. China has signed but not ratified the ICCPR, along with Comoros, Cuba, Nauru, Palau, Sao Tomé and Príncipe and Saint Lucia. A number of states have neither signed nor ratified the ICCPR including Malaysia, Saudi Arabia, Singapore and a number of Gulf and Caribbean states. Fewer states have acceded to the ICESCR. Among the most important states that have failed to ratify it include the United States (US), Cuba and South Africa. States that have neither signed nor ratified the ICESCR include Malaysia, Saudi Arabia, Mozambique, Singapore, and a number of Gulf and Caribbean states. More importantly, a number of states have made substantial reservations in their accession to the ICESCR. For example, China restricts labour rights in a manner consistent with its domestic law. India limits the right to self-determination, and subordinates the right to equal opportunity to its domestic law.

The division of the intertwined rights structure of the UDHR into two distinct treaty regimes suggested a hierarchy to human rights,¹⁰ one which states were free to accept or

⁵ For an example, S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago: University of Chicago Press, 2005, passim.

⁶ Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A (III), 10 December 1948. Available at: <http://www.un.org/en/documents/udhr/index.shtml> (accessed 9 February 2014).

⁷ International Covenant on Civil and Political Rights (ICCPR), United Nations General Assembly Resolution 2200A (XXI), 16 December 1996. Available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 9 February 2014).

⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations General Assembly Resolution 2200A (XXI), 16 December 1966. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 9 February 2014).

⁹ Harrington, above n. 1, at 159-166.

¹⁰ T. Meron, 'On a Hierarchy of International Human Rights', *American Journal of International Law*, 1986, vol. 80:1, 1.

reject as law in accordance with their national policy.¹¹ However, non-binding international consensus has striven to join together what the two covenants managed to separate,¹² but not entirely successfully. According to Yaser Khalaileh:

Some scholars assert that even if considered indivisible, human rights have a basic hierarchy of first-generation rights (civil and political, such as the right to life and participation politically), second-generation rights (economic, social, and cultural, such as a right to subsistence), and third-generation rights (“solidarity rights” or “collective rights”, rather than individual rights).¹³

The discussion of human rights as both a component of domestic legal orders and as a global framework for constraining such domestic orders has taken place within this context, including the debate about human rights and universal values.¹⁴ This is a context centred on the state as the principal actor with obligations toward individuals and others. It is also a field essentially bounded by the quasi-legislative and normative field-defining products of those institutions that represent the community of states – a development of regimes of hortatory, customary and conventional international law on human rights in general, and those imposing obligations on states relating to the social, economic and cultural rights of individuals in particular. That discursive approach marks even the way in which arguments are constructed, justifying the avoidance by certain states, notably the US, to embrace international standards of economic, social and cultural rights,¹⁵ and China to be leery of civil and political rights.¹⁶

There are other dimensions to the fracture that has emerged in the wake of economic globalization. Within these, the division of human rights into an ICCPR and an ICESCR

¹¹ L.R. Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes’, *Columbia Law Review*, 2002, vol. 102, 1832.

¹² See, for example, the Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/CONF. 57/123, 12 July 1993. Available at: <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 9 February 2014).

¹³ Y. Khalaileh, ‘A Right To A Clean Environment In The Middle East: Opportunities To Embrace Or Reject’, *The Environmental Law Reporter: News & Analysis*, 2012, vol. 42, 10280, at 10287. See also generally K.N. Wuerffel, ‘Discrimination Among Rights? A Nation’s Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law’, *Valparasio University Law Review*, 1998, vol. 33:1, 369, at 396-402.

¹⁴ For further discussion on this debate, see M. Freeman, ‘Human Rights and Real Cultures: Towards a Dialogue on “Asian Values”’, *Netherlands Quarterly of Human Rights*, 1998, vol. 16:1, 25; P. Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’, *International Journal of Law, Policy and the Family*, 1994, vol. 8:1, 1; and M.J. Perry, ‘Are Human Rights Universal? The Relativist Challenge and Related Matters’, *Human Rights Quarterly*, 1997, vol. 19:3, 461.

¹⁵ C.R. Sunstein, ‘Why Does the American Constitution Lack Social and Economic Guarantees?’, *Syracuse Law Review*, 2005-06, vol. 56, 1, at 11.

¹⁶ K. Lee, ‘China and the International Covenant on Civil and Political Rights: Prospects and Challenges’, *Chinese Journal of International Law* 2007, vol. 6(2):445-474; C. Buckley, ‘Chinese Intellectuals Urge Ratifying Rights Treaty’, *The New York Times*, 26 Feb. 2013 available at http://www.nytimes.com/2013/02/27/world/asia/chinese-intellectuals-urge-ratification-of-rights-treaty.html?_r=0.

reflects divisions between developing states and developed states (sometimes referenced as a Global North-South divide),¹⁷ and between states that have incorporated into their constitutional orders an explicit or implicit hierarchy of rights in which either civil-political or socio-economic rights are accorded pride of place. Those tensions might also explain the differences in China and India's approaches to human rights. India sits somewhat uncomfortably but deeply in the 'North' camp, to the extent to which civil and political rights are been accorded a greater significance than economic and social rights, at least to some extent. China, on the other hand, sits equally uncomfortably in the 'South' camp, to the extent that civil and political rights are accorded a less prominent position than economic and social rights. An exchange with high-ranking officials in China makes that positioning clear:

When asked about the many civil and political rights refused to his country's citizens as well as the many political prisoners within China, Premier Zemin responded by stating, "I believe the most important, the most fundamental human right is how to ensure that the 1.2 billion Chinese people have adequate food and clothing".¹⁸

The resulting fragmentation inherent in divisions within public law¹⁹ has only been increased by globalisation, which has led to the rise of autonomous societally-constituted private governance spheres.²⁰ 'It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation – that is, to the emergence of specialized and relatively autonomous spheres of social action and structure'.²¹ More importantly, globalisation has begun to undermine the settled framework within which human rights are treated as the sole preserve of states and the state system.²² Beyond efforts to carve out a space within which enterprises have human rights obligations autonomous of those borne by states,²³

¹⁷ R.S. Avi-Yonah, 'Bridging the North/South Divide: International Redistribution and Tax Competition', *Michigan Journal of International Law*, 2004, vol. 26, 371, at 371.

¹⁸ Wuerffel, above n. 13, at 399-400.

¹⁹ L.C. Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity', *Tilburg Law Review*, 2012, vol. 17:2, 177.

²⁰ G. Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct', *Indiana Journal of Global Legal Studies* 2011, vol. 18:611.

²¹ 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 58th Session, Geneva, 2006, U.N. Doc. A/CN.4/L.682 para 7. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.682 (accessed 9 February 2014).

²² L.C. Backer, 'Governance Without Government: An Overview' in G. Handl et al (eds.) *Beyond Territoriality: Transnational Legal Authority In An Age Of Globalization*, 2012, p. 87-123.

²³ See L.C. Backer, 'From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance', *Pacific McGeorge Global Business & Development Law Journal*, 2012, vol. 25:1, 69. See also L.C. Backer, 'Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law', *Columbia Human Rights Law Review*, 2006, vol. 37, 287.

globalisation has made it possible to consider what would have been impossible before the last decade of the 20th century – the possibility that the development of global norms touching on economic, social and cultural rights (along with civil and political rights) might be undertaken not only by states but also by non-state actors and particularly by large economic enterprises.²⁴ Globalisation, and its shift of focus from state to private action, may suggest the ways in which these national approaches may still find distinct application when undertaken through markets rather than through the political apparatus of these states.

Privatisation and its effects on the implementation of socio-economic rights protection regimes, then, serve as the focus of this chapter. This focus can be usefully divided into two essentially inter-related questions. The first is institutional in nature: to what extent can advances in the protection of economic and social rights be understood as driven by the private rather than by the public institutions in China and India? The second touches on process and substance: what accounts for the differences in the expression and vindication of economic and social rights between China and India? I will first set the context, focusing on the ways in which social and economic rights are understood within India and China, and the ways in which the structural relationships between civil, political, economic and social rights affect the form and character of implementation. In the next section then, I will suggest the role of globalisation and privatisation of human rights obligations through two case studies, one from India and the other from China. These also evidence the way in which the tensions between the North and the South, and the prioritisation of political and economic rights, play out quite differently within the private sector incorporation of these norms in China and India. I will conclude with some general observations about globalisation, privatisation and the advancement of human rights regimes.

