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Challenges to the Future of Civil and Political Rights

Dinah Shelton*

I. Introduction

The Universal Declaration of Human Rights (Universal Declaration)¹ and the American Declaration of the Rights and Duties of Man² first articulated in 1948 the list of internationally recognized human rights and fundamental freedoms. Since that time, only a few new claims have emerged to add to the list of basic rights, although subsequent treaty and soft law texts have further defined and refined the stated rights.³ On the other hand, none of the rights contained in the declarations seems to have been "de-certified" and denied continuing normative value. As this century nears its end, it may be asked whether the relative stability of the human rights catalogue will remain with the existing guarantees deemed adequate to meet coming challenges to human dignity and development, or whether, instead, new rights and obligations will be claimed and recognized. A response to this question and any attempt to predict the future of civil and political rights require evaluating present and foreseeable threats to human dignity and well-being.

Law in general is responsive to emerging values, conflicts, fears, and social problems. The initial articulation of international human rights norms fifty years ago responded to the "barbarous acts" referred to in the Universal Declaration of Human Rights.⁴ The Universal Declaration sees human rights

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1. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

2. American Declaration of the Rights and Duties of Man, O.A.S. Doc. OEA/ser.L./V./I.4 (1948).

3. See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

4. See Universal Declaration of Human Rights, *supra* note 1, preamble para. 2 ("Whereas disregard and contempt for human rights have resulted in barbarous acts which have

instrumentally, as "the foundation" and the means to achieve "freedom, justice and peace."⁵ Neither the barbarous acts nor the need for freedom, justice, and peace has disappeared. In this regard, the demand for civil and political rights, as part of the indivisible human rights canon, remains a fundamental objective.

The task of drafting the canon of human rights is largely complete, and international supervisory institutions are functioning more or less as intended, however limited that intent may have been.⁶ Although improvement of procedures and institutions is necessary, what currently demands attention is perhaps best expressed in a series of conjunctive phrases – human rights and democracy, human rights and technology, human rights and the environment, and human rights and trade. These phrases reflect the need to consider civil and political rights in the context of emerging social problems and values and the need to integrate human rights into all areas of human activity in the light of globalization, the increased interdependence of states, growth of trans-boundary civil society, and deregulation. In some instances, new rights may need to be articulated. In others, existing rights may be adequate to resolve the perceived problems if adapted to the new contexts. In fact, it may be in regard to obligations, not rights, that reformulation may be most needed in the future.

II. *The Debate over New Rights*

Not every social problem must result in the expression of a new human right. Even the existing catalogue is not always met with consensus; states and scholars occasionally challenge the concept and the content of rights from freedom of the press to the right to development.⁷ There are legitimate fears

outraged the conscience of mankind . . .").

5. See *id.* preamble para. 1 ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .").

6. The most frequently utilized supervisory mechanism is state self-reporting on compliance with human rights norms. In general, any procedure that would allow victims to file complaints regarding human rights violations is optional for states parties to the treaties. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 3, arts. 9, 14.

7. See generally MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? (1973) (discussing various human rights); Louis Henkin, *Economic-Social Rights as "Rights": A United States Perspective*, 2 HUM. RTS. L.J. 223 (1981) (discussing U.S. commitment to economic and social rights); David M. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 205 (Theodor Meron ed., 1984) (exploring nature of protection of social, economic, and cultural rights). For a debate over the existence of a right to environment, see generally HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson

that expanding the list will not only create further dissension, but will undermine the very concept of fundamental and inalienable rights by devaluing or trivializing core norms, taking time and energy away from the essential task of implementing and enforcing those rights that are nonderogable and universally accepted.⁸

The concern is legitimate and must be taken seriously; at the same time, the list can never be considered closed. It is impossible to predict future threats to human dignity, the foundation of all human rights, although it may be possible to identify current issues and developments that may require reformulated or expanded rights. Some scholars attempt to establish criteria that a claim must meet before it is included as a human right. Ramcharan speaks of qualitative characteristics such as appurtenance to the human person or group; universality; essentiality to human life, security, survival, dignity, liberty, or equality; essentiality for international order; essentiality in the conscience of mankind; and essentiality for the protection of vulnerable groups.⁹ Jacobs argues that a human right must be fundamental, universal in the sense that it is universally or very widely recognized and that it is guaranteed to everyone, and capable of sufficiently precise formulation as to give rise to legal obligations on the part of the state.¹⁰ Another way to approach the issue is to ask in each case whether existing norms, if fully implemented, would provide the necessary protection against the threat posed. If the answer is yes, no new right need be recognized. If the answer is no, consideration must be given to expanding the list of rights or to altering the scope of duties. The remainder of this paper discusses some trends, problems, and issues that arise in the context of civil and political rights.

