

3 | Poverty as a failure of entitlement: do rights-based approaches make sense?

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The *Human Development Report 2000* of the United Nations Development Programme (UNDP) noted: 'People are turning more and more to the law – including international human rights law – to claim their rights.' But what has to be claimed is access to resources necessary to acquire what people need. Rights are abstract acknowledgements of such claims. In order to get one's claims *honoured*, the rights acknowledging them have to be *asserted*. But will that help? Whether 'rights-based approaches' can be conducive to poverty eradication is the principal issue addressed in this chapter.

Notably, the 'rights of the poor' were declared more than fifty years ago in the Universal Declaration of Human Rights of 1948 (UDHR). Article 25, for example, is quite explicit: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control ...'

Strong and compelling language, indeed, but what has it meant for the world's poor? The international community responsible for such 'rights language' appears to be unable to guarantee its enforcement. Indeed, the global endeavour to realize these human rights suffers from a huge *deficit* in implementation, which all too often is submerged in the general euphoria of human rights declarations, conferences, committee meetings and workshops. Non-implementation is notably reflected in the language used with regard to poverty, for example 'poverty *alleviation*', 'poverty *reduction*' and 'pro-poor growth'. Taking human rights seriously, however, would seem to imply just one type of terminology: that of poverty *eradication*.

A fundamental weakness in human rights discourse concerns its relationship to felt social reality: the focus on *declared* rights, frequently at the beginning of long and enduring struggles for implementation, rather than *acquired* rights, i.e. formal legal protection of freedoms and titles that have already been granted societal recognition as sources of *entitlements*. This chapter examines the meaning of such a *declaratory* approach to rights with particular emphasis on the rights of the poor.

Human rights as declared rights

The tendency to abuse power is as old as human history. Therefore the use of power should always be tied to certain norms. Where such norms express legal protection of fundamental freedoms and basic entitlements of each and every human being, we speak of 'human rights'. Since here human dignity itself is at stake, claims based on these rights should normally trump other types of claim, both private and public.

The purpose of *rights*, as interests protected by law, is to put conflicts of interests in a normative setting and thus to prevent their manifestation as pure power struggles. But although rights are abstract acknowledgements of claims in the sense of a general commitment to offer legal protection for their realization, the world is full of denials of claims founded upon people's fundamental freedoms and basic entitlements. In fact, while the whole idea of rights is based upon the expectation that evident violations will lead to contentious action resulting in redress, *human* rights often remain without effective remedies. This is due to two crucial deficiencies: first, the often prevailing inadequacy of law as a check on power, and second, the lack of receptivity to these rights in many cultural and politico-economic contexts.

In terms of the role and rule of law, society is expected to function in such a way that rights are respected and claims based on entitlements connected to those rights are honoured. Dispute settlement is confined to cases in which there are conflicting claims protected by different rights (for example, between landlord and tenant). In the case of human rights, however, adequate embodiment in positive law is all too often lacking, resulting in little redress for violations in and from centres of power. Of course, there are notable differences in context here. In the Netherlands, for example, freedom of speech is protected by a historically *acquired* right, while in China freedom of speech is based on an internationally *declared* right that is structurally divorced from the national political centre.

The character of human rights as 'declaratory' rather than 'conclusive' is applicable to economic, social and cultural rights in particular and manifests itself especially in countries in the South. This is not just a matter of *socio-economic* context, i.e. no jobs, no access to land and hence extreme pressure on scarce productive resources, which breeds frustration and aggression rather than recognition of other people's freedoms and needs. There is also a *political* setting that finds its background in the history of colonialism and affects the distribution and control of power, both internationally and in local contexts. As a result, the fight for *social justice* in a modern economy and polity has a long way to go. Currently that struggle has not yielded impressive fruits internationally. Over the past

two centuries, the gaps between the richest and the poorest countries have widened immensely, while in absolute terms, in the poorest region, sub-Saharan Africa, the number of people living on less than one US dollar a day increased considerably during the 1990s.¹ As a result of decisions taken in the name of economic progress, the world's poor often face increasing daily hardships.² In that dim light, the toughness of the struggle for social justice within so many developing countries is hardly surprising.

