

RIGHTS IN DEVELOPMENT – 2003 YEARBOOK

INTRODUCTION

In February 2004 the World Commission on the Social Dimensions of Globalization released a lengthy report that, while pointing to the benefits of free trade, argues that globalization has also fuelled the polarization between its winners and losers both within countries and without. According to the Commission these deepening differences are creating imbalances that are “morally unacceptable and politically unsustainable” and globalization has taken place in an “ethical vacuum, where market success and failures have tended to become the ultimate standards of behaviour”.

Persistent and growing poverty is endemic to the countries in Africa, Asia, Eastern Europe and Latin America, and amongst the people in these countries as well as of countries of the developed world where the Commission identifies the losers as those whose jobs are moving to countries with lower wage regimes. These findings reflect poorly on five development decades that have brought great benefits to many but also great losses to many more.

This perception of the inequality and inequity that are at least partly brought about by traditional development policies and practices is not new. In 1986 the United Nations adopted the Declaration on the Right to Development precisely to address this type of inequality and in 1993 at the Vienna Conference on Human Rights the governments of the World re-affirmed that development is an inalienable right. Then in 1995 the World Summit on Social Development situated poverty in the context of under-development, noting that poverty was characterized by the denial of civil, cultural, economic, political and social rights. Most recently the Millennium Development Goals in 2000 were yet another commitment by governments to the establishment of targets for the eradication of poverty through international cooperation and sustainable development.

These insights into the reality of persistent poverty and of the increasing gap between rich and poor countries and peoples have gone hand in hand with the realization that

statistically-measured economic growth by itself is not sufficient to address the problem and that the outcomes of a rising tide that raises all boats are meaningless to those whose boats leak or who do not even own one.

The days are gone when development professionals could confidently assert that the model of the Marshall Plan designed following World War II could bring about the same results in developing countries in Africa, Asia, Eastern Europe and Latin America as it did in the reconstruction of Europe and Japan. It is no longer demonstrable that industrialization and economic growth by themselves will bring about development. Ever dwindling development assistance is a legacy of the free-market fundamentalism that was embraced so readily by many governments in the developed world in the early 1980s. Another is the unsustainable debt burden on developing countries that has been the result of some of the more controversial policy prescriptions of the international financial institutions.

The problems associated with these policies and the necessity to explore new ways of delivering development was brought into sharp focus with the 1997 economic crash in East Asia. It was not just that levels of poverty which had been successfully lowered for two decades suddenly rose to near thirty-year highs, but that the social costs of the ensuing turmoil and instability brought home as never before the importance of a mode of development that would address poverty as a matter of priority. The newly emerging frameworks such as the UN Development Assistance Framework, the World Bank's Comprehensive Development Framework and the relatively recent Poverty Reduction Strategy Papers all point to the growing realization that traditional development policies and practices have not proven as effective as expected. Indeed, in some cases these have had an actual negative impact on development, as Tone Bleie points out in this volume when she refers to the aid dependency and incremental and unsustainable growth of the bureaucracy and of civil society organizations in post-1990 Nepal brought about by some well-meaning but wrong-headed assumptions of the donor community.

Poverty as a mission statement for development is, of course, not new. As early as the 1960s World Bank President Robert McNamara tried to refocus the Bank towards poverty alleviation by looking at the factors that caused the failure of markets in

developing countries. And nearly twenty years ago the Declaration on the Right to Development proclaimed in Article 1.1 that “all people are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”. In this formulation the collective nature of the right to development is akin to established rights such as the right to self-determination and the right to a sustainable environment. The challenges remain how to “operationalize” the right to development and how the links between poverty, human rights and development can be used to bring about sustainable change. These are the challenges that the 2003 Year Book attempts to address.

The “human rights approach to development” is a term that comes up in many of the contributions to the Year Book. Since the early 1990s development agencies have been using the term in devising and implementing their projects. During this period many UN-affiliated and bilateral donor agencies and many NGOs have adopted the approach as their official policy.

