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# Towards an actor-oriented perspective on human rights

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## Summary

This paper argues that rights are shaped through actual struggles informed by people's own understandings of what they are justly entitled to. Examining rights from the perspective of actual struggles makes it possible for analysis to transcend accepted normative parameters of human rights debates, question established conceptual categories and expand the range of claims that are validated as rights. The paper draws out these "actor-oriented perspectives" in the course of reviewing four key debates that have been central to international human rights, showing how actor-informed perspectives question underlying assumptions in the debates and offer the possibility of moving beyond the impasse of some of the debates. The four key debates are: the extent to which human rights norms are socio-culturally contingent or universally valid; the extent to which the liberal individualist conception of rights permits recognition of group rights; the hierarchy between social/economic and civil/political rights; and the extent to which international human rights should place human rights obligations on non-state actors. The paper concludes with specific lessons that must be borne in mind in researching the linkages between rights, citizenship, participation and accountability.

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## Preface

This paper was prepared for the Development Research Centre on Citizenship, Participation and Accountability (Citizenship DRC), an international research partnership dedicated to exploring the new forms of citizenship which are needed to make rights real for poor people. The Citizenship DRC's programme emphasises collaborative work across national, institutional and disciplinary boundaries, adopting an approach that combines research, capacity building, dissemination and policy influence.

The Citizenship DRC brings together over 50 researchers from research institutions and civil society groups based in Bangladesh, Brazil, India, Mexico, Nigeria, South Africa and the UK. It is coordinated in the UK by the Institute of Development Studies (IDS); in Bangladesh by the Bangladesh Institute of Development Studies (BIDS); in Brazil by the Centro Brasileiro de Análise e Planejamento (CEBRAP); in India by the Society for Participatory Research in Asia (PRIA); in Mexico by the Instituto de Investigaciones Sociales of the Universidad Nacional Autónoma de México (IISUNAM); in Nigeria by the Theatre for Development Centre at Ahmadu Bello University (TFDC) and in South Africa by the Centre for Southern African Studies/School of Government of the University of the Western Cape (UWC).

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For more information, please see the Citizenship DRC website: www.ids.ac.uk/drc-citizen/

# 1 Introduction

Rights are shaped through actual struggles informed by people's own understandings of what they are justly entitled to. This paper shows that looking for the meaning of rights from the perspective of those claiming them transforms defined normative parameters of human rights debates, questions established conceptual categories and expands the range of claims that are validated as rights. The exercise of drawing out these "actor-oriented perspectives" on rights is organised around four key debates that have gone on among human rights legal practitioners and scholars. These four key debates are summed up in the following questions:

- Are there shared universal understandings of rights or are rights inherently contingent on socio-cultural context?
- Is there space for group-based claims in the liberal individualist conception of rights? How are individual freedoms to be protected in the context of group rights?
- Should rights be thought of as demarcated into a civil and political sphere on the one hand, and an economic, social and cultural sphere on the other, or are all rights interdependent, inter-related, indivisible and non-hierarchical? Most state legal frameworks accord weaker legal status to the later; does it still make sense to conceive of them as 'rights' in the absence of legal recognition and enforcement?
- The international human rights framework places obligations on states. Is it possible to use this framework for the legal accountability of non-state actors whose actions violate human rights?

The paper begins by mapping out these key debates and highlighting ways in which bottom-up actor-oriented perspectives shaped by specific human rights struggles have questioned the premises of these debates. I draw both from accounts of these struggles and critical responses to the debates to point to the possibility of an actor-oriented perspective on rights. The concluding part of the paper isolates specific points for reflection in thinking about meanings and expressions of rights, which is the theme of one working group within the DRC on Citizenship, Participation and Accountability.

