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What Next?

Draft thematic paper

Beyond Human Rights Fundamentalism: The
Challenges of Consensus Building in the 21st Century

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Introduction

The growth of, and priority accorded, human rights discourse especially at the international level over the past 20 years has been remarkable. This has been greatly facilitated by the formulations, priorities and conditions adopted by international assistance programmes of intergovernmental organisations, Western governments and non-governmental foundations and organisations. Human rights talk is everywhere and is put forward as an inherently progressive force or strategy. Numerous 'disadvantaged' and 'marginalised' groups are claiming rights, including women, indigenous peoples, people with disabilities, gays and lesbians. In many parts of the world, local groups who would not normally articulate their issues or struggles in terms of rights are being encouraged to do so. Non-governmental organisations in countries of Latin America, Asia and Africa are engaged in human rights advocacy and education, and a 'rights-based approach' to development is actively being promoted by the United Nations, the European Union and various donor agencies. Given the influence of these organisations, we are likely to hear much more human rights language and rhetoric in the next few years.

This article is an examination of the drive to prolong and consolidate 'the Age of Rights'¹ in the face of numerous critiques of rights discourse and its limitations in practice. It identifies trends towards what I have termed 'a human rights fundamentalism' as problematic and premised on a notion of intractable conflict as inevitable and endemic in human society. In conclusion, it calls for a transformation of rights discourse to move beyond fundamentalism and refocus on substantive issues, and, most importantly, challenges and processes for consensus-building in the 21st century.

Rights and human rights

Rights, very broadly defined, are simply claims of entitlement. It could be argued that much of social action is in a sense based on a claim. For example – taking and eating food constitute the claiming of a right to it, but only when stopped from taking this action, do people consciously express it as a right and begin to negotiate the terms of its expression. Since anyone can assert a right, the basis of the claim becomes fundamental and establishes its legitimacy. How legitimacy is constructed and comes to be accepted and recognised in society is thus central to establishing human rights regimes. This very broad definition means that all kinds of actions can come under the rubric of rights, and that issues of power, privilege and socialisation are ever present in any rights discourse, whether acknowledged or not. The term 'rights' is thus used in a number of different but related ways by different scholars, advocates and commentators focusing on different societies, to mean claims, entitlements and standards or core values which express what is morally acceptable or ethical and which may or may not also be sanctioned by the state through law.

The term 'human rights' is usually used today to describe *self-conscious* claims of entitlement articulated within the framework of a system of enforcement by or

¹ In two books with this title, the authors proclaim the 20th century as the age of rights. The term was however made famous by the publication in English of Louis Henkin's *The Age of Rights*, Columbia University Press, New York and Oxford, 1996.

on behalf of human beings, on the basis of some notion of equal or common humanity or human dignity. The self-consciousness of the claim reflects a location of power within a social relationship.² In other words, human rights are the language of the relatively empowered in any society. As demonstrated above, these self-conscious claims of entitlement only make sense in the face of threats and conflict. Rights thus embody a politics of resistance expressed in terms of a claim of legitimacy, and rights discourse raises the issue of how people and communities resolve conflict – whether through claims of rights, negotiation, power struggle (physical or otherwise), consensus-building, or combinations of all of the above. In discussing rights, therefore, we are in a very real sense discussing the very character and quality of human social interaction at different levels.

Rights are also expressed as standards to be aspired to. Perceptions of what people are entitled to, arise from the nature of social interaction and socialisation. Indeed, we cannot talk of entitlement without active claim-making of some kind, linked to a system of values. In this sense, one may argue that all societies have always had a concept of human rights in the sense of legitimate entitlements that people can and do claim in different ways, whether or not these are recognised and named as such. For example, anti-colonial resistance and anti-poverty struggles, including those opposing structural adjustment policies in different parts of the world, are rarely described as human rights struggles in much of the literature and yet constitute significant claims of entitlement by large groups of people.

Entitlements and standards are thus always contextualised, as they emanate from processes of recognition, non-recognition and struggle for recognition, with different and competing bases, expressed variously as nature, religion, the state and society. This is what makes the attempt to decontextualise and universalise them so problematic. Indeed, we must examine the motivations behind their decontextualisation and universalisation, which are highly political acts of manipulating processes of recognition. Arguably, such political acts are ongoing and inevitable in human society and part of the process of creating and maintaining solidarity. The major question, then, is why such value is attached to universality and decontextualisation or objectivity in the enunciation of entitlements.

The development and expansion of international human rights standards

The United Nations was born in the wake of the Second World War, emerging from negotiations between the allied powers, which had defeated Germany, Italy and Japan. The Charter declares as one of its aims the pursuit of international co-operation by, *inter alia*, promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.³ The Universal Declaration on Human Rights

² Very young children, for example, are generally not self-conscious claimants of rights because of the power differential between them and adults. This is also true of other vulnerable persons or groups within a relationship, until they begin to resist the situation in which they find themselves.

³ Article 1(3), United Nations Charter.

(UDHR) adopted in December 1948, which is considered by many to be the foundational Human Rights document of the UN, takes the form of broad, general principles contained in 30 articles, including the right to life, liberty, security of the person, an adequate standard of living, education, freedom of thought, conscience and religion, and freedom from torture and degrading treatment. Other foundational UN human rights instruments are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments, sometimes collectively referred to as the international Bill of Human Rights, were the subject of intense discussions and negotiations in the UN from 1946 until their adoption in 1966.⁴ The articulation of these standards and promotion of rights rhetoric by the United States and European countries, took place in a period when nationalist movements in Africa, Asia and Latin America, as well as labour movements and women were engaged in struggles for their rights to self-determination, to better conditions of work and to the vote, against and within those very countries. The ideals espoused in these instruments were thus being violated in practice at the national and international level at the same time as their articulation as universal standards.

At the UN level, socialist countries questioned the emphasis on individual civil and political liberties and sought to give priority to economic, social and cultural rights such as the right to food, housing, education and work. Many newly independent countries, which supported the socialist block on this issue, argued strongly, in addition, for the right to self-determination to support anti-colonial struggles. The resultant compromise was the two international human rights covenants, which have some overlap.⁵ Since the adoption of these three basic human rights instruments, the process of articulating human rights in international law has been an ongoing one, stimulated by pressure from different interest groups and resulting in hundreds of provisions in numerous international instruments.