A common definition has emerged from this trend. Manfred Nowak in his essay describes the human rights approach as one that is based “on the explicit recognition of a legally binding normative framework with rights, entitlements, duties, responsibilities and accountability”. A rights-based approach to development integrates the norms, standards and principles of the international human rights framework into the plans, policies and processes of development. The goal, as stated in the 1986 UN Declaration on the Right to Development, is the constant improvement of the well-being of the entire population of a country and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits of development.

It is important at the very outset to note the practical dimensions of a human rights approach. The approach is a *tool box* available to rights claimants, human rights advocates and development actors that provides the means to better analyze poverty, to hold duty bearers accountable for development and to empower people to claim their rights. The rights-based approach starts with the idea that the denial of human rights is both the cause and the outcome of poverty and marginalization. It is by

basing policies, plans and actions on the human rights framework as codified under international law that poverty and disadvantage can be reduced and eventually eradicated. But policies, plans and actions by governments are not sufficient if they are merely imposed from above. To ensure the sustainability of development interventions not only must people be involved in the decisions that affect their lives and be given access to the means to realize their rights, they must also become aware of their legal rights in order to be able to hold the duty bearers accountable. This is the sense in which the rights-based approach speaks of “meaningful participation”.

Ever since the 1980s development agencies – including the multilateral agencies – have proudly announced that their policies and practices have been contributing to the realization of economic, social and cultural rights, thus conflating economic growth with economic rights and social development with social rights. This assertion, stemming as it does from a lack of awareness of the precise legal obligations of states codified in the International Covenants, has not been helpful in elaborating on the right to development. The confusion is compounded by the lack of an enforcement mechanism related to the international Covenant on Economic, Social and Cultural Rights in contrast to that available under the International Covenant on Civil and Political Rights.

The legal dimension of the human rights approach is constrained by the nature of the international instruments themselves. The Optional Protocol to the International Covenant on Civil and Political Rights enables individuals to bring complaints to the appropriate Committee after all domestic avenues have been exhausted. For example, in his treatment of self-determination as a means to enforce the right to development Scheinin cites *Ominayak (Lubicon Lake Band) v. Canada*, *Länsman v. Finland* (Nos 1 and 2), *Mahuika v. New Zealand* and *Gillot v. France* heard by the Human Rights Committee. On the other hand the International Covenant on Economic, Social and Cultural rights does not yet have a complaints mechanism and therefore the accountability of the state is manifest only in States parties’ periodic reports and the comments and observations of the Committee without the possibility of legally-binding precedent-setting judgments.

In contrast to the International Covenant on Economic, Social and Cultural Rights, limited complaints mechanisms are available in the African Charter and the American Convention on Human Rights. However, there are relatively few precedent-setting cases and this explains the repeated reference in this volume to some of the most prominent ones including *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* in the African Commission of Human and People's Rights. Indigenous groups as identifiable groups that are often grievously damaged by development initiatives and whose right to development is most clearly denied are most often those featured in these cases.

Regardless of the question of legal enforceability, the periodic reports to and the observations and comments by the UN human rights committees do serve two important functions in the human rights approach. Having identified states' shortcomings they enable more accurate analysis and therefore the identification of priorities, and they provide advocacy tools for those claiming their rights. Thus while the International Covenant on Economic, Social and Cultural is at this stage wanting in the legal arena – an Optional Protocol is still some years away – it is extremely useful in the human rights approach for the identification of human rights objectives, for benchmarking and for advocacy. Needless to say, the fact that there is no complaints mechanism, however weak, does not void the obligations of states that are a party to the Covenant to respect protect and fulfil the inalienable rights enumerated in the treaty.

The legal status of the *right to development* is also addressed by a number of the contributors in the Year Book given that certain aspects of the right need urgent clarification. First, the right is not enshrined in a treaty, so there is no accepted legal definition in international law. Second, since the Declaration refers to the entire population of a country it becomes a legal quandary to enforce the right when the obligation for its realization (as with other human rights) lies with the State which itself represents the population. Finally, the composite nature of the right produces varying interpretations of the precise nature of the duty bearers and of the right holders so that the entitlements under the right remain unclear.

