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# Human Rights and Development in Africa: moral intrusion or empowering opportunity?

*Giles Mohan and Jeremy Holland*

## Abstract

Throughout the 1990s the debates about human rights and development have increasingly converged. The article asks *whether the emerging human rights-based approach to development, honed in the period of revisionist neo-liberalism, can deliver meaningful improvements to the African crisis?* It begins by outlining the evolution of the rights-based development agenda in order to understand how the present agenda is defined. The next section examines the theoretical underpinnings of the current rights-based development agenda and summarises two recent reports which place such concerns at their centre. From there we examine the implementation of rights-based procedures in Africa. The next section assesses the moral and practical implications of the rights agenda for Africa and we conclude by arguing that the emphasis on economic and developmental rights should be welcomed, because it raises the possibility of cementing the right to a decent standard of living. However, the potential exists for the rights-based agenda to be used as a new form of conditionality which usurps national sovereignty and by handing the responsibility for defending rights to authoritarian states the process does little to challenge the power structures which may have precipitated rights' abuses in the first place. Finally, the emphasis on universal rights, as defined through largely Western experiences, limits the relevance of rights to local circumstances and thereby effects another form of Eurocentric violence which seeks to normalise a self-serving social vision. Hence, only by embedding discussions of rights in the locally meaningful struggles that confront impoverished Africans and by promoting broader and direct participation which, crucially, promotes self-determination can a rights agenda more thoroughly promote African development.

## Introduction

"human rights are not, as has sometimes been argued, a reward of development. Rather, they are critical to achieving it" (UNDP, 2000: iii).

"human rights in the 1990s, to a greater extent than ever before, set a norm that regulates the relationship between state and society" (Sano, 2000: 741)

"For many people living in the South, international human rights are understood increasingly as a set of values that support the expansion of global capital, exploitation and control" (Evans, 1997: 92)

Throughout the 1990s the debates about human rights and development have increasingly converged. Previously, much of the debate around and practice of human rights was confined to the 'first generation' of human rights regarding personal or private rights; sometimes referred to as political rights. These are essentially 'negative' rights in that a person's freedom should be protected from the actions of other individuals, groups or the state. The struggle has been to enshrine these principles in law, such as a bill of rights, so that a person has the legal means with which to defend their freedom. Such bourgeois ideals grew out of the American and French revolutions of the 18th Century as well as the liberalism of the Enlightenment. Subsequently, demands have been made for more positive human rights regarding broader social justice, such as labour rights, and tangible welfare benefits, such as housing and health care. Such rights,

sometimes referred to as economic, social and cultural (ESC) rights, are more socially-defined, in that they carry an obligation for society-as-a-whole to ensure a minimum level of well-being for all. Clearly, the two sets of rights may be incompatible, especially for those who see well-being guaranteed through atomistic self-interest as opposed to communal or humanistic principles which emphasise equality. So, the rights arena has been forged out of competing political struggles in specific social and historical circumstances (Shivji, 1999).

Alongside these issues, the major development agencies have pursued a broad anti-poverty agenda, albeit one that is increasingly driven by a neo-liberal market logic. In the post-war period, the international human rights process, led largely by the United Nations, has sought to promote the indivisibility of political rights and economic, social and cultural rights. Since the early 1980s, the adjustment era has seen most Third World countries disciplined via debt conditionality with an emphasis on market-based development. This reduced the scope of the state which has been actively reformed to support marketisation. However, the impacts on poverty have been questionable so that some development agencies began to re-assert the need for welfare protection and a more active role for the state.

It is here that the rights agenda has become more mainstream, because it places obligations on the state, amongst other actors, to ensure a minimum level of well-being for all. This differs from the 'Basic Needs' of the 1970s, because the poor are encouraged to participate in defining and securing their welfare needs rather than being passive recipients of aid. As DFID (2000: 1) asserts, human rights "provide a means of empowering all people to make decisions about their own lives rather than being the passive objects of choices made on their own behalf". Two related issues arise here. First, is that multilateral and bilateral donor interventions have often usurped sovereignty through debt leverage, so will an emphasis on universal human rights be used as another means of deepening control over developing countries? Second, do the twin discourses of market hegemony and the universality of human rights involve an implicit erasure of cultural specificity and the denial of non-market alternatives to development?

So, given that the human rights agenda has important implications for democracy and sovereignty, and that the donors are championing 'rights-based development' (RBD), it seems appropriate to discuss these in an issue on governance in Africa. In this article we want to explore the question of *whether the emerging human rights-based approach to development, honed in the period of revisionist neo-liberalism, can deliver meaningful improvements to the African crisis?* This article begins by outlining briefly the evolution of the rights-based development agenda from its Enlightenment roots to the present day in order to understand how the present agenda is defined. This has seen the emphasis expand from a personal and civil focus to an international and 'developmental' one. The next section examines the theoretical underpinnings of the current rights-based development agenda and goes on to summarise two recent reports which place such concerns at their centre. From there we give an overview of the state of play of implementing rights-based procedures in Africa, as a whole, and in individual African countries. The next section assesses the moral and practical implications of the rights agenda for Africa and assesses both the opportunities and threats it presents. We conclude by suggesting the possible future for rights work in Africa and the research agenda attached to it.

### **Evolution of the Rights-based Development Agenda**

The struggles for rights are rooted in the Enlightenment and the emergence of citizenship. This saw the weakening of the monarch-subject relation and the movement away from particular to universal values. The emphasis was on the individual within society which fed into the

ascendant liberal philosophy of western politics. The French and American revolutions of the 18th Century saw rights enshrined in constitutional and legal terms, the most important being the American Bill of Rights of 1791. These civil and political rights primarily benefited the bourgeoisie and protected them from over-bearing state interference on the one hand and the popular participation that a genuine commitment to social equality requires on the other. Hence, as Ake (1987: 6) notes "(T)he idea of human rights really came into its own as a tool for opposing democracy". Subsequent rights were more socially- and economically- oriented and related to the welfare agenda of the 20th Century whereby the working class could expect a minimum level of protection. The most recent phases of rights have focussed on international solidarity through a social movements-led agenda around such issues as the environment and development. Some have argued (Bobbio, 1996), that we are entering a further phase of genetic rights concerning the integrity of our basic biological identities. The first two phases in the evolution of the rights agenda were largely confined to western democracies and concerned the relationship between the individual and the state. With the growth of international governance, more Third World perspectives are being recognised (though not always incorporated into it) which is re-shaping the relationship between the individual and the global political order (Sano, 2000). Ake (1987) notes that with this evolution, the human rights agenda has become a little more relevant to the needs of Africans.