For many years the status of economic, social and cultural rights continued to be controversial and they were rarely the focus of activities and campaigns of international human rights organisations. Even in many newly independent states, following the Western tradition, they found their way into constitutions as 'Fundamental Objectives and Directive Principles of State Policy' separate from fundamental human rights provisions. They have been referred to as second generation rights.⁶ It is, however, a third generation of rights applicable to groups, and peoples rather than just individuals, which has been most controversial. Notable amongst these are the right to self-determination, the right to development and the right to peace. Given the presence of so-called third generation rights in the ICCPR and ICESCR, this classification of rights is highly questionable and based neither on the historical emergence of the

⁴ These Covenants were debated from 1946, adopted in 1966 and entered into force in January 1976. By March 2000, 144 and 142 states respectively were parties to the Covenants.

⁵ For example, both covenants provide for the right to self-determination in identical terms.

⁶ This classification of rights in terms of generations was made famous by Karel Vasak, one-time head of the human rights division of UNESCO, at an inaugural lecture at the International Institute for Human Rights in Strasbourg in 1979. See Vasak, Karel, 'For the Third Generation of Human Rights: The Rights of Solidarity', *Revue des Droits de l'Homme*, No. 3, 1979.

rights claims, nor on their subjects or beneficiaries, but, it would seem, on the willingness of powerful Western states and organisations to acknowledge and deal with them.

Critiques of international human rights discourse

As several writers have observed, much of the literature on human rights, and monitoring and advocacy activities, emanate from academic institutions in the West and from international and local organisations funded largely by Western governments and foundations. They have focused on violations of civil and political liberties, with their searchlights turned for the most part on states, and violations in developing countries. **This has produced a discourse skewed in favour of civil and political liberties, and of Western states and institutions as defenders of legitimate human rights norms and discourse in the international community.**

One of the major debates in international human rights discourse has been between those who assert the universality of human rights norms and discourse and those who argue that this discourse is largely Eurocentric. This is the so-called debate between the 'universalists' and the 'cultural relativists'. The major basis of legitimacy of international human rights norms invoked by advocates has been their universality. 'Inherent', 'natural', 'rational', 'inalienable' and 'non-derogable' are all terms that are used in relation to the source and therefore the validity and universality of human rights, but the major argument advanced in modern times is that they are the result of a consensus of the global community secured through the UN.

While some scholars have rejected notions of universality of human rights, arguing that non-Western societies have their own conceptions of human dignity, not expressed as human rights, others have focused on the end or goals of declaring human rights and have sought to decipher African and Asian conceptions of human rights, expressing some confidence in the possibility of constructing a more universal human rights corpus.⁷ In response to this, other scholars have asserted that the notion of human rights is quite specific: it differs, they argue, from notions of human dignity, morality and ethics – which have existed in all societies – and refers to individual claims of entitlement made against the state. Thus the attempt to decipher an African or Asian concept of human rights in relation to pre-colonial African or Asian societies is said to be misguided. To the extent that the state exists in modern Africa and Asia, that conception of human rights which arose at a specific moment in history is relevant to those societies and is universal.⁸ It is thus argued that, whilst the concept or idea of human rights is universal, the form and core content

⁷ See, for example, contributions by Ben Asante, Wiredu, and Deng in An-Naim, Abdullahi and Deng, Francis, *Human Rights in Africa: Cross Cultural Perspectives*, The Brookings Institution, Washington DC, 1990.

⁸ This argument is put forward by Rhoda Howard in several of her articles. She consistently argues that the development and impact of capitalism internationally have given rise to the modern state arena and a relationship between the state and individuals and groups that in turn globalises the human rights agenda. See, for example, Howard, Rhoda, 'Group Versus Individual Identity in the African Debate on Human Rights', in An-Naim and Deng (eds), *ibid.* p.159.

necessarily reflects emerging patterns of social organisation – in particular, the relationship between the state and individuals.

There are many nuances to the debate between so-called universalists and cultural relativists, which cannot be explored here.⁹ Unfortunately, the debate has been conducted largely in oppositional terms and much of it has been clouded by the geographical location, affiliations and idiom of those engaged in it, limiting its usefulness. It is also not clear what is ‘cultural’ about the relativist position. Critiques of universalism and the liberal concept of rights emanating from European and American scholars and institutions are rarely classified as relativist.

It is fairly well acknowledged now that the concept of human rights as generalised entitlements accruing to everyone equally, enunciated in legal instruments and enforceable by the state, has its roots in Western liberal political traditions which came into ascendancy in 18th and 19th century Europe with the development of industrial capitalism, and the emergence of the capitalist state. Different aspects of the process of development of this tradition have been the subject of extensive writing and analysis by a number of scholars.¹⁰ In this period an emergent bourgeoisie or merchant class based in the cities was challenging established feudal political and economic systems, sometimes through violent revolution. The French revolution in 1789, with its Declaration of the Rights of Man and of the Citizen, was an example of this. The ideology of individualism and individual rights, embraced by the new bourgeoisie, emphasised freedom of expression, freedom of movement, freedom from state interference and the right to private property. These ideas facilitated, and were given as justifications for, the release of land and human resources for industry. The development of the new capitalist economic order, in which individuals as possessors of commodities interact with each other in the market place, thus went hand in hand with a political and legal system based on the principle of separation of powers and the rule of law.

In this system the role of the state is to support private economic interactions and act as umpire. The neutrality of the law and system of adjudication is supposedly guaranteed by the separation of law-making by the legislature from law enforcement by the executive and interpretation by the judiciary. The individual rights of citizens were thus primarily expressed as civil and political liberties to act without state interference. Professional advocates (such as lawyers and, now, civil society organisations) are engaged in the interpretation, monitoring and enforcement of these rights through specialised state and multilateral institutions, such as courts, tribunals and human rights commissions. Through this dominant discourse, a specialised arena of action for the formulation, enforcement and interpretation of rights or legitimate entitlements is promoted.