III. Human Rights and Democracy

Considerable human rights efforts have been expended in recent years to establish free elections and to achieve political rights by instituting democratic electoral processes.¹¹ For the most part, insufficient attention has been paid

eds., 1996) (presenting various articles on relationship between human rights and environment); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991) (discussing relationship between human rights and right to environment).

8. See Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 614 (1984). See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

9. B.G. Ramcharan, *The Concept of Human Rights in Contemporary International Law*, 1983 CAN. HUM. RTS. Y.B. 267, 280.

10. See F.G. Jacobs, *The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights*, 3 HUM. RTS. REV. 166, 170-72 (1978).

11. In the Inter-American system, efforts to establish democratic pluralism can be seen

to protecting human rights once a freely-elected government is in place. The breakdown of order in many of the emerging, so-called democratic states and the overreaching by democratic majorities demonstrate that the concept of human rights has yet to take hold to create a human rights culture in many regions of the world. A recent *Newsweek* article notes that most people now have the right to vote freely and adds "[b]ut that's not enough if governments then trample on basic rights."¹²

Free elections that bring to power racists, separatists, religious fundamentalists, and others intent on instituting a uniform belief system pose distinct dangers to freedom, justice, and peace. Too often they lead to restraints on speech, assembly, religion, and other basic liberties. The result is that countries without a tradition of peaceful political disagreement have disintegrated into conflict and have divided along racial, religious, or ethnic lines. Democracy, like respect for human rights, is not an end in itself, but a means to individual and social development.

A major issue for the present and the near future will be to ensure that democracy, representing one set of political rights, is not elevated to the detriment or to the exclusion of other civil and political, or economic, social, or cultural rights. It is not an easy matter to deny a political party or an individual the right to compete in the political arena because of a political agenda. Events in Algeria demonstrate the dangers involved. No individual or group, however, is entitled to use the political process to achieve power in order to deprive others of basic liberties. As the last article of the Universal Declaration states: "Nothing in th[e] Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth [t]herein."¹³ The Inter-American Commission on Human Rights applied this principle in denying that the political rights of former Guatemalan dictator Jose Efraim Rios Montt were violated when national law prohibited him from being a candidate for president of the country.¹⁴ The Commission rightly

in resolutions such as OAS General Assembly, *Representative Democracy*, AG/RES. 1080 (XXI-O/91) (1991); Ninth International Conference of American States, *The Preservation and Defense of Democracy in America*, Res. XXXII (1948); *The Declaration of Santiago*, adopted by the Fifth Meeting of Consultation of the Ministers of Foreign Affairs, reprinted in 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 134-41 (Thomas Buergenthal et al. eds., 1982). For a discussion of the monitoring of elections, see generally W. Michael Reisman, *International Election Observation*, 4 PACE Y.B. INT'L L. 1 (1992).

12. Fareed Zakaria, *Doubts About Democracy*, NEWSWEEK, Dec. 29, 1997/Jan. 5, 1998, at 57.

13. Universal Declaration of Human Rights, *supra* note 1, art. 30.

14. See generally Case 10.804, Inter-Am. C.H.R. 206, OEA/ser.L./V./II.85, doc. 9 rev. (1994). Montt had participated in a military coup, suspended the constitution, and taken various

perceived that the difficulties inherent in limiting political rights to preserve political rights should not lead to a denial of efforts to preserve democratic institutions that respect human rights.

Human rights precede, are inherent in, and flow from democratic processes and institutions. Some preconditions for effective democracy are protected as human rights – freedom of expression, freedom of assembly and association, and freedom of speech.¹⁵ In turn, democratic processes should ensure meaningful participation of the governed in the establishment of rules and structures of society. It requires periodic legitimation or revalidation to demonstrate the continued consent of the people. Hence, the Universal Declaration requires that the will of the people "be expressed in periodic and genuine elections which shall be by universal and equal suffrage."¹⁶ It also requires, however, the establishment and maintenance of an independent and impartial judiciary, with all persons accountable for their actions¹⁷ and with respect for the rule of law, including the provision of remedies when rights are violated.¹⁸ As noted during the Conference on Security and Co-operation in Europe meeting in Copenhagen in June 1990, "democracy is an inherent element of the rule of law," but pluralism is also important with regard to political organizations.¹⁹