Early debates around development and rights revolved around the political rights of people in colonised countries pushing for independence. In Africa, as Mamdani (1996) has shown, citizenship originally applied to the urban areas where expatriate whites were free to pursue and receive a relatively wide range of civic rights denied to the colonised. Some of these rights gradually spread to the African urban élites, but the rural areas were purposefully divided along and governed by customary laws. It is this 'bifurcated state' structure, with its distinction between 'rights' and 'customs' and the association of rights with colonially-derived privileges, that has led to scepticism and apathy by many Africans towards the promises of the 'rights agenda' (Penna and Campbell, 1998).

#### **Box 1: Milestones in Rights-based Development**

- American Bill of Rights (1791)
- UN Declaration on Human Rights (1948)
- The African Charter on Human and Peoples' Rights (1981)
- Declaration on the Right to Development (1986)
- The African Human Rights Commission (1987)
- Vienna Conference on Human Rights (1993)
- Copenhagen Conference on Social Development (1995)
- South African Government's Bill of Rights and the Truth and Reconciliation Commission (1995)
- UNDP Human Development Report (2000)
- DFID's Human Rights for Poor People (2000)

The latter phases in the evolution of rights cover the post-War period and begin with the 1948 UN Declaration of Universal Human Rights which enshrined the principles of universality, inalienability and indivisibility of rights. Subsequent Conventions and regional Commissions extended these principles into more areas of social, political, cultural and economic life. The early goals of the Human Rights movement were drawn out of the horrific experiences of WWII and sought to counter the particularistic and exclusionary racial hierarchy that underpinned Nazism (Shivji, 1999). Such challenges to racially-based discrimination chimed with the

demands of anti-colonial struggles in the Third World so that the human rights agenda was supported by these, soon to be, independent states.

Despite the rapid waning of American interest in the rights agenda (Evans 1995), the debates were hijacked during the Cold War and used as a means of castigating Communism and justifying political, financial and military support for governments who upheld 'proper' rights (Slater, 1993; Evans, 1997). Not surprisingly, this ideologically-charged period saw the continued separation of 'political' from 'economic' rights with the former taking precedence in this global battle over 'ways of life'. For newly independent African countries, the priority was development so that abstract debates about rights had little relevance to this cohort of modernisers who used centralised mechanisms to push through grandiose development plans. The result was that the developmental and human rights discourses tended to evolve separately. More importantly, perhaps, was the conflict that emerged over the question of 'self-determination' (Shivji, 1999). Initially, the right to self-determination was to be all-encompassing and was clearly an antidote to imperialism in all its guises. However, during negotiations in the mid-1960s over two key Covenants, the interpretation of political self-determination was reduced to the eradication of formal colonisation (or colonial-type rule such as Apartheid) while economic self-determination was equated with the demands for fairer trade relations and adequate foreign aid.

The thawing of the Cold War and the ending of Apartheid saw a renewed interest in human rights with people emerging from repressive political structures and demanding economic development alongside political freedoms. Such an environment was ripe for the rights-based development agenda whose institutional architecture had been developing piecemeal for the previous forty years. Sengupta (2000) believes that a consensus now exists over the value of human rights and even suggests that it represents, somewhat ominously, another element in the 'end of history'.

The rights-based development agenda has risen to prominence in parallel with the emergence of social development notions of participation and entitlements that challenged the "technical fix" development paradigm of the 1950s and 1960s and the delivery of basic needs in the 1970s. The adoption of the 1986 UN Right to Development signalled a unification of the civil and political rights with economic, social and cultural rights and a growing political consensus that was strengthened through subsequent declarations on Environment and Development (Rio), Population and development (Cairo), Social Development (Copenhagen) and the Platform for Action of the World Conference on Women at Beijing (Sengupta 2000). The perceived indivisibility of rights became increasingly clearly articulated in the development discourse, as illustrated by the language adopted during the fiftieth anniversary of the Universal Declaration in December 1998 and captured in the phrase "All Human Rights for All" (Maxwell, 1999).

### **Theoretical underpinnings of rights-based development**

"the developmentalists are seeking to reformulate their concerns in the language of rights, while the human rights advocates are taking on board developmental issues without which, they recognise rights-talk can have little meaning to, and legitimacy with the vast majority of the people in the poor countries of the South" (Shivji, 1999: 262)

The current approach to RBD is iterative and evolutionary in that it learns from and builds upon

previous approaches. The move towards RBD has evolved out of the coming together of two strands of development theory and practice which had previously been treated as discrete. On the one hand are human development approaches based around dynamic understandings of poverty and, on the other, human rights approaches based around questions of governance, participation and citizenship.

#### *Dynamic approaches to human development*

In recent years, income or commodity-centred conceptions of well-being have been challenged by multifaceted measurements of poverty, such as that underlying the basic needs approach of the early 1980s. Most importantly, from the 1980s, Amartya Sen (1997) conceptualised poverty in terms of human capabilities –(resources that give people the capability to be and to act) – and entitlements (the set of alternative commodity bundles that a person can acquire in any given societal context). By so doing he posed fundamental questions about the quality of life beyond the possession of commodities; the latter having only “derivative and varying relevance”. Speaking to these debates have been discussions of vulnerability. This is a more dynamic concept concerning the changing experiences in socioeconomic status relating to survival, exposure to risk, defencelessness and self-respect. Accordingly, vulnerability captures some of the multidimensional, dynamic and structural aspects of poverty: “Vulnerability denotes not simple lack or want, but defencelessness, insecurity and exposure to shock or stress” (Chambers, 1989: 1). Whilst vulnerability is not a concept that has been rigorously theorised, or for which generally accepted indicators exist, there are a growing number of conceptual frameworks for analysing vulnerability, including Moser (1998) and Bebbington (1999) and the livelihoods analysis frameworks of DFID (Scoones 1998). Crucially, this provides policy analysts with frameworks for linking entitlements to resources, because they emphasise the structures, institutions and processes that mediate individual, household and community-level access to a range of assets. This politicises the vulnerability discourse and creates analytical space for tackling the policy environment and policy making institutions.

