

INTRODUCTION

This book addresses the theme of responding to the human rights deficit. It is written in honour of Professor Bas de Gaay Fortman who has contributed substantially to theories on human right globally. He was founder of the human rights programme ‘Development, Law and Social Justice’ at the Institute of Social Studies in The Hague and its leader between 1982 and 2002. Together with others, some of whom have contributed to this volume, Bas (as his colleagues and friends commonly know him) devoted most of his time to the search of a formula through which the development process can become more meaningful to the majority of people. Throughout, he paid special attention to the role of law (national and international) in that process. The overarching theme of this volume, that of ‘responding to the human rights deficit’, is inspired by Bas de Gaay Fortman’s publications and teaching in the human rights sphere. The meaning of the term ‘human rights deficit’ is further explained in his inaugural address *Laborious Law*, delivered on 21 May 2001 at Utrecht University, on the occasion of accepting the Chair in Political Economy of Human Rights:

“[T]he global endeavour for the realization of human rights suffers from a huge *deficit* that is all too often submerged in the general euphoria of human rights declarations, conferences, committee meetings and workshops. Watch, for example, the still so difficult struggle against impunity of state-related perpetrators of violations of civil and political rights; look at the apparent lack of protection offered to minorities; consider the continued barrier of the public-private divide and its paralysing effects on the struggle against domestic violence; note the non-fulfilment of economic, social and cultural rights (ESCR) in a world in which so many people’s basic needs remain denied. That fundamental weakness in human rights concerns their relation to social reality: *declared* rights, all too often, at the beginning of what are bound to be long and enduring struggles for implementation rather than *acquired* rights in the sense of formal legal protection of freedoms and titles that had already acquired societal recognition as sources of *entitlements*.”¹

This book seeks to honour Bas de Gaay Fortman’s commitment to the search for ways to respond to the above-defined human rights deficit. Like his own work, which combines economic, political and legal analysis and expertise and often is interdisciplinary, this volume brings together authors of different backgrounds and

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1. B. De Gaay Fortman, *Laborious Law*, inaugural address delivered on 21 May 2001 at Utrecht University, on the occasion of accepting the Chair in Political Economy of Human Rights, English version, Institute of Social Studies, The Hague, p. 3.

disciplines. These authors share interest in responding to the human rights deficit, and all offer certain keys for taking up this challenge in the domain of their expertise. Their contributions are grouped in three Parts under the titles 'responding to the human rights deficit: general reflections', 'economic, social and cultural rights', and 'bridging the public-private divide'.

Book Outline

Part 1 consists of four chapters and addresses issues that are of general importance for the overall theme. The first chapter, on the causes of the human rights deficit and efforts to address it, by Paschal Mihyo and Karin Arts, locates the deficit in the rising inequality and increase in poverty at global and national levels. It questions the effectiveness of the poverty alleviation agenda as a substitute for a development agenda. It argues for responses to the deficit that ensure that all rights are preserved and enhanced, and which do not erode rights in trying to restore them. The second chapter, by Judge Raymond Ranjeva, analyzes efforts to protect human rights internationally and to promote a human rights culture. He argues that legal mechanisms for protecting human rights are now considered well-developed. However, respect for and promotion of human rights are by no means guaranteed. It is thus vital that the legal mechanisms be further supplemented within the framework of a holistic approach to training and education so that the culture of human rights gains recognition as a common cultural link. Peter Baehr, in Chapter 3, explores the impact of globalization on human rights NGOs. He shows that globalization has triggered increased involvement of human rights NGOs in relevant decision-making processes of inter-governmental organizations, including the United Nations (UN) and international financial institutions, and in questions relating to the operations and policies of multinational corporations. Addressing the effects of globalization unavoidably led to increased emphasis on economic, social and cultural rights and thus forced several NGOs, including Amnesty International, to broaden their mandates. Nico Schrijver closes Part 1 with a contribution on the question whether human rights can justify breaking up a state through secession, which usually will require the use of armed force. He analyzes the substance and status of the various relevant international legal norms, and reviews the range of different actors possibly involved in secession cases including the affected state, the secessionist movement, third states and international organizations. Schrijver concludes with a presentation of a set of factors that can guide assessment of cases arising in practice.