The solution to these problems essayed in the Year Book lies in looking at the interdependence of human rights and, as Martin Scheinin [argues] [has argued elsewhere (cite source if article committed)], substantive human rights provisions in international law can be used to address development-related claims. Accordingly Scheinin is opposed to a new and different monitoring mechanism for the right to development and urges the exploration of existing legal treaties to enforce the obligation of States for the realization of the right to development. Together with other contributors, he takes common Article 1.1 and 1.2 of the International Covenants on the right to self-determination – including the right to “freely dispose of their natural wealth and resources” and not to “be deprived of its own means of subsistence” – as the mechanism of accountability and shows how this has been used by indigenous claimants in their cases before the UN Committee on Civil and Political Rights and before regional human rights mechanisms. In this way he contests the claim that the right to development is about imperfect obligations by demonstrating that a “development-informed” reading of human rights treaties can enable their use in the implementation of the right.

Self-determination is also the focus of the contribution by Solomon Ayele Dersso who traces the legacy of the colonial experience in explaining ethnic conflicts that have resulted in inequitable development in Africa. Dersso shows how these conflicts are a legacy of the arbitrary partitioning of territory by the colonial powers and their exploitative practices. This legacy was carried on by the state systems inherited from the colonial period and aggravated by the uneven modernization between trade-friendly borders and the hinterlands. Dersso looks at the differences between internal and external self-determination in international law and practice and goes on to demonstrate the potential for the realization of group rights through a focus on self-determination that takes account of each local context, in this case Ethiopia and South Africa.

Markku Suksi’s approach on the right to self-determination also focuses on the difference between internal and external self-determination taking, the cases of *Katangese Peoples’ Congress v Zaire* and *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* as his point of departure. He examines the legal precedents from the perspective of participation in

decisions that affect economic rather than political self-determination in an attempt to link this to the right to development of the Katangese in Zaire and the Ogoni in Nigeria. Suksi points to the presence of self-determination as well as rights associated with development in the African Charter of Human and People's Rights and argues that the two cases he cites give some hope that sub-national institutions will eventually through genuine participation be implicated in the realization of the right to development.

In order to identify clear human rights objectives, the human rights approach enables a more accurate identification of the human rights shortcomings facing the poor and disadvantaged so that in collaboration with them it becomes possible to design plans of action for the short, mid and long-term. The success and effectiveness of development interventions can then be measured against the human rights objectives and if necessary complaints may be lodged with the appropriate mechanisms.

This calls for a human rights situational analysis that individually examines the status of the realization of each of the rights in the International Bill of Rights. It is through such an analysis that clear and achievable objectives can be identified, together with benchmarks that can be used in implementation. Such a human rights analysis will look at the state obligations to respect, to protect and to fulfil each right, discrimination in policy and practice, the priorities of those who are discriminated against, the opportunities to bring about change and the bringing to account of violators.

The nature of state obligations is thus of major concern in the Yearbook. For Hugo Stokke the emphasis of free-marketeters on reducing the size of government and the increasing influence of private actors on development undermines the ability of the State to meet its human rights obligations. With the spread of globalization and under the influence of the international financial institutions the possibility of appeals to international human rights law is diminished while the growing influence of non-state actors leads to ever greater reliance on international private law to settle claims. Drawing on the definition of rights as first and foremost a matter of self-provision, Stokke argues that the primary obligation of the state should be to refrain from interfering with the individual's self-provision and only in cases where the latter is

impossible should the state be obligated to assist and fulfil – in the main, economic, social and cultural – rights. But since its ability to do so is being curtailed, state obligations might be passing on to the private sector.

Róisín Hennessy on the other hand is more concerned to see that non-state actors are also seen as having obligations. Recognizing that governments remain the principal duty bearers she focuses on the international obligation to cooperate for development and proposes that the treaty bodies demand that developed countries include in their periodic reports the measures that they have taken to ensure that the international organizations which they control – or ought to control – implement policies that respect, protect and fulfil human rights. She also touches on the possibility of trans-national corporations being held accountable in domestic law and refers in particular to the Alien Tort Claims Act in the US as a model for this type of accountability.