⁹ For a more detailed exploration see Brems, Eva, *Human Rights: Universality and Diversity*, Kluwer, The Netherlands, 2001, and Hellum, Anne, *Women's Human Rights and Legal Pluralism in Africa*, Tano Aschehoug, 1997.

¹⁰ Rubin, G. and Sugarmann, D. (eds.), *Law, Economy and Society: Essays in the History of English Law, 1750–1914*, Professional Books, Abingdon, 1984; Thompson E.P., *The Making of the English Working Class*, Penguin, London, 1968.

It is this concept of rights and the relationship between the state and individuals, which emerged at a specific historical juncture in Europe, that has been carried forward by Europeans and the European diaspora into international human rights discourse today and is reflected in the form and content of international human rights instruments and local constitutions or bills of rights in many parts of the world. Its bias in favour of the individual as the bearer of rights and its neglect of the issue of responsibility to other individuals and to the group have been critiqued as an expression of *laissez-faire* individualism that is detrimental to social solidarity. The introduction of group rights and some emphasis on duties or responsibilities in the African Charter on Human and Peoples' Rights¹¹ was a reaction to this. The emphasis on equal rights or formal equality also masks substantive differences between individuals and groups, rendering real power relations invisible and therefore supporting the powerful.¹² The professionalisation of interpretation and advocacy has further removed the discourse of human rights from within the ambit and control of ordinary people everywhere, further alienating them in the process of defining and defending values they subscribe to. Commenting on the situation within the modern human rights movement, one commentator has observed:

[A]s the human rights effort has moved from a cause to a professional career, it has increasingly employed an exclusive, legalistic language that fails to resonate with people's lives and daily struggles. Its link to what is human and universal has been diminished, if not lost, and correspondingly, so has its power and appeal.

I have growing doubts about whether the human rights language we now use can be successful in capturing the imagination of a broad cross-section of people. In my experience, the increasingly legalistic approach to human rights has overshadowed a moral approach, which for me is what resonated early on.¹³

Yet, as has been argued earlier, even as a cause, its appeal and resonance was already severely limited.

It has also been argued that rights are vague and indeterminate. No right is absolute, not even the right to life.¹⁴ Rights are always subject to interpretation within a specific context. The adjudication of rights issues or conflicts involves the balancing of entitlements to determine legitimacy based on policy and social considerations and is thus a political undertaking. Furthermore, it has been argued that it is not the declaration of a right that confers the benefit on an individual or group but the social actions surrounding it, such as its adoption by a judge in a lawsuit, or support and active advancement by social movements. In his work on the pay equity cases and movement in the US, Michael McAnn explores practically how rights consciousness can advance political empowerment as movements learn to use, question and change law and legal

¹¹ OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted at 21 ILM, 1982. See, for example, Articles 20 and 27 on – respectively – peoples' rights to existence and self-determination, and individuals' duties towards their families and societies.

¹² For example, whilst workers have the formal right to negotiate a contract, in reality they may have little or no bargaining power *vis-à-vis* an employer. This discrepancy between formal equality and substantive equality has been well documented in relation to women's rights, especially with regard to employment and labour policies.

¹³ Cox, Larry, 'Reflections on Human Rights at Century's End', Council on Ethics and International Affairs, Carnegie, 2003.

¹⁴ The right to life is violated, for example, by the death sentence in criminal law in many societies and in situations of armed conflict.

institutions.¹⁵ Albie Sachs also examines how human rights are constituted in active struggle in the context of South Africa.¹⁶ It is in this sense also that Larry Cox emphasises the importance of the causes underlying any human rights advocacy.¹⁷ The declaration and proliferation of human rights standards in legislation therefore amount to little more than rhetoric, even though this rhetoric may serve an important function of consolidating the gains of social movements in so far as it has widespread acceptance, creating an illusion or myth that becomes a part of the culture of that society.¹⁸

The priority to be accorded to different kinds of rights has also been a source of dispute in international relations. Enforcement of human rights has generally reflected the interests of powerful groups within the system. The voices of critics, although ever-present, have often been muted, rising from time to time as real-life conditions for different groups, and constellations of power, change.¹⁹

Reconceptualisation, reconstruction or the end of rights

It is clear from the foregoing discussion that the discourse on human rights in international relations has been contentious from the very beginning. Resistance to the Western liberal concept of human rights and the practice it entails has been most visible in the international arena, emanating both from leaders and representatives of socialist and developing nations against control and definition of their activities and practices by Western governments and donors, and from marginalised and vulnerable interest groups such as women, indigenous peoples and displaced persons seeking recognition of and remedies for their particular vulnerabilities. Scholars and activists genuinely concerned about issues of democratic struggle and legitimacy within the international system have also challenged the Western liberal model. These challenges have taken the form of a continuous expansion of the content of human rights to include a wider range of concerns, as well as reconceptualisation and restructuring of rights to recognise and legitimise action by a variety of groups.

In the past 10 years there has been an upsurge of interest in economic, social and cultural rights which are being enunciated in growing detail in many international policy statements and documents emanating from specialised agencies of the UN dealing with food and agriculture, health and education, among many other subjects. As a result of the concerns with economic development and poverty eradication, scholars and groups in the Global South and their supporters in the North continue to advocate the need for an understanding of the link between development, democracy and human rights.²⁰ In an era of globalisation, the glaring contradictions between the

¹⁵ See McCann, Michael, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, University of Chicago Press, Chicago, 1994.

¹⁶ Sachs, Albie. *Protecting Human Rights in a New South Africa*, Oxford University Press, Cape Town, 1990.

¹⁷ Cox, Larry, *op.cit.*, p.8.

¹⁸ Scheingold, Stuart, *The Politics of Rights: Lawyers, Public Policy and Political Change*, (2nd edition), University of Michigan Press, Ann Arbor, 2004.

¹⁹ For example, advocacy for the right to development, and giving greater priority to economic, social and cultural rights, made little headway until after the Cold War.