Many of the measures needed to ensure civil and political rights in the context of emerging democracies and dysfunctional countries are positive measures similar to those required to achieve progress in economic, social, and cultural rights. Institution-building and technical assistance to create an independent and impartial judiciary and to build a competent and honest civil service, as well as the provision of resources for educating police and military forces, raise issues of capacity as well as willingness to achieve compliance with international obligations. The positive measures required result in a

actions against "subversives." *Id.* at 206. The Guatemalan Constitutional Convention in 1986 approved article 186, which banned from holding office the "leader and chiefs of any coup d'état, armed revolution or similar movement that changes the constitutional order" as well as those who became head of the government as a result of such actions. *Id.* at 207. For a discussion of the Inter-American system and democratic rule, see THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS* 494-559 (4th ed. 1995); Dinah Shelton, *Representative Democracy and Human Rights in the Western Hemisphere*, 12 *HUM. RTS. L.J.* 353 (1991).

15. See Universal Declaration of Human Rights, *supra* note 1, arts. 19, 20; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 61 (1992).

16. Universal Declaration of Human Rights, *supra* note 1, art. 21(3).

17. *Id.* arts. 7, 10, 11.

18. *Id.* art. 8.

19. Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, 29 *I.L.M.* 1305, 1308.

blurring of the oft-stated distinction between state abstention to achieve civil and political rights and state action to further economic, social, and cultural rights. In this regard, it is perhaps appropriate to reiterate the indivisibility of all rights rather than attempt to articulate any new rights. In terms of implementation, however, the issue of capacity means that the task of ensuring civil and political rights may require international aid rather than condemnation in respect to those countries that have the will, but lack the capacity without international assistance, to build democratic institutions that respect human rights. Thus, the obligation in article 2 of the International Covenant on Economic, Social and Cultural Rights "to take steps, individually and through international assistance and cooperation, especially economic and technical" to achieve the full realization of the guaranteed rights²⁰ may need to be considered as applying to civil and political rights as well to economic, social, and cultural rights.

IV. *Technology and Human Rights*

In contrast to issues of democracy and human rights, the problems arising due to technological change may very well necessitate either further elaboration of existing norms or development of new rights. Most significant, perhaps, are the human rights concerns that are emerging from developments in biotechnology, including reproductive technology, treatment of death and dying, cloning, genetic transfers, and the emergence of new diseases and resistant strains of formerly treatable or curable ailments. Some of these scientific changes raise fundamental issues about the very concept of human identity and questions concerning whether there is or should be a right to genetic integrity, even to species integrity, that limits or prohibits manipulating the very code of human existence and personal identity, even with the informed consent of the individual.²¹

The Human Genome Project, a global network of genetic researchers, has developed a systematic plan to coordinate the mapping of the human genome.²² Genes contain the code to produce a protein, the material of cellular structure that determines most chemical reactions in the body.²³ With a

20. International Covenant on Economic, Social and Cultural Rights, *supra* note 3, art. 2.

21. See generally HUMAN DNA: LAW AND POLICY (Bartha Maria Knoppers et al. eds., 1997) (presenting various articles concerning human genetics).

22. See Kara H. Ching, Note, *Indigenous Self-Determination in an Age of Genetic Patenting: Recognizing an Emerging Human Rights Norm*, 66 FORDHAM L. REV. 687, 691 (1997). The human genome consists of a sequence of nucleotide bases which contain approximately three billion pairs, some of which form the 50,000-100,000 genes found in human cells. *Id.* at 690.

23. *Id.*

map of the human genome, scientists may identify genetic markers and the location of disease-producing genes.²⁴ Mapping could make it possible to diagnose a predisposition, cure, or preventative measure.²⁵ In a related proposal, the controversial Human Genome Diversity Project seeks to collect and to analyze genetic samples from indigenous groups throughout the world in order to amass "a representative sample of human genetic variation."²⁶ Researchers would have access to the resulting database.²⁷ The Model Ethical Protocol for Collecting DNA Samples²⁸ contains extensive guidelines that include measures on mandatory informed group and individual consent, benefits for participating communities, privacy, and patenting.²⁹

Genetic mapping and diagnostics raise the specter of eugenics. To take an extreme example, one may suppose that geneticists might discover that homosexuality is genetically determined and not only will become able to identify the genes, but to alter them as well. Do we eliminate the "different?" On the other hand, suppose one group has a natural defense to a disease that decimates another group. Can the state require genetic sharing? Should parents be permitted to choose the characteristics of their children? Or, do the human species and each individual have a right to the natural diversity produced by thousands of generations of genetic transmission? Do humans have a right to genetic privacy? Is it any more acceptable to manipulate the physical integrity of the individual than it is to manipulate the personality or the intellect?