(Non)-implementation of economic, social and cultural rights

From a legal-philosophical perspective, human rights may be seen as connecting general principles of justice with the conception of human beings as individuals with subjective rights. Each distinct human right has a *core* that relates to human dignity. Behind that core is a general principle connected with *public justice* in the sense of a communal conviction of what is so crucial for the integrity of the public-political community that it should be enforced. Examples of such principles of justice reflected in the International Bill of Rights are liberty, equality, due process (with sub-principles such as habeas corpus and objectivity and impartiality in judicial decision-making), humanity (respect for human life), the integrity of the body, privacy, stability of possessions,³ and participation.⁴ The next step in terms of standard-setting is to elaborate these principles in domestic legal texts. The relative success of such attempts to further embody human rights in positive law depends first on the functionality of the country's legal systems, second on the country's judicial and political openness to the issue of legitimacy as a notion transcending pure formal legality, and third on country-specific cultural factors. Indeed, the spiritual roots of a human rights language can be found in different social and cultural contexts.⁵ Hence, in accepting their responsibility for the implementation of human rights, states are well advised to look for religious and other types of moral support for efforts made within the environment of their specific jurisdiction, as well as in an international setting. This applies to the North as well as the South. Particularly problematic in the US setting, for example, is the principle of recognition of need – *social justice* – which lies behind Articles 22 to 25 of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The struggle for social justice appeals to people's sense of solidarity and collective responsibility. But in the context of a settlers' society like the US – a country that has such a dominant influence on global culture – it is individual autonomy rather than social justice which dominates legal and political thinking. ('Your well-being is not my concern. I made it, now you have to make it!') Of course, this type of politico-legal thinking is not confined to the US. Notably, the

culture underlying economic globalization is generally based on possessive individualism rather than social justice.

Apparently, the international community still lacks the means to enforce the fundamental freedoms that have been declared as universal rights. With regard to basic entitlements for each and every human being, even a human rights *profile* has not yet been established. Yet the formulation of basic entitlements to education, healthcare, food, clothing, housing and employment as *rights* has raised expectations and 'rights-based approaches' further increase these. Thus, the world of human rights is a world of unfulfilled expectations. While, inevitably, human rights have to be incorporated in the systems of our time ('mainstreaming'), a serious concern today is that they have become a *system* of their own, involving inter-governmental and non-governmental centres, compliance and complaints procedures with commissions, committees and courts of law, training programmes and academic teaching courses, often quite far removed from real-life perspectives. The term 'secular religion' is used in this connection, particularly in an institutional sense.

Is it advisable, then, to capitulate and abandon that whole international venture for the protection of human dignity through rights? My answer is no, because in the global struggle to bind all use of power to essential standards, we have nothing that could better suit the requirements of protecting people's human dignity in a modern setting. Rhetoric, true, but a strong and morally compelling rhetoric. Rights do, indeed, fulfil the important function of providing legal protection to subjective claims based on recognized interests, and hence the incorporation of human rights in functioning legal systems must be seen as essential. Even where not yet incorporated, human rights discourse can still be seen as *normative statements of a moral code*.

My use of the word 'moral' here indicates that the grounding of these rights is in morality and does not imply that human rights should be considered as 'moral rights' as opposed to 'legal rights'. Political science circles in North America particularly seek to bifurcate moral and legal rights, with the term 'moral rights' standing for rights that cannot be enforced or, in other words, rights without remedies.⁶ But remedies are never automatic; rights-holders always have to claim what they are due. So the term 'acquired rights' should not be misinterpreted to mean rights with automatic remedies. Rights are *performative*, i.e. they require action on the part of those who hold them. In the case of human rights the struggle is often to acquire the entitlements that are supposed to be protected by internationally declared law. In other words, of primary interest to people living in poor sanitary conditions is not the internationally declared right to health but their daily

access to clean water. The latter rests upon a concrete entitlement. In many respects, then, that struggle for entitlements is still in its early stages; hence human rights often cannot offer immediately effective realization.

The word 'right', then, holds a *legal* significance – that what is confirmed in such terminology *ought to be* protected by law so as to guarantee enforcement. Like law itself, rights find their meaning in order and justice. As human rights are rooted in justice, their realization is not just a matter of enforcing positive law, but a moral issue as well.

Poverty as entitlement failure

The strategic model on which the global human rights venture is based consists of international standard-setting and monitoring coupled, principally, with local struggles for enforcement and implementation. In this endeavour, international agencies for development cooperation such as the UNDP have chosen to concentrate their efforts on 'enabling environments' in the sense of enhancing the right type of conditions under which people can exercise their human rights. Many people, however, live in environments that, far from being conducive to local implementation, must be regarded as hostile to any effort for the protection of basic human dignity. In such *disabling conditions*, human rights tend to function not so much as legal resources but as *political instruments* to mobilize dissent, protest, opposition and collective action aimed at social and economic reform.