Social and Economic Rights Approaches in India and China

The role of social and economic rights in Asia is marked by an embrace of the general proposition of international human rights,²⁵ an inclination to carve out an Asian values perspective on these universal rights,²⁶ and a sense that such an Asian values framework is itself contestable because of the wide differences in values among Asian states.²⁷ The critical distinction within the now essentially defunct Asian values debate had been on

²⁴ J.G. Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection' in D. Held and K. Mathias (eds.) *Taming Globalization: Frontiers of Governance*, Cambridge: Polity Press, 2003, p. 93.

²⁵ See, for example, 'Final Declaration of The Regional Meeting for Asia of the World Conference on Human Rights', also known as 'The Bangkok Declaration', 1993. Available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/9d23b88f115fb827802569030037ed44?OpenDocument> (accessed 9 February 2014).

²⁶ See G. Langguth, 'Asian Values Revisited', *Asia Europe Journal*, 2003, vol. 1, 25; and Q. Liu, 'Understanding Different Cultural Patterns or Orientations Between East and West', *Investigationes Linguisticae*, vol. 9, 21.

²⁷ A. Sen, 'Democracy as a Universal Value', *Journal of Democracy*, 1999, vol. 10:3, 3.

the focus on development versus democracy.²⁸ When this opposition is translated into human rights terms, civil and political rights are put into opposition against economic and social rights, even within the new context of national values (e.g., human rights with Chinese characteristics etc.).²⁹ Also important to the discourse in Asia are the implications of what many commentators understand as the generational divide between civil-political rights on the one hand, and social, economic, environmental and cultural rights on the other.³⁰ These points are evidenced by the development of different approaches to social and economic rights discourse in China and India. The discourse reflects fundamental differences between approaches that tend to value economic, social, civil and political rights differently, with the development of distinct patterns or approaches to the incorporation of social and economic rights by both public and private actors.

The schism between civil-political rights and socio-economic rights has profound political, ideological, and cultural implications. Katharine Young describes this divide succinctly as the consequences of a late secularisation of the protection of material interests, and of strategic deployment of rights development in the course of the refinement of the ideological engagements of the Cold War:³¹ ‘Yet even with the end of this polarisation, consensus continues to lead to conservative and abstract expressions of the content of economic and social rights.’³²

The Chinese Approach

This generational dispute is not confined to the realm of legal scholarship – it is a snapshot of the larger North-South (or East-West) divide. Like many other developing countries, the Chinese government has been emphasising the importance of socio-economic rights while casting scepticism on those highly individualist first generation rights (i.e. civil-political rights). In fact, China has been rather successful in framing ‘human rights’ within the concept of socio-economic rights.³³ But many Western scholars have expressed scepticism on the very concept of human rights as being exclusively socio-economic rights, suggesting that those so-called economic and social rights are in

²⁸ D.K. Mauzy, ‘The Human Rights and ‘Asian Values’ Debate in Southeast Asia: Trying to clarify Key Issues’, *The Pacific Review*, 1997, Vol. 10(2), pp.210-236; M.C. Davis, ‘Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values’, *Harvard Human Rights Journal*, 1998, vol. 11, p. 109..

²⁹ H. Liu, ‘On Building Theoretical System of Human Rights with Chinese Characteristics’, *China Human Rights*, May 2011, vol. 11(3) online, available http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20110520_746459.htm.

³⁰ I. Brownlie, *Principles of Public International Law*, 7th edn., Oxford University Press, 2008, p. 519-604.

³¹ K. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’, *Yale Journal of International Law*, 2008, vol. 33:1, 113, at 148.

³² *Ibid.*, at 148.

³³ R. Peerenboom, ‘What’s Wrong With Chinese Rights?: Toward a Theory of Rights With Chinese Characteristics’, *Harvard Human Rights Law Journal*, 1993, vol. 6, 29

fact ‘entitlements’ that justify the development of ‘welfare states’.³⁴ Even some prominent scholars from developing countries, such as Indian Nobel-laureate economist Amartya Sen, have expressed doubt on the validity of this socio-economic rights construct.³⁵ Sen argues in favour of the universality of civil-political values, and suggests that ultimately, a liberal democratic political system that fully recognises the political and civil rights of individuals is the most favourable model for economic development.

There is little general evidence, in fact, that authoritarian governance and the suppression of political and civil rights are really beneficial in encouraging economic development. The statistical picture is much more complicated. . . . On balance, the hypothesis that there is no relation between freedom and prosperity in either direction is hard to reject. Since political liberty has a significance of its own, the case for it remains untarnished.³⁶

Liu Huawen also links the concept of soft law (both domestic and international), human rights (including social and economic rights), and social construction together, and argues how these concepts serve the development of rule of law.³⁷ The key, for Liu, lies in his concept of ‘social construction’. Social construction is understood to mirror the state policy of modernisation and its focus is on economic development and social harmony grounded on the obligations of the state rather than on the construction of popular rights.³⁸ Tellingly, Liu Huawen suggests that soft law, both domestic and international, plays a significant role in promoting human rights through the social construction of a society based on rule of law. Most importantly, ‘the place of soft law implementation and of the realisation of the rule of law is not in the court or within judicial organs, but in the broad societal space.’³⁹

Others have also noted the connection between Chinese perceptions of the role of the state and its willingness to embrace international norms and instruments.⁴⁰ Indeed, Dingding Chen has argued that Chinese human rights internationalism is grounded in its embrace of socialist modernization under Deng Xiaoping,⁴¹ one that emphasized the

³⁴ A. Kirkup and T. Evans, ‘The Myth of Western Opposition to Economic, Social, and Cultural Rights? A Reply to Whelan and Donnelly’, *Human Rights Quarterly*, 2009, vol. 31:1, 221.

³⁵ A. Sen, ‘Human Rights and Asian Values’, *The New Republic*, July 1997, vol. 217 (2/3), pp. 33-40, available <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=64ca745e-1372-4a38-ab55-e6f55be49938%40sessionmgr110&vid=6&hid=118>.

³⁶ *Ibid.*, at Part I, p. 33..

³⁷ H. Liu, ‘Soft Law and Human Rights and Social Construction’, *China Human Rights*, May 2012, vol. 11(3) [available at: http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20120627_907104.htm](http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20120627_907104.htm) (accessed 9 February 2014).

³⁸ Z. Li, ‘Solidly Improve the Scientific Social Management to Build a Social Management System with Chinese Characteristics’, *People’s Daily*, 2 February 2011.

³⁹ H. Liu, ‘Soft Law’, *above n.* 37 at http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20120627_907104_4.htm.

⁴⁰ D. Chen, ‘China’s Participation in the International Human Rights Regime: A Sate Identity Perspective’, *Chinese Journal fo International Politics*, 2009, vol. 2(3), p. 399-419.