²⁰ For an early commentary on this in the African context, see Aidoo, Akwasi, 'Africa: Democracy Without Human Rights?' *Human Rights Quarterly*, No.15, 1993, pp.703-715

policies of international financial and trade institutions and the quest for people's economic, social and cultural rights are evident, as national governments increasingly require repressive measures to enforce such policies.²¹

Perhaps the most important attempt to reconceptualise and reconstitute human rights at the international level has been the formulation of the right to development. The right to development has been raised since the 1960s and 1970s when Senegal advocated its recognition, and is somewhat peculiar in terms of embracing or consolidating several other rights, especially economic, social and cultural rights. It was hotly debated for several years and was an integral part of the call for a New International Economic Order, making the link between implementation of human rights and economic and social development, which is also a major preoccupation of the UN according to its Charter.²² The right to development was eventually recognised in a declaration adopted by the UN General Assembly in 1986 and has been one of the most controversial rights advocated in the history of the UN.

Not surprisingly, opposition to the right to development at the international level has centred round the argument that it is too broad and indeterminate to be enforceable. This is despite the fact that virtually all rights stipulated in the major UN human rights instruments are broad and indeterminate and subject to interpretation in specific contexts. Indeed, whilst these controversies raged on in the UN over the expansion of human rights, regional and national level initiatives were also being carried out. The African Charter on Human and Peoples Rights, for example, is an interesting blend of various types of rights and was the first human rights instrument to give recognition to the right to development within a framework of legally enforceable rights.²³

In addition to this expansion of the scope of human rights is a call for meaningful enforcement, requiring an integrated approach to rights which focuses on the linkages required to make major existing human rights a reality. For example, the right to life necessarily implies a right to food, land and other resources. This is what Shivji advances as 'composite' rights.²⁴ Women and indigenous peoples, among many other constituencies, have sought to have their concerns reflected as human rights in specific international instruments. Most of these instruments require states to take specific action, not merely to desist from interfering with the individual or to act as umpire. In the Convention on the Elimination of All Forms of Discrimination Against Women, unlike in the earlier Covenants, the emphasis is not just on legislative measures but on 'all appropriate measures'.²⁵

The situation of selective enforcement mirrors the interests and priorities of the powerful states and actors within the system. In a state-centric system, weak states are demonised and held to higher standards of accountability than stronger

²¹ Notable examples of such policies include withdrawal of state subsidies on health and education, devaluation of currencies, triggering high inflation in prices of goods locally, as well as privatisation of public enterprises, leading to massive retrenchment of workers.

²² UN Charter, Article 55.

²³ See Article 22.

²⁴ See Shivji, Issa, 'Constructing a New Rights Regime: Promises, Problems and Prospects' *Social and Legal Studies*, Vol. 8, No. 2, pp.253-276.

²⁵ See Articles 3 and 5.

states. This is a serious problem of global governance and responsibility that goes beyond the purported excuses and attempts by corrupt leaders in developing countries to evade responsibility for human rights. States are often not in a position to implement social and economic rights. With the economic liberalisation policies being imposed by the West and international financial institutions, the position of the private sector is being strengthened and yet neither the enterprises operating in that sector nor the authors of the policies are held accountable for human rights violations or implementation. The focus of international human rights organisations and the media is on local elites in control of the state apparatus, who need to deploy military force to protect corporations and in the face of people's resistance. How can the right to food security be guaranteed without the right of access to land and agricultural policies that protect and facilitate local production? How can the right to health be guaranteed in the face of privatisation of health services and a near-monopoly of research and drug production by large pharmaceutical corporations? The rhetoric, content and scope of international human rights have thus expanded considerably over the past 50 years as a result of the claims of various groups, whilst the form and mechanisms for enforcement have not kept pace and the powerful are not held accountable for systemic and continuous violation of rights. This broadening of the content of human rights is threatening its form. As more and more interest groups express their particular interests as rights and seek their recognition and legitimation, the actual and potential conflicts between rights become more apparent. The image of objective and neutral adjudication of rights issues and conflicts through an impartial process is destroyed and the battle for legitimacy becomes overt and political. Pressures for the reconceptualisation and expansion of human rights discourse, and against selective enforcement, purportedly to make it more universal, are undermining the claim of that discourse to superiority over any other, and generating a crisis of legitimacy within the system.

For example, the right to private property may conflict with the right to food and housing when issues arise as to people's access to land and work, and the cost of housing. The right to freedom of thought and religion of different groups may come into conflict. These confrontations of interests occur within national boundaries but have international dimensions. Violent physical and economic confrontations of local and multinational interests in one country may spill over to others in the shape of a migration of peoples as refugees and this in turn raises issues of the status of the new immigrants in their host countries. For example, in African immigrant communities in France, when parents who circumcised their female children or women wearing the hijab were penalised in recent years, the issue was framed as one of the conflicting rights of two different communities and of parents and children. Local or international legal systems and human rights advocates are then called upon to adjudicate in a battle for legitimacy which triggers or intensifies conflict.

The right to development has been the most radical reformulation of human rights in the UN system to date, moving away from fragmented articulations of rights and seeking to integrate economic, social, cultural and political rights. Following the declaration of that right in 1986, working groups were established to make recommendations and review progress on its promotion and implementation. The UN Commission on Human Rights in 1996 endorsed the

view contained in the report of the 2nd Working Group that ‘the right to development involves more than development itself; it implies a human rights approach to development, which is something new’.²⁶ In the past 10 years various UN agencies and donor agencies have sought to articulate rights based approaches to development to guide their work. The outcomes of these discussions and policy statements adopted on the rights based approach to development illustrate some of the dilemmas inherent in human rights discourse.

Rights based approaches to development

The promotion of a ‘human rights approach’ to development was spearheaded by individuals and groups advancing the right to development. They sought to draw clear links between economic and social development and human rights, and to expand the scope of human rights to emphasise the needs of disadvantaged groups.²⁷ Today, United Nations agencies, the EU, bilateral agencies and many non-governmental agencies are all speaking the language of rights-based approaches. So what is this rights-based approach to development? It has been expressed in different ways by different agencies and by commentators trying to analyse what they mean.