The objectives arising from a human rights analysis that takes account of the state obligations might include legislation or the repeal of laws that impact on the realization of specific human rights, the abolition of administrative practices that discriminate against certain sectors of society, the pursuit of companies that violate the rights of their workers, the provision of information to institutions responsible for investigating human rights violations, advocacy targeting the providers of development assistance, working with communities to demand specific entitlements from local authorities, to a dialogue on the allocation of resources to the realization of specific rights.

A comprehensive human rights analysis also enables the setting of relevant measures of success in achieving human rights objectives. These will address not only overall quantitative trends – for example, the number of people living below the poverty line – disaggregated for gender and disadvantage; but also qualitative improvements through measuring the space available for the voices of those whose rights are most denied to be heard at home and abroad.

One of the main new features of the human rights-based approach is its focus on the accountability of the duty bearers. It is governments – national, regional, local – who have the duty to respect, protect and fulfil human rights. When they willfully fail to do

so they are in breach of international law. The challenge is to identify mechanisms by which this accountability can be assured and methods to be used so that, not only can governments be brought to account, but also that they take steps to meet their obligations for the realization of human rights for all.

It is not unusual in international debates about development for the “value added” of the human rights approach to be brought up. Using the language of economics, development professionals in particular demand the evidence that the approach works before they are prepared to put it to the test. By contrast proponents of the human rights approach argue that it provides the tools for better analysis, better identification of priorities, in short, better development. In both cases there are two factors that the approach shares with all aspects of practical human rights work: its basis in international law allows duty bearers to be held accountable through whatever legal means are available and the internationally accepted human rights standards and norms provide the basis for domestic and international advocacy.

Mechanisms of accountability fall into two broad categories: domestic and international. However, in many countries the courts are neither fair nor impartial and the other instruments of state are misused for the benefit of ruling elites. Even in these cases, reference to existing commitments made by governments provides a powerful tool for advocacy both within the country and without. At the international level, governments that provide development assistance – either for specific projects, as budget support or through multilateral agencies – are also bound by the obligations to respect, protect and fulfil human rights.

The human rights analysis will have revealed the shortcomings in the realization of each specific right and the measure to which the government has not met its obligations to respect, to protect and to fulfil each of the rights in the International Covenants. The analysis will thus also have identified the most vulnerable groups and thus the priorities for advocacy and action. As in all planning mechanisms, the human rights approach needs to take account of objectives that can be immediately met, those that will be achieved in the mid-term and those that will be achievable in the long-term. This is recognized, as Nowak points out, in International Covenant on Economic, Social and Cultural Rights Article 2 where it is stated that human rights

can only be realized progressively because obstacles to the full realization of rights will arise from such factors as resource constraints, lack of capacity, institutional challenges or infrastructure. However, while governments will not realistically be in a position to meet all of its obligations simultaneously they are obligated to take action immediately on the most pressing human rights issues.

The types of human rights objectives that might stem from a comprehensive analysis are dependent on each context. The Year Book contributors cover a broad range of these. Mustaniemi deals with amendments to or the repeal of legislation and the formulation of new laws to protect specific rights in her reference to Malawi and Tanzania in the context of the rights to work and education. Bleie touches indirectly on changes in the practice of Nepalese public officials that affect the realization of rights including discriminatory regulations, and the exclusion of certain sectors from access to services. One implication of Nowak's contribution on poverty reduction strategies is the creation or improvement of existing institutions such as appeal courts, human rights commissions or other institutions overseeing the performance of governments and non-state actors. Koskinen's treatment of the land rights of women highlights changes in policies and budgetary allocations either for affirmative action or to provide basic services to those who are most deprived. Both Dersso and Suksi call for the creation of institutions and institutional arrangements so that communities can identify their needs, are able to access basic services and are able to voice their demands unhindered by government obstruction or fear of others.

