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Legitimacy and Legality

Passing a nobleman's land, a beggar asks him: "Whose is this land?" "It is mine," comes the answer. "And how did you get it?" "Well, I inherited it from my father." "And how did he get it?" "He inherited it from my grandfather." "And he?" "From my great-grandfather." So they go on and on until they come to a great-great-...-great-grandfather who lived in the Middle Ages. Here the nobleman replies: "He fought for it!" "Ah!", says the beggar, "shall we fight for it again?"

Old Dutch story

We have earlier mentioned "enabling environments" approaches to human rights. The reality of the world today is that millions of people live in what might be called "disabling environments": misallocation of resources, extreme social and economic inequality and exclusion, violence in and among communities, corruption, anarchy, cultures of domination and submissiveness. In such conditions of abject poverty, extreme vulnerability, famine and other gross and systematic violations of basic human dignity, human rights tends to be a strange and alien element. Conventional human rights strategies, primarily based on juridical mechanisms and the use of legal resources, are bound to fail.

One "disabling" factor is certainly a malfunctioning economy. This has two aspects: economic ineffectiveness, in the sense of misallocation of resources, and economic injustice, meaning the exclusion of people from access to resources and entitlements to basic goods and services. Our review in chapter 3 of conventional development-oriented approaches to poverty and destitution showed that responses focusing only on market freedom tend to be insufficient if not counterproductive. What is needed is a proper analysis of existing entitlement systems – the regularized arrangements in which people's participation in the economy is rooted -- and how they function. If the limitation of resources is to be tackled by increasing productivity, this will have to be supplemented by entitlement-oriented approaches.

An analysis of entitlement systems must give primary attention to the role of the state. A practically



non-existent or failed state — such as one finds in Somalia, for example — is certainly an adverse environment for the realization of economic, social and cultural rights. On the other hand, the great famine in North Korea during the late 1990s may be seen as a violation of rights by a totalitarian and terrorist state, which uses law and state power to oppress its own citizens. The centralized command state, encompassing the entire economy (and most other spheres of life) and blocking private initiative, has virtually collapsed, having manifested in the former Soviet Union and its allies a total inability to run the economy effectively.¹

The role of the state is generally linked with the quality of politics and the nature of the government. Crucial here is the question of the control of political power or office. While no political environment is entirely free of corruption, a climate in which corrupt decision-making is permanently taken for granted in everyday life must be judged as totally harmful to the implementation of socio-economic rights.

Another major factor is civil society. In typically adverse environments this is non-existent, since all associations are subservient to the regime. Totalitarian government will naturally provoke resistance. But such resistance is bound to remain rather weak in environments where fatalism or determinism undergirds a culture of resilience and passivity in the face of domination: people accept things as they are. Personal attitudes to power and its use are rooted in culture; thus in analyzing environments regarding the implementation of human rights, cultural factors must be given special attention.

Human rights in adverse environments

Laguna de Bay is a lake not far from Manila, the capital of the Philippines. On its shore is a fishing village. The catch is primarily for local consumption. However, only about a third of the lake is accessible to the locals; the rest is owned by rich individuals from Manila. These “waterlords” have affixed nets to the bottom of the lake, in effect trapping “their” fish in private “ponds”. But every once in a while a typhoon sweeps the water across the lake; and the fish escape from the private ponds. “Today God is with us,” the locals say. But what about tomorrow? Should the lives of these poor villagers remain forever limited by unequal access to basic resources? Should things always stay as they are? Or might God be assisted a little?



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In this context the word “God” is used almost as a synonym with justice. Some languages express that conviction in their vocabulary. In Chinyanja, for example, the word for “God” is *Mulungu*, while justice is called *Chi-lung-amo*. God is the upright one and justice means doing God’s will.

Today the fishermen of Laguna de Bay have organized themselves in a cooperative which also fights for their fishing rights. In this way they are assisting God in righting the wrong. Their struggle for greater access to the lake is a fight against legality, as embodied in the status quo, in favour of legitimacy, a generally held conviction requiring what is right and wrong. Here human rights play a crucial part. These villagers have become aware that they have rights which follow from universal socio-economic rights. Human rights may, in other words, transform a clash of interests as protected by different power positions into a struggle for social justice. Hence, in adverse environments the primary meaning of human rights is to make people aware of what is basically wrong. Cultures of passivity, determinism and submission may thus give way to new forms of initiative and resistance.

What is at stake here are not ordinary subjective claims in the sense of interests protected by law. Behind human rights are freedoms and needs so fundamental that their denial puts human dignity itself at risk. What may seem from the outside to be a simple conflict of distinct interests protected by different power positions is now placed in a normative context, confronting both interests and the use of power with values attached to human dignity. Where positive law is not protecting respect for such freedoms and needs, human rights maintain their character as principles of legitimacy. In other words, where needs meet rights actors become duty-holders; indeed, there are no rights without corresponding duties of others. As James Gustave Speth has put it, “the human rights approach to poverty eradication is motivated by duty.”²

From the angle of legitimacy, the poor are to be viewed not just as people in need but as human beings with dignity and rights.³ While this may sound self-evident, such a perspective is far from generally accepted. Its implication is that when people get into situations in which their needs are denied in such a way as to affect fundamentally their human dignity, these needs constitute the basis of claims grounded in human rights. A recognition of this link may be found in religion. In Christianity, for example, the claims of the poor are grounded in their rights, while Islam would place the emphasis on the duties of the rich.