#### *Institutions, governance and participation*

This emphasis on institutional processes links directly with debates around governance and participation (Mohan and Stokke, 2000). The key to RBD is that it attaches political rights and responsibilities to fundamental aspects of human needs and well-being. Gaventa and Valderrama (1999) usefully draw out this entwining of different interpretations of governance and participation. They see two traditions; one driven by community participation and the other by political participation.

The community focused participation is well documented (Chambers, 1983; 1997) and grew out of the realisation that formal state-based development programmes had yielded limited benefits. Since the 1970s, the acceptance of participation has become widespread, but at its base is a belief that development energies lie outside of the state and are built from local knowledge. It relies on relatively closed and homogenising notions of community where participation in decision-making is direct and unmediated by representatives. Political participation, on the other hand, has focused on more formal engagement with the state by individuals or organised groups and parties. These political processes tend to be less direct than community participation and involve elections, lobbying, advocacy and the day-to-day interaction with the local state. The good governance agenda of the 1990s (Leftwich, 1994; Rhodes, 1997) focused centrally on this level of participation.

Gaventa and Valderrama (1999) argue that local governance can benefit from the coming together of these two traditions through 'citizenship participation' which involves "the direct intervention of social agents in public activities" (Cunill, 1997: 77) and has seen renewed interest in decentralisation and political culture. Democratic decentralisation has been a perennial tool in development planning since independence, but it holds an important place in RBD, because for the majority of the poor the state is the local state (Mamdani, 1996; Migdal, 1994) and it is where most citizenship claims will be contested. On the other hand questions of political culture have been re-awakened through debates around social capital. As the World Bank (1997: 114) notes local institutions "are valuable not only for their ability to meet basic needs, but also for the role they play in building trust and a sense of public connectedness among those excluded or alienated from the formal political process". So, "there is thought to be a synergistic relationship between the emergence of strong civil society and social capital formation" (McIlwaine, 1998: 418).

### **The Policy Content of Rights-based Development**

So far we have traced the emergence of RBD and discussed the theoretical ideas underpinning it and the political arrangements believed to be necessary to achieve it. The emergence of RBD discourse from its intellectual origins in poverty analysis and participation has created an operational space for an absorption of the rights agenda within the neo-liberal policy frameworks. This is most clearly demonstrated in the transition from the policy analysis in the World Bank's *World Development Reports* of 1990 and the 2000/01. Both WDRs took poverty as their theme, but while the 1990 WDR emphasised labour intensive growth combined with investment in human capital, the WDR 200/01 signalled a shift in policy analysis towards a concern with "empowerment" through enhanced political participation of poor people in tackling institutional "dysfunctionalities". Even as the ideological climate continues to frame policy imperatives of market provision of goods and services and the attendant erosion of the state's redistributive function, the neo-liberal establishment has successfully repositioned itself with respect to the rights-based agenda by championing accountability, transparency and the role of citizen participation in demanding their rights.

In this section, we look in more detail at the actual policy agenda attached to RBD. We have structured this around different scales and roles for convenience, which reflects a logical division of labour between institutional levels although there are clearly inter-linkages between these scales and levels. At the root of RBD is a liberal belief that development is a matter of personal choice and effort, but that this is tempered by the prevailing social and political conditions. It also adds a strong action-orientation, in that people now have a claim or entitlement on other people and institutions which, if it is socially-accepted or legally-defined, gives people a minimum level of expected well-being. The DFID Report (2000) stresses this 'obligation' as a key feature of the new framework which takes us well beyond basic needs approaches which were passive and treated the poor as helpless victims. It also provides limits on the damage that individuals should be allowed to bear as a result of externalities generated by other activities, no matter how valuable these activities appear to be.

As we would expect, the key documents are replete with lessons and action items, or in the UNDP's vocabulary 'bold new approaches'. Underpinning DFID's policy agenda is a triumvirate of core principles - participation, inclusion and obligation. These involves (2000: 3):

- Participation: enabling people to claim their human rights through the promotion of the rights of all citizens to participation in, and information relating to, the decision-making processes which affect their lives. They acknowledge that action needs to go "beyond and above local-level processes of consultation..(and)..linking poor people's perspectives with national and international policy processes"

(2000: 19);

- Inclusion: building socially inclusive societies through development which promotes all human rights for all people and encourages everyone to fulfill their duty to the community;
- Obligation: strengthening state policies and institutions to ensure that obligations to protect and promote all human rights are fulfilled.

Overlying these principles are policy items which map onto different political institutions and scales. These can be summarised thus:

### *International*

The RBD approach takes into account the globalisation of the world economy whereby the actions of states beyond their borders is factored into any consideration of rights. At the international level there is a need for commitment, co-operation and co-ordination. The international organisations must be committed across the board to enshrining a RBD approach in their operations. At present, some institutions such as the ILO, UNICEF and UNDP have a strong record of incorporating human rights into project design, but others are less stringent on this, so the challenge remains to bring all institutions in line and up to speed. Practical measures for assisting policy-makers to mainstream RBD revolve around the understanding and measurement of the current state of human rights so that much is made of benchmarking and data collection so that decision-makers have a clear picture of how societies are operating with respect to human rights. Another recommendation regards global governance more generally. In response to an on-going critique of the internal democracy of the major institutions the UNDP report argues that "all countries - small and weak - have a voice in decisions" (2000: 85). International civil society also has a key role in advocacy, monitoring, and consumer pressure. Civil society has generally been the motive force behind human rights legislation and its role must continue although this is to be in collaboration with states, international organisations, and corporations which may further erode the 'independence' of civil society.