⁴¹ *Ibid.*, p.409-410.

primacy of the ICSECR as compatible with the building of socialism with Chinese characteristics.⁴² It is China's identity as a socialist state that makes the difference.⁴³

Bo Ma focuses on the harmonisation of economic and social rights with Chinese values. Providing a genealogical account for the Chinese conception of human rights, he advocates a pragmatic approach for human rights dialogue.⁴⁴ He posits that the existence of 'grey areas' in the human rights debate between the West and China are partially attributable to the different conceptions of 'civil society' in China and Western democracies.⁴⁵ However, Bo Ma does not believe that such cultural difference should be expressly used by states to avoid improving their human rights records. Instead, the author suggests that globalisation will compel states to converge their differences and bridge the gaps.⁴⁶

Wei Jianxin and Liu Li, in contrast, seek to tie social and economic rights directly to the Chinese constitutional system.⁴⁷ For them, citizens have social and economic rights, but these require the state to give them substance to affirm the effectiveness of citizenship, but also the absolute protection of the government of responsibility for civil commitment benefits. From the constitutional perspective, social and economic rights then are not so much individual rights as state obligations recognised through the Chinese constitution. Fang Zhulan, Luo Rundong and Wang Hongtao take a different approach.⁴⁸ They posit that the imperfections in the protection of people's economic rights is the key root of social disharmony. Protection of the human resource capital right is an important part of improving people's economic rights. Like other scholars, their focus is on the political project of creating a harmonious society in line with the Chinese Communist Party's goal. In order to construct a harmonious society, it is necessary to lay emphasis on improving people's human capital rights. Zhulan and Luo argue that that the 'labour-capital' relationship is the key to understanding social harmony in the industrial stage of mankind. Economic rights and social harmony are also stressed by Yang Hongli and Ju Rongliang.⁴⁹

⁴² Ibid., p. 414.

⁴³ Ibid., 417.

⁴⁴ M. Bo, 'Analyzing Concepts of Human Rights with an Asian Accent', *China Human Rights*, March 2012, vol. 11(2) online available at: http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20120530_896240.htm (accessed 9 February 2014).

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ J. Wei L. Li, 'Shehui Jingji Quanli Zhi Xianfa Jiedu' (社会经济权利之宪法解读) [Constitutional Interpretation on Social and Economic Rights], 3 *Nankai Journal (Humanities & Social Science Edition)* 2011, pp. 107, 107 (China).

⁴⁸ Fang Zhulan, Luo Rundong & Wang Hongtao, 'Zhengzhi Jingji Xue Shiye zhong de Hexie Shehui' [Harmonious Society in a Perspective of Political Economy (Symposium)], 4 *Academic Monthly* 2007, vol. 4, pp. 4, 7 (2007) (China).

⁴⁹ H. Yang and R. Ju, 'Jingji Lunli Shiye de Hexie Nongcun Shehui Zhixu Jiexi' [Analysis on Harmonious Rural Social Institution in the View of Economic Ethics], 9 *Reform* 2009, pp. 87, 87 (2009) (China).

The Indian Approach

While Chinese scholars tend to view economic and social rights as an obligation of the state rather than as rights individuals can exercise against the state, Indian authors tend to focus more on the enforcement of naturalised international obligations through judicial and other mechanisms.⁵⁰ Parmanand Singh considers the effectiveness of public interest litigation (PIL) in the enforcement of social and economic rights,⁵¹ focusing on PIL in the Indian Supreme Court since the late 1970s as a judicially crafted governmental vehicle for the development of a public law of social and economic rights.⁵² The judicial approach to socio-economic rights protection in India has permitted the development of a discourse of social and economic rights through the language of law, deeply embedded within the traditions of public law litigation in India.⁵³ This has engendered a lively debate, but one quite similar to those in North America and Europe.⁵⁴

Vijayashri Sripathi, for example, describes how the Indian Supreme Court developed expansive substantive principles effectively imposing positive socio-economic obligations on the state and its instrumentalities.⁵⁵ The focus in India has also been on relaxing the rules that limit access to courts, empowering the courts with additional investigative authority,⁵⁶ and extending the jurisdictional powers of courts.⁵⁷ The object of these changes to the judicial system is to empower individuals against the state rather than to encourage the state to meet its obligations to its citizens. To that end, economic and social rights are subsumed within civil and political rights in India.

Some other scholars have argued for the importance of a coordinated development of individual social and economic rights between Indian and international standards.⁵⁸ Birchfield and Corsi contend, for example, that 'India's reliance on domestic law to

⁵⁰ I.S. Shankar and P.B. Mehta, 'Courts and socio-economic rights in India' in V. Gauri and D.M. Brinks (eds.) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge: Cambridge University Press, 2010, p. 146.

⁵¹ P. Singh, 'Enforcing Social Rights Through Public Interest Litigation: An Overview of the Indian Experience', Conference paper presented at the International Conference on the Realisation of Socio-Economic Rights in Emerging Free Markets: Perspectives from China and India, City University of Hong Kong School of Law, 29-30 November 2012.

⁵² Ibid. See also R. Kumar, 'International Human Rights Perspectives on the Fundamental Right to Education – Integration of Human Rights and Human Development in the Indian Constitution', *Tulane Journal of International and Comparative Law*, 2004, vol. 12, 237.

⁵³ O.C. Reddy, *The Court And The Constitution Of India: Summits And Shallows*, Oxford: Oxford University Press, 2008.

⁵⁴ See for example R. Kadambi, 'The Supreme Court of India's Jurisprudence on Social Rights, Welfare, and Secularism', *George Washington International Law Review*, 2011, vol. 43:4, 813.

⁵⁵ V. Sripathi, 'Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective', *Tulane Journal of International & Comparative Law*, 2007, vol. 16:1, 49, at 103.

⁵⁶ Ibid.

⁵⁷ N. Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court', *Washington University Global Studies Law Review*, 2009, vol. 8:1, 1.

⁵⁸ L. Birchfield and J. Corsi, 'Between Starvation and Globalization: Realizing the Right to Food in India', *Michigan Journal of International Law*, 2010, vol. 31, 691.

identify, adjudicate, and implement a constitutional right to food reflects a more general confidence in its own sovereignty and position vis-à-vis international human rights bodies when it comes to espousing and upholding human rights'.⁵⁹ They also note that the relationship between civil and political rights on the one hand and the vindication of substantive social and economic rights on the other, 'is reflected in India's third periodic report submitted under Article 40 of the International Convention on Civil and Political Rights (ICCPR) to the Human Rights Committee'.⁶⁰

On the other hand, others like Sukanya Pillay argue for a more prominent role for international law within India.⁶¹ She contends: 'India must comply with its binding international legal obligations regarding the human rights to food and development. To do so, India must adopt a human rights-centered approach to development that will create the economic and social conditions to promote the rights and development of all people'.⁶² Raj Kumar again talks about this intersection of national and international legal regimes and its effects on the development of social and economic rights in India.⁶³ He argues that the 'enforcement of economic, social, and cultural rights could provide the precious space and numerous opportunities that would make the enjoyment of civil and political rights socially meaningful and practically significant'.⁶⁴ But harmonious integration of international standards requires the use of national institutions to supplement an individual rights-based regime through the courts.⁶⁵ This is an idea also taken up by Vijayashri Sripathi, who argues for the expansion of the role of national human rights institutions.⁶⁶

The Difference in the Two Approaches

The differences between Chinese and Indian scholars vis-a-vis socio-economic rights are, thus, profound. The approaches to the notion of rights that have been developing in China and India are also fundamentally different. In India, that development has tended to parallel those of European and North American systems. The focus is on individual rights against the state enforced by individual effort through the courts and developed on a case-by-case basis, with periodic legislative interventions. In China, that development has tended to seek the forging of a distinct view of the relationship between rights, the individual and the state. In contrast to India, rights in China impose obligations on states rather than giving power to individuals to enforce them against the state. As a consequence, these rights are vindicated through increased administrative efforts by the states rather than by the invocation of a judicial process. To the extent the judiciary is

⁵⁹ *Ibid.*, at 703.

⁶⁰ *Ibid.*, at 703-704.

⁶¹ S. Pillay, 'India Sinking: Threats to the Right to Food, Food Security & Development in an ERA of Economic Growth,' *Windsor Year Book Access to Justice*, 2009, vol. 27, pp. 127, 132.

⁶² *Ibid.*, at 128.

⁶³ Kumar, above n. 52.

⁶⁴ *Ibid.*, at 249.

⁶⁵ *Ibid.*, at 283-284.

⁶⁶ Sripathi, above n. 55.

invoked, it is effectively to goad the state to undertake its duty to protect rights.⁶⁷ These distinctive approaches have real world consequences. It is to those that this chapter turns next.