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Naturally, to be covered by human rights, needs should be of an essential or basic nature, and the reason they are not being satisfied should lie in the lack of possibilities to participate in socio-economic processes connected with the production, distribution and consumption of essential goods and services. Exclusion from such processes, resulting in a denial of basic needs, may mobilize people to an aroused awareness of their socio-economic rights. The key word here is legitimacy.

Legitimacy, which has both objective and subjective aspects, relates to principles, means and outcome of the use of power.⁴ Legitimacy transforms power into authority. It is based on people's conviction that the way power is exercised over them and the way they are being ruled are right, and hence that they are morally bound to obey. It is a combination of human needs with public opinion, political conviction and cultural expression that demands satisfaction of these needs as a condition of legitimate use of economic power.

In this light legitimacy becomes not so much a fact as a process. Central in this process is the "public interest" or "common good", in the sense of all that keeps the public-political community together. The public interest is not to be seen as the highest common factor of all private interests: while many thieves might concede that punishment of theft is in the public interest, very few would consider that their own punishment would be in their own private interest.⁵ The idea of the public interest is rooted in the idea of society as a living community. Dworkin (who uses the term "integrity") specifies what this means:

fairness, "the right structures for the political system, the structure that distributes influence over political decisions in the right way";

due process, "the right procedures for enforcing rules and regulations the system has produced";

justice, the right outcome of the socio-economic and political order: "the right distribution of goods, opportunities and other resources".⁶

Using outcome as an example, famine, implying gross and systematic violation of the right to food, may be seen as a barometer of legitimacy in the sense of an obvious indication that the use of political and economic power has not been in line with certain basic principles.⁷ While famines are correlated with factors that may be explained through entitlement analysis, as Amartya Sen has stressed, their consequences may set in motion entitlement struggles against illegitimate use of power.



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When disputes arise from clashes of conflicting interests, juridical principles put the confrontation in a normative setting. Such norms were already codified in Roman law. In the sphere of socio-economic rights, there was the rule *nemo de domo sua extrahi debet* (no one may be evicted from his own house). Acceptance by the Dutch supreme court of the occupation by squatters of houses or office buildings which have been left empty by their owners for purposes of speculation goes a great deal further than this by incorporating a right to housing into positive law. Thus, economic and social rights may have an impact on the social and economic relations between people as protected by private or criminal law. But in order for this to happen, those whose claims find their basis in these rights must obviously take action. Through action first, and acquiescence to the new situation later, an illegality may be turned into legality. The roots of this lie in the legitimacy of the action, based as it is on resistance against injustice rooted in the wrong institutions and the wrong procedures and manifested in the wrong outcome. K.L. Karst and K.S. Rosenn, discussing Bolivian land reform in 1952-53 under the title "Land Reform First, Then Law", note that "effective land reform in Bolivia occurred when the campesinos occupied the great estates, ejecting both owners and administrative foremen".⁸ This action was followed by a great deal of legal activity, because the peasants wanted to regularize their new situation by acquiring proper titles.

Distortions in the distribution and control of power, wrong procedures, corruption, inequities in the outcome of processes of production, distribution and consumption of goods and services -- all of these factors may pose serious obstacles to people seeking to satisfy their basic, priority needs. While awareness of the economic right to food or to shelter is usually dormant for most people, in adverse conditions these needs activate those rights in the sense of a legitimate basis for claims. Such claims will manifest themselves as challenges to the existing economic, political and legal order and may in turn initiate processes to change institutions, procedures and outcomes so that economic, social and cultural rights can be implemented. Through the ages such processes have been set in motion by those who have felt affected by the wrong institutions, the wrong procedures and the wrong outcomes. Think, for example, of the widow in Jesus' parable (Luke 18:1-8), who presses the unjust judge for justice time and again until he finally gives in. In resistance to what people feel is basically wrong lies the secret of legitimacy as a weapon against legality in



situations where needs meet rights.

To put it in slightly different terms, legitimacy is based on the right operation of entitlement systems.⁹ The implementation of socio-economic rights may thus be perceived as processes of legitimating claims grounded in basic needs -- in other words, as distinct ways of protecting needs of people through basic entitlements.¹⁰ In this light, analyzing the entitlement systems behind concrete cases of entitlement failure is a starting point for making economic, social and cultural rights a reality.

Poverty, destitution and entitlement failure

Who gets what – and how? This is a basic question in any socio-economic order. Amartya Sen of India, who received the Nobel Prize in economics in 1998, calls this “the acquirement problem”. Acquirement -- the term is chosen to avoid the ambiguous connotations of the more familiar word “acquisition” -- is the practice of getting access to the necessary resources and the goods and services needed. Sen identifies certain “legal channels of acquirement”.¹¹ Although this notion is essential for the implementation of economic, social and cultural rights, Sen observes that it “is often neglected not only by non-economists, but also by many economists, including some great ones”.¹²

Acquirement involves not only people’s productive activities but also the titles on which their access to resources is based and their rights to the fruits of production. Thus two people with the same amount of income may be in entirely different positions as far as their claims are concerned. The \$100 earned by a farmer who owns his land is worth far more in terms of security within the socio-economic structure than the \$100 a seasonal agricultural worker earns in wages. Behind people’s participation in or exclusion from socio-economic processes lie different sets of rights and duties which might be characterized as entitlement positions.

