

RIGHT TO DEVELOPMENT? Notes Toward An Operational Approach

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Words mean what I say they mean.

- Alice in Wonderland
(The Red Queen)

Aye, but a man's reach must exceed his grasp
or what's a heaven for?

- W. B. Browning

This is the way the world ends
Not with a bang, but with a whimper.

- T. S. Eliot

Do not go silent into that good night,
But rage, rage against the dying of the light.

- Dylan Thomas

Toward Definitional Ground Clearing (Synthesis?)

Discussion of the right to development has regularly become embrangled in attempts to create a series of rather unreal dichotomies between traditional political human rights and subsequently articulated socio and politico economic rights. This pseudo cartesian (or pseudo dialectic) approach tends to obscure a great deal more than it reveals; except perhaps about some of the participants in the debates. Its origins - and much of its rhetoric - flow narrowly from the Cold War and more broadly from entrenched versus excluded individual, community and sub-class interests.

Individual rights cannot in general be separated either from communal rights or from a social context. A Lockean social contract and a parliamentary democracy both posit a social context and a right of communities (or at least majorities grouping individuals) to decide as necessary prerequisites for individual rights to vote or to stand for election. Similarly the right to freedom from hunger or to an adequate diet (most rights can be formulated either positively or negatively) is usually seen as collective but in practice necessarily involves actual individuals' access to actual food.

Absolute or conditional is a distinction which may have some validity albeit the absolutes are mostly negative eg freedom from torture (including perhaps freedom from starvation?). But most rights are conditional eg freedom of speech is conditioned by "clear and present danger" doctrines both in respect to shouting "fire" in a crowded theatre and "Carib-Paki bastards go

home" in Brixton. The arguments turn on what rights should be conditioned to what degree to protect what other rights. There is no very evident correlation with whether the right is "traditional" (eg freedom of speech) or socio political (eg to enjoy the fruits of ones labour). If either is employed in a way leading to a clear and present danger to the rights of others then a case for limitations arises.

Costless versus costly is a recent - and singularly unfortunate - dichotomy. Freedom of speech, or organisation, or ability to remove officials by majority (community) decision would not be costless to the rulers of Poland or the Philippines, occupied Kampuchea or Zaire, Afghanistan or El Salvador. It would cost them their power in each case and for many their lives in several. (Indeed in these cases accepting and acting on a right of freedom from malnutrition would be less costly.) It is rare that those denying the validity - or simply refusing to allow the enjoyment - of a right perceive it to be costless. Iddi Amin did not view torture as a pastime but as a means to consolidate and maintain power nor kill those who spoke of talking tortoises from petty irritation but because by calling up a well known historic (if legendary) precedent they "envisaged the death of the king" (Kabaka Mutesa in the original case).

Unifying versus conflictual is a division overlapping the two previous ones. Almost any right is in some circumstances and from some perspectives unifying. (Any genuine right genuinely prepounded aspires to universality which is a different point.) But in different contexts and from different perspectives almost any is conflictual. The right to an adequate diet in some contexts means restraints on landlords, money lenders, food merchants, tax collectors, etc - consider both the prophets in the Old Testament and medieval bourgeois laws on regrating, engrossing and forestalling for recognition of such conflict far older than and in different ideological traditions from Marxism. The right to free speech is equally conflictual in most contexts.

Pragmatic or principled tends to relate to the case put more than to the right considered. Milton's stirring defence of free speech in Aereopagitica was basically pragmatic - suppressing the false led to suppressing much of the true, in open debate the true would usually win out (and by true Milton meant normative Truth as well as objective fact). Similarly the Brandt Commission's case against mass poverty at global level is that the poor are poor producers, customers, payers and upholders of the peace. But most ardent proponents either of freedom of speech or of the right to eat believe there is a normative as well as a pragmatic basis. Both Locke and Rawls tend in assuming a type of value calculus which is utilitarian in the narrow sense to cut themselves off from the way most real people live and act out value judgements or choices or struggles.

Immediately possible rights can - to some degree - be separated from those attainable only over time. However, which is which depends both on contexts and on perceptions. The right to an adequate diet is globally immediately possible on technical and real resource grounds albeit not on political commitment and power structure ones. (The same is true in India, the reverse in Tanzania and neither the technical/real resource nor political basis exists in Zaire.) Similarly the right to free speech is possible now - at a somewhat limited level - anywhere if the political cost is acceptable to those now in power but if it is read to mean the right to be able to communicate effectively to those interested in hearing it is not

fully achieved anywhere because of very real technical, institutional and real resource constraints. Phased movement toward fuller exercise of rights is not unknown eg apertura in Brazil, Humphrey-Hawkins Act on employment in USA.