Unfortunately, too often the debate has centered on procedure and on the requirement of free and informed consent. It may also be appropriate, and even necessary, to question the need for substantive limits on what can be done, even with the consent of the individual, because of the impact on society as a whole. Just as the right to be free from slavery is inalienable and no individual can choose to be a slave, it may be necessary to establish the limits to genetic manipulation, the line beyond which individuals may not give consent, however free and informed. Human dignity, and even human existence, may depend on it.

Commodification of human parts and genetic material is also an issue. The patenting of human genetic information has been permitted, based on a

24. *Id.* at 691.

25. *Id.*

26. *Id.* at 692 (quoting Henry T. Greely, *The Control of Genetic Research: Involving the "Groups Between,"* 33 HOUS. L. REV. 1397, 1415 (1997)).

27. *Id.*

28. The North American Regional Committee of the proposed Diversity Project published the Model Protocol. *Id.* at 693.

29. *Id.*

desire to provide incentives for scientific research and development in the genetics field.³⁰ The United States has granted, and the Supreme Court has upheld, life patents,³¹ something that needs to be scrutinized carefully by human rights scholars and activists. On the other hand, the Supreme Court of California has rejected the notion that property principles could be utilized to protect the interests of an individual whose spleen was used for commercial purposes.³² As Justice Arabian questioned: "Does it uplift or degrade the 'unique human persona' to treat human tissue as a fungible article of commerce?"³³

A recent note describes one set of problems:

Genes and the information they contain are fundamental building blocks of a people's identity. Genetic research on groups of people occasionally results in lucrative biotechnology patents. . . . Researchers have recently targeted indigenous peoples for genetic study because their heightened isolation may have resulted in unique genetic traits of increased resistance or susceptibility to disease.

. . . . [I]ndigenous peoples have concerns about the procurement and use of their genetic materials. Many are worried about researchers obtaining genetic samples without the informed consent of their subjects. Some of these peoples' religious or philosophic beliefs do not permit the patenting of life. No avenues exist for these peoples to enjoin the patenting of their genetic material. No mechanisms beyond private contract currently ensure that the indigenous donors will be adequately compensated, or compensated at all, for their contribution. Moreover, many indigenous people may never have access to medical advances based on their own genetic material because they do not live near medical facilities.³⁴

The sum of all these considerations has led some to coin the term "molecular colonialism," a fear that the DNA of indigenous peoples will be harvested for genetic samples.³⁵ The fear is based on experience.

30. *See id.* at 695.

31. *See* Diamond v. Chakrabarty, 447 U.S. 303, 318 (1980) (affirming earlier judgment of Court of Customs and Patent Appeals that living things are patentable subject matter).

32. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 487-97 (Cal. 1990) (sustaining dismissal of cause of action based on conversion). For a discussion of the issues involved in *Moore*, see generally Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLAL. REV. 207 (1986); Jennifer Lavoie, Note, *Ownership of Human Tissue: Life After Moore v. Regents of the University of California*, 75 VA. L. REV. 1363 (1989).

33. *Moore*, 793 P.2d at 497-98 (Arabian, J., concurring).

34. Ching, *supra* note 22, at 687-88.

35. *See id.* at 697.

As the note states:

In the early 1990s, the U.S. Department of Commerce submitted a patent application on the cell line of a Guaymi woman[, a member of an indigenous group inhabiting Panama]. The cell line was believed to have anti-viral qualities. Rural Advancement Foundation International ("RAFI") found the application while going through a database of patent applications and contacted the Guaymi people. Neither the tribe nor the woman knew anything about the development of the cell line or the patent application. Rural Advancement and other groups supported the Guaymi in their demand for withdrawal of the patent application. The Guaymi tribal president explained, "[i]t's fundamentally immoral, contrary to the Guaymi view of nature, and our place in it. To patent human material . . . to take human DNA and patent its products . . . violates the integrity of life itself, and our deepest sense of morality." Later that year, due to international pressure, the Center for Disease Control withdrew the patent application.³⁶

Another case involved the Hagahai, an isolated 260-member tribe from the Madang Province of Papua New Guinea.³⁷ In 1984, some tribe members sought outside help for illness that plagued the group.³⁸ During diagnostic efforts, researchers discovered that several members of the tribe were infected with the human T-cell leukemia virus (HTLV-I) that usually produces severe leukemia, but that is benign in the Hagahai.³⁹ Scientists created an HTLV-infected cell line of Hagahai DNA, the cell line was patented in the United States, and the researchers were listed as the "inventors."⁴⁰ The Papua New Guinea government questioned whether the patent claim violated that nation's sovereignty.⁴¹ After considerable controversy, on October 24, 1996, the National Institute of Health forfeited its rights to the U.S. patent.⁴²

It is important to consider whether the existing human rights protections are adequate in the face of bio-prospecting, commodification of human genetic material and organs, and other biological developments. The International Covenant on Civil and Political Rights calls for free consent before medical or scientific "experimentation."⁴³ It does not require "informed" consent, nor does

36. *Id.* at 700 (quoting Philip L. Bereano, *Patent Pending: The Race to Own DNA*, SEATTLE TIMES, Aug. 27, 1995, at B5).