Entitlement analysis received a strong impetus through Sen’s *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford, Clarendon Press, 1981), which addresses the problem of entitlement to food. In investigating several cases of famine in Bengal, Ethiopia and the Sahel countries, Sen found no



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instance in which the explanation was a decline in the availability of food; indeed, during the great famine in the Sahel in the 1980s, the export of groundnuts for the world market continued while people were starving. Each case of famine analyzed by Sen appears to have been caused by entitlement failure.

We saw in chapter 2 that Sen distinguishes between production-based and trade-based entitlement. Subsistence economies are typically based on the former: production for one's own needs. While labour productivity is low, socio-economic security may be relatively high. Specialization in production, division of labour and technologies based on economies of scale will increase productivity. But the transition from a production-based to a trade-based economy may negatively affect people's entitlement positions and thus diminish their socio-economic security. Activities to increase productivity imply change, and change produces conflict around rights and obligations. Entitlements analysis offers insight into such processes. Sen bases his entitlements analysis primarily on direct access to resources. Two factors determine the entitlements of a person living in a society whose economy features private ownership and exchange in the form of trade (exchange with others) and production (exchange with nature): the endowment of the person (what he or she owns) and what Sen calls exchange entitlement mapping -- the specification of the alternative commodity "bundles" the person can command for each endowment bundle.

For example, a peasant has his land, labour power and a few other resources, which together make up his endowment. Starting from that endowment he can produce a bundle of food that will be his. Or, by selling his labour power, he can get a wage and with that buy commodities, including food. Or he can grow some cash crops and sell them to buy food and other commodities. There are many possibilities...¹³

A key word here is the adjective "own": his own land, her own labour, his own shop, her own knowledge. Entitled by such ownership, people may engage in transactions with others. The juridical foundations of such entitlement positions are property and contract.

Our discussion of economic, social and cultural rights requires a broader definition of entitlement. By entitlement we understand the possibility to participate legitimately -- in the sense of participation based on rights -- in processes of production, distribution and consumption of goods and services. Entitlement is thus a function of both law and power. Power means opportunity, actual command. Law protects in case of dispute.



The assumption here is that law results from processes based on the legitimation of power, which of course is not always the case. When law has thus lost its legitimizing function, as we have seen, legitimacy may challenge legality.

This combination of law and power makes entitlement such a precious affair. Entitlement is far more desirable than the occasional claim; thus people try continuously to improve their entitlement positions. They may appreciate the benefits that come from holding a winning lottery ticket or having a temporary job or receiving emergency food aid, but such episodes bring no structural improvement of one's entitlement position. Far preferable is the tenured job, fully protected by modern labour law and providing the employee access to many facilities and allowances. Moreover, persons must adjust to external influences that affect their participation in the economy. Thus, more than a given state of affairs, entitlement is a process. There is always an inter-relationship between rights and duties within a socio-cultural context.

Introducing this qualification, "structural" points to the need to look beyond entitlement positions -- what people can acquire on the basis of their current rights and duties -- to entitlement systems, which regularize arrangements for access to resources and acquiring goods and services. People find socio-economic security on the basis of their positions in these systems.

The relevance of an entitlement systems approach to implementing socio-economic rights can be further illustrated by two distinctions. The first is between formal and informal entitlement. The latter prevails in what economists call the informal or "hidden" economy. What have been described as money-metric approaches¹⁴ to the measurement of welfare in areas where the informal economy is extensive are likely to miss essential elements in people's entitlement positions. This certainly applies to Africa, but the hidden economy is also of crucial importance in the countries of Central and Eastern Europe. Although the legal rules tend to be much clearer in formal entitlement positions, the study of acquisition may in fact be more problematic than in the informal economy, whose essence is actual rather than just officially regulated access. An analysis of informal entitlement from a juridical angle looks not so much at formal rules and institutions but rather takes a living law approach -- a focus on actual instead of formal control of power.

In countries where there is no meaningful labour law, for example, workers may still exert a



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significant influence on working conditions. An historical case in point comes from 18th-century Barbados, where slave-owners could not sell husband and wife separately. This was not because of any formal prohibition or fear of legal recourse, for slaves were merely objects of ownership, not legal subjects. However, the practice of selling spouses separate from each other became impossible because of social realities by which those who formally had no rights informally achieved legitimation of certain power. Behind this “living law”, of course, lay the fear of slave insurrections (in sociological terms, “potential collective action”). The manifestation of individually powerless people as a collectivity changed social relations. Where formal and informal systems of entitlement co-exist, people’s entitlement positions may become highly complex.

A second important distinction is between primary and subsidiary entitlement systems. The latter come into play only after acquirement on the basis of rights guaranteeing immediate access fails. Examples include social welfare to support people who have no earnings from labour and food aid in case of famine. Naturally, people tend to prefer primary entitlement -- access to resources and rights to goods and services on the basis of integration into the community -- to subsidiary entitlement as compensation for being marginalized. For example, when the Green Revolution seriously affected the primary entitlement positions of weaker groups in rural areas of India, subsidiary entitlement in the form of food coupons distributed by the state could not be regarded as a satisfactory compensation.¹⁵ Another illustration is the shift of emphasis in government thinking about poverty in South Africa from “redistribution of incomes..., closing the gap” to “more jobs”.¹⁶ Such shifts reflect growing attention to people’s socio-economic rights.