Taken literally the term ‘rights based approaches to development’ makes little sense. One might wonder what is meant by a claims-based or entitlement-based approach to development, to substitute other terms; or indeed what other approaches there are, and conclude that this is another meaningless fad, which illuminates nothing. Viewed in historical context however, it makes more sense. Following the Declaration of the Right to Development, which includes the right of all persons to access and enjoy economic, social and cultural resources²⁸ as well as the obligation of states to facilitate and remove hindrances to this process,²⁹ all organisations and agencies engaged in development activities including UN agencies needed to comply with the declaration and recommendations for its implementation by adopting an approach to their work which was in line with it. Understood in the context of the right to Development, a rights-based approach to development work could be revolutionary. However, given the indeterminacy of both the terms ‘rights’ and ‘development’, the meaning of this approach is by no means settled. However, the trends in the interpretation being adopted by various agencies and organisations are instructive.

UN agencies have fairly clearly stated the goals of the rights-based approach to development. In 1998, the year in which the 50th anniversary of the UDHR was being commemorated the UN Secretary General stated:

²⁶ UN Document E/1996/24.

²⁷ For a clear indication of this, see Dias, Clarence, ‘The Rights Way to Development: Challenges and Opportunities’, Human Rights Council of Australia Symposium Papers, www.hrca.org.au/symposium.htm. He was one of the main contributors to the articulation of rights based approaches to development in the UN system. See also Frankovits, ‘The Human Rights Approach to Development: Rules to Live By’, *Fletcher Journal of Development Studies*, 2002 Vol 17, pp. 9–17.

²⁸ Declaration of the Right to Development, General Assembly Resolution 41/128, 1986, Articles 2 and 8.

²⁹ *Ibid.* Article 6(3)

[A] rights based approach to development describes situations not simply in terms of human needs, or developmental requirements, but in terms of society's obligations to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance when needed.³⁰

The rights-based approach was thus being juxtaposed with a needs- or charity-based approach to development. Several UN agencies, notably the UNDP, whose mandate is development, and the Office of the High Commissioner for Human Rights made statements on rights-based approaches to development. According to the High Commissioner for Human Rights:

In adopting 'Integrating Human Rights with Sustainable Human Development', the United Nations Development Programme (UNDP) promotes international standards established to protect the human rights of every individual. I welcome this approach by which human rights has acquired a powerful new advocate. We are all custodians of human rights, the birthright of all human beings. Human rights bring to the development discussion a unifying set of standards—a common reference for setting objectives and assessing the value of action. The rights approach will enhance the human dimension of UNDP strategies that, among others, focus on eliminating poverty, helping groups that require special protection, and strengthening institutions of governance and democracy. We must understand the role of human rights as empowering of individuals and communities. By protecting these rights, we can help prevent the many conflicts based on poverty, discrimination and exclusion (social, economic and political) that continue to plague humanity and destroy decades of development efforts. The vicious circle of human rights violations that lead to conflicts—which in turn lead to more violations—must be broken. I believe we can break it only by ensuring respect for all human rights.³¹

Later in 2001, the Office of the High Commissioner for Human Rights stated: 'A rights based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights'³² By 2004 UNICEF attempting a summary of the common understanding of UN agencies eight years after the recommendations of the 2nd Working Group on the Right to Development had this to say:

All programmes of development cooperation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. A set of programme activities that only incidentally contributes to the realisation of human rights does not necessarily constitute a human rights based approach to programming, where the aim of all activities is to contribute directly to the realisation of one or several human rights.

...The following elements are necessary, specific and unique to a human rights based approach:

- a) Assessment and analysis to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers, as well as the immediate, underlying, and structural causes when rights are not realised.
- b) Programmes to assess the capacity of rights holders to claim their rights, and of duty bearers to fulfill their obligations. They then develop strategies to build these capacities.
- c) Programmes to monitor and evaluate both outcomes and processes guided by human rights standards and principles.

³⁰ UN Secretary General, 1998.

³¹ 'Integrating Human Rights with Sustainable Human Development', a UNDP Policy Document, January 1998.

³² UN High Commissioner for Human Rights.

d) Programming is informed by the recommendations of international human rights bodies and mechanisms.³³

These and subsequent statements from the UN over the years indicate that the rights-based approach was gradually being worked out in detail after its goals were broadly stated. It is in this working out of detail that certain trends are decipherable.

According to Andre Frankovits, one of the main contributors to the articulation of the human rights based approach to development:

For a human rights analysis to be useful, each of the rights should be considered separately. For each right, the relevant existing legislation and by laws that either promote or hinder the realisation of the right, the obstacles to the realisation of rights caused by non-state actors, the status of existing enforcement mechanisms for the protection of human rights, the resources available and the priorities within government policies allocated to the realisation of each right, and the sectoral and geographic areas of greatest disadvantage need to be identified in turn. It is important to deal with each of the rights separately because this enables sufficient dis-aggregation of data for the establishment of clear human rights objectives.³⁴

He identifies three essential steps to a human rights approach to development:

1. The formulation of goals and implementation processes in human rights terms
2. An agreement by all stakeholders on appropriate performance indicators including the establishment of realistic time frames for achieving objectives and concrete measures of progress
3. An evaluation of outcomes based on both human rights and meaningful participation and benchmarks and indicators for implementation:
 - for each right the relevant existing legislation and bylaws, or legislation and bylaws that should be enacted, that either promote or hinder the realisation of the right;
 - for each right the obstacles to the realisation of rights caused by non-state actors and the state of existing enforcement mechanisms for the protection of human rights that are either applied or ignored;
 - the resources available and the priorities within government policies allocated to the realisation of each right;
 - sectoral and geographic areas of greatest disadvantage in order to enable focus on these areas;
 - for each right programmes which already exist and those programmes which need to be designed to address the most vulnerable.

These kinds of technical formulae for the implementation of rights-based approaches have been adopted in essence by UN agencies and a number of bilateral donors such as the UK Department for International Development (DfID) and the European Union. Flowing from this,

³³ 'The Human Rights Based Approach: Statement of Common Understanding' in UNICEF, *State of the Worlds Children 2004*, Annex B, p.91.