Part 2 of this volume is devoted to economic, social and cultural rights and to issues relating to minorities. Jeffrey Harrod sketches the new politics of economic and social human rights in chapter 5. He argues that, throughout the historical evolution of human rights economic and social rights (among others in the form of

material equity) were linked to civil and political rights. However, in the most recent phase of that evolution, Harrod notes a contradiction between the increasing acceptability of civil and political rights and degrading economic and social rights. He explains the causes of this contradiction and ends his chapter with the message that the current interest in economic and social rights, together with corporate social responsibility and some other factors, are indications that in future the trend will be towards re-linking civil, political, economic and social rights. Then, Hans Opschoor highlights some of the economic aspects of economic, social and cultural rights, for example in the realm of (the right to) development. According to Opschoor, human rights are needs based, which links them to economic science. Economists consider (lack of) entitlements from the triangular perspective of institutional arrangements, people and resources. The dynamics of the overall political-economic system within which this triangle is situated co-determine the prospects for economic, social and cultural rights. Given these aspects, the political economy of human rights and the notion of human development provide approaches and insights that are useful for furthering all human rights. In chapter 7, Mansoob Murshed elaborates a political economy perspective on violent conflict and the failure of rights. He explores a range of causes of civil wars and points out that conflict-affected nations share a weak social contract and often lack a well-functioning democracy. Post-conflict reconstruction requires deep systemic institutional changes for tackling inequality and restoring the social contract. The international community can support such changes, for example through the United Nations system, and has a role to play in conflict prevention. Mohamed Salih, in chapter 8, takes up the human rights deficit from the perspectives of minority groups. He shows how, within the setting of the nation-state, minority-majority tensions can develop into major conflicts, leading for example to genocide, discrimination or displacement. Although minorities may fare better in a democracy, according to Salih their position depends more on the nature of the dominant nation that constitutes the nation-state than on democracy. Authoritarian regimes often deny and/or abuse minorities' rights, including the right to livelihood. Authoritarian development treats minorities as obstacles and sources of conflict detrimental to development. Therefore, there is every reason to be critical of the state, democracy and development, and to search for alternative development. Part 2 is closed by chapter 9 in which Selma van London and Arie de Ruijter explore issues concerning legality, justice and the indigenous cultural dimension, on the basis of examples taken from the Inuit. The effect on law of globalization, the rising multiculturalism that it brings, and the implications of (the policy of) the nation-state and the concept of citizenship are analyzed. Whether law and a legal system, including international instruments, can protect and do justice to indigenous peoples depends on a range of factors and circumstances reviewed by the authors. Nevertheless, the cultural dimension is gaining weight in legislation and in the

administration of justice. However, according to van Londen and de Ruijter the protection of indigenous peoples' rights cannot be left exclusively to states. International organizations have a role to play as well.

Part 3 of this book deals with bridging the public-private divide. In chapter 10, Jessica Byron discusses gender and human rights in the Commonwealth Caribbean. She presents the global and the Caribbean machinery for protecting women's rights and their effectiveness and relevance, assessed from the point of view of the major human rights issues that Caribbean women are facing (such as violence, sexual harassment and inequality in the labour market). Both have prioritized legislative responses to women's rights but fail to protect these rights adequately. Efforts should be made to improve implementation and to mainstream gender concerns in all relevant policy areas. Byron argues that these issues are closely linked to male marginalization and masculinity crisis in the Caribbean, which will have to be considered when formulating academic and policy responses. Surya Subedi follows with a chapter on multinational corporations (MNCs) and human rights. The unclarity about and controversiality of MNC accountability for human rights violations, according to Subedi is one of the major deficits of the current human rights system. He analyzes the current trend to make MNCs accountable for human rights violations, primarily through progressive development of international law, court cases and self-regulation. Finally, Thanh-Dam Truong explores aspects of the human rights question in the global sex trade. She discusses current criminal practices of international human trafficking for the sex sector, and presents the multi-dimensional human rights deficit that results for the women involved. Responding to this complex situation is a difficult task. Truong analyzes the pros and cons of some of the possible responses, including abolition and regulation. She concludes that an integral approach is required, for example one that targets both prostitution and migration, and one that considers economic circumstances and mechanisms. While legal measures are important, non-legal measures such as the monitoring of international migration and alertness of banks may contribute equally to better protection of rights.