Particularly in adverse conditions such as situations of extreme pressure on scarce resources, a political economy analysis, i.e., one implying a meta-juridical approach that looks beyond disciplinary boundaries, may be enlightening.⁷ Crucial to the analysis is the interface of and interaction between economic, political and legal aspects of problems and policies.

Political economy of human rights, then, is a way of looking behind systemic violations and structural non-implementation. Remarkably, its contribution is not restricted to economic, social and cultural rights. Lack of implementation of civil and political rights, too, must be assessed in a politico-economic context. With regard to poverty these so-called first-generation rights should be seen as 'empowerment rights', indispensable in any struggle to transform declared socio-economic rights into a meaningful basis for actual entitlement. Conversely, in respect of the realization of civil and political rights, economic, social and cultural rights may be seen as 'sustainability rights'.

The core focus of political economy vis-à-vis human rights is acquirement: why and how do people succeed in acquiring what they need for sustainable livelihoods. The methodology I propose starts with Amartya Sen's notion of *entitlement failure*, as advanced in his *Poverty and Fam-*

ines.⁸ Behind failing claims to essential goods and services are deficient entitlement positions, and behind entitlement failure are malfunctioning entitlement systems.

For example, in his analysis of several cases of famine in Bengal, Ethiopia and the Sahel countries, Sen found no instance in which the explanatory factor was a decline in the availability of food; indeed, during the great famine in the Sahel in the 1980s, the export of groundnuts to the world market continued while people were starving to death. Each case of famine analysed by Sen appears to have been caused by *entitlement failure*.

In this connection, Sen distinguishes between production-based and trade-based entitlement. Subsistence economies typically rest 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 about rights and obligations. Entitlement analysis offers insight into such processes. Sen bases his entitlement 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.

Elsewhere, I have expanded this methodology into an *entitlement systems analysis*.⁹ Briefly, a basic distinction first has to be made between rights, entitlements and claims. A right implies neither more nor less than an *abstract* acknowledgement of claims. Entitlement is concrete: actual legitimate command over a good or service in a specified use.¹⁰ A claim is a concrete *act* of acquirement. For example, the owner of a house is generally presumed free to use it. This includes the presumption of an entitlement to live there. Hence owners may well claim actual occupancy of their premises. But it is quite possible that another person is already entitled to occupy that house, for example a tenant. If two distinct individuals claim occupancy at the same time, the judge in question will look behind the conflicting claims and weigh the relative strengths of the respective rights as well as the different interests of the parties. If, in light of the case's facts, there is no completely on-point precedent (as there usually is not), general legal principles may assist in finding developing law for this specific dispute. With

regard to this type of case, for example, an old *regula iuris* says 'Nemo de domo sua extrahi debet' (people cannot be evicted from their own house); a modern principle is 'Sale can break no rent'. The latter means that a new owner cannot terminate the occupancy of the tenant without consent.

Just as the relationship between abstract rights and concrete entitlements¹¹ is not mechanical, neither is there an automatic link between entitlements and honoured claims (actual acquirement). Usually, in order to claim what one wants, certain activities must take place within processes of production, distribution and consumption of goods and services, for example land has to be worked, commodities have to be manufactured and sold, services have to be delivered, consumer goods have to be bought in shops, a door has to be opened with a key. Entitlements provide neither more nor less than access to such processes; actual acquirement also requires activities and action.

Now, suppose a person is homeless simply because he or she lacks an entitlement to occupy any premises. What is the effect of the housing right as defined in Article 25 of the UDHR and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in terms of that individual's concrete entitlement? Unfortunately, this human right does not generally function as a direct source of concrete entitlements. If, however, a landless individual takes direct action to use land currently belonging to absentee owners, the right to food as recognized in international law may well play a part in processes of ex-post legalization. This is, in fact, the way in which the 'Sem terra' movement of landless peasants in Brazil tends to operate. In terms of poor people's 'coping strategies', this may be termed *quiet encroachment*.