37. *Id.* at 701.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 702.

43. International Covenant on Civil and Political Rights, *supra* note 3, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.").

it extend to treatment that is not experimental. Perhaps the notion of inhuman or degrading treatment⁴⁴ would be adequate to cover certain techniques, especially prolonged life support of someone in a persistent vegetative state. For the indigenous, self-determination could be seen as encompassing "internal self-determination," referring to their ability to control all aspects of their lives. The right of indigenous peoples to decide whether, and to what extent, to participate in genetic research could be recognized as within the scope of self-determination. More broadly, the right to self-determination could secure for all persons the right to control access to and use of genetic material.

The Draft United Nations Declaration on the Rights of Indigenous Peoples acknowledges the urgent need to recognize the rights of indigenous peoples.⁴⁵ It explicitly states that indigenous peoples' genetic resources are entitled to special protection.⁴⁶ More broadly, the United Nations Educational, Scientific and Cultural Organization adopted on November 11, 1997 the Universal Declaration on the Human Genome and Human Rights (Declaration).⁴⁷ The Declaration relies upon human rights, intellectual property, and environmental texts, including the Convention on Biological Diversity.⁴⁸ In recognizing the genetic diversity of humanity, the Declaration quotes from the Universal Declaration's preamble to reaffirm "the inherent dignity, and . . . the equal and inalienable rights of all members of the human family."⁴⁹ The Declaration is positive toward research on the human genome, foreseeing "vast prospects for progress in improving the health of individuals and of humankind as a whole."⁵⁰ It calls for respect for human rights in regard to such research, and calls in particular for nondiscrimination on the basis of genetic characteristics.⁵¹

44. *Id.*

45. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, preamble para. 6, U.N. Doc. E/CN.4/Sub.2/1994/56, reprinted in 34 I.L.M. 541 (1994).

46. *Id.* art. 29. Article XX of the Proposed American Declaration on the Rights of Indigenous Peoples similarly recognizes the rights of indigenous peoples to control, develop and protect their human and genetic resources. *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights, Feb. 26, 1997, art. XX, reprinted in OAS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, OEA/ser.L./V./II.95, Doc. 7 rev., 633, 644 (1997).

47. United Nations Educational, Scientific and Cultural Organization, *Universal Declaration on the Human Genome and Human Rights* (visited Sept. 24, 1998) <<http://www.unesco.org/ibc/uk/genome/projet/index.html>>.

48. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992).

49. *Universal Declaration on the Human Genome and Human Rights*, *supra* note 47, preamble para. 4 (quoting Universal Declaration, *supra* note 1, preamble para. 1).

50. *Id.* preamble para. 6.

51. *Id.*

The Declaration in general combines techniques and legal approaches from both human rights and environmental protection.⁵² It demands that all research, treatment, or diagnosis be preceded by rigorous assessment of the potential risks and benefits and be based on the prior, free, and informed consent of the person concerned.⁵³ Rather than declare a right to genetic integrity, the Declaration places its focus on duties and provides in article 10 that "[n]o research or research its [sic] applications concerning the human genome, in particular in the fields of biology, genetics and medicine, should prevail over respect for the human rights, fundamental freedoms and human dignity of individuals or, where applicable, of groups of people."⁵⁴ Article 11 specifically prohibits cloning and other "[p]ractices which are contrary to human dignity."⁵⁵ However, at the same time, article 12 identifies freedom of research as part of freedom of thought.⁵⁶ Because the group of experts involved in drafting the Declaration came from the scientific and research community, it is incumbent on those concerned with human rights to examine the Declaration carefully to determine whether its protections are adequate.