³⁴ Frankovits, *op. cit.*, p.13.

development assistance programmes to strengthen human rights frameworks in developing countries and enhance access to justice are being promoted. The objectives of these programmes are to strengthen human rights and legal systems at the national level, to promote efficiency and certainty as opposed to arbitrariness in the system. Activities envisaged under many of such programmes include supporting the promulgation of legislation on a wide range of issues, reorganising legal institutions such as courts, lands registries and companies registries, and training judges who will be involved in interpreting the legislation. 'Technical support' from developed countries is offered for this purpose. Access to justice for ordinary people is also promoted through new Alternative Dispute Resolution mechanisms established to simplify adjudication of disputes.

Some non-governmental donor agencies have interpreted rights-based approaches to development differently and some have declined to adopt this new jargon. According to CARE,³⁵ in a statement setting out its position, a human rights approach signifies:

- a more profound commitment to empowerment,
- a deep respect for the inherent dignity, worth and potential of the people we seek to assist,
- helping people understand their basic rights as human beings,
- a more explicit effort to catalyse local grassroots leaders and groups and to strengthen their ability to stand up for their rights, to participate in relevant decision making processes and to shape their own development.³⁶

Other groups and commentators call for the adoption of a more holistic view of development, rights and participation, emphasising the importance of empowering people to make claims of entitlement and to participate in social change.³⁷ The debate and discussion on rights-based approaches to development is thus still young and rages on.

The goal of implementing the right to development and moving from a needs- or charity- based approach to development assistance, to a rights- or entitlements-based approach,³⁸ is being contradicted by the interpretation of what constitute rights and human rights and some of the strategies being adopted. The approach proposed by Frankovits and reflected in the Statement of Common Understanding³⁹ seems more likely to guarantee work for legal researchers and scholars and to generate bureaucratic reports than to change the way governments and donor agencies work or make them more accountable. It is also hard to see how such bureaucratic analysis and reporting processes can mobilise people to define and claim entitlements and resist negation of those entitlements by governments, donors and private sector corporations. Given the indeterminacy of human rights norms, as discussed earlier, this discourse is

³⁵ A US-based, international non-governmental organisation.

³⁶ CARE, 'A Rights-Based Approach', www.kcenter.com/phls/rba.htm

³⁷ Veneklasen et al. *Rights Based Approaches and Beyond: Challenges of Linking Rights and Participation*, Sussex : Institute for Development Studies 2004.

³⁸ See Annan, Kofi, *op. cit.*

³⁹ UNICEF, *op. cit.*

fertile ground for manipulation by various interest groups. The concept of development assistance and aid to developing countries is by its very nature discretionary and directly contradicts the empowerment of people to make claims as of right. It is perhaps not surprising that many donor agencies are finding the advancement of what could be understood as an entitlement-based approach to development assistance (in other words, a 'right to aid') too radical and threatening for their liking. The discourse on rights-based approaches to development is taking on a life of its own as a technical quick fix, increasingly distanced from its origins – advocacy for the right to development and a new more equitable international economic order. There are observable and worrying trends towards a 'human rights fundamentalism', which still take rights as determinate and universal, requiring only correct application.

The growth and development of human rights fundamentalism.

The term 'fundamentalism' is generally used to describe a faith in detailed core texts that does not question or examine the origins of the texts and processes by which they emerged, and a certain rigidity in textual interpretation in favour of the literal as opposed to the contextual.⁴⁰ It is in this sense that I use it in relation to human rights. With the proliferation of international instruments and the strengthening of professional interpreters of the text, these instruments have been and are being accorded a central status in human rights discourse in an effort to make them the new Bible and Koran of the late 20th and early 21st century. This is premised on the idea that they embody 'universal values'. They have become the starting point and point of reference for many a human rights activist and organisation, who carry it to the 'disadvantaged' in poor urban and rural communities to translate and evangelise about their contents to those 'ignorant' constituencies which are presumed not to know their rights or entitlements because these rights and entitlements are viewed exclusively as those defined and conferred upon them by the State or articulated in these local and international instruments. The provisions of these human rights instruments are of course usually framed as general principles to be applied to specific situations, such as freedom from discrimination; but there is a sense in which some provisions also presume a specific form of social organisation and values. This is the case, for example, with the right to private property, the right to social welfare and insurance, the right to membership of trade unions and the endorsement of the public/private divide in the provision of educational facilities.⁴¹ Vestiges of this human rights fundamentalism that seeks to define the limits and parameters of the discourse are to be found in the position of some advocates of universalism, as discussed earlier, in which they seek to impose definitions and standards of human rights internationally, on the grounds that they are inherent in the condition of being human or even that they emerged

⁴⁰ It was first used to describe trends in Christianity that emerged at the end of the 19th century in reaction to what was perceived by certain individuals as a secularisation or watering-down of the faith. The term derives from the collaborative efforts of a group of Christian clergymen to publish 'The Fundamentals of the Christian Faith : A Testimony to Truth', a series of booklets in the first decade of the 20th century. The term has since then come to be primarily associated in the popular consciousness with Islamic groups.

⁴¹ All to be found in the ICESCR and ICCPR. Yet in some communities, the entitlement to social welfare and insurance is based on and guaranteed by membership and roles or duties of the individual in that community. Presumptions concerning the modern state and contributions to it in the form of tax or premiums are thus difficult to apply.

from a process of negotiations and consensus in the UN (irrespective of the imperfections of such a consensus). The strengthening of legislation and the non-recognition of conceptions of rights that fall outside the sphere of such legislation, and of what is defined as legitimate by the state or international organisations, are important mechanisms for determining what is legitimate.