Entitlement systems

We have suggested that people’s unmet needs should be taken as the primary focus for the implementation of socio-economic rights. To get a clearer picture of what lies behind unmet needs, let us look at the core elements of the entitlement systems in which individual and communal acquirement is rooted. There are three main areas here: entitlement based on direct access to resources, institutional entitlement and state-arranged entitlement. Furthermore, in globalized economies, global and regional arrangements such as



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the World Trade Organization (WTO), the European Union or the North American Free Trade Area (NAFTA) have a continuous impact on people's entitlement positions.

Direct access

Entitlement guaranteeing direct access to resources is based on private (civil and commercial) as well as public (criminal) law, promulgated and enforced by state institutions. Already Adam Smith stipulated "an exact administration of justice" as the first task of the state in a market economy. This is to provide security in the sense of "the predictive states of mind, the expectations, that result from assurances given by the law of property and contracts".¹⁷ The person who owns a piece of land may expect to use the fruits it delivers, because society protects property; the person who sells something may expect payment because society provides a regularized means of enforcing contracts. Consequently, it is the law that directly enables individuals to make legitimate claims. The law upon which economic systems of direct private access to resources are based, it must be borne in mind, requires a functioning state.

A private law system is well suited for the implementation of fundamental human freedoms (freedom of conscience and religion, freedom of speech and expression, freedom of assembly and association) -- provided it operates within the framework of the rule of law; in other words, that the state itself can be summoned for unlawful action. What is further required is a certain amount of human rights activism on the part of the judiciary. This happened in India, for example, with the incorporation into positive law of the right of defendants in criminal cases to free legal aid (as a result of judgments by the judiciary based on Article 2 of the International Covenant on Civil and political Rights). Such "judicial activism" may be encouraged by civil society organizations which are prepared to take cases to court even if they regard a favourable judgment to be unlikely. At least, such action creates awareness in the community that it is rights which are at stake. This is possible only where the judiciary is independent, creative and committed to human rights. Even so, human rights will not be transformed into actual entitlement if law does not rule. This restriction tends particularly to operate with regard to economic, social and cultural rights. For example, it proved difficult to enforce the Indian Supreme Court's prohibition of bondage of workers in outlying areas where feudal lords rather than



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the law were in control.

In market economies -- based on freedom of enterprise and consumption and free exchange through systems of markets and prices -- entitlement guaranteeing direct access to resources plays a major part. Such an economic order is conducive to continuous change, in which one individual, using his or her rights, may benefit more than another. Thus, some people see their wealth growing while others fall into a state of poverty. Private law is not an appropriate mechanism to correct this; and criminal law, the other legal pillar of a market economy, protects property against unauthorized attempts to correct the distribution of wealth. As Anatole France put it: "The law, in its majestic equality, forbids the rich, as well as the poor, to sleep under bridges, to beg on the streets and to steal bread." That private and criminal law are not suitable for protecting economic and social rights is illustrated by the fact that Sen's entitlement analysis was very much inspired by the great Bengal famine of 1943, when he saw people starving on the pavement in front of well-stocked food shops which were being protected by the police.

Yet, economic and social rights may play a role in relations between individuals, for instance through the application of the old legal principle *Quod est illicitum lege, necessitas facit licitum* (necessity breaks the law). In 19th-century France *le bon juge* Malinvaud accepted *force majeure* whenever it was evident that a person accused of stealing food had been hungry at the time. However, this obviously still falls far short of guaranteeing the right to food.

All in all, in cases of famine and other manifestations of structural non-implementation of economic, social and cultural rights, private law acts as a constraint rather than a resource. The challenge is a socio-political one: how to embark on processes of socializing the laws of property and contract. Generally, legitimacy -- implying a connection with people's legitimate needs -- will constitute the basis of resistance to the exercise of power.

Institutional entitlement

Institutions constitute another core element in entitlement positions. Indeed, people's access to productive resources and their acquirement of the goods and services they need often comes through the



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institutions with which they are affiliated. Such institutions may be seen as semi-autonomous: they have their own rule-making capacities, and the means to induce or coerce compliance, but they are also part of a larger social matrix which may encroach on their autonomy.¹⁸ Manifold state regulations, for example, are likely to influence decisions made within the institution.

An obvious specimen of a semi-autonomous social institution that regulates entitlement is the tribe, which allocates its members' access to the land and their entitlement to its fruits -- usually under the chief's authority -- while expecting them to fulfil various obligations. The (extended) family is another. Often, the standard of living of individuals depends not so much on the income they themselves earn but rather on the total income of the household to which they belong and how the household organizes the use of this income.

In modern society many of the institutions in which entitlement is rooted take the form of associations rather than communities. Examples are political parties, trade unions, schools, universities, sports clubs, churches and other religious organizations. Business enterprises also tend to function as entitlement subsystems: a job usually means much more than just a transaction in which labour is hired for a certain price. Within enterprises people are likely to acquire substantial and complex entitlement positions. Socio-economic security -- the feeling of being protected against economic threats and risks -- is derived from the individual's position within such institutions.