# 2 What does an "actor-oriented" perspective mean?

By an "actor-oriented" perspective I mean an understanding of human rights needs and priorities that is informed by the concrete experiences of the particular actors involved in and who stand to gain directly from the struggles in question. My understanding of an actor-oriented perspective is drawn in part from legal literature that does not necessarily position itself within the human rights tradition, but which calls for an evaluation of legal principles in terms of their concrete effects in a social setting, rather than in

terms of the conceptual coherence of abstract principles.[1] This literature goes beyond a call for attention to context to an emphasis on consequences for less powerful groups and/or individuals in society. To quote one of the authors, Joseph Singer,

> When we ask ourselves whether a social or legal practice works, we must ask ourselves, 'works *for whom?*' Who benefits and who loses from existing political, economic, and legal structures?
>
> (Singer 1990: 1841)

Such an approach explicitly acknowledges the reality of power differences and hierarchical relationships in society, and therefore points to the need to look beyond abstract formal equality principles to the effect of those principles in entrenching or challenging hierarchy– from the perspective of the subordinated. (Matsuda 1990:1768; Minow and Spelman 1990:1650).

When people ask the question 'works for whom?' and translate this question into action, they change the terms of institutionalised understandings of rights and make rights real in their own context. They use an otherwise legalistic discourse of rights in a transformative manner that translates it into an effective challenge against power inequalities. They shift the parameters of the discourse and expand the possibilities for action.

## 3 Actor-informed perspectives on key debates in international human rights

Focusing on four key issues that have been central to international human rights debates, this section demonstrates that a focus on concrete struggles leads to a questioning of the underlying assumptions and changes the terms of the debates.

### *3.1 Universality -v- cultural relativism*

Do human rights principles provide a universal standard to be applied uniformly, or are they contingent on social context? Are human rights norms universal by virtue of a common humanity, or is the concept of human rights inherently defined by the specific cultural context? This debate has characterised the post-World War II human rights movement since the enactment of its founding document – the Universal Declaration of Human Rights (UDHR), 1948 – and continues to be intense. I will map out the various positions represented along the spectrum of "universalist" and "cultural relativist" arguments.

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[1] See e.g. scholarly work in the "critical pragmatic" framework: Joseph Singer, 'Property and coercion in federal Indian law: the conflict between critical and complacent pragmatism'; Margaret Radin, 'The pragmatist and the feminist'; Mari Matsuda, 'Pragmatism modified and the false consciousness problem'; Martha Minow and Elizabeth Spelman, 'In context' – all in *Southern California Law Review* (1990).

### *3.1.1 The universalist arguments*

The first type of universalist argument is the normative claim that human rights *should* provide a universal standard because rights inhere in every human person by virtue of simply being human. Rights flow from the inherent dignity of every human person. Rights are not given by the sovereign and therefore the sovereign cannot take them away. Nor are rights pegged to social status or stratification based on age, gender, or caste. This argument is influenced by the idea of "natural rights" attributed to natural law theorists, such as Kant (Wilson 1997: 8). Contemporary variants of this normative universalist position are found in Jack Donnelly (1989), Rhoda Howard (1991) and Oscar Schachter (1983).

It also finds expression in international human rights documents such as the 1993 Vienna Declaration on Human Rights, adopted at the first UN Conference on Human Rights. The preamble to the Declaration states that 'all human rights derive from the dignity and worth inherent in the human person' and that the UDHR 'constitutes a common standard of achievement for all peoples and all nations'. Article 1 reinforces this by asserting that 'human rights and fundamental freedoms are the birthright of all human beings' and that the universal nature of rights and fundamental freedoms 'is beyond question.'

Since rights flow from the inherent dignity of the human person, they are therefore not contingent on particularities such as political, social, economic or cultural context.

The second category of universalist arguments is the formalist argument that since most states have ratified and agreed to be legally bound by international human rights law, then human rights standards are universal. In addition, some argue, the UDHR, though simply a declaration that is not legally binding is such a widely accepted landmark instrument in human rights that it has (or parts of it have) become customary international law. (Steiner and Alston 2000: 367). Customary international law refers to norms that have evolved from state practice over time, which bind even those states that have not entered into specific treaties on those aspects of international law: in this case, human rights.

This argument resonates with Howard's contention that human rights must be seen as universal because even if their Western origins were acknowledged, most states around the world have adopted the liberal state framework. This framework makes rights inevitable and indispensable in regulating state-citizen relations (Howard 1991).

This category of universalist arguments is not concerned with the legitimacy of human rights standards; formalist criteria such as the fact of ratification alone, or the existence of a liberal state framework will suffice to make the case for universality.