The evolution of the human rights approach to development has been paralleled by the emergence of poverty reduction strategies in the context of development. Debt relief and the provision of development assistance to developing countries has now been made virtually conditional on the formulation of these poverty reduction strategies monitored by the World Bank and the International Monetary Fund. Bilateral donors are taking their lead from the evaluation of the two multilateral institutions and PRSPs have become *de rigueur* for governments seeking international loans and grants. As Nowak points out in this volume, although "the widening concept of poverty comes close to a deprivation of human rights, both international financial institutions have so far avoided adopting a human rights approach to poverty reduction strategies". In his contribution Nowak outlines the importance of using the state obligations to respect,

protect and fulfil each right as a guide to assess whether a state is in breach and to devise appropriate interventions including those targeting non-state actors. He takes the right to education as his example and concentrates on the need for each state to formulate action plans that will be based on disaggregated information that takes account of gender, discrimination and corresponding marginalization.

Yet there is no guarantee that such an analysis will be able to present either a comprehensive or practical solution to the challenge of realizing the right to education. As Maija Mustaniemi, points out the right to education is an empowerment right that is instrumental in enhancing the enjoyment of other individual rights and freedoms. However, simply enshrining the right in constitutions or legislation is no guarantee that it will be realized; the abolition of formal tuition fees may impact negatively on the quality of education while the maintenance of non-tuition costs can put education outside the reach of poor families. The conflict between the need for children to assist their family to survive and their right to be educated is starkly brought into focus in Sub-Saharan Africa. Whether assisting their farming parents in the field, performing household chores or augmenting the family income by laboring for landlord or factory owner, children contribute to the family budget and the family can not afford relinquish this contribution. Mustaniemi opposes another right instrumental for the enjoyment of other rights to the right to education: the right to work including in safe and healthy working conditions. She argues that in order for the right to education to be realized it would be far more productive to regulate the time and conditions of the work of children than prohibit them from working and to attempt to coerce them into attending school at an unreasonable sacrifice to themselves and their families. Protecting children at work and regulating their working hours will allow time for non-formal education and make their school attendance more sustainable.

The lesson is that to operationalize the right to development and to formulate appropriate poverty reduction strategies there is a need to analyze the status of each of the rights in a given context, to assess the degree to which each is respected, protected and fulfilled, and to do this in a participatory manner that is more than consultative. At the same time, however, the economic dimensions of the costs of meeting the state obligations must be borne in mind. This points to the urgent need for development

actors to become human rights literate and to be prepared to draw on the body of and commentary on international law while human rights advocates need to broaden their horizons to demand more than formal adherence to the international human rights framework.

The way to implement the right to development as a collective right then is to explore how each of the rights and the state obligations that flow from them can be realized. The collective right to self-determination, a feature of both Covenants that appears in the Declaration of all the UN conferences in the nineties, is directly relevant to the development of indigenous peoples as shown by Scheinin and Dersso. Alessandra Lundström and Kristian Myntti provide an additional gloss by linking development that affects indigenous peoples to the right to food and the right of participation as their starting points.

Lundström points out that indigenous peoples are most vulnerable with respect to the right to food as development encroaches on their livelihoods. Whether it is through the loss of land, deforestation or forced resettlement due to mineral and oil exploration, the ability to produce, conserve and distribute food is increasingly curtailed and leads to food insecurity. These are of course the characteristics of the right to food that have been clarified by the Committee on Economic, Social and Cultural Rights and their identification in the context of development as it relates to indigenous peoples is more evidence for the necessity for an analysis of poverty through a human rights prism. In this context Lundström refers to calls by the UN human rights system for increased access to land and agrarian reform as the means to ensure the right to food of indigenous populations. She refers approvingly to the “Zero Hunger” project of the Brazilian Government that, while not using explicit human rights language, adopts a human rights approach by identifying vulnerable groups, addressing discrimination and accepting the responsibility of the state to coordinate the appropriate interventions. As with most of the other contributors she cannot but acknowledge that the regional human rights mechanisms – the Inter-American Commission on Human Rights and the African Commission on Human and Peoples’ Rights – have stronger complaints mechanisms than the Covenant and quotes the decision on the Ogoni people positively as one that specifically refers to the right to food of an indigenous population.