Analyses made of the entitlement bases of different categories of people -- peasants in a given area, workers in a certain industry, people in the informal sector in a particular town -- reveal that these are to a large extent a matter of organizations, their relative power and their external and internal arrangements. They have their internal rules as well as norms imposed upon them from outside. For example, Sally Falk-Moore's study of the production of expensive ready-made women's clothing in New York shows

a densely interconnected social nexus having many interdependent relationships and exchanges, governed by rules, some of them legal rules, and others not... Both the legal and the non-legal rules have similar immediately effective sanctions for violation attached. Business failures can be brought about without the interventions of legal institutions. Clearly, neither effective sanctions nor the capacity to generate binding rules are the monopoly of the state.¹⁹

Thus, an analysis of institutions as bases of entitlement and commitment (duties) should focus not so



much on rules per se as on the sources of these rules and of effective inducement, coercion and claiming. This appears largely to be a matter of networks and people's position within them. From this angle, exclusion may be regarded as a process of "outplacing" people, in the sense of disconnecting them from effective networks.

State-arranged entitlement

The state is a public-political institution of a very special nature, and entitlements arranged through it warrant separate treatment. In regard to the rights to health and to education, the role of the state is essential, since it largely regulates access to medical care and schools, police protection and other collective goods. State law in these areas tends to be instrumental -- intended to support and promote policies for collective action. Processes of enlarging the collective socio-economic sector within modern market economies are based on interdependence.²⁰

But the state of course does not only give; it also takes away -- through various forms of taxation. In other words, it rearranges entitlement. Its policies for doing so are not always easily accepted. People may try to circumvent laws by changing the situation on which their treatment by the state was supposed to be based. In reaction to increased taxation, for example, they look for ways to raise the level of their deductible costs. Thus it is not the intended effects of instrumental law that predominate but rather its side effects. Similarly, in cases of state subsidies, people may try to get themselves into a category that entitles them to a subsidy which was clearly not intended for the likes of them. Thus, for example, persons with a comfortable income may manage nevertheless to benefit from state-subsidized housing. Meanwhile, many people in lower-income categories do not succeed in acquiring subsidies intended for their benefit. State-arranged entitlement is action-oriented in the sense that citizens seldom realize their entitlements realized just like that. Citizens who wish to benefit from a subsidy or welfare allowance have to cross at least five different barriers: (1) finding out that there is such a scheme; (2) learning where to get information about it; (3) overcoming embarrassment about collecting the information; (4) understanding the information and applying it to their own situation; (5) filling out the forms and going through the rest of the bureaucratic procedure. One Dutch study found that nearly one-third of the respondents believed they had submitted a formal request for social welfare while the



civil servants concerned felt they had done no more than supply information about it.²¹ More broadly, awareness of one's fundamental freedoms and basic entitlements as guaranteed in international law is an obvious starting point for any rights-based approach to intolerable living conditions.

Besides unintended side-effects and attempts to circumvent them, instrumentalist public policies face the simple reluctance of some individuals to obey the law. Thus, alongside the formal (official) sector of the economy and an informal (circumventing) sector, an evading sector (black market) comes into existence. As a result, processes of entitlement become rather difficult to analyze, let alone direct.

It is misleading to say that the realization of economic and social rights requires the state to take positive action whereas implementation of civil and political rights implies a restraint on state power. On the one hand, promotion of civil and political rights requires positive measures to create a socio-economic and political context conducive to respect for human rights; on the other hand, socio-economic rights may be plainly violated by the state. Agricultural policies oriented to producing foodstuffs for the global market while disregarding and destroying domestic food security may clearly lead to the violation of the human right to food.

Where the state does embark on positive measures to implement economic and social rights, it is better to focus on improving existing entitlement positions rather than to create alternative mechanisms based on state bureaucracies. Here we may recall the general preference for primary as opposed to subsidiary entitlement. The latter may be easily affected by the socio-political culture as expressed in the spirit of the day. In the realm of entitlement there are in practice no "acquired rights" in the sense of permanent and standing guarantees by the state. In many countries around the world today, "non-nonsense" policies of "deregulation", "privatization" and "structural adjustment" have had direct and serious effects on the entitlement situation of certain categories of people, bringing with them new violations of economic, social and cultural rights.

We have said that the power of the state may be used not only to establish separate state-arranged entitlement systems but also to intervene in entitlement positions based on direct and institutional access. To prevent undue intervention in private and corporate entitlement relations through corruption or tyranny, state



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power has to be depersonalized. The binding of all power, including that of the state, to law -- “not might but right” -- is a fundamental principle. Other principles of the state subject to the rule of law -- the *Rechtstaat* -- are democracy, the accountability and substitutability of those executing state power and the independence of the judiciary from the executive.

Administrative law in a *Rechtstaat* takes three different forms: legitimizing the execution of state power, aiming at certain policy effects and guaranteeing the rights of citizens in the execution of public policies. If the third category is lacking, state intervention may result in a deterioration of people’s entitlement positions.

Because the state plays so crucial a role in establishing conditions that either enhance or exclude people’s participation in processes conducive to acquiring the goods and services they need, it is logical to focus on state responsibilities in mechanisms for the realization of economic, social and cultural rights. Four questions arise in this context:

-- Is there a state and is it functioning? Does the legal system protect legitimate access to resources and rights to the fruits of productive activities? In a failed state a modern market economy cannot work. Is the state strong enough to carry out its policy decisions and to collect taxes?