Dividing rights into legally enforceable and not legally enforceable has a tendency to be a debater's trick. If the definition of legally enforceable is that there is a law requiring or forbidding certain acts with sanctions for its violation, then to argue that an asserted right is not a right because no such law exists invites the answer "then pass an Act"! If the point at issue is actual enforcement (or protection of exercise) of the right this applies to almost every right in almost every country whatever legal protection it enjoys - the variations of degree are very wide but perfection is very rare. In any event protection/enforcement does not ultimately depend on statute law eg USA non-acceptance of Central American/Caribbean refugees; Zimbabwean ending of segregated health/education facilities 18 months before acts requiring them were repealed.

New or synthesis is more a question than a dichotomy. Evidently numerous aspects of the right to development are embodied in more traditional rights. Whether all are is much less certain - the interaction of "packages" of rights may be catalytic and need to be seen as an interwoven whole (by no means a novel view in the civil rights tradition). Further the formulation of rights - even if not necessarily their basic nature - varies over time and space. The question about formulations (even if ultimately not about rights) is whether they are appropriate and useful not about whether they are "truly new" or regroup elements already contained in different formulations. A ground clearing that takes half a paper may seem one singularly inappropriate formulation! In the case of the right to development that may not be the case - both its proponents and opponents have managed to create vast clouds of smoke and sparks which prevent generation either of much light for those people who would wish to see or much heat for those human beings who are - literally - left "out in the cold" (or hot or wet or dry as the case may be).

Elements In An Operational Definition

The elements noted here have some claim to universality. However, they are formulated from the perspective (if not in the rather more concrete case and struggle oriented) vocabulary of the poor (or excluded, exploited and oppressed). This is deliberate as well as a concession to spatial limits. Rights need to be (and historically are) formulated primarily in terms of those who need to enjoy them and are barred from doing so by forces beyond their control. In the case of the right to development those human beings, communities, sub-classes are primarily the poor even if, arguably, some of the rich are also constrained as well.

Six elements seem central:

- a. participation (direct or indirect but in either case effective) in decision taking;
- b. participation in enforcement of decisions (whether via the courts, elections or some form of withdrawal of support);
- c. participation in production - to have a direct claim on its fruits (and a direct power to reduce or halt it);

- d. effective access to basic individual/household consumer goods (including food, shelter, clothing, etc.) primarily from adequately productive and fairly remunerated employment/self employment;
- e. effective access to basic public services - especially health, education, water;
- f. ability to engage in self organisation to implement/enforce/protect the other elements of the right to development.

This bears a family resemblance to the ILO definition of Basic Needs - and more to its earlier draft on Basic Human Needs which proved politically unacceptable. It has little resemblance to minimum material needs approaches whether those with substantial platonic goodwill - eg Robert MacNamara's - or those which were overtly manipulative - eg Nero's bread and circuses.

It is apparently deceptive to most readers in two different respects. The first is as to its feasibility (at least over a twenty year period) on technical and real resource grounds - which is absolute globally and fairly high in all but a handful of states given moderate, targeted increases in real resource transfers. The second is in assuming that it is either politically easy or per se politically naive. A fairer criticism would be that it is politically explosive and may in many countries amount to a commitment to a course of struggle likely to lead to not insubstantial levels of violence.

Toward Programmatic Operationality

Any right can be defined generally/globally. Any programme at a concrete place, at a specific time to move toward making that right effective for particular communities of human beings and the individuals belonging to them will vary in verbal formulation, specific targets, priorities, sequences, tactics and time frame. Effective ability to communicate now usually requires building up "informal" or "open access" channels but to suppose the Village Voice and state/foundation funded open access time are relevant to Tanzanian villages is about as plausible as to think wall newspapers and meetings of all the residents together are relevant to Manhattan.