The debate on the priority of first, second and third generation rights and their enforcement is another case in point. To fragment rights and classify them separately, and then engage in a debate about their priority or the feasibility of enforcing some rather than others, ignores the linkages between them and the historical context that has given rise to their denial, as well as the particular interests or values expressed in such prioritisation. These classifications continue to be adopted in the discourse on rights in spite of UN statements on the indivisibility of rights. After much heated debate, the World Conference on Human Rights held in Vienna in 1993 also reaffirmed the indivisibility of rights, but in practice this is not yet understood or taken as seriously as it should be. The right that most clearly expresses the interlinkages between and indivisibility of human rights is the controversial right to development. Yet again, rights-based approaches are being advanced that will consider each right separately and examine legislation related to it as well as establish benchmarks and indicators for its implementation,⁴² advancing this process as value-free. This advancement of a technical and correct way of viewing and interpreting human rights seeks to restrict the discussion to a group of professional experts and rational processes, and is fundamentalist.

As noted earlier, the dominant expression of Western liberal democratic values and processes in international human rights discourse in the UN has been resisted through the expansion of both the content (values) and the form (processes) of human rights. This expansion, culminating in the articulation of the right to development, and threatening a crisis of legitimacy, is now being met with a closing of ranks and a return to Western liberal conceptions as representative of human rights in the shape of rights-based approaches. The technical and narrow interpretations of rights-based approaches to development – divorced from the right to development and promoting conceptions of human rights as fact, the rule of law as necessary process, multi-party democracy (separation of powers) as a necessary condition and emphasising technical/expert assistance in law reform and the training of judges – promote the old formalist Western liberal notions of human rights and the rule of law. It ignores or deemphasises issues of substantive interests and goals as well as people's direct and active participation in decision-making. It calls for more legal rights and more efficient adjudication and enforcement of those rights, without overtly addressing the issue of rights for whom, and to do what.

Even advocates of rights-based approaches, seeking to promote a more holistic view of human rights and its linkages with empowerment and participation, fall into the trap of placing this indeterminate discourse in the centre stage, where it is easily manipulable by existing powerful interests, and upstaging other discourses with a potential for more profound substantive social change.

⁴² Frankovits, *op cit*.

Beyond human rights fundamentalism: the challenges of consensus-building in the 21st century

At the heart of all these debates is a legal positivist conception of human rights which sees them essentially as norms emanating from the state, to be enforced by the state, without interrogating the concept of the state and law implicitly adopted. Which state and whose law, operating in whose interests? Historically, in places as diverse as 18th century France and 20th century South Africa, human rights language and rhetoric have been about political struggle for legitimacy. Groups claiming a specific legitimacy may then seek to consolidate their positions by adopting laws and bills of rights to support them. It is a myth that rights are abstract, decontextualised, predeclared, inherent entitlements. It is social action or individuals and movements making claims within concrete social contexts that bring rights into being and give meaning to them.

The dominant conception of human rights today focuses on the declaration of general individual rights and their legal enforcement through the state and international political and economic pressure. The emphasis is therefore on the enunciation of rights in legal documents and holding states to account through the domestic legal system or at the international level. Yet, all human rights instruments leave the state the ultimate loophole of determining what is reasonable, in the public interest, and for the promotion of welfare and democratic values, and justifying its actions accordingly.⁴³ This presupposes that the state is responsible for violation, capable of preventing it and/or capable of providing the goods or services being claimed. The current ideology of neoliberal globalisation with its emphasis on privatisation and free markets is in direct conflict with this concept of human rights. The state is increasingly withdrawing in many places from providing social services for its citizens, and in 'Southern' countries being stripped of its control of the resources it needs to be an effective provider. Civil law or the law of torts is inadequate to protect individuals from neglect by the private sector. What meaning has the right to education and health for poor people where education and health services are privatised and beyond their reach? Who would they sue for lack of provision when that lack has been legitimised and institutionalised in an unequal market place?

The state is now being called upon to create an enabling environment for private actors to operate freely and to regulate the conflicts that occur. How it deals with the conflicts that occur due to lack of provision for the poor is a function of the balance of power and interests in any given society. The state itself is thus a site of contestation of power. In 18th century Europe the emergent bourgeoisie wanted freedom from the authority of the aristocracy and the church, expressed in terms of civil and political rights or liberties, and an enabling environment for the development of capitalism in terms of laws and regulations centred round individuals and facilitating the exploitation of natural resources worldwide. A variety of oppressed and disadvantaged groups today want access to resources and provision of services, expressed in terms of opposition to capitalist monopoly. This requires changes in mechanisms for the allocation of resources in society as well as a rethinking of the role and structure

⁴³ See, for example, Article 4 of the ICESCR, and Articles 4(i), 6(i) and 9(i) of the ICCPR.

of the state, not an embracing of the laissez faire state and existing monopolisation of those resources by a few.

What Now?

The clamour for the actualisation of economic, social and cultural rights and the right to development, as well as calls for a concept of 'composite'⁴⁴ rights or an integrated approach to understanding human rights⁴⁵ emanating from scholars and some constituencies in countries of the global South, are radical and in conflict with the current ideas of fragmented rights and liberties, as well as with technocratic rights-based approaches to development earlier discussed.⁴⁶ The focus in this increasingly audible discussion has shifted from formal equality to substantive equality. This requires a better articulation of concrete substantive goals sought by movements and groups, as well as a different understanding of rights as strategy rather than goal. Today, people all over the world are demanding a more meaningful democracy and democratisation of society. They are demanding access to land and other resources, participation in decision-making, and more harmonious (less exploitative) relationships with each other and the environment⁴⁷ – the recognition of rights as well as responsibilities.

The dominant, state-centric concept of human rights and the system of adjudication that goes with it cannot accommodate all these demands without drastic changes. The centrality of debates on values and legitimacy to human rights and the political nature of human rights struggles are becoming evident. The focus now needs to be on how to transform the contexts that bred these struggles and conflicts, in order to reduce them and promote a more harmonious social consensus based on more equitable sharing and allocation of resources.

Rights assertion is the language and mode of expression of conflict situations and its centrality is an indication of the pervasiveness of conflict or breakdown of consensus in a society. The assignment of formal rights typical of human rights law and discourse is the expression of the dominance of market relations and commodification of all things, masking exploitative, unequal relationships and dominant interests that influence the assignment of values in society. The outcomes of rights adjudication is an indication of these relationships. One party wins and the other loses, leading to a delegitimisation of one set of claims. They are rarely called upon to give and take or to share.⁴⁸ Massive inequalities resulting from historically exploitative relationships are the bedrock of denials of particular interests of individuals and whole groups such as indigenous peoples, women and workers. They are offered the panacea of formal equality or human rights in a highly unequal market place. Sometimes they mistake it for their substantive claims of rights and are temporarily distracted, until they find that their situation is not improving or is in fact deteriorating.