-- Is the execution of state power subject to democratic processes of legitimation or is it authoritarian or even totalitarian? Does the state guarantee fundamental freedoms?

-- Does the state limit its function in the economy to creating the right conditions for market institutions to function, or is it all-comprehensive? If the state is limited in an economic sense, does it adequately provide collective goods and services subject to due processes of legitimation of public office?

-- How are the relations between the state and the institutions on which people’s entitlements depend structured and conducted? What is the quality of relations between the state and civil society?

The fact that all these questions are important when considering strategies for implementing economic, social and cultural rights makes it very difficult to generalize about the operation of entitlement systems and the implementation of socio-economic rights in a local context.



International effects on entitlement

It is not only national states that affect people's direct and institutional entitlement positions. National economies are increasingly affected by the international order. No analysis of entitlement positions can neglect these supra-state arrangements. Regional and global supra-state trade arrangements have the character of structured interventions in people's entitlement positions -- affecting prices, for example -- rather than assuming the nature of entitlement systems in their own right.²² It is no coincidence that the Zapatista uprising in the Mexican state of Chiapas broke out on 1 January 1994. The leaders of the insurrection deliberately chose this moment to act because it was the day on which the North American Free Trade Area (NAFTA) came into effect, and they recognized that this newly established trade regime would directly affect the entitlement positions of peasants in Chiapas through its impact on prices.

Thus, the entitlement systems approach presented here may have considerable practical significance in analyzing people's socio-economic security. It may indeed serve as a basis to rethink strategies for the implementing economic, social and cultural rights. Naturally, the objective is an adequate structuring of people's acquirement in strong entitlement positions.

Identifying needs, implementing rights and the role of NGOs

To those unable to realize the basic entitlements set forth in Articles 22 to 26 of the Universal Declaration of Human Rights, the law manifests itself as a constraint more often than as a resource for concerted action. "Laws grind the poor, and rich men make the law", goes a 17th-century song.²³ As Amartya Sen concluded from his analysis of famine: "The law stands between food availability and food entitlement."²² It was this which has stimulated his own subsequent work on strategies of entitlement protection.²⁴ The question is whether, in the words of John Maynard Keynes, people should always die quietly. Keynes believed not: "For starvation, which brings to some lethargy and helpless despair, drives other temperaments to the nervous instability of hysteria and to a mad despair."²⁵

Let us go back here to the situation of the Bengali people dying of famine in front of well-stocked



food shops. There was of course a good reason for those without access to food to lie down there. Begging at this spot might appeal to buyers with the necessary means of food acquirement (cash); and money collected from the haves could immediately be used to satisfy the need for food. Although the shop-owners could not be identified as primary duty-holders in the sense that they ought to have given out for free the commodities which they themselves had to buy, at that well-chosen spot the rights-holders did confront society significantly with its duties. To relate the right to food of those in need to the duties of others generally demands an insight into the specific circumstances of that particular famine in its international, national and local contexts. Such an analysis in context was in fact Sen's focus in *Poverty and Famines*.

Entitlement, we repeat, is a matter of both power and rights. Since it is unlikely that power will be fairly distributed from above, it must be acquired through concerted collective action by those who lack the possibilities to get their claims realized. The action taken by the fishermen in Laguna de Bay is indicative of an alternative approach to development: development from below, or development as emancipation. Many other examples could be cited: the action of the sem terra movement in Brazil in the 1990s — in which thousands of landless people illegally occupy land as squatters and then begin an often successful struggle to get their titles recognized — is one of the best-known cases.

Addressing economic injustice is of course no more than a first step in efforts aiming at redress. Despite the brave words of the beggar in the old story cited at the beginning of this chapter, it is unlikely that he could realize land reform on his own. Implementation of economic, social and cultural rights requires concerted action by all actors involved. In such efforts the natural orientation is towards social rather than legal change. Yet it is important for those involved in entitlement-oriented development through “self-help” action against positive law to base the steps they take in a universally accepted morality. Here human rights may play an important part, especially social and economic rights such as the rights to work, food, health, education, clothing and housing.

Where people are obviously suffering from the violation of such rights, the starting point is to identify clearly unmet needs. In the first place this involves the people themselves — and some have been taught through the ages to deny their own needs. Processes of conscientization can help them to find spiritual



sources of protest in their own cultural environment while developing their own ways of expressing feelings of contention. Churches and other non-governmental organizations working in this field should be aware that the languages of resistance used by people in need have their roots in local culture and religious spirituality and do not necessarily reflect a human rights discourse. But once legitimate needs have been identified, it may be important to seek a clear human rights profile. This implies awareness-building, enhancing people's recognition and understanding of their basic freedoms and entitlements. Human rights education is thus fundamental to any strategy of human rights implementation.

Involvement from outside in efforts to redress injustice begins with an existential feeling of being affected, fundamentally moved in the depths of one's being. In processes of activating human conscience, religious convictions and worldviews play a crucial role.

Mechanisms of turning away

Humanity has of course developed powerful mechanisms to avoid being affected by the needs of others. Perhaps the most common is the reversal of responsibilities: blaming the poor themselves for their own destitution. "You know, these people are poor because they want to be poor!", we once heard a government official say about the inhabitants of the slums of Tondo in Manila. In this way poor people are seen as offenders rather than victims; and since they disturb law and order they are best isolated in the workhouses of former times or the shanty-towns and slums of today.