After building RBD into project design, the next challenge remains monitoring and enforcement of rights abuses. The UNDP are careful to stress that strengthening the rights-based approach in development co-operation must be 'without conditionality'. The emphasis now is on 'transparent and open' economic policy formulation which confers 'ownership' on the implementing country and where the final decision rests with elected officials. There is a recognition that economic actors have a role to play in promoting RBD. The UNDP (2000: iii) begins its report by arguing that "Rights makes human beings better economic actors" so that a vibrant economy, while not guaranteeing human rights, is a requisite. The Report goes on to suggest ways in which economic growth can be balanced with respect for rights. Corporations should not use their wealth for unfair lobbying and should apply codes of conduct in all their operations while states should promote an enabling economic environment which is pro-rights. The DFID (2000) makes similar points, but acknowledges that "(I)t has proved equally difficult to hold transnational corporations themselves legally accountable for alleged human rights violations" (14) although voluntary codes might be a solution.

### *National*

The key role in RBD is given over to the state. The UNDP is at pains to stress that such work must go beyond legislation and actively embed the importance of rights in all social norms. DFID adds that states are not homogenous entities so that different branches of the state must also show commitment, co-operation and collaboration. The branch which has received most attention is the judiciary since it is an impartial and accessible judiciary which can enforce human rights. Such judicial reforms sit alongside those other elements of good governance



which have become accepted elements of policy reform such as increasing bureaucratic accountability and transparency and the holding of competitive elections. However, the practice of democracy must be 'inclusive' and go 'beyond elections' and include minorities and permit an active civil society and free press.

### *Locally*

At the local level the emphasis is on participation, decentralisation and the strengthening of civil society to be more rights-oriented. The onus for this falls on the state to provide "a legal framework that protects the right to participation...the need for continual reform to adapt to changing circumstances...put in place decision-making processes that are transparent and open to dialogue, especially with poor people and poor communities" (UNDP, 2000: 65, 67, & 78). On the other hand civil society must remain vigilant of rights abuses and act as the independent monitor. So, for civil society and NGOs, the emphasis has changed somewhat. The gradual move away from output-based approaches to more process-based ones saw the emphasis shift to capacity building of local NGOs and civil society organisations. With RBD, this has continued, but altered somewhat to enable people to use their rights to ensure their well-being. So NGOs become involved in legal and political literacy, and civic leadership (Fowler, 2000).

### **Implementing Rights-based Development in Africa**

In this section we outline the implementation of the rights-based development agenda in Africa as it currently stands. This is important in order to understand the problems facing African countries in realising a 'universal' project and as a baseline against which to assess the desirability and prospects for achieving these goals. A key tension in the rights debates in Africa has been over the timing, balance and importance of political rights on the one hand and ESC rights on the other. Some see democracy as a pre-requisite for any meaningful development, which raises questions about whether there are particularly *African* human rights and consequently a specific *African* democracy (Maluwa, 1997). Others stress that under extreme poverty and marginalisation, it is economic and social rights which are more important, and that the operation of imperialism has contributed to this underdevelopment. As Shivji (1999: 260) notes "This is a dilemma which expresses itself in the dichotomy between the so-called social/economic rights and political/civil rights on the one hand, and various attempts to reconcile the tension by reconceptualising the jurisprudence of rights, on the other". The rights-based development approach contends that such a dichotomy is not useful, because only if people are empowered to determine their genuine needs will development occur. This, they contend, simultaneously promotes sustainable democracy and well-being.

The formal rights framework in Africa centres on the 1981 African Charter on Human and Peoples' Rights which came into force in 1987 alongside the establishment of The African Commission of the same name, which is itself a product of the Organisation of African Unity (OAU) (Murray, 2000). As with all regional Charters, it is derived from the 1948 Universal Declaration, but takes into account the African experience which saw a greater emphasis on economic, cultural and social rights; that is, those which pertain directly to material well-being or 'development' (Maxwell, 1999; Sano, 2000). In keeping with the OAU's beliefs and, more importantly, the tenets of international law, the Charter and Commission have to recognise the primacy of individual states. As we shall see, debates over the limitations of state-centric legal discourses have been paramount given the weak record of accountability of African states and other diverse socio-political entities that co-exist within and alongside formally recognised states.

One of the key elements of the African approach to human rights has been to recognise the particularity of Africa's experiences within a discourse which stresses the universality of human values. African debates stress the role of 'tradition', colonialism and imperialism in shaping the constitution and realisation of human rights (An-Na'im, 1999a). For example, the African Charter on Human and Peoples' Rights seeks to "eradicate all forms of colonialism from Africa..(while taking into consideration)..the values of African civilization" (Murray, 2000: 203). Independence marked, in theory at least, the most important conferral of rights in that people became genuine citizens and that their countries were accorded international sovereignty. Clearly, the post-independence record of state decay and neo-imperialism have shown the limitations of these visions as the mass of Africans have been denied, through no fault of their own, some basic aspects of human dignity and social welfare.

A key problem with human rights legislation is that under international law, only states are recognised as having 'personality'; that is they are the only formally recognised legal bodies. So, any human rights legislation must be embedded within national political and judicial structures. At present the formal policy frameworks for realising RBD are uneven. It needs re-emphasising that much of the RBD agenda is iterative and evolutionary and builds upon the good governance and participatory approaches that have become widespread over the past decade. Hence, many of the policy discourses and the institutional architecture already exist. For example, bureaucratic accountability and responsiveness are key elements in RBD, but have clearly been on the agenda for a while. Similarly, gender equality as a central tenet of RBD has been contested since the 1970s. However, current policy stresses certain political and institutional innovations.

