

HUMAN RIGHTS AND POVERTY REDUCTION

- Realities, controversies and strategies

Can human rights make aids agencies more accountable?

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The perspective of this contribution is one of a practical lawyer, relatively unversed in the field of development but keen, if the occasion arises, to further the interests of sustainable development by making aids agencies accountable. Whether this is to be done in terms of the continuing struggle for human rights or otherwise is the subject of these observations.....

If you ask people generally about rights they are in favour of them; particularly if they are expressed as "human rights". What is a human right is not always understood and all too often the mere fact that Something Ought To Be Done is expressed as someone's right. However, viewed in these terms there is an expectation that this supposed right can be enforced by going before a judge and getting on order.

Theoretical constructs have been evolved by academics based upon human rights law ². However, in reality, the difficulties caused by this are when several human rights conflict. Questions that arise relate to the proportionality of an agencies response in, say, securing political rights to vote on the one hand and the expenditure of resources to secure economic and social rights of alleviating hunger and disease on the other. It is, after all, also, a human right of a rich person and corporation to enjoy property ! ³ On this it is interesting to observe the recent initiative of the World Bank, however⁴,

"The world now accepts that sustainable development is impossible without human rights. What has been missing is the recognition that the advancement of an interconnected set of human rights is impossible without development. Enlightened legislation and vigorous civil society are essential. But they are not enough. Human rights are in a sense both the design and the product of people organised through government. They don't just happen. Many public services will only reach the poor if governments are both capable of delivering them, and do so without the obstacles of corruption; laws related to end child labour will be more effective in economic conditions that allow families to live off the incomes of parents; and legal rights are better pursued in effective court systems."

If you ask a human rights lawyer, however, about the human rights implications of development, the approach would be – is – coloured by three crucial notions which come to bear on subject:

I SOFT AND HARD LAW

First, to explain or remind you about the notion of HARD and SOFT law.

"Hard" or "black letter" law is the text of an Act of Parliament and that part of judge-made law that is settled and normative. You can go to court and have a judge enforce it.

"Soft" law is other material which may influence the state of the law but is not itself directly enforceable law. Examples are international agreements which have not been incorporated into domestic law, writings of eminent jurists, practice of states and this is not exhaustive.

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² See for example McGoldrick, 'Sustainable Development and Human Rights An Integrated Conception' (1996) 45 ICLQ 796

³ see Protocol 1 of the European Convention on Human Rights.

⁴ *Development and Human Rights: the Role of the World Bank* www.worldbank.org

In the context of the issues under consideration, the distinction between hard and soft law is important; first in relation to what human rights law there is and, second, what can be done with it: whether it can be meaningfully enforced when there is no will to otherwise do so by, especially, states.

The European Convention on Human Rights

The conventional view of "human rights" relates to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, now part of our law. It is now "hard" law: in terms of conventional human rights, the European Convention on Human rights is now given effect in English law by the Human Rights Act of 1998.

There are two limitations on using the Human Rights Act and, indeed the Convention, in support of arguments to underpin a Human Rights analysis of development.

First, it is limited to human rights issues which arise essentially in the territory of the signatory state. The Act of Parl restricts its application to the territory of the state because Art 1 of the Convention provides,

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Part I of this Convention."

Thus, anyone in Westminster and anyone in Belmarsh is covered. So are British Overseas territories and colonies and, if the UK had control over prisoners in Guantanamo Bay, it would be considered that the UK had jurisdiction. But the UK does not have jurisdiction in the states of the developing world, not even if they are members of the Commonwealth.

II POSITIVE AND NEGATIVE RIGHTS

Second, the second notion relates to POSITIVE and NEGATIVE rights. Although expressed in terms of rights, what are described are on the whole, NEGATIVE rights-

A POSITIVE RIGHT requires a person to do something a NEGATIVE RIGHT requires a person not to do something.