Another mechanism of turning away from social injustice is to see poverty as an inevitable fact of life, a simple basis for economic calculation. In this way the poor may even become objects of exploitation rather than mere neglect: they are people whom one can hire for less than subsistence wages while setting them to work in intolerable conditions.

A third way of avoiding the fate of the poor is through escape: simply closing one's eyes. Reading the newspaper or watching television, one can concentrate only on the diversions: sporting events, tabloid gossip and the endless stream of advertisements which call on us to see life as just leisure and pleasure.

Finally, our duty in response to the needs of the poor may be averted by "deporting" them, fully



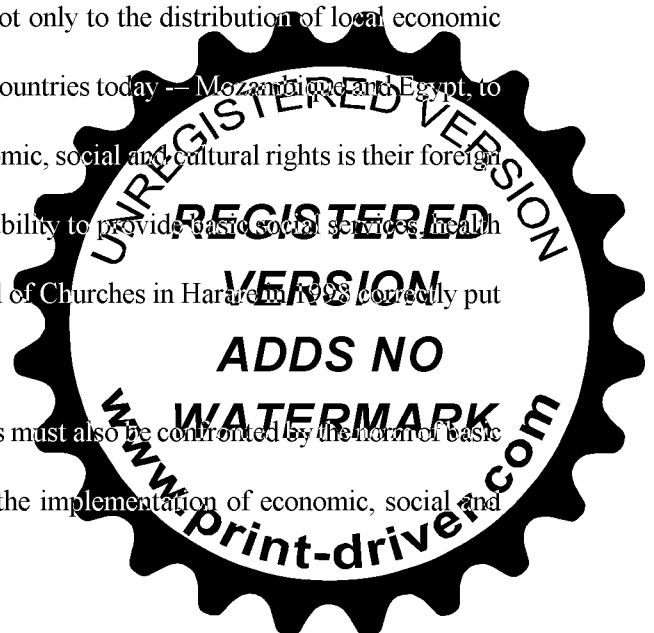
delegating responsibilities for them to humanitarian organizations such as Oxfam, the church aid agencies, Médecins sans frontières and the like. The challenge for such agencies is of course to do their work in such a rights-based perspective that people in more privileged positions become aware of their responsibilities rather than averting these. A good example here is the threat by European trade unions and political parties of a consumer boycott of Chiquita bananas when it was feared that the company might lay off thousands of workers who were not needed because the plantations in Central America were flooded -- a far different reaction from sending relief aid to people who have lost their jobs.

One of the most successful long-term instances of supporting local resistance to oppression based on human rights instruments was the Human Rights Resources Office for Latin America (HRROLA) established by the World Council of Churches (WCC) following the coup d'état of General Pinochet in Chile in 1973. Over the next two decades it based its involvement throughout Latin America and the Caribbean on a combination of four different approaches, which should not be seen as consecutive stages in a process but rather as the four corners of a net that can be tightened only by pulling from all sides together: analysis, advocacy, assistance and action.

A “four A’s” strategy

The first element of an integrated approach to human rights implementation is a thorough analysis of the institutions, procedures and outcomes behind economic injustice. In this book we have emphasized the use of entitlement systems analysis. Such studies should attend not only to the distribution of local economic power but also to the international economic order. For many countries today — Mozambique and Egypt, to mention only two — a major constraint on implementing economic, social and cultural rights is their foreign debt servicing. Excessive debt, as we have seen, burdens the ability to provide basic social services, health care and education. The eighth assembly of the World Council of Churches in Harare in 1993 correctly put great emphasis on the issue of debt cancellation.²⁶

Where needs meet rights, international power relations must also be confronted by the norm of basic human dignity. In analyzing this international dimension of the implementation of economic, social and



cultural rights, attention should also be paid to how national and local institutions interact with multilateral institutions and other lenders. There are international as well as domestic responsibilities for the debt predicament in which many countries currently find themselves. The challenge here is to “forgive” while at the same time making sure that the sinners “go and sin no more”.

Analysis provides the basis for any timely identification of needs. In the context of civil strife, a striking recent example of such an approach is the International Crisis Group of Mort Abramovitz. In any situation in which this group notes the need for early warning, it thoroughly analyzes the tendencies towards civil war as well as the possibilities of avoiding such disaster. From such a well documented and argued base, the group then puts pressure on governments to embark on early action. *The Economist* notes two important trends in this strategy:

The first is that humanitarians of various kinds are thinking bigger than they used to. Human-rights watchdogs began by documenting torture; now they press governments to impose sanctions on the torturers. Aid organizations began by handing out disaster relief; then they moved into longer-term development, hoping to make future missions unnecessary. In his own way, Mr Abramovitz has made the same pilgrimage, from dealing with disasters to addressing their cause...