### *3.1.2 The multicultural universalists or weak cultural relativists*

I refer to this category of arguments as "multicultural universalists" or "weak cultural relativists" because they do not reject universality outright, and neither do they insist that rights are contingent on cultural context. Rather, they refer to the incompleteness of international human rights discourse as currently constituted. Their position is that human rights can be truly universal if as many world cultures as possible contribute to shaping a universal discourse of rights. Every society has a valuable contribution to make

because every human society has some fundamental idea about human dignity and social justice, of which the particular concept of human rights is just one aspect (Schachter 1983). An-Na'im expresses this argument as follows:

> Current and foreseeable new human rights cannot be seen as truly universal unless they are conceived and articulated within the widest possible range of cultural traditions . . . As normative propositions, human rights are much more credible and thereby stand a better chance of implementation if they are perceived to be legitimate within the various cultural traditions of the world.
>
> (An-Na'im 1992: 2)

They charge that human rights principles as expressed in existing human rights laws and institutions are not universal because they were shaped by a distinctly Western experience. The origin of human rights can be traced to an Enlightenment mindset, and its modern institutions have roots in specific historical circumstances – post World War II Europe (Wilson 1997: 4). Some cite the absence of non-Western representatives at the drafting of the landmark human rights instrument, the UDHR (Mutua 1999).[2] Others cite the inadequate representation of indigenous peoples in the process of formulation of rights at the international level. Since they are not adequately represented in this state-oriented system, their values and needs are not taken into account, and therefore the norms so formulated cannot claim to be universal. (Falk 1992: 48).

According to these authors, the project for the modern human rights movement is to make human rights truly universal by accommodating these fundamental ideas in as many cultures as possible, particularly non-Western cultures. The modern human rights movement should build on them, rather than work from a Western conception of rights as the starting point (Mutua 1995). 'Retroactive legitimation' is not only possible but desirable, and the existing human rights standards should be open to revision and reformulation (An-Na'im 1992: 6; Matua 1995: 346).

### *3.1.3 Radical cultural relativist arguments*

Radical cultural relativist arguments are at the other end of the spectrum from normative and formalist universalist arguments. The radical cultural relativist arguments hold that there can be no transcendent idea of rights. Radical cultural relativism views culture as 'the sole source of the validity of a moral right or rule' (Wilson 1997: 2). Therefore international human rights norms reflect a particular cultural viewpoint – a Western one. A good example of radical cultural relativism is the statement that the American Anthropological Association (AAA) issued in reaction to the draft UDHR in 1947. The AAA cast doubt on the UDHR's claim to represent a universal perspective. It stated:

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[2] Remarks at plenary session of Harvard Human Rights Program's 15th anniversary celebration, September 1999.

> How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America? . . . Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.
>
> (AAA 1947: 539)

Examples of features that the AAA regarded as being of a typically Western worldview are the centrality of the individual as opposed to the community (which I discuss under a separate heading below), and the emphasis on rights as opposed to duties.

In the arena of state practice of international law, cultural relativism is expressed in the reservations that various states have made to some human rights instruments. The UN Convention on the Elimination of All Forms of Discrimination Against Women registers the highest number of reservations, most of which relate to the provisions that stipulate equality in family relations and state obligation to reform customs and practices that discriminate against women.[3] The phrasing of the reservations show clearly that the states concerned see these provisions as inherently contradictory to their cultural and or religious values. For example, Bangladesh, Tunisia, Libya and other Muslim countries cite conflicts with Islamic law as the reason for their reservations, and give no indication that this situation could change to permit withdrawal of the reservations any time in the future.

The radical cultural relativist argument has provided ammunition for governments bent on deflecting criticism of their governance practices. A frequently cited example is what has come to be referred to as the "Asian values" argument, contained in the Bangkok Declaration that was issued by a summit of Southeast Asian leaders meeting just before the UN Conference on Human Rights held in Vienna in 1993. The Bangkok Declaration states that rights must be understood within the context of national and regional particularities, and must be informed by specific cultural, religious and historical backgrounds. It condemns the 'imposition of incompatible standards' through political pressure or conditionality in development assistance.

In a move that was clearly intended to counter the Bangkok Declaration, over 200 NGOs took part in the drafting of an Asian Human Rights Charter in commemoration of the 50th anniversary of the UDHR in 1998. The charter reaffirms the relevance of fundamental human rights in the Asian context, and the universality of such rights (Ghai 1998).