Thus, the "right to life" in ECHR is the right not to be deprived of life (art 2) and there is a right not to be tortured (art 3) not to interfere with the right to impart and receive information (art 10), or the family (art 8) and so on. In this respect the rights under the Convention are like the Ten Commandments, thou shalt not kill, etc

Note that a "right" of this kind does not imply a right not to avail oneself of the right. The "right to life" does not necessarily imply a right to die⁵. Neither does the existence of a negative right imply anything other than a duty on the part of the state not to interfere with the right and to properly investigate a loss of life which the state has caused⁶ and in a manner that satisfies a number of criteria⁷. It has also been established that the state has a duty to guard life if it is aware or should have been aware of risks to life⁸. This is a long way, however, from the state a. being required to nurture life and b. doing so beyond the shores.

On this analysis, it becomes clear that conventional, black letter, hard law provides little assistance in support of a human rights based rationale for aid and development.

⁵ See Pretty v UK 2004

⁶ McCann v UK EHRR []

⁷ R v [] Coroner on the application of Middleton 2004 House of Lords.

⁸ Osman v UK EHRR []

In order to find human rights law to support a proposition that there are positive obligations upon states we need to look elsewhere.

INTERNATIONAL LEGAL ORDER

What is the material that is available ? There are many important instruments whose status in international law is established. It will be seen that many refer to obligations that are not susceptible of measurement, they are aspirational aims. They often speak of mechanisms rather than independent organs for the settling of disputes.

The United Nations Charter 1945

Preamble :-

“to promote social progress and better standards of life in larger freedom”

“ to employ international machinery for the promotion of the economic and social advancement of all peoples”

Art 55⁹ contains the aspirations of the organisation in terms of quality of life objectives throughout the world.

The Universal Declaration of Human Rights of 1948 is the very important instrument made pursuant to these objectives. It proclaims that every “organ of society and individual” ,

“shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measure, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”

What is interesting and significant is that, additional to familiar rights expressed in the terms of the ECHR, we find, a series of positive rights¹⁰, among them article 25:-

“1. 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 services¹¹....”

III INDIVIDUAL AND COLLECTIVE RIGHTS

⁹ Art 55 “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a) higher standards of living, full employment and conditions of economic and social progress and development;
- b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

¹⁰ E.g. right to work (art 23), to rest and leisure (art 24), education (art 26), participation and cultural life (art 27)

¹¹ “...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.”

Time to introduce the third notion: it is the idea of GROUP rights, when human rights law is conventionally expressed in terms of INDIVIDUAL rights. The distinction is important; individual human beings may have rights that can be enforced at their own behest; the rights of inchoate groups of human beings may require different mechanisms to secure their rights as a whole.

The next instrument which takes the notion of positive rights further is the International Covenant on Economic Social and Cultural Rights of 1966. It recognises that,

“...the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”

Declaration on the Right to Development 1986

This was made by the General Assembly¹²

“Art 1

The right to development is an inalienable human right by virtue of which every human person and all person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized....”

By art 4.,

“1. States have a duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development...”

The word “duty” is a strong word; there follow paragraphs that are exhortative, using expressions such as what states “should” do.

International law is also created by the writing of eminent jurists. Thus Prof Philippe Sands QC has taken the view¹³,

“ the concept of “sustainable development” is now established in international law, even if its meaning and effect are uncertain. It is a legal term which refers to processes, principles and objectives, as well as to a large body of international agreements on environment, economics and civil and political rights.”

AID AGENCIES AND ACCOUNTABILITY

The context in which I see the issue is, on the one hand, huge unmet need for resources by the developing world; on the other, the rich world reluctant to part with the wherewithal, desirous to spend it on what is politically or economically expedient for itself, willing to pander to political objectives, vulnerable or well disposed to corruption and bribery.

How do human rights principles hold agencies to account ?

¹² GA resolution 41/128 Adopted 4 December 1986

¹³ *International Law in the Field Of Sustainable Development* (1994) 65 Brit Journal of Int Law 303 at 379`

There are very few cases where development issues have been litigated before the courts. The Supreme court of India is a notable exception in the context of the right to water within its own state.