Economic and Social Rights from the Global to the Private: Two Case Studies

A focus on the public law aspects of the incorporation of economic and social rights into the landscape of India and China tends to ignore an important and emerging vector of change. Even as the two countries continue to confront the consequences of the internationally-based framework of human rights defined by the UDHR as well as the ICCPR and the ICESCR, private sector actors have begun to take a more active role in developing their own (and sometimes related) frameworks for the incorporation of social and economic rights into their operations. These efforts are undertaken autonomously but also sometimes in network with international organisations and national institutions. Two case studies, one from India and one from China, suggest the convergence and divergence of these efforts taken by the private sector. They also suggest the way in which globalisation has transformed the governance landscape, permitting a measure of privatisation of governance that would have been unthinkable at the time the UDHR, ICCPR and ICESCR were drafted.

India – Tension between the Global and Private: Vedanta Corporation

The privatisation of economic and social rights in India is being effectuated within a dynamic and rights-based discourse that has been an important part of Indian political life since the 1970s.⁶⁸ Economic and social rights originate in the public sector in the traditional manner – from the state downward to its people. The extent of those obligations under globalisation has clouded the traditional state-based rights regimes by adding another layer of norm creation (i.e. by private enterprises) that has yet to be fully incorporated within the structures of public law. Moreover, the rise of private sphere actors, principally large economic enterprises, with their own interventions in rights sustaining activities has also changed the landscape of rights. The privatisation of rights coupled with the creation of the private sphere produces a complex approach to the vindication of rights through the intermeshing of public and private spheres.

These collisions and the Indian approach to privatised economic and social rights regimes is nicely illustrated by the the controversy over Vedanta’s operations at Niyamgiri Hills.⁶⁹ Niyam Dongar hill contains over US\$2 billion worth of bauxite deposits. In 2005, Vedanta began to build a bauxite refinery at Lanjigarh on the Niyamgiri foothills. The plant became operational in 2006. Vedanta Resources is a multinational natural resources

⁶⁷ Peerenboom, above n. **Error! Bookmark not defined.**

⁶⁸ See P.B. Mehta, ‘India’s Unlikely Democracy: The Rise of Judicial Sovereignty’, *Journal of Democracy*, 2007, vol. 18:2, 70.

⁶⁹ Survival International, ‘We’ll Lose our Soul. Niyamgiri is our Soul’. Available at: <http://www.survivalinternational.org/tribes/dongria> (accessed 9 February 2014).

enterprise,⁷⁰ founded and owned by Indian business magnate Anil Agarwal, one of the richest men in the world.⁷¹ The Dongria Kondh tribe, about 8,000 members of which live in scattered villages throughout the Niyamgiri Hills in the state of Orissa, consider the Niyamgiri Hills to be holy. Among them, the Niyam Dongar hill is the holiest of the holy, considered the seat of their god, Niyam Raja.⁷²

The Vedanta bauxite mines at Niyamgiri Hills have been the object of national legal controversy. In 2004, the Peoples Union for Civil Liberties filed a PIL before the Indian Supreme Court regarding the potential environmental impact of the Vedanta mines.⁷³ The Central Empowered Committee (CEC) recommended against mining in Niyamgiri.⁷⁴ In 2007, however, the Supreme Court allowed a Vedanta subsidiary, Sterlite, to apply for a license to mine at the Niyamgiri Hills. By 2008, Sterlite's mining activities at Niyamgiri had been approved by the Indian Supreme Court, although the company did not obtain final regulatory approval until 2009.⁷⁵

Socially conscious investors did not approve Vedanta's behaviour. For example, in 2007, the Norwegian government's Sovereign Wealth Fund sold its stake in Vedanta,⁷⁶ citing systemic environmental and human rights failures at four of Vedanta's Indian subsidiaries and concerns about the company's mining activity near Niyamgiri.⁷⁷ The Fund drew on international legal principles, developing standards produced by NGOs and the position of the World Bank on the relevant issues.⁷⁸ Norway's actions were quickly followed by other European funds, including the Dutch pension fund manager, PGGM, which cited frustration about its inability to convince Vedanta to change its Orissa operations plans.⁷⁹ But these actions have not appeared to have negatively impacted

⁷⁰ Vedanta, 'Our Story – What We Do'. Available at: <http://www.vedantaresources.com/about-us/our-story/what-we-do.aspx> (accessed 9 February 2014).

⁷¹ 'Profile: Agarwal, Anil', *Forbes*, 2013. Available at: <http://www.forbes.com/profile/anil-agarwal/> (accessed 9 February 2014).

⁷² Survival International, above n. 69.

⁷³ 'Bauxite Shortage Hits Vedanta Aluminum', *Metalworld*, January 2013, p. 68. Available at: <http://www.metalworld.co.in/newsletter/2013/jan/infocus1-0113.pdf> (accessed 9 February 2014).

⁷⁴ Central Empowered Committee (CEC), 'Report in IA no. 1324 regarding the Alumina Refinery Plant being set up by M/S Vedanta Alumina Limited at Lanjigarh in Kalahandi District, Orissa'. Available at: http://assets.survivalinternational.org/static/files/behindthelies/CEC_report_smaller.pdf (accessed 9 February 2014).

⁷⁵ 'Government approves controversial mine', *Survival International*, 18 May 2009. Available at: <http://www.survivalinternational.org/news/4561> (accessed 9 February 2014).

⁷⁶ L.C. Backer, 'Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets', *The American University International Law Review*, 2013, vol. 29:1, 1.

⁷⁷ Norway Council on Ethics, 'To the Ministry of Finance, Recommendation of 15 May 2007', 15 May 2007. Available at: <http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/RecommendationVedanta.pdf> (accessed 9 February 2014).

⁷⁸ Ibid.

⁷⁹ M. Cobley, 'PGGM Joins Norway Fund in Vedanta Boycott', *Financial News*, 7 July 2010. Available at: <http://www.efinancialnews.com/story/2010-07-07/pggm-vedanta> (accessed 9 February 2014).

Vedanta's share price in European markets.⁸⁰

In 2008, Survival International, a UK-based NGO, launched a new campaign targeting Vedanta's planned mining activity at Niyamgiri.⁸¹ On 19 December 2008, Survival International submitted a complaint to the UK National Contact Point (NCP)⁸² under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines) against Vedanta's planned mining activities in Niyamgiri.⁸³ In its final decision,⁸⁴ the NCP found that Vedanta had failed to engage the Dongria Kondh in adequate and timely consultations.⁸⁵ The NCP also concluded that Vedanta did not respect the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments.⁸⁶ But more importantly, the NCP determined that even if the Indian Supreme Court's rulings were determinative of Vedanta's obligations under Indian law, they had no effect on a determination of Vedanta's obligations under the OECD Guidelines, and especially on the application of the Guidelines within the company's home jurisdiction.⁸⁷ Vedanta was thus faced with the simultaneous application of two governance systems: the legal-system of India and the social-norm system represented by the OECD Guidelines.

Vedanta's response was dismissive of the NCP's decision.⁸⁸ Vedanta's representatives were quoted as saying that "Vedanta wishes to make clear that it does not accept the UK NCP's conclusions ... Vedanta considers the UK NCP's criticisms both inaccurate and inappropriate" because "Vedanta's group of companies is a predominantly Indian organisation, in terms of both ownership and management structure."⁸⁹ Indeed, the NCP's opinion has no legally binding effect. But by early 2010, it was reported that the

⁸⁰ Ibid.

⁸¹ 'New Survival campaign targets British company Vedanta – mine set to destroy remote tribe', *Survival International*, 29 April 2008. Available at: <http://www.survivalinternational.org/news/3272> (accessed 9 February 2014).

⁸² See L.C. Backer, 'Case Note: Rights And Accountability In Development (Raid) V Das Air And Global Witness V Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations', *Melbourne Journal of International Law*, 2009, vol. 10:1, 258.

⁸³ Survival International, 'Vedanta Resources plc (UK) – Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECXD Guidelines for Multinational Enterprises', 19 December 2008. Available at: http://assets.survivalinternational.org/documents/96/Survival_complaint_VEDANTA.pdf (accessed 9 February 2014).