Crosscutting Themes

This book has at least four major crosscutting themes. The first one is that of the universality of human rights. While Judge Ranjeva (chapter 2) finds an explicit starting point in it for his analysis, in fact all chapters in the book implicitly build on the notion of universality of human rights. Harrod (in chapter 5) locates the human rights deficit in the relationship between civil and political rights and economic, social and cultural rights, and in attempts to elevate one over the other. In Chapter 6 Opschoor follows the same line and raises a few more specific key issues on the indivisibility and universality of human rights.

The second common theme is that of inclusion and exclusion as a critical factor in the discourses on the human rights deficit. According to van Londen and de Ruijter (chapter 9), exclusion and inclusion involve recognition or non-recognition of differences and similarities in position and power between individuals and groups. Byron (chapter 10) takes a similar position in her analysis of gender and human rights, and inclusion and exclusion of men and women. Van Londen and de Ruijter see power as a resource that can be used by individuals and groups to allocate to themselves (or others) positions, resources, rights and obligations, that is to maximise their interests and minimize those of others. In Chapter 1 Mihyo and Arts argue that human power and institutional agency have failed to promote and protect social justice. They point out that this has led to the rise of ideologies that seek to locate power in religious and supra-human institutions as a way of protecting vulnerable groups from the excesses of human power. They caution that in most cases these alternative ideologies end up aggravating rather than reducing human rights abuses. Murshed (in chapter 7) brings out the issue of access to natural resources in the context of inclusion, exclusion and power, as an important potential cause of conflict and area of human rights violations.

Within the context of examining the mechanisms used for social and political exclusion, and that of finding ways to come to more inclusive mechanisms, the role of law is considered by several authors. Van Londen and de Ruijter show that law can be an instrument for the codification of socio-cultural practices, contradictions, hierarchies and complementarities in society. They argue that law can and has been used to institutionalize social differences and inequalities and to construe, emphasize and reciprocate differences and dependencies based on age, gender, culture, race, social class, religion and ethnicity. In Chapter 8 Salih argues that international conventions and national laws are normally used to construct and deconstruct identities and in the process ascribe rights and status to groups or individuals. According to him minorities are denied social and cultural rights and, through differentiated, status-based and legal entitlement systems, they face problems of exclusion.

Subedi and Truong (chapters 11 and 12) focus on the lack of adequate laws, standards, regulations and codes of conduct, in relation to controlling multinational corporations and trafficking in women respectively. Truong notes that absence of instruments and norms has made trafficking in women easier and allowed criminal groups to enter and control the migrant and sex labour markets. She also argues that de-regulation and removal of controls on labour markets and the removal of travel restrictions within trade and regional blocks have contributed to the vulnerability of women migrant workers in various labour markets.

Truong attributes the physical and psychological suffering by women in the global sex trade to what she refers to as a triple deficit. In this context women suffer as women, as members of a sexual minority and as bearers of a particular national

identity, which reduces their mobility across borders. Her thesis strengthens the arguments by Salih, van London and de Ruijter that norms and rules define productive and reproductive roles, allocate rights to education and employment and limit opportunities for minorities in terms of rights of citizenship, ownership and participation. Byron adds women to this perspective and Truong further adds women sex workers and minors whose status as ascribed by custom or prescribed by laws gives them less entitlements and rights.

A last aspect in relation to the role of law in the context of inclusion and exclusion applies especially to international law. Several authors note that the limited circle of full subjects of international law poses serious constraints for the protection and promotion of human rights, in public, but even more so in private spheres. Schrijver (in chapter 4) concludes that the prohibition of the use of force as codified in Article 2(4) of the UN Charter is incumbent on states only. He suggests that there are sufficient reasons to seek extension of this prohibition to international organizations, peoples organizations or perhaps multinational corporations. Baehr, Subedi and Byron each consider the limited reach of international law as well, for example in relation to NGOs, MNCs or private individuals.