The Council of Europe Convention on Human Rights and Biomedicine (Convention), signed by twenty-two states on April 4, 1997,⁵⁷ goes further in establishing that states parties shall protect the dignity and the identity of human beings, referring to the latter as a human right to be respected along with other rights and fundamental freedoms.⁵⁸ This is reinforced by article 15, which provides that scientific research in the field of biology and medicine is subject to the provisions of the Convention and "the other legal provisions ensuring the protection of the human being."⁵⁹ This suggests that all existing human rights norms govern research and treatment, whether undertaken by the state or by private actors. Article 2 explicitly states that "[t]he interests and welfare of the human being shall prevail over the sole interest of society or science."⁶⁰ Free and informed consent is the subject of chapter two of the agreement, providing a basic principle for "intervention."⁶¹ Unfortunately, the

52. See generally *Universal Declaration on the Human Genome and Human Rights*, *supra* note 47.

53. *Id.* art. 5.

54. *Id.* art. 10.

55. *Id.* art. 11.

56. *Id.* art. 12.

57. Council of Europe: *Convention on Human Rights and Biomedicine*, Apr. 4, 1997, 36 I.L.M. 817 (1997).

58. *Id.* art. 1.

59. *Id.* art. 15.

60. *Id.* art. 2.

61. *Id.* art. 5.

Convention contains no definitions of terms. One problematic provision is article 7, which concerns the mentally ill.⁶² It allows nonconsensual treatment, without substantive limits on the nature or the extent of the intervention, when "without such treatment, serious harm is likely to result to his or her health."⁶³ It would have been preferable if the treaty had imposed a requirement that the least harmful or dangerous treatment be utilized and had excluded permanently disabling or personality-crippling "treatments" such as lobotomies and electroshock.

The provisions on the human genome are more progressive than those of the United Nations Educational, Scientific and Cultural Organization's text. Article 13 provides that "[a]n intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants."⁶⁴ No tests or alterations are permitted for gender selection⁶⁵ or for other preferences.⁶⁶ "The creation of human embryos for research purposes is prohibited,"⁶⁷ and the human body and its parts are not to be used for financial gain.⁶⁸ The treaty foresees enforcement through injunctions, compensation, and punishment. There is no direct reference to the jurisprudence of the European Convention on Human Rights.

The Convention also contains no direct ban on human cloning.⁶⁹ Because of concerns over this omission, the European states negotiated a protocol to this effect.⁷⁰ The Committee of Ministers presented the draft, prepared at its request by the Steering Committee on Bioethics, to the Parliamentary Assembly, which prepared an opinion recommending adoption of the draft protocol.⁷¹ The preamble calls cloning "contrary to human dignity"⁷² and in article 1, its only substantive provision, the draft prohibits "[a]ny intervention

62. *Id.* art. 7.

63. *Id.*

64. *Id.* art. 13.

65. *Id.* art. 14.

66. *Id.* art. 12.

67. *Id.* art. 18(2).

68. *Id.* art. 21.

69. *See generally id.*

70. *See generally* Council of Europe: Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Jan. 12, 1998, Europ. T.S. No. 168.

71. *Id.* at 1415 n.*.

72. *Id.* at 1417.

seeking to create a human being genetically identical to another human being, whether living or dead."⁷³

It seems clear that procedural and substantive human rights issues are emerging because of scientific developments in biology and medicine. These necessitate careful consideration of several questions, including the issue of whether there should be a right to genetic integrity and, if so, under what circumstances that right should be limited in light of the needs of society.

V. Environmental Protection

Technology and human activity in general have transformed our natural surroundings, making some areas uninhabitable and creating risks for the future survival of human life on the planet. Humans cannot be separated from the natural environment on which all life depends. The complex ecological web in all its diversity has intrinsic and instrumental value, comprising a vast number of elements only partly known and understood. It has become clear that serious environmental harm impacts human rights and that human rights violations can lead to environmental degradation. The complex interplay of the two has led to the widespread adoption of environmental rights and the articulation, primarily in constitutional law, of a right to a safe, healthy, and ecologically-balanced environment.

The environment has two characteristics that have broad implications for human rights – interdependence and irreversibility. Environmental science demonstrates that air and water know no boundaries, that climate change is a global issue, and that the reduction in biological diversity impacts across boundaries and regions.⁷⁴ Furthermore, much environmental harm is irreversible – extinct species are gone and dead lakes and rivers cannot be brought back, at least in the short term.⁷⁵ The problems can be demonstrated in regard to freshwater. Less than one percent of the water of the earth is accessible for human use.⁷⁶ Any loss of water resources, especially pollution of underground aquifers, poses dangers for future generations. According to the World Health Organization, more than five million people die each year as a

73. *Id.* art. 1.