⁸⁴ 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises – Complaint from Survival International against Vedanta Resources plc', United Kingdom National Contact Point, 25 September 2009. Available at: <http://www.oecd.org/investment/mne/43884129.pdf> (accessed 9 February 2014).

⁸⁵ Ibid, para 65-67.

⁸⁶ Ibid.

⁸⁷ Ibid, at para 56.

⁸⁸ 'Vedanta Snubs British Government Again', *Survival International*, 12 March 2010. Available at: <http://www.survivalinternational.org/news/5632> (accessed 9 February 2014).

⁸⁹ Ibid.

Church of England had sold its £2.5 million stake in Vedanta.⁹⁰ Amnesty International also criticised the operations of Vedanta in Orissa, eventually issuing a highly critical report in 2010 based on earlier work.⁹¹ There was also political action taken against Vedanta in the UK. For example, the British government's Department for Business Innovation and Skills issued follow up reports reflecting the parties' responses on the implementation of the recommendations of the Final Statement.⁹² Survival International argued that Vedanta had done little to implement the UKNCP Final Statement.⁹³ Vedanta continued to seek protection in compliance with Indian national law.⁹⁴

The most interesting consequence of the UK NCP's decision was the political reaction of the Indian government. Despite the government's urging that the Indian Ministry of Environment and Forests approve Vedanta's proposed Niyamgiri mine,⁹⁵ by August 2010, a committee commissioned by the Ministry of Environment and Forests released a report raising concerns over Vedanta's planned mining activities in Niyamgiri.⁹⁶ In August 2010, India's Environment Minister Jairam Ramesh blocked the project.⁹⁷ In October, 2010, India's Environment Ministry rejected Vedanta's plan to expand the Lanjigarh refinery below the Niyamgiri hills, and demanded immediate improvements be made to the existing plant in the area.⁹⁸ Finally, in January 2014, it was reported that the Indian government had disapproved Vedanta's plans to mine at the Niyamgiri hills.⁹⁹

⁹⁰ 'India refinery "threatens health of local community"', *BBC News Online*, 9 February 2010. Available at: http://news.bbc.co.uk/2/hi/south_asia/8505250.stm (accessed 9 February 2014).

⁹¹ Amnesty International, 'Executive Summary of Report: Don't Mine Us out of Existence: Bauxite Mine and Refinery Devastate Lives in India', ASA 20/004/2010, 9 February 2010. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4b7275272> (accessed 9 February 2014).

⁹² 'Follow up to Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises – Complaint from Survival International against Vedanta Resources plc', United Kingdom National Contact Point, 12 March 2010. Available at: <http://www.oecd.org/daf/inv/mne/46085980.pdf> (accessed 9 February 2015).

⁹³ *Ibid.*, ¶ 15.

⁹⁴ *Ibid.*, ¶ 20.

⁹⁵ 'Vedanta's Controversial Mine Gets Backing of Indian PM', *Survival International*, 30 June 2010. Available at: <http://www.survivalinternational.org/news/6152> (accessed 9 February 2014).

⁹⁶ Dr N.C. Saxena et al, 'Report of The Four Member Committee For Investigation into the Proposal Submitted by the Orissa Mining Company For Bauxite Mining In Niyamgiri – Submitted to the Ministry of Environment & Forests Government of India New Delhi', 16 August 2010. Available at: http://moef.nic.in/downloads/public-information/Saxena_Vedanta.pdf (accessed 9 February 2014).

⁹⁷ 'David v. Goliath: Indian Tribe in "Stunning" Victory Over Mine Giant', *Survival International*, 24 August 2010. Available at: <http://www.survivalinternational.org/news/6385> (accessed 9 February 2014).

⁹⁸ 'Troubled Vedanta Loses Appeal for Controversial Refinery', *Survival International*, 21 October 2010. Available at: <http://www.survivalinternational.org/news/6605> (accessed 9 February 2014).

⁹⁹ 'Victory: India Saves "Avatar tribe" From Vedanta Mine', *Survival International*, 13 January 2014. Available at: <http://www.survivalinternational.org/news/9621> (accessed 9 February 2014).

China – Tension between Public and Private; Economic over Political Rights: Foxconn

In contrast to the Indian experience, the case study drawn from China suggests a very different approach to the locus and articulation of rights. Rather than viewing rights as attached to the individual and asserted by that individual before national courts or against the state, rights in China are understood as something the state (or the employer in privatised entities) has an obligation to protect. As a consequence, rights are seen as an administrative responsibility, the fulfilment of which maintains the legitimacy of the state, rather than an object of litigation and judicial intervention. This was well illustrated by the labour problems encountered by Apple Inc. and Foxconn in China.

Foxconn was started on a shoestring in Taipei, Taiwan by Terry Gou in 1974 as Han Hai Precision Industry Company, Ltd., with an investment of about US\$7,500.¹⁰⁰ Hon Hai, a public company listed in Taiwan, has US\$43 billion market capitalisation and uses the trade name Foxconn.¹⁰¹ As of December 31, 2013, Foxconn employed 1.077 individuals worldwide, with operations all across China, the United States, and Europe.¹⁰²

In the first decades of the 21st century, one of Foxconn's largest operations is a plant located in Longhua, Shenzhen, China,¹⁰³ where it manufactured parts for a number of large multinational enterprises.¹⁰⁴ Foxconn's operations as a contract manufacturer place it squarely in the middle of the global supply chain of finished goods for sale by upstream enterprises to consumer markets worldwide. It is this relationship with upstream manufacturers that has permitted corporations such as Foxconn to develop a sophisticated system for the articulation, monitoring and implementation of socio-economic rights frameworks autonomously of the state.

The incorporation of social and economic rights within global supply chains has been generally subsumed within the enterprise's corporate social responsibility (CSR) policies . Over the last decade, CSR systems have assumed the character of governance, forming

¹⁰⁰ Foxconn is now called the 'Hon Hai/Foxconn Technology Group'. 'About Hon Hai – Group Profile', Foxconn.com. Available at: http://www.foxconn.com/GroupProfile_En/GroupProfile.html (accessed 9 February 2014).

¹⁰¹ J. Dean, 'The Forbidden City of Terry Gou', *The Wall Street Journal*, 11 August 2007. Available at: <http://www.wsj.com/articles/SB118677584137994489> (accessed 9 February 2014).

¹⁰² Foxconn, 2013 CSER Annual Report (2014), p. 12, available <http://ser.foxconn.com/downloadAttachment/8abe98dc49ef1d1b0149ef2c266b0006/2013+Foxconn+CSER+Annual+Report.pdf>.

¹⁰³ 'Light and Death: A Series of Deaths Expose A Big Computer Maker Unaccustomed to Scrutiny', *The Economist*, 27 May 2010. Available at: http://www.economist.com/node/16231588?story_id=16231588 (accessed 9 February 2014).

¹⁰⁴ D. Nystedt, 'Kindle Screen Maker Will Increase Capacity to Meet Demand', *Computer World*, 28 July 2010. Available at: http://www.computerworld.com/s/article/9179759/Kindle_screen_maker_will_increase_capacity_to_meet_demand (accessed 9 February 2014). H. Blodget, 'Apple Adding More iPad Production Lines to Meet Holiday and 2011 Demand', *San Francisco Chronicle*, 23 November 2010. Available at: <http://www.sfgate.com/news/article/Apple-Adding-More-iPad-Production-Lines-To-Meet-2455806.php> (accessed 9 February 2014).

closed systems of regulation among an identifiable set of stakeholders who develop, operate, monitor and sanction compliance with these behaviour rules.¹⁰⁵ Foxconn developed its own approach to CSR in general, and towards its obligations to implement regimes of social and economic rights.¹⁰⁶ It incorporated a stakeholder management process ‘into its daily operations at various levels and in different business functions’.¹⁰⁷ For employees, this translated into a standard under which ‘all employees are treated equally’,¹⁰⁸ with a focus on employee living and working environments, labour relations and mental health.¹⁰⁹

Large multinational actors for which Foxconn also serves as a downstream supplier impose a similar system of regulatory norms relating to economic and social rights on Foxconn. Among them is Apple Inc., which has had long operated its own CSR governance system throughout its supply chain. The system had worked reasonably well, grounded in accountability through Apple’s vulnerability to reputation damage among consumers and investors in developed countries. Like other large multinational enterprises with well-developed global supply chains, Apple has governed behaviour throughout its supply chain through a Supplier Code of Conduct that was regulatory in character.¹¹⁰ This Code of Conduct specified behaviour standards and expectations in the areas of labour, human rights, worker health/safety, environmental impact, ethics and management.¹¹¹ As a condition of engagement, Apple, like most multinational companies adhering to similar systems, requires suppliers to abide by its governance rules for suppliers; suppliers also cede to Apple the power to audit their operations for this purpose and to sanction them for violations.¹¹² Apple made clear the autonomous nature of its supply chain management standards: ‘Apple prohibits practices that threaten the rights of workers – even when local laws and customs permit such practices’.¹¹³ At the same time, these company standards are derived from developing international standards.¹¹⁴ Apple

¹⁰⁵ L.C. Backer, ‘Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator’, *University of Connecticut Law Review*, 2007, vol. 39:4, 1739.