Some are part of the general human rights processes led by the United Nations. Since the mid-1960s there has been various Conventions covering discrimination against key groups (race, gender and children) and protection from torture. Countries sign up to these which indicates a willingness to enshrine these principles in law. The UNDP (2000) reviewed the coverage of these signatories which shows that some African countries, such as Cameroon and Zambia, have signed and ratified all of the Conventions whereas Ghana has only signed up to the Conventions covering racial and gender discrimination while Nigeria has signed up to all except that covering torture and degrading treatment. Other policy channels are largely constitutional and involve statements in the constitution or in a separate Bills of Rights. Maluwa (1997) notes that in Southern Africa, Botswana, Namibia, South Africa and Malawi have fully-fledged Bills of Rights. Most countries' constitutions include some recognition of fundamental human rights based, to a large extent, in European and American constitutional practice. These see a separation of legislative and judicial branches of the state and include various mechanisms for protecting political freedoms such as freedom of speech and *habeas corpus*. However, as An-Na'im (1999b: 43) notes "None of the countries surveyed provide full-fledged constitutional protection for economic, social and cultural (ESC) rights", although, crucially, there is no country in the world which does so. A more recent addition, in the wake of South Africa's Truth and Reconciliation Commission has been the establishment of national Human Rights Commissions to monitor the implementation of human rights legislation and disseminate information on abuses and best practice (Human Rights Watch, 2001). Clearly, recognition at the Convention, Commission and Treaty level only stipulates what a state should do and is not a good indication of what it actually does.

The record of human rights protection in Africa, in general, and the work of The Commission, in particular, has been mixed. We do not have the space for a detailed account of these experiences

(see Murray, 2000), but some pertinent points, drawn largely from An Na'im (1999b), are worth making. The first problem is the degree to which African countries respect constitutionalism. Many have made important steps in this regard, but often fail to promote economic, social and cultural rights and, more importantly, have a range of means to suspend the constitution. Some of these are legal, such as during States of Emergency or through 'claw back clauses', while others are less obvious and range from the selection of judges through to outright intimidation. A second problem relates to the recognition of customary law within the formal legal system. Despite claiming to recognise Africa's uniqueness and diversity, and hence the legitimacy of its customary legal practices, these can conflict with universal principles or are simply not taken seriously by constitutional lawyers (in part because they are not codified). In practice, customary law usually gives way to statutory or common law. A third set of problems relate to the judiciary and legal profession. Training is often poor, selection can be politically motivated, and regimes tend to circumscribe the independence of the legal profession. A fourth set of problems relate to the international organisations which support human rights promotion on the ground. The African Commission is rather élitist, lacks clear reporting structures, and has unclear authority to enforce decisions or condemn violations of human rights (Murray, 2000). Similarly, many of the international NGOs which have been major supporters of human rights causes operate in élitist ways (for example, organising urban-based workshops for lawyers) and tend to impose, through funding conditionality, their own agendas on local NGOs.

### **The paradoxes of Rights-based Development in Africa**

The implementation of the rights-based development agenda within the context of existing structures of African political economy raises a number of important questions for the future of this project. In this section we highlight some major tensions and contradictions arising out of the articulation of a universal political ideal and the realities of territorial states and embedded cultural practices.

#### *Sovereignty, conditionality and modernity*

An overarching set of criticisms relates to the broader agenda of RBD and its relationships to modernity and western imperialism. Turner (1993) argues that modernisation involves a progressive move from particularism ('tribe', community, ethnicity etc) to universalism and secularism. In this sense, citizenship represents a significant dimension of modernity whereby it initially related to membership of the city-state and later to membership of a nation-state. A possible danger of this reading is that citizenship, as with modernity, becomes equated with the suppression of difference and, hence, open to totalising or exclusionary practices.

Furedi (1997) takes development back to the colonial period and the inter-twinning discourses of stewardship and civilization which legitimised a 'moral intrusion' such that "The right of the West to intervene has become a moral imperative" (87). Since then all manner of interventions have ensued leading to the present situation of "Western proprietorship of human rights" (Penna and Campbell, 1998: 7). As with any discourse, the human rights discourse is based on symbols which confer meaning, but as Penna and Campbell (1998: 9) note "In human rights discourse, the majority of positive symbolism used is Western". A key element of the evolution of rights thinking is to treat African (and other 'non-Western') experiences as lacking any relevance for 'universal' values, thus effecting a form of Eurocentrism which, as we discuss below, can become an ideological hammer in the face of cultural difference.

Evans (1997) focuses centrally on the paradoxes of universal human rights discourses and sovereignty. He argues that rights are usually discussed in legal or philosophical terms which

can mask political and economic interests. He argues that universal human rights are 'imposed' because they offer a "coherent claim to authority over the sovereign state" (91) and "represent a further attempt to forge new structures of colonial dominance" (92). In this sense human rights might become a new form of conditionality in dealings between the multilateral institutions and recipient countries. Tensions along these lines were clearly visible at the Rio Earth Summit where Southern delegates felt constrained by Western governments bent on protecting their own environment and economic growth while disciplining Southern countries into restrictive environmental codes. Similarly, at the Vienna Human Rights Conference a year later, "some Asian countries questioned external criticism of their human rights records; in particular, they showed their resentment at having imposed on them a set of values based on Western traditions" (Potter et al, 1999: 129).

The recent UNDP report (2000: 30) is clearly aware of this issue, but is adamant about such responses,

"There is a tension...(B)etween national sovereignty and the international community's monitoring of human rights within countries...Many people still see the promotion of human rights for some groups..as a threat to their own values or interests. This divisiveness in values breeds opposition to human rights for all"

The implication seems to be that any country who is sceptical about the application of universal human rights may well be using this as a defence mechanism for the pursuance of human rights abuses. However, the blanket refusal to countenance detractors from a universal HR approach, does smack of 'moral intrusion', and, more importantly, makes it difficult to differentiate between a legitimate and illegitimate rejection of universalistic rights. The emphasis on developing regional human rights codes, such as the African Charter, seems one 'best fit' solution which balances universality with politico-cultural specificity.

#### *Universalism, cultural relativity and community*

Hence, a key problem is the tension between a universal set of values and a multiplicity of embedded local practices (Nagengast and Turner, 1997; Penna and Campbell, 1998). Debates have arisen around the use and abuse of both 'universalism' and 'tradition' since both are tied to distinct social and political visions. As we have seen, the universalist argument can conceal western hegemonic aspirations. On the other hand, the discourse of traditionalism has been used by unscrupulous regimes and/or local people to resist external scrutiny and persist with inhumane behaviour. In Africa, this tension has been brought to the fore over such matters as female genital mutilation (Penna and Campbell, 1998) and the relationship between customary law and common law whereby the latter usually prevails (Murray, 2000).