A consequence that might follow from the general housing right articulated in international human rights law is a judicial prohibition on depriving human beings access to their sole resort without offering an alternative. Thus, in public interest litigation, the Indian Supreme Court ruled that homeless beggars cannot be simply removed from street pavements where they sleep. Olivier and Van Rensburg's chapter in this book discusses in detail the South African Constitutional Court's judgment of far-reaching strategic importance in *The Government of the Republic of South Africa and Others v. Grootboom and Others*,¹² which obliged the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions, albeit within the South African constitutional 'progressive realization' parameters. Naturally, in carrying out these duties the state must prioritize. But in doing so, those who should be put highest on the list are the individuals belonging to the most vulnerable and deprived groups in society. Although the overall housing programme

implemented by the state since 1994 had resulted in a significant number of additional houses, it failed to cater to the needs of the group requesting remedial action in this particular case. The court issued a declaratory order requiring the state to implement measures aimed at relief for those desperate people who had not been properly cared for in the state programme applicable in the Cape Metropolitan area. Such measures would have to be taken before the programme that had led to their forced removal from the spot where they had at least benefited from roofs over their heads could be implemented. In short, while generally economic rights have been declared as rights without pre-existing entitlements, through concrete action entitlements pertaining to the human right in question can be asserted. Human rights, in other words, are *transformational*: they establish a normative framework for processes of social change.

As there can be rights without entitlements, the opposite may equally obtain. Thus, a peasant may have lawful access to a plot simply because a relevant authority, for example the chief of his tribe, granted access for as long as that person worked that piece of land. Indeed, institutional relations may also serve as entitlement (sub-)systems. Generally, the titles of people living and working in the informal sector of the economy are unprotected by state law, leading to *possession without ownership* and similar juridical actualities. Highly relevant in this connection is the relationship between citizens and their state. Besides state law protecting already existing entitlements, state power may also serve as a source of new entitlements. The state may also interfere negatively in people's entitlements, however, for example through expropriation. Hence, for the purpose of human rights implementation, government policies and actions, in the broadest sense of enforcing entitlements for 'private' actors or in the more traditional sense of positive state regulation, have to be closely monitored in their effects upon the entitlement positions of those living in daily hardship.

The universality of human rights as internationally accepted standards of legitimacy facilitates the mobilization of international support in struggles against their violation. For example, international pressure, through reporting or other procedures by the United Nations Special Rapporteur for Housing, may contribute to processes that will result in actual recognition of people's housing needs. Indeed, it is often (international) non-governmental organizations rather than states which work with and support those carrying out their responsibilities in UN compliance mechanisms.

The rights of the poor: some alternative approaches

Notably, the possibility of judicially enforcing human rights abuses tends to be underestimated, particularly with regard to economic, social

and cultural rights. Although, as pointed out, a homeless individual cannot usually sue the state for provision of a house, forced evictions or cutting off essential services can be contested in courts of law. There is a legally enforceable difference, in other words, between a state of non-implementation and a concrete act of violation. Now, if human rights were no more than subjective rights, albeit of a special type, the human rights deficit mentioned earlier would have a paralysing effect on the whole effort to protect human dignity by law. In that case, the issue would be confined to *justiciability*. But the main point is that precisely in situations where the use of legal resources becomes problematic, the function of human rights as *standards of legitimacy* is activated, through confrontation of power abuses with norms based on the protection of human dignity. Government housing policies, for example, must be based on the right of everyone to live in a decent house and government budgets should reflect the priority given to people's housing needs.

Specifically designated human rights, then, must be seen not merely as subjective rights – to be enforced through claims based on entitlements connected with them – but also as general principles of justice. As such, they play a role in adjudication, not as a direct basis for judicial acceptance of certain claims, but as normative principles that guide judicial decision-making, much as the old *regulae iuris* performed that function.¹³ Consider, for example, the damages suffered by small fishermen when, in the name of development, big trawlers are introduced into shallow waters, destroying the breeding grounds for the fish that form the basis of the local fishermen's livelihoods. Those who have suffered as a result may fail to achieve judicial recognition of claims based on a subjective 'right to development', but the right to development may well be invoked in order to determine responsibility for a tort.¹⁴

Thus far, the emphasis has been on law in a modern universalistic sense, i.e. enforcement of rules through regularized mechanisms. If, however, the realization of fundamental norms binding the use of power were purely dependent on formal legal processes, in many places deficits in the enforcement of crucial standards would be much worse. Fortunately, however, law can also work through *informal* mechanisms or, in another terminology, as *living law*.¹⁵