⁴⁴ Shivji, Issa, 'Constructing a New Rights Regime: Promises, Problems and Prospects', *Social and Legal Studies*, Vol. 8, No. 2, 1999, pp.253-276.

⁴⁵ Gutto, 1992.

⁴⁶ See p.X.

⁴⁷ Peace movements, indigenous peoples movements and environmental or earth justice movements are examples of this.

⁴⁸ There have of course been some modifications to this in arbitration and alternative forms of dispute resolution, and there is room for change in the approach of human rights tribunals.

Vast differentials in access to resources and its historical underpinnings are increasingly being recognised and challenged, and better terms of trade in the international system or a new international economic order demanded. This is evident in calls for affirmative action, reparations for Africans affected by the slave trade, as well as for expropriation of property and disruptions in indigenous communities in North America. Corporate concentration and lack of accountability are also being challenged and participation in decision-making at all levels from the local to the global is being demanded by groups and movements. These take the form of substantive claims for land, work, food and fair trade, as well as state and corporate accountability for allocation and use of resources and for pollution, among many others. Such claims of entitlement offer an alternative to abstract and decontextualised rights favoured by fundamentalists and should not be sidetracked into being reinterpreted as such by them.

In conclusion: What Next and How Next? The quest for a universal basis of entitlement

The Western liberal human rights paradigm that posits human rights as emanating from the state and promotes a specific form of state, based on dominant economic interests, is facing numerous challenges and is in crisis. Its content is expanding to a point where it is threatening its very form and its proponents are hanging on, resisting attempts to transform it and returning vigorously in other guises to its 'fundamentals'. But this fundamentalism continues to be challenged.

The existing global system is an abrogation of integrated human rights. It has consolidated the priorities and interpretations of an elite focusing on market mechanisms and the right to private property or to monopolise resource allocation. This elite of persons, groups and states also arrogates to itself the right to monopolise global governance through the UN, to facilitate the activities of large private corporations, and to decide what is right for the majority of people, irrespective of their opinions or consent, and in spite of their resistance⁴⁹. This system needs urgent reform to overcome its inability to promote human dignity and worth and its resultant crisis of legitimacy.

As earlier stated, there are many indications that pressures for reform towards a more equitable economic and social system are mounting, from village councils to the UN. The process of change is underway in different parts of the world although it faces many challenges. Already, people are seizing the right to freedom of movement in search of livelihoods, demonstrating against war, resisting environmental damage and challenging the state and corporations in the oil and nuclear power and armaments industries. Calls for sovereign national conferences, referendums, decentralisation of power through local government, reform in corporate governance and accountability, as well as reforms in global governance through the UN, are also cases in point.

⁴⁹ The demonstrations against the war in Iraq and the growth of the international peace movement since 2004 are an example of this resistance.

Serious dialogue towards the building of a new social consensus is very much needed. So also is a change in concrete conditions – a bridging of real differences in access to resources, economic interests and values. Recent examples of such processes, after protracted violent conflict, are to be found in South Africa and Rwanda. It is evident that this dialogue is fragile, threatened in part by the onslaught of global capitalism (with its concentration of corporate and political power) and the liberal democratic ideology that accompanies it and provides the illusion of equality, participation and justice for all.

Around the world in many cultures there still exist local or indigenous institutions that provide alternative ways for ensuring that entitlements to basic needs are shared and maintained. These often build on community responsibility and user rather than ownership rights. They usually have elaborate and sophisticated checks and balances to prevent concentration and misuse of power. Many of these systems of governance have been weakened and transformed as a result of the colonial experience in Africa, the Americas, Asia and Australia but enough evidence of them remains to build on in constructing modern, alternative systems. They are proof of the human capacity to create nurturing societies based on values other than the profit motive and the accumulation of material wealth at the expense of others, which can be a source of inspiration for economic and social reform. The growing movements for cultural affirmation and the development and valorisation of local and indigenous knowledge are trends towards taking people's participation seriously and decentralising power.⁵⁰

Decentralisation of power and control over resources would also have a profound effect on the media and systems of education. Participation of more interest groups in these critical processes of knowledge creation and information dissemination is crucial to social change. Notwithstanding the trends in this direction identified above, the immediate prognosis is not so good. Observable trends are towards growing concentrations of resources and power in the hands of a few, especially in this sphere of knowledge creation and information dissemination.

Human rights was an idea that was used by the emergent bourgeoisie in 18th and 19th century Europe and the United States to mobilise people for the tremendous changes in economic and social organisation that took place in that period and for consolidating their gains thereafter. It now needs to make the transition to being an idea that mobilises people in today's global village for changes beyond corporate capitalism, multiparty democracy and formal equality, to more fundamental changes in allocation and use of resources as well as processes of democratisation required to guarantee human wellbeing, peace and security.

It is a time for broader concepts of human rights which recognise and embrace popular perceptions and understandings of needs and entitlement around the world, within the framework of intra and international interdependency, responsibility and co-operation, and for a response to crises and conflict in terms of genuine social dialogue, mediation and co-operation. It is time to move

⁵⁰ See, for example, the discussions in the special issue of *Africa Development*: 'All Knowledge is First of All Local Knowledge', *Africa Development*, Vol XXX, No. 3, 2005.

beyond a fundamentalism that seeks to maintain the status quo and to control, restrict and silence active participation in the process of defining legitimate entitlements needed for human wellbeing and dignity. The challenge of building a new social consensus is the challenge of people all over the world, organising and empowering themselves to contest and change existing concentrations of resources and power in the hands of a few, exploitative relationships of control and the assignment of values and legitimacy based on them. It is the challenge of people devising mechanisms for sharing resources and co-operating to use them. For new language, concepts and consensus on meaning and interpretation will only emerge from new, more democratic and peaceful forms of interaction.