The second trend behind Mr Abramovitz is that government and multi-government bureaucracies are ceding power to non-governmental organizations... He has spent most of his career in government..., but he preferred to set up the International Crisis Group, believing that an outside organization might prove more influential than a senior government official.²⁷

Abramovitz’s ways of alerting duty-holders can serve as a useful model for churches and other non-governmental organizations active in the field of poverty and destitution. Analysis which alerts is one foundation of strategies at the intersection of needs and rights. Another is assistance. Naturally, victims of human rights abuses -- whether of a civil-political or of a socio-economic nature -- seek compensation, healing, rehabilitation and redress. In the area of socio-economic rights we have already touched on a delicate dilemma in this connection. If, for example, people lack education, the response of providing educational facilities may impede collective action to demand the state to organize education for everyone. At a minimum, the legitimacy of people’s unsatisfied basic needs should continue to be stressed in order to maintain a human rights profile.

Advocacy means speaking out: exposing human rights violations while linking them to clear



responsibilities on the part of duty-holders. Naturally this must be connected with lobbying and action based on human rights networking. Human rights education may serve to set poverty and destitution clearly in the context of the violation of socio-economic rights. Awareness on the part of both rights- and duty-holders may create the expectations in society which legitimate unmet needs as a basis for claims grounded in rights. Pressure to get these claims honoured should aim at implementation. In this difficult process, in which many constraints will have to be overcome, coordination and cooperation between multiple actors is required: the people themselves, non-governmental development organizations in the field, foreign donors and (international) non-governmental organizations engaged in human rights implementation. Where needs meet rights, all “actors” become duty-holders.

NOTES

¹ See Bas de Gaay Fortman, “Is Socialism Possible?”, *Sociological Affairs*, Vol.1, No. 1, 1998, pp.97-107.

² James Gustave Speth, “Poverty: A Denial of Human Rights”, *Journal of International Affairs*, Vol. 52, No. 1, Fall 1998, p.287.

³ See Bas de Gaay Fortman, “Sitting Back in Horror: Intra-State Collective Violence in a Global Context”, Annual Day Address, The Hague, Institute of Social Studies, 1994.

⁴ See Bas de Gaay Fortman, “Is Democracy Possible”, *Sociological Analysis*, Vol. 1, No. 3, 1998, p.65.

⁵ Cf. Bas de Gaay Fortman and Berma Klein Goldewijk, *God and the Goods: Global Economy in a Civilizational Perspective*, Geneva, WCC, 1998.

⁶ Ronald Dworkin, *Law's Empire*, London, Fontana, 1986, p.404.

⁷ See Alex de Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa*, Oxford, James Currey, 1997.

⁸ K.L. Karst and K.S. Rosenn, *Law and Development in Latin America*, p.650.

⁹ See Bas de Gaay Fortman, “Beyond Income Distribution: An Entitlement Systems Approach to the Acquirement Problem”, in J. van de Linden et al., *Theory of Income Distribution: Heterodox Approaches*, Cheltenham, Edward Elgar, 1999, pp.29-75.



¹⁰ Cf. Bas de Gaay Fortman, “Van Nood naar Recht: Veertig Jaar Recht op Voedsel”, *Internationale Spectator*, Vol. 43, No. 3, 1989, pp.157-60.

¹¹ Amartya Sen, *Hunger and Entitlements*, Helsinki, World Institute for Development Economics Research, 1987, p.8.

¹² Amartya Sen, *Food, Economics and Entitlements*, Helsinki, World Institute for Development Economics Research, 1986, p.5.

¹³ Amartya Sen, *Poverty and Famines*, pp.45f.

¹⁴ See L. Hanmer, G. Pyatt and H. White, *Understanding Poverty in Africa: What Can We Learn from the World Bank's Poverty Assessments?*, The Hague, Institute of Social Studies, 1996.

¹⁵ See V. Ramprasad, *The Hidden Hunger: Food Policy in India and its Impact on Entitlement*, Penang, Third World Network, 1990.

¹⁶ R. Mogotlane, “Developing South Africa in Peace: Migration in Perspective”, paper for Pugwash Meeting no. 218, Lahti, 1996, p.3.

¹⁷ K.L. Karst and K.S. Rosenn, *op. cit.*, p.637.

¹⁸ See Sally Falk Moore, “*Law as Process*”: *An Anthropological Approach*, London, Routledge & Kegan Paul, 1983, pp.55-56.

¹⁹ *Ibid.*, p.79.

²⁰ See Abram de Swaan, *In Care of the State: Health Care, Education and Welfare in Europe and the USA in the Modern Era*, Cambridge, Polity Press, 1988, p.13.

²¹ Cited by W. van Oorschot and P. Kolkhuis Tanke, *Niet gebruik van sociale zekerheid: feiten, theorieën, onderzoeksmethoden*, The Hague, Ministry of Social Affairs, No. 16a, March 1989, p.9.

²² Bas de Gaay Fortman and Chris Kortekaas, “Intra-state Collective Violence in a Political Economy Perspective”, *Pugwash Annual Proceedings*, London, 1996.

²³ Quoted by C. Hill, *Liberty Against the Law: Some 17th Century Controversies*, London, Allen Lane, 1995.

²⁴ Cf. J. Drèze and A. Sen, *Hunger and Public Action*, Oxford, Clarendon Press, 1989.

²⁵ J.M. Keynes, *Economic Consequences of the Peace*, New York, Viking, 1920, p.213.

²⁶ For the assembly statement on international debt see Diane Kessler, ed., *Together on the Way*, report of the WCC eighth assembly, Geneva, WCC, 1999, pp.177-82.

²⁷ *The Economist*, 25 July 1998, p.51.