While 'law' manifests itself as regulation of power, living law has the nature of 'anti-power'. An illustration may be taken from the social history of slavery in Barbados. Beginning at the end of the eighteenth century, records of slave births and sales show that infants were no longer sold separately from their mothers and that the nuclear slave family became a common phenomenon, in that husbands and wives were not sold separately.¹⁶

While slaves were still regarded as chattels and certainly not recognized as legal subjects, motherhood became a 'customary right, evidenced by the noticeable self-enforcement of human rights by informal means'.¹⁷

Moreover, as noted previously, human rights function not only as legal resources but as *political instruments*: standards of legitimacy, applicable to any use of power, whether by state or non-state actors. The processes through which this is effected may have a formal as well as an informal character. Besides living law, in other words, *living politics* also confront power with human rights standards. To illustrate the meaning of living politics, it may be helpful to juxtapose two distinct situations: a parliament without a free press and a free press without a parliament. The former means *dead* politics; a free press without a parliament, on the other hand, can lead to *living* politics. Likewise, in the case of the fishermen summarized above, those in power might be aware of the submerged, but significant, potential resistance likely to be activated when the local population see their fishing grounds destroyed, and might discourage big trawlers from fishing in the shallow waters. Indeed, *living politics* are likely to become increasingly relevant with regard to non-state actors.¹⁸

Notably, globalization today also affects interpretations of legitimacy. For example, as a consequence of globalization, principles regarding the use of power become more and more *general* in the sense of being shared in the whole *ius gentium*. This opens the way to more *inductive* approaches to envisioning a human rights discourse. A deductive approach derives concrete rights from international treaties and other formal sources; an inductive approach starts from what people themselves see as the fundamental freedoms and entitlements that everyone should enjoy and hence ought to be protected by law. Such a growing focus on real-life contexts influences the processes of legitimization. In Bangladesh, for instance, private wash places appear to be a strong priority for rural women. Such essential entitlements can be identified only inductively.

In short, then, institutional decisions that affect the lives of people are being increasingly confronted with universal standards of legitimacy, including modern human rights. While the international structure for the protection of human rights has been designed with a particular emphasis on the state, today growing attention is being paid to human rights observance by non-state actors such as (transnational) corporations, discussed in Voiculescu's chapter in this book. As historically the applicability of rules of justice has never been confined to the state, such a development is not surprising.

Conclusion

The project of protecting a decent life for each and every human being by *declaring universal rights* is not simple. Declared *rights* are rights, and a rights-based organization of society demands functioning legal systems. A crucial point is that while one can have rights without entitlements (for example, a displaced person who still owns his house but lacks access to it), the opposite may equally obtain: entitlements without rights. The poor are generally people with some actual possessions but few legal titles. This is the core of Hernando de Soto's argument in *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*.¹⁹ According to de Soto's calculations, the average assets possessed by the poor amount to US\$8,000 per person. He deplores the fact, however, that poor people's daily access to certain resources and their claims are not protected by established legal titles, i.e. it is practically impossible for them to borrow, invest or accumulate. The assets of the poor, for example a piece of land with a shack, cannot be used for further accumulation because there is no title registered and protected through the modern, universalist legal system.

Therefore, if rights-based approaches are to effectuate change within the rubric of international poverty law, they should remove such constraints and ensure that the entitlements reflected among poor people are equally protected under our legal regime. In other words, policy should be aimed at moving from living law to formally protected entitlement.

Declaring rights implies that much more is necessary than just protecting already acquired bundles of entitlements. Human rights law is *laborious law*. In many a politico-economic context, the transformation of these declared rights into acquired rights that actually guarantee fundamental freedoms and entitlements for everyone requires long and enduring struggles. For civil and political rights, the political order has to be confronted. For economic, social and cultural rights, the entitlement (sub-)systems that lie behind structural non-implementation have to be changed, requiring a confrontation with existing economic powers.

In sum, the rights approach as launched in the *Human Development Report 2000* provides an important methodology for envisioning innovative and integrative strategies to tackle poverty and other violations of basic human dignity. What is needed now is a systematic evaluation of its implications. This might be based on the following elements:

1. Poverty is 'a brutal denial of human rights'.²⁰ Hence, rights-based strategies confront the status quo. As such, they differ from development approaches based on a harmonious striving for progress (development

interpreted as a pure positive-sum game). The basic orientation is not material resources, but the constraints in poor people's daily struggles for sustainable livelihoods.