74. See generally ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* (1991 & Supp. 1994).

75. See ALEXANDRE KISS & DINAH SHELTON, *MANUAL OF EUROPEAN ENVIRONMENTAL LAW* 9 (2d ed. 1997).

76. *Comprehensive Assessment of the Freshwater Resources of the World*, U.N. Commission on Sustainable Development, 5th Sess., ¶ 33, U.N. Doc. E/CN.17/1997/9 (1997) <gopher://gopher.un.org/00/esc/cn17/1997/off/97-9.EN>.

result of polluted drinking water.⁷⁷ Severe water shortages exist in twenty-six countries, and by 2025, two-thirds of the world's population could face water shortages.⁷⁸ Sixty percent of the world's drinking water is located in just ten countries, and much of it is polluted. Freshwater shortages are already raising tensions and threaten to be a cause of future interstate conflicts. Similarly, virtually all the known commercial fish stocks are declining or are endangered.

Interdependence and irreversibility mean, in the first place, that environmental quality must be considered a common concern of humanity. Second, the common concern is a human rights concern, linked to, but broader than, life, health, political participation, culture, and standard of living. Civil and political rights can be adapted to enhance environmental protection, which, in turn, strengthens other rights. It has become common to speak of the right to environmental information, the right to public participation in environmental decision-making, and the right to a remedy for environmental harm. These procedural rights, however, are inadequate to protect the substance of the biosphere. As with medical experimentation, there are certain actions that should not be taken, regardless of the procedural regularity, because the impacts extend temporally and spatially beyond those involved in taking the action.

Existing human rights standards are not sufficient, even if fully implemented, to safeguard a healthy and ecologically-balanced environment. Such an environment can be seen as a necessary precondition to all other rights, ensuring the present and future well-being of humankind, or as inextricably intertwined with existing rights. In this light, states are increasingly incorporating a specific right to environmental quality in constitutional and regional human rights texts. Virtually every constitution written or revised since the 1972 Stockholm Conference on the Human Environment has included a right to environment in some form. The right is different in many regards from other human rights because environmental harm is largely due to private conduct, not state action. The articulation of the right seeks to ensure that the state places a high priority on environmental protection and will take effective action to prevent state and nonstate conduct that produces environmental harm or serious risk thereof.

77. *Id.* ¶ 63. The Convention on the Rights of the Child requires states to take appropriate measures to implement the child's right to health, including efforts to combat disease through, *inter alia*, the provision of clean drinking water, "taking into consideration the dangers and risks of environmental pollution." Convention on the Rights of the Child, *supra* note 3, art. 24.

78. *Comprehensive Assessment of the Freshwater Resources of the World*, *supra* note 76, ¶ 84.

Most frequently in the European system, environmental protection has been sought through the use of existing human rights norms.⁷⁹ The primary right invoked is article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which involves privacy and family life.⁸⁰ The European Court has accepted that environmental harm may interfere with privacy and family life and has balanced the competing interests of the individual and of the community as a whole. The result has been limited environmental protection. However, the scope of protection remains narrow because environmental degradation is not itself a cause for complaint, but must be linked to an existing right.

In contrast, the 1994 United Nations draft principles on human rights and the environment explicitly state that "[a]ll persons have the right to a secure, healthy and ecologically sound environment."⁸¹ Subsequent principles detail the contents of this right, including the right to freedom from pollution, environmental degradation, and activities that adversely affect the environment; the right to preservation of environmental components; and the rights of information, participation, and remedy. The United Nations Commission on Human Rights has had the draft declaration under consideration for the past three years and is divided over the text, with opposition coming primarily from the United States and some of the European Union countries. The latter position is not entirely consistent with a text of the Organization for Economic Cooperation and Development that states that the promotion of a "decent" environment is recognized by many of its member states as a fundamental human right.⁸²

In international human rights texts, the right to environment has been included only in recently adopted regional texts.⁸³ The theoretical and practi-

79. See generally *Herrick v. United Kingdom*, App. No. 11185/84, 42 Eur. Comm'n H.R. Dec. & Rep. 275 (1985); *X v. Germany*, App. No. 7407/76, 5 Eur. Comm'n H.R. Dec. & Rep. 161 (1976); *Lopez Ostra v. Spain*, 303 Eur. Ct. H.R. (ser. A) (1994); *Fredin v. Sweden*, 192 Eur. Ct. H.R. (ser. A) (1991); *Powell v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) (1990).

80. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Council of Europe, art. 8, 213 U.N.T.S. 222, 230.

81. *Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, U.N. ESCOR, 46th Sess., Annex 1, at 74, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994).

82. Organization for Economic Cooperation and Development, *Responsibilities and Liability of States in Relation to Transfrontier Pollution*, reprinted in 13 ENVTL. POL'Y & L. 122, 122 (1984).