One of the sources of these problems is in the philosophical inheritance of the rights discourse. We saw that the dominant conception of human rights and development are based on liberal individualism arising out of The Enlightenment. However, the alternative to liberalism is some form of communitarianism which sees rights shaped by and accountable to a collective (von Lieres, 1999). Talking of Africa, Ake notes "(O)ur people still think largely in terms of collective rights and express their commitment to it constantly in their behaviour" (1987: 5). It is, in part, this recognition that the African Charter contains the notion of 'peoples' although Murray (2000) has discussed the problems of defining and delimiting 'peoples' and with it the whole notion of cultures as bounded and identifiable entities.

The African Charter, like the OAU, upholds the sanctity and integrity of colonially-created states, comprised of a multiplicity of 'nations'. However, in recognising 'peoples', the African Charter creates tensions over self-determination. The first difficulty is that there is no clear definition of what constitutes a 'people'. It is used to refer to the population of a state, although a people is not the state itself, but it can be something other than the entire population of the state (Murray, 2000). For example, the African Commission has recognised the Katangese of Congo and the Casamance of Senegal as peoples. The second problem is in interpreting the legitimacy of peoples' rights. If a people feel oppressed by the state, how can they press for self-determination within the fixity of a territorial nation-state? Again, this tension has not been resolved and the rights discourse in Africa does not countenance full-blown secession, preferring instead solutions such as participation, decentralisation, federalism, and proportional ethnic representation. Indeed, most RBD champions such conflict-reducing solutions which retain a state-based logic, such as the UNDP's idea of 'inclusive democracy' (UNDP, 2000).

### *The state, democracy and accountability*

The discussion of freedom and justice at the universal, national, community and individual levels raises further questions about the state. As we have seen, despite the international proclamation of universality, the institutions which oversee international law are relatively weak. This means that the onus for defending human rights claims falls largely on states (An-Na'im, 1999a). So, while various multi-levelled mechanisms exist, or have been proposed, the quality of rights depends upon the nature of the state in which the rights' claimant exists.

In the African context this clearly creates major problems in using a state-centred rights framework for securing development and justice. As An-Na'im (1999b: 22) observes "(A)frican societies appear to regard the post-colonial state with profound mistrust and have no sense of ownership of it nor expectation of protection or service from it". Such a problem is compounded when the state is simultaneously the perpetrator of rights' abuses and the institution through which grievances should be aired and addressed. In most cases, then, the state in Africa remains a significant generator of human rights abuses as well as holding the key to their protection. For example, the recent report from Human Rights Watch showed that while many regimes have established Human Rights Commissions in order to secure donor support they are largely ineffective and turn a blind eye to rights abuses (The Guardian, 23rd February 2001). However, states can initiate more positive action as An-Na'im's (1999b) contrasting discussions of Nigeria and South Africa highlight.

The Nigerian state has been a flagrant abuser of human rights. The Constitution contains wide-ranging derogation (the ability to suspend or repeal) clauses which cover most human rights while much of the Constitution was suspended during the Abacha regime by declaring a state of emergency. Additionally, the state has suppressed *Shari'a* law which can only be tolerated where it is compatible with the Constitution. There has also been highly flexible and wide-scale abuse of military tribunals which are outside the common law. The poor pay of judges has resulted in them extorting money from litigants in order to get a case to court while human rights lawyers have been stigmatised and threatened by the state authorities. While far from perfect, South Africa has been cited as having an innovative and purposeful approach to human rights. Not only has South Africa passed a Bill of Rights and set up the Truth and Reconciliation Commission, but it has gone furthest in providing constitutional protection for economic, social and cultural rights. For example, customary law has been made expressly subject to the non-discrimination provisions of the constitution although the implementation of this remains to be contested. South Africa has also attempted to increase access to the legal system through a re-

structuring of the courts to handle special jurisdictions such as labour and juvenile cases. They have also been at the forefront of experimenting with low-cost delivery of legal services through such mechanisms as para-legal extension.

A further, and more general, problem associated with an overly legalistic and state-centred view of rights is that certain human rights abuses fall outside of the state's purview and authority. Again, this relates to the origin of rights whereby they relate to the 'civil' or 'public' domain which, implicitly, meant the political space of men (Assiter, 1999). The private realm fell outside of this discourse yet it has consistently been the site of some of the worst human rights abuses. Clearly, domestic violence against women and the abuse of children are the most significant, yet they hold an ambiguous place in the human rights legislation. Since 1970, the existence of CEDAW (The Convention on the Elimination of All Forms of Discrimination Against Women) provides a commitment to breaching the public-private divide, yet its forceful application in legal systems has been hampered by the feeling that Western feminists have hijacked gender and development issues on behalf of 'universal sisterhood' which only serves to silence and marginalise the voices of Third World women (Mohanty, 1997). Additionally, as expected, national legal processes, dominated by elite men, have tended to stifle gender legislation in the name of its 'un-Africaness'.

The over-reliance on the legal system in securing rights has seen the opening up of supplementary practices. Maxwell (1999) highlights four of these which are echoed in the major documents from DFID and UNDP. First, monitoring at international, national and local levels can help create a culture of compliance. Second, publicity and advocacy help create political structures and policy changes in support of rights. Third, accountability can be created administratively by specifying delivery standards through such things as Citizen's Charters. Finally, as the DFID were at pains to stress, rights-based approaches can be encouraged by broadening participation and giving more people a 'stake' in social decision-making.

#### *Globalisation, liberalisation and structural underdevelopment*

A key debate revolves around the distinction between political and economic rights. These issues have been pre-figured in such debates as those concerning the 'developmental state' (Leftwich, 1994) which stresses that economic growth can only be achieved through the suppression of rights, the quashing of civil society and the denial of democracy. On the other hand, the 'good governance' agenda, much like the rights agenda, argues that democratic participation is not a reward for a harsh economic transition, but is central to any definition and process of economic development. Either way, there is a clear separation between the 'economic' and the 'political' which allows states and agencies to focus on one or the other, despite the supposed 'indivisibility' of rights. In general, the human rights discourse has privileged the political over the economic with some going further to suggest that this is because the recognition of political freedoms is relatively costless compared to economic rights which promise tangible material inputs such as housing and health care (Sengupta, 2000). We shall return to this issue below in examining Shivji's (1999) discussion of the right to life.