2. The focus of a rights approach is not poverty as a general phenomenon, for example, the number of people who have to survive on less than so much per day, but rather on the lives and daily hardships of the poor. The centre of attention is people's needs rather than the state's resources.
3. The poor are *people with rights*. Economic, social and cultural rights are meant to offer people protection in order that they might obtain their basic human needs. Hence the injustices that lie at the *roots* of denied needs have to be addressed. An entitlement (sub-)systems approach may serve to reveal the causes of concrete entitlement failure. In other words, the strategy must move from an individual case-by-case response to addressing the structures behind non-implementation of human rights. When poverty is seen not as a natural hazard, but as a denial of basic human dignity, a strong normative component emerges.
4. Rights can be approached from a 'deductive' perspective, for example distilling some eighteen specified civil, political, economic, social and cultural rights from the international treaties and covenants while going into the juridical intricacies of legal definition. Another approach is 'inductive': what are people's own perceptions of what they are due in terms of fundamental freedoms and basic entitlements? Rights-based approaches will have to combine the two methods in spelling out the implications of human rights at the grassroots level.
5. A core notion of implementing a rights approach is *accountability*, meaning that institutions and persons exercising power (actors, in other words) become duty-bearers. In concrete situations of non-implementation, the challenge is to identify duty-bearers while specifying their duties. At times, the duty bearer appears evident, for example when Zimbabwean president Robert Mugabe ordered bulldozers to level people's shacks and destroy their possessions, simply because he wanted 'eyesores' out of view during a state visit by Queen Elizabeth II in the 1980s (recently this has become 'standard practice' in Zimbabwe). Likewise, in the South African *Grootboom* case the duty-bearer was identifiable. But often this is not the case, because behind non-implementation lie complicated social, political and economic structures.
6. Human rights are not just *legal resources* but *political instruments*. The latter implies that the use of power can be seen as legitimate only if human rights standards are followed. *Legitimacy* is a core concept referring to institutions and principles, procedures and outcome. Hence,

rights-based approaches have to track not just inputs but *outcomes*, identifying and utilizing specific standards within a context that is not merely local but also international. Indeed, rights-based approaches will remain meaningless if not connected to responsibilities for global injustices as well.

Within this context, the human rights regime faces three major internal threats. First, human rights might be viewed simplistically, as if universality were just a matter of international law – and furthermore an already settled issue. Although perceived as clear in a legal sense, in political and cultural terms universality remains a major challenge, requiring continuous mobilization of support from every possible quarter in the struggle to protect the dignity of all. Indeed, the global human rights venture necessitates much more than just the involvement of international lawyers, however important their role may be. Second, human rights may be conceptualized as a pure *system*, far removed from the real-life experiences of people struggling for their daily livelihoods. I am referring here to legal instrumentalism: law as an instrument of social change. In fact, the concept of ‘rights with remedies’ is as simplistic as that of ‘rights without remedies’. The real tasks we are facing today are no longer primarily in standard-setting, but in the tribulations of implementation. The third risk is in capitulation: the feeling that human rights law is of such a laborious nature that we should abandon the whole discourse.

Human rights law is not impossible law, as long as one refrains from positivist dogmatism, while being prepared to look creatively for new ways of using human rights as legal resources – human rights as not just subjective rights in the conventional sense but general principles of justice which play their part in adjudication in a way similar to the old rules of law (the *regulae iuris*). With regard to economic, social and cultural rights and collective rights, this opens new avenues for litigation. Related to this, human rights operate as general standards of legitimacy. As such, they may function in alternative approaches to poverty, such as living law (‘quiet encroachment’) and also as instruments in the politics of protecting human dignity.

Finally, the word *approach* is somewhat weak, making a ‘human rights approach’ sound like the latest fashion in launching ideas on development. If the poor have rights – and they do – then there is no new ‘approach’ conceivable that would deny or ignore these rights. Indeed, human rights is a *commitment*, following from a *conviction* (well expressed in Article 1 of the UDHR), and hence for actors adopting ‘rights-based approaches’ there will be no way back.

Notes

1 See, for example, UNDP (1999) *Human Development Report*, New York, and the World Bank (2000) *Global Economic Prospects and the Developing Countries*, Washington, DC.

2 See B. Klein Goldewijk and B. de Gaay Fortman (1999) ‘Development-oriented approaches’, *Where Needs Meet Rights. Economic, Social and Cultural Rights in a New Perspective*, Geneva: WCC Publications, pp. 19–35.