¹⁰⁶ Foxconn, ‘2011 CSER Annual Report’, 2012. Available at: http://ser.foxconn.com/SelectLanguageAction.do?language=1&jump=/cser/Annual_Report.jsp (accessed 9 February 2014).

¹⁰⁷ *Ibid.*, p. 9.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Apple, Inc., ‘Apple Supplier Code of Conduct’. Available at: http://images.apple.com/supplierresponsibility/pdf/Apple_Supplier_Code_of_Conduct.pdf (accessed 9 February 2014)

¹¹¹ *Ibid.*

¹¹² Apple, Inc., ‘Supplier Responsibility: Auditing’. Available at: <https://www.apple.com/hk/en/supplier-responsibility/accountability/> (accessed 9 February 2014).

¹¹³ ‘Apple Becomes the First Technology Company to Join the Fair Labor Association’, *The Next Web* (Jan. 13, 2012 available <http://thenextweb.com/apple/2012/01/13/apple-becomes-the-first-technology-company-to-join-the-fair-labor-association/>).

¹¹⁴ Apple Supplier Code of Conduct, above n. 110.

reports the results of its monitoring in an annual Apple Supplier Responsibility Progress Report.¹¹⁵

This intensely self-referential network of multi-layered private governance came under increasing stress when workers at the Foxconn Shenzhen plant began to commit suicide in noticeable numbers.¹¹⁶ The way in which Foxconn and Apple responded, and the role of civil society actors and the media, suggest the beginning of privatised rights developments in China. In the wake of the suicides, Foxconn suggested that it had complied with all the legal requisites applicable to its operations in China and thus was not culpable. But civil society actors were quick to discredit this line of argument.¹¹⁷ Foxconn had to react – not because the law required it, or as a consequence of legal action, but as a result of the social context in which it operated. Foxconn was failing to meet its obligations, the evidence of which was reflected in the deaths of its employees, eventually too numerous to be explained away. Public opinion (and especially its expression in global media outlets) was being turned against it, potentially affecting Foxconn's relationships with its principal customers who are all sensitive to shifts in public opinion, which might in turn have significant effects of sales of end products. Civil society elements, well aware of this relationship, sought to exploit it through a noisy letter writing campaign.¹¹⁸

Civil society pressure forced one of Foxconn's most publicly exposed customers, Apple, to intervene. Facing increasing criticism and publicity from Western news media, Apple boss Steve Jobs first defended conditions at Foxconn.¹¹⁹ But when this proved ineffective, Foxconn agreed to raise wages by about 20 per cent,¹²⁰ and boosted its resources devoted to employee mental health.¹²¹ Nevertheless, media coverage remained unrelenting, and increasingly focused on Apple.¹²² Unable to generate sufficient legitimacy by itself or in concert with Foxconn, Apple turned to a third party certification organisation. On 13 January 2012, Apple disclosed an almost complete list of its direct suppliers for the first time, and announced their new membership in the Fair Labor

¹¹⁵ See, for example, Apple, Inc., 'Apple Supplier Responsibility – 2012 Progress Report'. Available at: http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf (accessed 9 February 2014). See also 'Supplier Responsibility 2015 Progress Report'. Available at: http://images.apple.com/supplier-responsibility/pdf/Apple_Progress_Report_2015.pdf (accessed 19 February 2015).

¹¹⁶ '13th Foxconn worker reportedly attempts suicide', *The Daily Caller*, 26 May 2010. Available at: <http://dailycaller.com/2010/05/26/latest-foxconn-suicide-comes-after-visit-by-boss/> (accessed 9 February 2014).

¹¹⁷ 'Another Foxconn Employee Died of Fatigue', *China Labor Watch*, 2010. Press Releases. Available at: <http://chinalaborwatch.org/pro/proshow-96.html> (accessed 9 February 2014).

¹¹⁸ China Labor Watch, 'Get Involved: Letter to Buyers Regarding the Recent Suicides at Foxconn', 2010. Available at: <https://www.chinalaborwatch.org/news/new-254.html> (accessed 9 February 2014).

¹¹⁹ 'Apple boss defends conditions at iPhone factory', *BBC News Online*, 2 June 2010. Available at: <http://news.bbc.co.uk/2/hi/technology/10212604.stm> (accessed 9 February 2014).

¹²⁰ Watts, 'Foxconn offers pay rises', above n. **Error! Bookmark not defined.**

¹²¹ Foxconn, '2011 CSER Annual Report', above n. 106, p. 24.

¹²² L. Guo et al, 'A case study of the Foxconn suicides: An international perspective to framing the sweatshop issue', *The International Communication Gazette*, 2012, vol. 74:5, 484.

Association (FLA),¹²³ a non-profit organisation whose objective is to improving the lives of workers.¹²⁴

Key to the FLA's work is the collaborative development of working standards and the enforcement of a system of monitoring and reporting (transparency) of compliance.¹²⁵ Like product certification programs, standards evaluators like the FLA are powerful mechanisms to enforce the private ordering governance derived from the adoption of voluntary codes of behaviour by multinational enterprises.¹²⁶ Process certification has provided NGOs with a new and more institutionalised role in the application of governance standards among communities of enterprises that have adopted them.

This shift in Apple's approach towards CSR may reflect a number of realities – the loss of a charismatic leader, a capitulation to scepticism from NGOs and investors about the validity of autonomous reporting, or an actual shift of internal corporate culture. In its March 2012 Report on its investigation of Foxconn,¹²⁷ the FLA 'observed at least 50 issues related to the FLA Code and Chinese labor law, including in the following areas: health and safety, worker integration and communication, and wages and working hours.'¹²⁸ Foxconn agreed to make all necessary changes to remediate by 1 July 2013.¹²⁹ But even this report was subject to criticism.¹³⁰ The relationship continues. Apple has sought additional suppliers for its products.¹³¹ A year later, Foxconn announced the construction of a plant to make displays for Apple.¹³² Work at the Foxconn plants in China continue,¹³³ though under the aegis of the internationalized Supplier Code of

¹²³ S. James and A. Satariano, 'Apple Opens Suppliers' Doors to Labor Group After Foxconn Worker Suicides', *Bloomberg*, 14 January 2012. Available at: <http://www.bloomberg.com/news/2012-01-13/apple-opens-suppliers-doors-to-labor-group-after-foxconn-worker-suicides.html> (accessed 9 February 2014).

¹²⁴ Fair Labor Association, 'Home'. Available at: <http://www.fairlabor.org/fla/> (accessed 9 February 2014).

¹²⁵ Fair Labor Association, 'What We Do, Monitoring, Transparency and Public Reporting'. Available at: <http://www.fairlabor.org/fla/go.asp?u=/pub/mp&Page=WWD> (accessed 9 February 2014).

¹²⁶ C. Shea and S. Sitar, 'NGO Accreditation and Certification: The Way Forward? An Evaluation of the Development Community's Experience', International Center for Not-for-Profit Law. Available at: http://pdf.usaid.gov/pdf_docs/PNADB766.pdf (accessed 9 February 2014).