This in turn means that the discourse of universal rights is relatively mute regarding global capitalism as a generator of inequality. Turner (1993: 2-3) argues that citizenship "is inevitably and necessarily bound up with the problem of the unequal distribution of resources" which is in keeping with the thrust of RBD. However, Evans (1997) is more vitriolic about the relations between global capitalism and rights. He argues that by stressing political and civil rights, the human rights discourse led by 'the forces of globalization' has sidelined critical discussions about

economic rights. So, while international law stresses sovereignty and self-determination, the actual operation of dependency denies the realisation of these rights. He goes on to state that "(U)nless political and economic interests are threatened, the economic imperative of globalization suggests that victims of rights abuses will be ignored" (Evans, 1997: 98). There is a danger, as with recent discourses of democracy and good governance, that by stressing the political realm as distinct from the economic, RBD not only downplays the constraints arising from structural inequalities, but does little to address them.

Nowhere is this more clear than in Africa's experience of colonialism and neo-imperialism (Maluwa, 1997). For many, the adjustment era plunged Africa into deeper dependency and more polarised poverty. As Wanyeki (1999: 104) observes, the lack of respect for the rule of law is evidenced "by the adoption and implementation of structural adjustment programmes in disregard of their impact on human rights". This paradox could, charitably, be seen as a failure of 'joined-up thinking' in global governance, but more realistically it reflects the neo-liberal urge to impose marketisation without consideration of its social and political impacts. The pragmatic question which opens up for the development community is whether such anti-imperialist rights are achievable in the present climate of neo-liberal globalisation and geopolitical governance?

Some believe a progressive agenda can and should be realised through rights-based social provision. For example, the exercise of human rights by organised labour and the insistence of 'due process' has enabled unions to make political gains against global capital (Beckman, pers.comm.). This opens up wider debates regarding social policy and globalisation. In the past, social policy has been an important means for redistributing resources and ensuring social welfare at the level of the nation state. Deacon (1997) argues that globalising forces have forced a 'supranational concern' with social policy upon us even though such thinking is in its 'primitive stages'. In promoting the case for a global social policy, Norton (2000) argues that the freer movement of capital between nations, with capital 'regime shopping' for the best conditions, encourages governments to lower standards of labour rights and labour protection. At the same time, liberalisation restricts many sources of revenue previously available to fund social expenditures (trade tariffs, labour taxes), producing a 'fiscal squeeze', while volatility in capital flows has been shown to lead, under some conditions, to rapidly developing crises of welfare at the regional and national level.

Given these arguments, Norton considers the policy environment to be ripe for change, pointing to the multilateral lending institutions increasing engagement in the 1990s with 'classic' social policy areas of concern, such as poverty reduction and social protection. Redistribution between countries already operates at the sub-global level through EU mechanisms and Deacon argues that such programmes could be expanded into international development, citing the UNDP's (1992: 78) argument for a global system of progressive income tax from rich to poor nations.

However, such initiatives are still open to Furedi's accusations of 'moral intrusion'. Ferguson (1999) tackles this head on in acknowledging critiques of benign or progressive globalisation as ethnocentric or neo-colonialist. The rejection of a raft of global social policy principles, argue its protagonists, serves the interests of class and gender elites in southern contexts as much as it irritates northern governments looking to appease their own constituents. What is stressed by Norton and others is that those with a normative position on social policy principles need to create a broad constituency for those principles in the north and south. That means dialogue and partnership rather than trying to impose measures through policy conditionality. The most encouraging signs of an emerging social agenda are those that are springing up as truly global

responses to the challenges of globalisation such as the north-south links underpinning fair trade movement and the movement for debt relief.

### *Citizenship and social welfare*

This emerging debate on global social policy raises further questions regarding what might be termed 'thin' citizenship. Marshall (1964) argued that in Britain rights proceeded from civil (legal) in the 17th century, to political (parliamentary democracy) in the 18th and 19th centuries to social (welfare state) in the 20th century. While we can criticise this teleology for presenting a too simplistic view of the evolution of rights and for not specifying whether all rights are of equal importance, its greatest weakness is in failing to specify the linkages between citizenship and capitalism (Turner, 1993). In particular, citizenship rights might be seen as a radical principle of equality or, by providing checks and safety nets, simply a means of promoting solidarity and the stability required for further accumulation. This latter interpretation of rights emphasises important concrete entitlements such as housing and clean water, but generates a citizen whose political agency is only exercised in pressing for basic needs. The focus on legally-defined welfare provision might preclude alternative trajectories with RBD becoming another form of neo-liberal market-led development. Such a process will be exacerbated with such things as GATS (Global Agreement on Trade and Services) which moves control away from local people towards global corporations in a mass privatisation of welfare (World Development Movement, 2001).

A final paradox of globalisation and rights relates to the relative mobility of capital and the control of people (Pettman, 1999). The twin discursive pillars of globalisation and universal human rights suggest that the mobility of finance, goods and ideas is greatly enhanced and necessary for continued prosperity while all humans should have the same opportunities and be subject to the same rights. In practice, while certain forms of capital, including some types of labour, have become more mobile, states police their borders like never before. Despite pretensions to global citizenship, in beggar-thy-neighbour global capitalism, clear differentiations are made between citizens and non-citizens. So, despite a discourse which laments the inevitable waning of state power, states still retain authority to territorially define legitimate citizens with valid rights. Pettman (1999) goes on to suggest that we should press states harder to protect rights and expose the myth of powerlessness in the face of globalisation.