THE PERGAU DAM - A CASE STUDY

Possibly the only example of a government agency being challenged successfully in the courts of its own state, the case has a number of lessons to teach us. Ten years ago, in Regina v Secretary of State for Foreign Affairs ex p World Development Movement [1995] 1 Weekly Law Reports the High court had to consider the proposed grant of substantial funds to Malaysia. The disquiet originally felt about the project which had been secret for years was that arms were essentially being traded for aid.

The Overseas Development and Cooperation Act 1980 provides:

“ 1(1) The Secretary of State shall have power, for the purpose of promoting the development or maintaining the economy or a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature.”

The Permanent Secretary Sir Tim Lankaster noted,

“Supporting the project with aid funds would not in his view be consistent with policy statements by Ministers to Parliament about the basis objectives of the aid programme and the way aid funds are managed, which is also the context in which Parliament voted aid monies. Nor did the project meet well established criteria by which public investments should be assessed...”

The court quashed the grant, immediately releasing over £200m for proper development purposes. Sir Douglas Hurd, the Foreign Secretary, has extensively written about the furore the case caused at the heart of government and the impact it had on policy¹⁴.

A number of observations are instructive:

1. this was not a human rights case but had everything to do with human rights. The lesson is that a *tangential attack* on a bad decision may be appropriate and more effective.
2. the government tried to argue that the WDM had no standing to bring the case, that no one in the UK had a “sufficient interest in the outcome of the proceedings” for the purpose; after all, no citizen here, let alone a group was directly affected by the decision to build a dam rather than any alternative disposition of aid. That argument was conclusively determined against the govt and it is inconceivable that they will try again.

It is now well established that if a legal issue in public law can only be determined if brought to the attention of the court by a pressure group, it will be heard if there is no identifiable individual who is¹⁵; indirectly some voice is given to Collective Rights.

3. the case was brought before HR Act came into force; it was not possible to prey in aid the ECHR rights even if they had been relevant.

¹⁴ Hurd, D [name of autobiog]

¹⁵ Regina v HM Inspectorate of Pollution and Min of Ag etc ex p Greenpeace [1994] 4 All ER 329

But supposing Sir Tim Lancaster, who had advised the Sec State had not expressed a view or a view which the applicants, the World Development Movement, had discovered? Might it have been arguable that, in deciding what is meant by the words,

“for the purpose of promoting the development or maintaining the economy or a country or territory outside the United Kingdom, or the welfare of its people,”

That regard should be had, to interpret what those words meant, to international instruments?

I would like to think we are now at the stage when, having incorporated ECHR law, we can use other –presently “soft” instruments as aids to interpretation. We, in my opinion, are at the stage in developing jurisprudence in which we found ourselves in the years leading up to the incorporation of the HRA. In cases of ambiguity, or where the context of English statute law was unclear, the court could look at obligations to which the state was party.

A proposed grant – or refusal to make a grant - which could be demonstrated not to foster human rights might very well not fall foul of the legal criteria in the UK in the first instance. However, if it could be shown that it had direct, adverse and disproportionate effects on human rights as understood in the international context, there might very well be a challenge that would stand up in court.

CONCLUSIONS

Human rights may in some circumstances be the basis for practical advancement of development causes.

It may not arise in a manner that is expressed in terms of a “human right” or “human rights law”.

Soft law one day is hard law the next; it is part of the aid world lawyer’s task to push at the boundaries in the cause of justice in the service of humanity.

But the legal remedies embrace any number of further possibilities:

FREEDOM OF INFORMATION

The new Freedom of Information Act 2002 is now in force. It is an aspect of human rights law. Without information no one will be held to account. It must be used constructively. The Right to Know creates an obligation on aid agencies to Find Out.

THE DUTY TO GIVE REASONS

Over recent years public authorities have been called to account by requirements to give reason for a decision¹⁶. The more grave the consequences of a decision the greater the obligation to give reasons.

HUMAN RIGHTS AUDIT./ THE WORLD COURT / []

[To be concluded]

¹⁶ See for example []