83. See *African Charter on Human and Peoples' Rights*, June 1981, art. 24, 21 I.L.M. 59 ("All peoples shall have the right to a general satisfactory environment favorable to their development."); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Nov. 17, 1988, art. 11, ¶ 1, OEA/ser.A./44, No. 69

cal problems involved in developing such a right have yet to be fully considered. In particular, both the temporal and spatial extent of environmental harm raises problems about the scope of the right and remedy, in particular whether there are duties owed to "future generations" and persons outside the territory and the jurisdiction of the state. It seems likely that the jurisdictional limit on human rights duties was included in treaties out of a belief that states would be largely incapable of violating the rights of individuals in other states. This is not the case with environmental harm, which is often transboundary in scope. Thus, the appropriate extent of state obligations needs careful consideration, as does the question of whether there is juridical content to the notion of rights of future generations.

VI. Trade, Globalization, and Human Rights

Globalization of civil society has led to the creation of powerful nonstate organizations and entities, many of them capable of and engaged in violating human rights. Globalization, coupled with trade liberalization and deregulation, has produced high social costs, reflected in lawsuits against corporate complicity in human rights violations in, *inter alia*, Burma,⁸⁴ Ecuador,⁸⁵ and Nigeria.⁸⁶ Economic globalization may undermine national and international human rights protections as states make an effort to remain competitive and to entice investment. The "race to the bottom" is a threat, as countries are pressured to relax their standards for the treatment of workers, denying collective bargaining, minimum wages, and, in some cases, the right to be free from forced labor.

The growth of powerful nonstate actors poses a problem for human rights law. International agreements were written to guarantee rights against the state, and none of the instruments directly applies to nonstate actors. Corporate codes of conduct on worker rights and environmental protection are inadequate because they use self-regulation and thus often aim at the lowest common denominator and only after public pressure. State regulation is often difficult or impossible, not for lack of will, but for lack of capacity. International human rights law in the future must address the problem of abuse of power by nonstate actors.

(1988) (not in force) ("Everyone shall have the right to live in a healthy environment and to have access to basic public services.").

84. See generally *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

85. See generally *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom. Jola v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

86. See generally *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (S.D.N.Y. 1996) (demand for jury trial).

One approach that has been suggested, but that poses enormous dangers, is the notion of drafting a Universal Declaration of Human Responsibilities. A group of former heads of state, joined in the InterAction Council, has proposed such a text, to be adopted on the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights. The United Nations Educational, Scientific and Cultural Organization also has a text under consideration that was drafted at a meeting of philosophers held March 25-28, 1997. The responsibilities it discusses are little more than an extension of human rights obligations to individuals and other nonstate actors. Rather than limiting or "balancing" the Universal Declaration of Human Rights with a declaration of responsibilities, which could provide a pretext for the state to limit existing rights, it would perhaps be better to attempt to extend the possibility of claiming human rights against nonstate entities as well as against state actors.

It must be emphasized, however, that the role of the state remains crucial. Each state has an obligation not only to respect, but, to ensure human rights and fundamental freedoms. Given the challenge posed by interdependence and globalization and the resulting power shift from states to civil society, state intervention remains necessary to protect the basic freedoms. As Gordon Christenson states, "Neither human dignity nor voluntary transactions or investments can thrive in world civil society without credible and legitimate international and national legal systems in which participants may place at least some trust in return for protection."⁸⁷ Legal systems, both national and international, must cooperate to protect society's fundamental values and to referee when there are competing values that require balancing and reconciliation. Market mechanisms alone will not provide the necessary protection and are incapable of balancing and reconciling competing values, especially when they themselves reflect one of the values in competition.

VII. Conclusion

The next century will bring new problems and new contexts for the protection of human rights. Some emerging issues can be seen in recent developments in governance, technology, and economics. They may require refining existing human rights norms or invoking human rights protections against new actors. In some instances, new rights may be necessary to respond to the most serious threats to human dignity and to well-being, when existing norms do not include the necessary guarantees.

87. Gordon A. Christenson, *World Civil Society and the International Rule of Law*, 19 HUM. RTS. Q. 724, 733 (1997).

None of the emerging issues should lead to ignoring the ongoing need to protect civil and political rights as they are currently formulated. From Afghanistan to Zaire, gross and systematic violations remain around the world. It is not necessary to formulate new rights to have enough to do well into the next millennium. Regional and global systems should be strengthened to monitor and to expose violations and to provide remedies to victims. Prevention of violations through institution-building and support for human rights nongovernmental organizations is also crucial to fulfilling the promise of the Universal Declaration of Human Rights.