3 I.e. the principle behind Article 17 of the UDHR which declares the right to property.

4 I.e. the principle behind Article 21 of the UDHR on the right to participate in government. Cf. the *regula iuris* ‘Quod omnes tangit debet ab omnibus approbari’, as formulated in the *Corpus Iuris Canonici* (SEXTI DECRETAL., LIB. V, TIT. XII., DE REGULIS IURIS, Bonifacius VII, Regula XXIX).

5 Michael Ignatieff signals a political crisis, a cultural crisis and also a *spiritual* crisis in human rights. See M. Ignatieff (1999) *Whose Universal Values? The Crisis in Human Rights*, Amsterdam: Praemium Erasmianum Essay.

6 Joseph Wronka, for one, sees human rights as a process from ‘rights as ideals’ via ‘rights as enactments’ to ‘rights as exercised’. See J. Wronka (1998) *Human Rights and Social Policy in the 21st Century*, Lanham, MD: University Press of America, pp. 28–30.

7 For a definition of political economy I refer to the *Review of Political Economy* in its mission statement: ‘Political economy is best defined as an approach to economics which puts first priority on practical, and policy ‘issues, and tailors theoretical and empirical work accordingly. The economy is regarded as being located in historical time, interacting with a political, social and natural environment. Within the system the agents change and interact in a manner which cannot be described adequately by the assumptions of neoclassical theory.’

8 A. Sen (1981) *Poverty and Famines. An Essay on Entitlement and Deprivation*, Oxford: Clarendon Press.

9 See B. De Gaay Fortman (1999) ‘Beyond income distribution. an entitlement systems approach to the acquirement problem’, in J. Van der Linden et al. (eds), *The Economics of Income Distribution: Heterodox Approaches*, Brookfield (US)/Cheltenham (UK): Edward Elgar, pp. 29–75.

10 In the essay referred to above I define entitlement as the possibility of making legitimate claims, and hence a function of both power and law. The term ‘command’ used in the present text constitutes a quite appropriate modification suggested by Suzanne Verstegen in her paper *Understanding and Preventing Poverty-related Conflict*, presented at the workshop ‘Resources, Entitlement and Poverty-related Conflict’, The Hague: Clingendael Institute, 5 March 2001, p. 14.

11 This distinction provides more clarity than that between abstract rights and concrete rights, as used in the *Human Development Report 2000* (based on Ronald Dworkin’s work).

12 2000 (1) SA 46 (CC).

13 In this way collective rights, too, can play their part. Thus, as an enlightening principle the right to a healthy environment, for example, or the right to development, may well determine a court case.

14 The right to development is based on UN General Assembly Resolution 41/128 of 4 December 1986. It stipulates, among other things, the duty of states to adopt development policies that aim at 'free and meaningful participation in development' and 'the fair distribution of benefits' resulting from development. Through a certain period of regular practice, supported by *Opinio Iuris*, principles formulated by the General Assembly may acquire the status of general principles of law. Another example is Sovereignty over National Resources. See N. Schrijver (1997) *Sovereignty over National Resources. Balancing Rights and Duties*, Cambridge: University Press, pp. 371ff.

15 While the term 'living law' is used with different meanings I use it here in the sense of *informal* processes of setting, monitoring and enforcing norms pertaining to order and justice within a certain community.

16 See H. McD. Beckles (1989) *Natural Rebels. A Social History of Enslaved Women in Barbados*, New Brunswick, NJ: Rutgers University Press, *inter alia* pp. 105 and 107.

17 Obviously, slave owners feared that non-compliance would imply a considerable risk of slave revolts and hence jeopardize the whole social system.

18 One of the most striking developments in this respect is the incorporation of human rights clauses in the general principles of transnational corporations. Shell International, for one, not only adopted such a human rights clause in its own code of conduct but also deleted the phrase 'Shell is not involved in politics'. While, naturally, party politics is a different matter, the universal responsibility for the observance of human rights implies that no actor in business can stay out of politics. The whole discussion on corporate responsibility and human rights was sparked off particularly by Shell's traumatic experiences in Ogoniland. See Amos Adeoye Idowu (1999) 'Human rights, environmental degradation and oil multinational companies in Nigeria: the Ogoniland episode', *Netherlands Quarterly of Human Rights*, 17 (2): 161-84.

19 H. de Soto (1999) *The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else*, London: Bantam Press.

20 UNDP (1998) *Integrating Human Rights with Sustainable Development*, New York.