Several authors discuss cultural conformity, incorporation and subordination as mechanisms for inclusion or exclusion. According to van Londen and de Ruijter cultural identity is usually taken as a measure for the allocation of civil and political rights as they define citizenship, residence rights and nationality or nationhood. They are also used to allocate resources and rights to participate in decision making. Cultural conformity is required in order to acquire status and rights, and becomes a mechanism for incorporating, including or excluding minorities or indigenous groups and migrants. In the same vein, Salih views minorities as a political construct in a culturally determined and socially demarcated nation-state. In his view the human rights deficit is a result of the failure of majoritarian democracy to protect the rights of minorities from majoritarian tyranny. He also argues that usually, the economically or culturally powerful groups use legal instruments to institutionalize domination. Mihyo and Arts use the case of Zimbabwe to show how groups with political power without economic power can try to use their political power to acquire resources from those economically powerful but politically weak.

Another aspect of the inclusion/exclusion theme is the role of the nation-state in the process of exclusion. According to Salih, nationhood and the composition of the nation-state determine the entitlement systems and confer political and social recognition. He also argues that the nation-state becomes a mechanism for the ascendancy of the dominant nation within a state and the suppression and subordination of other nations within that state. De Ruijter and van London, who also see the nation-state as an institution normally used to subordinate weak nations

within a nation-state, share this view. They argue that even multiculturalism where raised is in most cases advanced to domesticate diversity and subordinate it to the dominant culture. They also point out that, while indigenous groups for example have the protection of international treaties on their rights migrants hardly have such protection. Truong makes a similar argument about women migrant sex workers. Addressing the issue of exploitative migration, Truong advances a thesis that it occurs because of the failure of the nation-state to regulate migration and this failure creates room for criminal networks to step in and fill the gap for their own profit. She also argues that the resultant violations of women's rights and dignity are allowed to continue because the illegal trade in migrant sex workers cheapens labour, provides the essential sexual and comfort services required on changing labour markets dominated by single men and uncured for ageing populations. She also urges that the trade has become an essential component of trade and investment in the services sector. In this context national boundaries are very crucial in making labour mobility difficult and therefore illegal labour cheap.

The subordination of weaker nations in a nation-state and the use of power to exclude them from political power are also underlined in the chapter by Mihyo and Arts when discussing the land reform processes in Zimbabwe. Then, both Baehr and Subedi point out the major role of some multinational corporations in processes of exclusion and, as pointed out before, show that current international law fails to hold them (fully) accountable for their actions. Given the unlikelihood of a strengthening of international law on this issue in the near future, Baehr suggests that the alternative lies in strengthening the role of the state.

The third theme is about the reasons for the continuation of economic, social and political exclusion, and human rights violations at large. Opschoor addresses the issue by arguing that the denial of the universalism of human rights is normally based on the subordination of social and economic rights to civil and political rights. Baehr explains the impact of globalization on both civil and political, and economic, social and cultural human rights. Ranjeva argues that formally accepted human rights norms are important but that by themselves they are often insufficient for curbing human rights violations. The additional activities required to increase adherence to those norms, that is the promotion of a culture of human rights, are all too often lacking. In trying to address the issue of why the deficit continues Murshed argues that conflict for example is generated by greed, the collapse of the social contract or ecological stress and that in some cases it has become a source of livelihood for those promoting it and those engaged in it. Other deficits such as alienation, disenfranchisement and dispossession are used as mechanisms for either eliminating competition for resources as in the case of the Inuit of Canada discussed by van Londen and de Ruijter or in the cases of the landless as discussed by Mihyo and Arts. Another objective is cultural integration and assimilation of

weaker nations or minorities as shown by van Londen and de Ruijter as well as Salih.