Some priority items of personal/household consumption are fully culturally bound - eg the minimum acceptable form of decent burial which in China and probably much of Africa would appear in the top five items most poor households would list as basic needs/rights to be secured. Others are more malleable but by no means either simply "objective" nor totally fluid eg an adequate diet is almost never defined by actual human beings (including one fancies nutritionists when eating) solely in terms of technical nutritional standards. Similarly the form and coding (as partially distinct from content) of free speech is often culture and context specific (eg "parliamentary language" is far from identical to normal standards of non-slanderous both as to inclusion and exclusion).

If one takes participation seriously, initial targets (and struggles and tactics) must turn in large part on how poor people and their groups perceive reality. This is not to claim that a leader should imitate a mirror perambulating down a highway nor to say that consciousness raising is merely a slogan for manipulation. It is to say that a peasant community may and may validly see the initial barriers to an effective right to development as baboons eating their crops because they have no say in district

government and lack of pure water because central government allocations go only to towns. If so, to argue that the "real" problems are rich peasant exploitation of poor and World Bank lending patterns will not do much to further either peasant consciousness or concrete action - and is not consistent with the self determination strand in the right to development. (A strict Platonist whose model came from The Republic - like a reductionist Marxist - would not accept this because he does not accept problem identification and programme decisions as properly participatory by and of the poor rather than handled "for" them by Guardians - whether Platonic or Politbureaucratic.)

However, there are objective considerations. These overlap the previous category; the poor often do have better understanding of many objective realities confronting them than most of their unpoor champions. What the starting point is and what human, institutional, legal and real resource availabilities are must influence immediate targets, sequences and priorities. To propose air conditioners as a basic need of the poor in Africa need not be ill intentioned (highland Africans often find coastal climates more oppressive than Europeans) but it is either soft headed or wrong headed on objective limitation and priority grounds.

Further - while one hesitates to describe access to, exercise of and protection for a right as ever fully attained - the time needed to reach "full implementation" of rights must vary with starting points, costs of achieving them and resources available. To achieve freedom from malnutrition in Sweden is a shorter term goal than in the USA or - a fortiori - Upper Volta. To attain freedom of speech (in a functional not a formal sense) in Kenya is a longer term goal than in - say - Denmark with both Algeria and Tanzania arguably in between and Viet Nam even longer.

Toward Access and Enforceability

A right - if one accepts that rights have a normative base - does not cease to exist because it is violated even if the violation is legally allowed or enforced. Both apartheid and Amin's executions are seen as gross violations of rights - both have had the backing of law in their basic thrust if not in each individual case. However, in talking of rights except in the most abstracted or radical chic senses, it is necessary to focus on human beings, singly and socially having effective access to them and some means to enforce the continuation and expansion of that access to (enjoyment of) their rights.

In any particular case this probably should include (after at least broadly defining the nature of the right and the concrete embodiments of first steps toward making it effective) several steps:

- a. identifying who already enjoys access to the right - individually, communally, as members of a sub-class (eg all members of this seminar presumably have effective access to the right to an adequate diet) - and why they have that access as well as how secure it is;
- b. identifying who does not have effective access (eg most "location" residents in Zambia, most refugees), why and how permanent the denial is (in the two examples both the why and - perhaps - the how permanently questions have different answers);

- c. in the cases of those with access what powers to enforce the right (legally, politically, religiously, by social sanctions, economically) exist and how strong are they?
- d. in the cases of those without effective access why do they not have (or conceivably have but do not use - probably a rare case) powers to enforce the right?
- e. what routes, measures are in fact identifiable to deal with exclusion from access and power (possibly separable - Rwanda refugees in Tanzania have had access to basic services and self employment opportunities but their power to enforce them - citizenship - is both subsequent to enjoyment of access and a granted privilege rather than a right)?
- f. What duties and what limitations (eg on the non-poor) need to be imposed to ensure effective and sustainable access for those who do not now enjoy it? How can these be structured to do the least harm to other rights and to have some chance of operationality? Freedom to preach racism can deny any chance for effective equality of opportunity to minority communities and individuals and freedom to amass land can require near starvation of rural new landless but the ways of preventing either are varied and have quite varied impact on freedom of speech and freedom to enjoy the proceeds of ones labour (and to pursue ones occupation) more generally.

It is not always necessary to ask these questions - leaping into action is sometimes appropriate eg when massive violations of the right to life (whether from legal or paralegal execution or from starvation) are occurring or likely to occur unless deterrence is brought to bear. However, it is usually desirable to do so as a prelude to (not a substitute for) action. To ask the right questions - especially as to practicable means - is very often half way to finding the right answers and a quarter of the way to initial implementation.