¹²⁷ Fair Labor Association, 'Independent Investigation of Apple Supplier, Foxconn – Report Highlights', March 2012.

¹²⁸ *Ibid.*, p. 2.

¹²⁹ M. Panzarino, 'Fair Labor Association posts mostly complimentary status report on Apple supplier Foxconn's factories', *The Next Web*, 21 August 2012. Available at: <http://thenextweb.com/apple/2012/08/21/fair-labor-association-posts-mostly-complimentary-status-report-apple-supplier-foxconn-factories/> (accessed 9 February 2014).

¹³⁰ D. Tam, 'Fair Labor Association Too Easy on Apple, Foxconn, Study Says', *CNet*, 7 November 2012. Available at: http://news.cnet.com/8301-13579_3-57546750-37/fair-labor-association-too-easy-on-apple-foxconn-study-says/ (accessed 9 February 2014).

¹³¹ E. Dou, 'Apple Shifts Supply Chain Away From Foxconn to Pegatron', *The Wall Street Journal* (May 29, 2013), available <http://www.wsj.com/articles/SB10001424127887323855804578511122734340726>.

¹³² S. Colt, 'Foxconn Is Building A Whole Factory Just To Make Displays For Apple' *Business Insider* (Nov. 20, 2014, available <http://www.businessinsider.com/foxconn-is-building-a-dedicated-factory-in-taiwan-for-apple-displays-2014-11#ixzz3TjyogsuN>).

¹³³ Apple, Supplier Responsibility, Our Suppliers, ¶ 18 (Final Assembly Facilities) available <https://www.apple.com/supplier-responsibility/our-suppliers/> (last accessed March 6, 2015).

Conduct put in place in the wake of the suicides. In the end, internationally derived non-legal standards burdened Apple and Foxconn as if it had been imposed by the state.

Globalisation, Privatisation and the Advancement of Human Rights Regimes

In the previous section, I considered the extent to which commentators have identified a divergence in the Indian and Chinese approaches to the privatisation of human rights, the way in which those divergences reflect substantial differences in the public law cultures of the two countries, and the lessons such divergences may provide for businesses, policy-makers, and NGOs seeking to enhance the protection of economic and social rights.

For the development of socio-economic rights in China, this means that actors will often have to invoke administrative methods, either through the state, or more importantly, through private rules that supplement state regulation. On the other hand, for the development of socio-economic rights in India, it means a greater reliance on litigation and the invocation of national and international legal and governance norms. These contrasted insights with respect to the implementation of social and economic rights in India and China are nicely illustrated in the two case studies (Vedanta and Foxconn). The similarities and differences mark the parallel development, within both public and private spheres, of distinct approaches to human rights protection. Globalisation has substantially changed the field in which human rights are developed, understood and implemented. Human rights have become part of the discourse of the private market, as well as of the state system.

However, the expansion of human rights' spheres operate to include the private sector appears to have retained, virtually intact, the current tension caused by the bifurcation of human rights discourse between civil-political rights on the one hand and socio-economic rights on the other. This bifurcation, when operationalised by private actors, produces substantially different approaches to the way in which social and economic rights are understood and implemented. The two case studies show the ways in which the division of human rights into the ICCPR and the ICESCR is also reflected strongly in private systems of rights implementation. The civil-political and socio-economic schism in human rights perceptions plays an important role, significantly affecting the form and method of rights creation, management, monitoring and remediation.

In India, social and economic rights are constructed within a law-based discourse. Privatisation focuses on the interaction of governance systems operating simultaneously at the local, national and international levels. It involves the management of the extent to which private actors must conform to the legal obligations generated at the local, national and international levels. Those obligations are vindicated through judicial or quasi-judicial processes connected to each level of governance system. Self-constituted organs – indigenous groups, provincial and national legislatures, international organisations and enterprises – generate rules. Ultimately, the extent of private rights and obligations remain connected to a rights discourse that is tied to political action by the state, a state

that responds to its obligations as a stakeholder in supra-national and private global governance systems.

The Vedanta case study suggests that states retain an important role in the development of social and economic rights, even where they are not at the centre of the implementation of such rights. Thus, one can understand the nature of the governance polycentricity at the heart of the UK NCP's analysis. The UK NCP, which has been more active than many other NCPs in developing its principles-based governance norms, has become a leading voice in the application of a social norms-based framework drawn from an increasingly comprehensive network of governance standards being developed at the supra national level. Polycentricity is not merely about the enforcement of the OECD Guidelines. It is also about the intermeshing of a large number of norms architectures into something like a comprehensive and *coherent* structure of governance.¹³⁴ However, the UK NCP's emerging analytical and substantive framework is not merely about layering governance. Rather, because polycentricity produces potential tension among simultaneously operating systems, the move toward supra-national social norms-based governance also includes a strong mediating element. In this case, it is looking to the supra national system itself to serve both as source of autonomy and as a bridging element between principles-based systems at the supra national level and law-based state systems.

Indeed, the success of the Vedanta model in incorporating socio-economic rights within India has not gone unnoticed. Similar complaints have been filed by a coalition of Indian, South Korean, Dutch and Norwegian civil society organisations with the South Korean, Dutch and Norwegian NCPs concerning the behaviour of a Korean multinational company, POSCO, in India.¹³⁵ These complaints allege that POSCO has breached the OECD Guidelines for Multinational Enterprises because it has failed to prevent human rights abuses and carry out comprehensive human rights and environmental studies for its proposed iron mine, steelworks plant and associated infrastructure in the state of Orissa, India.¹³⁶

The complainants focus on allegations of human rights and environmental violations related to POSCO's construction of a 12 million tons per annum integrated steelworks plant, captive power plant, captive port and other related infrastructure in the Jagatsinghpur District of the state of Orissa.¹³⁷ The adverse human rights effects have been compounded by POSCO's failure to conduct comprehensive human rights and environmental due diligence or any meaningful stakeholder consultation with any of the affected local communities. The complainants also call on the Dutch pension fund, ABP,

¹³⁴ Backer, 'Rights and Accountability', above n. 82.

¹³⁵ 'Lok Shakti Abhiyan et al. vs POSCO', OECD Watch, 10 October 2012. Available at: http://oecdwatch.org/cases/Case_260 (accessed 9 February 2014).

¹³⁶ Ibid.

¹³⁷ 'Complaint filed against POSCO for failure to carry out human rights due diligence', Global Compact Critics, 9 October 2012. Available at: <http://globalcompactcritics.blogspot.com/2012/10/complaint-filed-against-posco-for.html> (accessed 9 February 2014).

and the Norwegian Government Pension Fund to prevent or mitigate the real and potential adverse impacts directly linked to their operations through their financial relationships with POSCO. The POSCO matter had wider repercussions. The Norwegian sovereign wealth fund was criticised for failing to take action against POSCO in light of the complaint.¹³⁸ Ultimately, the Norwegian NCP published a final statement determining that the Norwegian sovereign wealth fund itself violated the OECD's Guidelines for Multinationals.¹³⁹ This broke new ground. "The Norwegian NCP affirms the stance taken by the Dutch NCP in the case filed against ABP that the Guidelines apply to fund managers and minority shareholders."¹⁴⁰ The Final Statement determined that the Norwegian sovereign wealth fund had an obligation of use of its influence to persuade POSCO to comply with the Guidelines. "NBIM should request that POSCO prevent further impacts, mitigate those that are underway, and provide or cooperate in remediation where it has caused or contributed to human rights abuses that have already occurred, including by setting up an appropriate grievance mechanism."¹⁴¹

Rights privatisation in China, on the other hand, is in the 'South' camp, i.e. according less significance to civil-political rights. Although privatisation in China too focuses on the interaction of governance systems operating at the local and international levels, those systems in China – unlike in India – are autonomous and private, grounded in the control and accountability mechanics of the private market, not of the state. Within this system, the state retains an important but nevertheless background space. In India, the Supreme Court as well as the government have played an important role in interacting with sovereign organisations with a private or transactional character. In China, the government apparatus has remained very much in the background as large multinational enterprises and supra national monitoring systems engage in the formulation and remediation of consequences for the violation of socio-economic rights developed and adopted through these private systems. These entities remain accountable to the state for violations of law, but also to each other and their transnational stakeholders for the violation of rights developed and adopted through private systems as a supplement to those rights accorded to individuals by the state.