Discrimination, denial of status, slavery and apartheid are used to make labour cheap. By terminating the hunting rights of the Inuit, they are forced to look for employment and alternative sources of livelihood. The same objective is achieved through policies that create landlessness among weak groups or minorities as shown by Salih, van Londen and de Ruijter. The dynamics of sex slavery as discussed by Truong include comfort and care services for single men who the enterprise system has refused to pay a family wage and temporary, casual and migrant male labourers, soldiers, truck drivers, or the unemployed who in most cases are not accompanied by families. They also include entertainment services and sex tourism, which have major contributions to national income. Apartheid systems are usually based on racial subordination but they are perfected by theories of separate development. The subordinated groups are given autonomy without citizenship and they are denied nationhood. Without nationhood they lack international identity. They become cheap sources of labour. Salih argues for example that the enslavement of black people in Mauritania has always been aimed at keeping them as a source of cheap labour and also to deny them of national identity and incorporate them into Arabic nations such as Morocco.

Finally the book focuses on responses to the human rights deficit. Strategies for redressing the deficit are examined in each of the chapters. The first response discussed is abolition of the structures and practices that sustain the inequities or inequalities. According to many authors abolition has the potential of aggravating the deficit if its root causes remain intact. Mihyo and Arts show how abolition of private land ownership in the land reforms in Cuba and Mexico turned peasants from tenants to state labourers. Truong examines the effectiveness of laws that have tried to abolish or outlaw prostitution and she concludes that the assumptions underlying this response fail to attack the core causes of prostitution. Prohibition is another strategy that has been widely used to stop illegal practices including prostitution, trafficking in human beings, child labour and similar problems. It is agreed by many of the authors that prohibition is good but not sufficient to remove violations unless it is accompanied by a real assault on the structural and institutional factors that, for example, support the demand for child labour or migrant sex labour.

Judicial and legal interventions are possible responses and in most cases relied upon to defend human rights. But, as Salih, van Londen and de Ruijter have concluded, judicial intervention is normally within rules and norms defined and coded by the dominant groups. It is also shown by van Londen and de Ruijter that judicial intervention depends on the beliefs, ideology and values of the interpreting judges. In this context it is not very predictable. Furthermore, as shown by Mihyo and Arts, the executive can always ignore judicial decisions where it is the violator

and if it has total control of the legislature it can do that with immunity. Truong examines the potential effects of decriminalization of prostitution and concludes that it may enhance the civil and political liberty of those involved but it cannot be effective unless economic and social rights are enhanced and education and awareness programmes mounted to reduce hazards and abuses. Ranjeva also underlines the importance of human rights education as a means to promote the culture of human rights. In his view, such promotion is an essential ingredient of any strategy that aims to support the required translation of formally accepted legal norms into effective daily behaviour.

Allocative justice is another response that has been attempted and is discussed in the book. Salih shows how reforming the voting system can reduce the dominance of elite minorities over the powerless majority or the dominance of majorities over minorities. In some countries special quotas of parliamentary seats have been allocated to traditionally disadvantaged groups. One wonders whether such systems though progressive do not stifle the competitiveness of such groups and in some cases create a feeling that they deserve only the number of seats allocated to them. Allocative justice seems to have ended up as a failure in the case of agrarian reforms according to Arts and Miho who argue that, unless carefully planned, land reforms can end up diminishing productivity and food supplies thereby frustrating the same goals they are meant to achieve.

Peter Baehr points at the trend for human rights NGOs to engage critically with relevant intergovernmental and non-state actors such as multinational corporations. This occurs through using traditional means such as providing information and influencing policy-making through lobbying, but also through innovative means such as staff exchanges between the World Bank and NGOs. The latter strategy might open hitherto closed doors to information and decision-making processes, but clearly also carries risks of too close association between actors that need to play distinct roles. The prevailing spectrum of human rights problems, for example those triggered by globalization, require NGOs to be critical about their own mandates and adjust/widen them if necessary. According to Baehr the legitimacy of the activities of human rights NGOs would be enhanced by genuine concern for representativeness, but the current 'western' image of many human rights NGOs (which might anyway disappear in the future) should not keep them from spreading their human rights message.

International organizations of various kind clearly have a role to play in the protection and promotion of human rights, as concluded by van Londen and de Ruijter in relation to indigenous peoples, by Subedi in relation to controlling multinational corporations, by Baehr on non-governmental organizations and by Schrijver on the use of force.

All in all this book provides a rich spectrum of views on the features of the human rights deficit and on ways of redress. We hope that it will be of interest to its readers.

Karin Arts and Paschal Mihyo, The Hague, January 2003.