### **Conclusion**

As a creature of liberal individualism, the rights agenda tends to serve the interests of the propertied and the powerful. However, the recent emphasis on economic and developmental rights should be welcomed, because it raises the possibility of cementing the right to a decent standard of living; even if such commitments remain tentative and uneven. Clearly, as with any ideological venture lead by the major international development agencies, the potential exists for the rights-based agenda to be used as a new form of conditionality which usurps national sovereignty and thereby further denies the autonomy and freedom which are a *sine qua non* for democratic development. Additionally, by handing the primary responsibility for defending rights to unaccountable and authoritarian states the process does little to challenge the power structures which may have precipitated rights' abuses in the first place. Finally, the emphasis on universal rights, as defined through largely Western experiences, limits the relevance of rights to local circumstances and thereby effects yet another form of Eurocentric epistemological violence which seeks to normalise a particular and self-serving social vision. Hence, the balance sheet in favour of rights-based development, as it is currently conceived, is relatively empty. So, do we simply ignore the RBD agenda or can it be used to effect more meaningful solutions to the



African crisis of development?

Both Ake (1987) and Shivji (1989, 1999) argue that any discussion of abstract rights pertaining to abstract 'humans' is meaningless and unhelpful for Africa and serves only the interests of those protagonists who stand to benefit from the status quo. Shivji (1989: 69) argues that

"human rights-talk should be historically situated and socially specific. For the African perspective this ought to be done frankly without being apologetic. Any debate conducted on the level of moral absolutes or universal humanity is not only fruitless but ideologically subversive of the interests of the African masses"

He goes on to assert that any concept of rights in Africa must be anti-imperialist which forces the issue of self-determination back on to the agenda and it is, in part, for this reason that he welcomes the 'new rights agenda' (Shivji, 1999). He states "imperialism is the negation of all freedom" so that human rights in Africa "must be thoroughly anti-imperialist, thoroughly democratic and unreservedly in the interest of the 'people'" (Shivji, 1989: 70 cited in Penna and Campbell, 1998: 11).

Ake (1987) has been equally adamant that any notion of human rights must be grounded in the realities of the African crisis. For him, writing 15 years ago, the spectre of fascism in Africa was the paramount political problem so that any articulation of human rights must be "to combat social forces which threaten to send us back to barbarism" (1987: 7). Both authors criticise the individualism of bourgeois liberal rights and assert that African societies are far more socially-oriented so that an African version of human rights must go "beyond the dominant Western liberal conception as an individual bearer of rights and include a wide range of more substantive contents" (Von Lieres, 1999: 140).

The question remains as to how such a process might be engendered. Mamdani (1996) concludes that more genuine citizenship must acknowledge the bifurcated state and negotiate both rights-based and ethnic identities through a "balance between decentralization and centralization, participation and representation, autonomy and alliance" (Mamdani, 1996: 298). However, beyond that he remains vague. Von Lieres (1999: 146) also sees multiple democratic 'spaces' opening up following the retreat of the state, leading to a

"a new dynamic model of interaction between multiple, often interdependent socio-political and cultural spaces and groups..(moving us away)..from the idea of the citizen as a bearer of rights towards the idea of the citizen as participant and claimant, embedded in a series of networks guaranteeing inclusion and preventing marginalization from wider social and political processes" (Von Lieres, 1999:146)

While she may be right to describe the African political imagination as 'survivalist', such a view of political inclusion remains rather voluntaristic and denies the possibility that, in an environment of poverty and political turmoil, the 'new spaces' might be filled by warlords, gangsters and other anti-democratic factions.

Both Ake and Shivji also posit alliances between diverse political communities as one means of pressing for meaningful rights. Indeed, Ake's strategic *realpolitik* leads him to argue, despite his general scepticism towards liberal rights, that we need "a coalition of all those who value democracy not in the procedural liberal sense but in the concrete socialist sense. This is where

the idea of human rights comes in. It is easily the best ideological framework for such a coalition" (1987: 8). Ake rightly acknowledges that any realisation of such rights will involve struggle such that empowerment cannot be handed down by development agencies or the state, but must be taken by the marginalised. Instead, we will see "a protracted and bitter struggle because those who are favoured by the existing distribution of power will resist heartily" (1987: 11). As a result, he is somewhat dismissive of any institutional or procedural reforms of the type imagined in the RBD agenda (Maluwa, 1997).

Shivji (1999) is more positive about the potential role of legislation in securing a rights-based approach to development. In keeping with the RBD agenda he believes productive gains can be made by bringing together the developmental and human rights traditions. To support his case he examines the successes of 'social action litigation' (SAL) in India which has pushed for social justice as opposed to the individualistic 'natural' justice enshrined in liberal rights discourses. SAL has questioned the issue of what it means to live and broadened it to include a range of rights not normally considered justiciable. In particular, a person not directly affected by an abuse of rights can still bring a petition to court if they feel that basic rights to live have been violated. And by expanding the notion of what it means 'to live' to include a right to work, the dichotomy between political and ESC rights is breached. Shivji uses this to press for a new rights regime which asserts that a right to life is the most fundamental human right. However, unlike liberal conceptions, it accepts that 'living' involves being part of a wider collective which may be anything from a family, community organisation or trade union.

Allied to this is this right to self-determination which applies in two senses. First, to nations within the uneven global political-economy. This marks his approach out as more transformatory and radical than the current RBD approaches which see all nation-states as equals which covertly denies the unequal use of power by some states and TNCs. Second, self-determination applies to minorities or 'nations' existing within the borders of accepted nation-states. This is not simply about recognition of these groups, but about allowing them "to determine their 'self' politically in terms of participating in major decision-making processes that affect their lives" (1999: 269). In this regard, Shivji is welcoming of the African Charter's inclusion of 'people's' rights, so long as these are taken seriously.

Such efforts can justifiably be dismissed as drops in the ocean which will not effect major social transformation. While individual victories in favour of the oppressed and marginalised may have limited impact, the broader process keeps alive the debate about the limitations of existing political structures to deliver development while simultaneously giving credibility to those organised activities aimed at transforming livelihoods and discrediting those who oppose such activities. So, we do not believe that the rights-based development agenda, as currently constructed, will challenge the structures which create underdevelopment. Only by embedding discussions in the locally meaningful struggles that confront impoverished Africans and by promoting broader and direct participation which, crucially, promotes self-determination can a rights agenda more thoroughly promote African development.

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