Law and Enforceability

Law - at least statute law - is neither the only nor the ultimate source of enforceability. This is probably particularly true of the right to development and of many aspects of it. The right not to starve has very considerable moral, emotional, cultural and - sometimes - political force but is very rarely (never?) legislated directly, nor indeed would it be made readily enforceable if it were.

Nor does law provide an inclusive or basic definition of rights even in principle. (In practice the correspondence is even less - legally validated rights are often flagrantly violated and rights on which there are no laws at all more widely enjoyed and honoured.) While a body of Law (as contrasted with individual laws) which is organically related to a society's values, practices, traditions, culture may influence how rights are perceived and enforced even if it is less than fully definitive (especially in periods when perceptions and/or power structures shift).

However, this is not the same thing as saying that in general law has no relationship with (or a negative relationship to) rights even though that may be true in some cases. Laws are often more than a simple recapitulation of what exists. They can play a target setting and norm presenting role as well as providing one avenue toward enforceability. How

fully they can do this depends partly on how much change, how fast they require, how widely the norms embodied in them are accepted (including by those who violate them) and how many holders of how much power put what priority on enforcing them. The very different effectiveness of USA and UK anti-discrimination legislation relates in part to such considerations as well as to the very evident greater technical legal weaknesses of the UK legislation.

Law - broadly defined - has several roles in respect to establishing any right, the right to development included:

- a. as an educational tool (in the hands of the would be beneficiaries of the right);
- b. as a defence mechanism (against those who violate the right protected by existing law even when state initiated enforcement is unlikely and the state is among the violaters who need to be restrained. This is not so unreal a use as might be supposed - the tradition of the *rechstadt* has partial echoes surprisingly widely as eg some - even if not most - South African, Philippine and Indian cases suggest);
- c. as a limitation on actions by the state or by other actors (either because the state really does accept and will enforce the law or because it and other actors see a non-legal cost in breaking the law);
- d. as a lever or pressure point (eg broad declarations on the right to development embodied in law may form a platform for criticizing actions/practices/resource allocations which frustrate their implementation);
- e. as a tool for - and a defence of - self organisation and participation in respect not only of formal constitutional law but also of administrative law (including general regulations whatever their formal status) and of the organisational embodiment and self defence of groups seeking access to the right to development.
- f. as a means of imposing a sanction (cost) or erecting an injunction (barrier surmountable only at a cost) against a violater of some embodiment or aspect of a right.

The basic problems with the use of law in these ways are at least fourfold:

- a. access to the law - both intellectual and financial - is often easiest for those who already enjoy effective rights and/or wish to deny them to others;
- b. use of laws to bind a state which does not in practice agree with them has distinct limitations beyond individual cases or secondary issues - ie one can hope to gain a few degrees of freedom sometimes but not challenge the basic interests of dominant decision takers who will ultimately respond by coercing the courts/lawyers or changing the law;
- c. laws in a broad - and sometimes loose - way do represent the values, goals and interests of those (individuals, sub-classes, corporate bodies) in power whereas the right to development is primarily concerned with altering access to - inter alia - power and therefore requires changes in the laws before it can depend on their enforcement as a generally positive force;
- d. the majority of lawyers in most countries (including judges) are not poor and do - personally and as a profession or sub-class - have fairly effective access to the right to development. Thus both "what

we have we hold" and "invisibility" (or non-comprehension of) the poor and their assertion of a right to development are more often the rule than the exception in legal circles.

None is either absolute or insoluble. Collectively they can be formidable. However, considerations b and c, once portions of the right to development have adequate power bases to have been enacted as law and to have substantial institutional/political backing, begin to operate in the inverse (pro-right to development) way. At that point the last problem may become lesser - with a more diversified group of entrants into the legal and paralegal professions - or greater with lawyers the guardians of the last ditch against more effective access to the right to development whatever lawmakers and the poor may say or legislate. It is not accidental that revolutions fairly generally take a dim view of individual lawyers, judges and laws; not uncommonly of the existing legal profession and legal system as a whole and sometimes of the rule and role of law generally. Not accidental, but not desirable either since laws and especially Law are among the least bad/least ineffective ways of creating and maintaining institutional and procedural frameworks within which effective access to all rights (including the right to development) could be enjoyed.

Draft - to be revised prior to publication. May be cited but not directly quoted without reference to the author.