As noted before, the focus in China is not on rights but on the obligations of the employers – i.e. an administrative rather than rights-based approach. Indeed, one of the most interesting aspects of the Foxconn case study was the willingness of all actors to hold corporations liable to their governance obligations. The threat of adverse impacts resulting from dissatisfaction in the consumer and investor communities appeared sufficient, at first blush, to make the threat credible.

¹³⁸ 'OECD Monitor Criticises Norway Wealth Fund on Ethical Investment Policy', Reuters, May 27, 2013, available http://articles.chicagotribune.com/2013-05-27/news/sns-rt-norwayfund-posco15n0e80qe-20130527_1_oil-fund-wealth-fund-oecd.

¹³⁹ 'Norwegian NCP publishes final statement in POSCO/ NBIM case', OECD Watch (May 27, 2013), available <http://oecdwatch.org/news-en/norwegian-ncp-publishes-final-statement-in-posco-nbim-case>.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

This suggests the growing power of private markets in CSR governance. It illustrates the increasingly important role of NGOs in the development of human rights standards and their monitoring and enforcement – functions once thought central to the role of states. It also evidences the economics of CSR enforcement, at least in some areas. Apple became an accredited enterprise within the FLA family because it made economic sense to do so – that indicates both the lower costs of compliance overseen by the FLA and the benefits of belonging to a wider group of enterprises and NGOs that have developed and are adhering to common social norm (soft law voluntary) standards.

The Apple Supplier Code itself is grounded in international hard and soft law, much of which has not been transposed into the domestic law of the US, much less the domestic law of host states in which Apple’s suppliers may be operating. Thus, Apple’s enforcement of its Supplier Code is dependent on its ability to report its activities to its principal constituents – shareholders and consumers. The conduct standards, thus, are directed toward investors and consumers, and not necessarily dependent on the needs or desires of the objects of the codes. Communication with shareholders and consumers is both direct and indirect. In that respect, global media sources play a critical role. NGOs play a critical role as authenticators and monitors of standards. Their participation ensures that the system enjoys some legitimacy and also makes it harder for enterprises to use the system solely for self-serving purposes. One crucial fact is such a system draws on but does not depend on the action of states and other international public bodies. Organisations like the FLA institutionalise transparency mechanisms so that markets for information and disclosure can arise, producing similar disclosure products for consumption by investors and consumers to guide their purchase and investment decisions. This system provides a viable approach to transnational governance without the need for state intervention. Effectively, the FLA contributes to making soft law functionally hard while it retains a soft character within public law frameworks.¹⁴²

The FLA will, like any third party CSR organisation, impose its own requirements and image upon Apple’s supply chain, limiting its corporate autonomy. Despite this fact, future FLA reports will exist alongside Apple’s own reporting and policy statements, which will continue to exist as a means to influence third party criticism of the company’s practices. Although Apple was able to use the weight of its CSR policies to limit the consequences of early scandals, the lasting effects have culminated in a period of seemingly unrelenting publicity and attention by mass media and third party groups, demonstrating that the legitimacy of third party review is itself subject to scrutiny.¹⁴³

While accredited companies lose autonomy in the construction and application of voluntary codes throughout their supply chain, they gain a certain amount of legitimacy by joining collaborative standard-setting and transparency-facilitating outside institutions

¹⁴² Backer, ‘God(s) Over Constitutions’, above n. 2.

¹⁴³ S. Greenhouse, ‘Critics Question Record of Monitor Selected by Apple’, *The New York Times*, 13 February 2012. Available at: <http://www.nytimes.com/2012/02/14/technology/critics-question-record-of-fair-labor-association-apples-monitor.html> (accessed 9 February 2014).

like the FLA. Effectively, accredited companies can outsource enforcement of their codes while retaining a substantial stake in the development of both the standards and the monitoring systems to be applied. But Apple has not lost all of its authority to create CSR governance systems. Even as an FLA accredited company, Apple still retains control over its supplier governance systems in the areas beyond labour standards – significantly these include the areas of environmental standards, ethics, management systems and worker education rules in the case of Apple. The result is the continued elaboration of hybrid governance systems, even in the purely private sphere.

The mixed result, however, ought not to blind one to the reality of the power of privatised rights making. In a world in which only the law produced by the state truly matters, there would be nothing of interest in a story about a stream of suicides in the Chinese manufacturing facility of a Taiwanese enterprise serving as the manufacturing site for the US branded products sold in developed states. But the ‘fuss’ over it has had palpable effect. The effect is not ‘legal’ in the sense that it resulted from the application of the law of a state. Yet it has produced changes in behaviour, and the perceived need to pay compensation, under corporate rules that are autonomous from those of the laws of either China or the US. The rules of the private market, and the perceived preferences of important stakeholders including investors, customers, employees, and consumers, have asserted a power to affect behaviour as powerful as any rules of the state.

Looking at the Vedanta and Foxconn/Apple case studies together, it is apparent that the development of social and economic rights-based governance systems within the private sphere can follow substantially different routes. In this respect, the writings of Indian and Chinese intellectuals mirror the structures of privatised development of socio-economic rights. It is institutional and market-based in China, grounded in the objectives of furthering a harmonious and well-ordered enterprise organisation. In India, it is political and law-based, following a judicial remedial model grounded in the development of a legal superstructure to manage the respective rights and obligations of the Indian community. In China, the development is bound to the development of multinational systems of norms that can be used by groups of multinational corporations. The focus is on economic conditions. Accountability is grounded in market principles. The techniques for monitoring are dependent on transparency and the emergence of groups of independent organisations willing to hold governance organs to the rules they have crafted. Privatisation changes the locus of the administrative apparatus but not its character. Vindication of rights originates in the state, or the enterprise, and their respective obligations. A rights based judicially enforced remediation architecture is notable by its absence. In India, a different perspective emerges. The development of socio-economic rights regimes are grounded in a contentious three-way relationship between international organisations creating normative frameworks, the apparatus of the domestic legal order and international civil society. The language is not market-based but rights-based. India operates closer to a public law model even when the context is private. In India, the state and its courts provide the basis for the remediation of individual rights. Internationalization, to the extent it applies, is understood as a political intervention, and,

to the extent it is given effect, it is only by the political authorities and based on an application (or in the case of Vedanta, a re-application) of domestic law.

Conclusion

Globalisation has opened a governance space within which NGOs now serve as an important vector for the implementation of binding systems of rules for the vindication of social and economic rights. But the *manner* in which the non-state sector engages in this process of naturalising socio-economic rights within its operations can differ substantially among states. That difference, in part, can be explained by the differing *local political cultures* in which non-state governance is effectuated. At the same time, these privatised and market-driven global developments remain substantially tied to networks of international actors and norm builders that serve to bridge the divide between the public and private spheres.¹⁴⁴

In this chapter, I have tried to highlight the ways in which these two forces interacted within the quite distinct political cultures of China and India. In India, privatisation and globalisation of social, economic and cultural rights occurs within a framework in which human rights are thought to be vested in individuals and vindicated by individual action against the state or other actors through the courts. Thus, the Indian state and private spheres still speak the language of law and rights, founded on privileging the ICCPR. In China, rights devolve to individuals but they are vested primarily in the state and understood not as a right of individuals against the state but as an obligation of the state for the benefit of individuals. The Chinese state and private spheres look to the ICESCR as a framework within which national notions of social harmony within institutional and governance parameters may be operationalised. Those differences, perhaps, serve as a window for understanding the reasons why the CSR or human rights obligations of Vedanta and Foxconn/Apple were resolved in such different ways.

¹⁴⁴ L.C. Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation', *ILSA Journal of International & Comparative Law*, 2008, vol. 14:2, 499.