Myntti also takes specific rights as indicative of issues of development relevant to indigenous peoples in the development context. He argues that a wide-range commitments in UN Declarations and by international institutions have asserted meaningful participation in development projects as a right and identifies the right to information as critical for the realization of the right to participation. Yet his contribution leaves open the question as to the enforceability of such a right. The World Bank's emphasis on participation, especially in the formulation of Poverty Reduction Strategy Papers, has been contentious for some time. While originally welcome by NGOs as providing new opportunities for influencing government development policies, the nature of the participation in PRSPs and development projects affecting indigenous peoples has been criticized widely for the superficial nature of the consultation. In the typology listed by Myntti, all too often public participation remains in the area of consultation – the opinions of different sectors of the public are sought, but seldom heeded.

If indigenous peoples' participation in development is often tenuous, women's participation is most often absent. It is not only in Africa that cultural beliefs about women's role in society excludes them from taking part in and benefiting from development. One of the means by which women's participation could be enhanced is through their economic empowerment, and this is the argument that Päivi Koskinen posits in her treatment of the position of women and land rights in Tanzania. She shows how women are systematically excluded through inheritance and marriage laws from owning land and argues that title to land could guarantee financial independence through credit and banking guarantees. In her view economic clout would be followed by political influence and the resulting empowerment would be manifested in their participation in development. One outcome of this empowerment could include an improvement in female nutrition and health, which in her words would improve "in turn the enjoyment of other human rights such as the right to health and the right to food". Once again the human rights principle of non-discrimination is linked to development and Koskinen relies in the main on the Convention on the Elimination of All Forms of Discrimination Against Women to make her case. At the same time she points out that legislation is lacking and that cultural norms preclude a rapid end to discrimination.

We return to the findings of the World Commission on the Social Dimensions of Globalization. In the era of regulations whose main purpose is to govern the conditions for the free market, development agencies are struggling for relevance. The growing realization that poverty and dispossession lead inevitably to the undermining of a favourable economic climate has resulted in most becoming committed to poverty reduction as the main development objective. For poverty is the main basis of conflict in the globalized world.

If indeed, globalization is perceived to be taking place in an “ethical vacuum” then the international human rights framework provides the means to banish the vacuum. There are some major hurdles to be overcome in the twenty-first century to reinforce the human rights regime and to temper the impact of free market fundamentalism. The growing tendency among some developed countries to once again use human rights for their national interest and as a political tool is of major concern. The imposition of policies designed to benefit the developed world rather than the developing countries have produced a backlash seen in Seattle, Genoa and Mumbai. However, these developments are taking place at a time when the World Bank has accepted that economic development on its own is not sufficient and in a context in which the President of the Bank can state publicly that the Bank has to look at the implications of the human rights approach. An increasing number of trans-national corporations are adopting codes of conduct that recognize that human rights violations are bad for business.

Globalization is not the sacred preserve of these corporations but has brought together human rights advocates in a common cause to temper the impact of economic change. Even though the rhetoric of small government pervades development debates and poverty reduction strategies, the pressures for state intervention in many areas remain. The potential trade war between Europe and the US demonstrates that the necessary regulatory powers of the state must remain in place, if only to preserve the economic interests of the nation state. Civil society organizations in both developed and developing countries are demanding a seat at the table and the threat of massive instability has brought the realization that the seat must be provided.

The Year Book is evidence for this trend. The contributions exemplify the many strategies available to lawyers, academics, civil society organizations and human rights bureaucrats to draw the link between development, human rights and poverty and to act to bring about change. Through a documentation of case law, human rights analysis, policy dialogue and precedent-setting, the contributions in the Year Book provide additional tools for the realization of the right to development.

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