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[3] CEDAW articles 2(f), 5(a) (calling on states to reform customs, practices and stereotypes that reinforce women's inferior status) and 16 (which calls upon states to take legal and other measures to ensure equality in family relations).

### *3.1.4 Actor-informed perspectives that question the terms of the universality-v-cultural relativism debate*

Mahmood Mamdani challenges the assumptions underlying the debate on universality (specifically the debate on whether rights are of a Western origin) by arguing that rights are defined by struggle, and rights struggles are born of experiences of deprivation and oppression.

> Without the experience of sickness, there can be no idea of health. And without the fact of oppression, there can be no practice of resistance and no notion of rights . . . Wherever there was (and is) oppression – and Europe had no monopoly over oppression in history – there must come into being a conception of rights.
>
> (Mamdani 1989:1–2)

Viewed from this perspective, human rights are both universal and particular: universal because the experience of resistance to oppression is shared among subjugated groups the world over, but also particular because resistance is shaped in response to the peculiarities of the relevant social context.

The extreme positions in the universalist-v-cultural relativist have also been criticised for obscuring manifestations of local understandings of rights –"vernacularization" of rights, in the words of Sally Engle Merry (Merry 1997). She uses ethnographic data drawn from Hawai'ian struggles for independence to show that even though the discourse of human rights is based on "Western liberal-legalist ideas", when specific struggles in non-Western societies utilise the discourse in framing their demands, the concept is reinterpreted and transformed. This transformation is a two-way process of incorporation of local understandings and the addition of global discourses, and it is this two-way process that she refers to as "legal vernacularisation".

A similar challenge has come from accounts that undertake a situated analysis of how people actually live in a context of legal and cultural pluralism,[4] and strategically draw from both their cultural or religious norms and formal rights regimes in dealing with real life situations. Both cultural norms and formal rights regimes provide opportunities and challenges in dealing with specific situations. The lines are not so clear-cut in reality, which rules out a clear cut demarcation placing the blame for human rights violations on culture and positing universal human rights principles embodied in formal laws as the solution. (Nyamu 2000; Nhlapo 1995; WLSA 1995).

## ***3.2 Individual or group rights?***

One of the arguments made in the AAA statement of 1947 and other radical cultural relativist critiques is that human rights discourse downplays the importance of community. It therefore seeks to impose an individualist model of rights that is at odds with non-Western ways of life. This same emphasis is present

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[4] Most post-colonial societies are characterised by "classic" legal pluralism, which refers to the co-existence of formal laws derived from the colonial encounter with the West, and laws based on custom and religion, which have been incorporated into the legal system. (Merry 1988; Griffiths 1986).

in the constitutions of countries that have adopted the liberal state framework. Is there space for group-based claims in the liberal individualist formulation of rights? Conversely, how are individual liberties to be protected in the context of group rights? These questions have been the subject of debate in the broader conversation between liberals and communitarians. The former conceptualise people/citizens as self-interested autonomous individuals while the latter view individual identity as being defined through relations with others and embedded in community. A good summary of the various arguments in this broader debate is contained in Mulhall and Swift (1992), so I will not go into detail here. In addition, Jones and Gaventa (2002) address the liberal-communitarian debate briefly in discussing the various conceptions of citizenship.

The debate is really between an abstracted view of the rights-bearing individual as a universal construct, and a contextual view of the individual as defined by his/her ethnic, cultural, or religious community (Steiner and Alston 2000: 365). The abstracted view of the individual tends to view group rights as being in opposition to the very concept of human rights. Rhoda Howard, for instance, views collective rights as 'a claim for something very different from human rights; it is a claim that reasserts the value of the traditional community over the individual' (Howard 1992: 83). The individual holder of rights holds them against his or her community 'or even family.'

The contextual view holds that a collective conception of rights is consistent with the liberal conception of rights, because membership in a community plays an important role in enabling meaningful individual choice and supporting self-identity (Kymlicka 1995: 105; An-Na'im 1999: 59).

This philosophical debate aside, there are some international human rights documents that embody human rights whose holders are groups as well as individuals. An early example is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The 1981 African Charter on Human and Peoples' Rights designates some rights as individual (dignity, recognition of legal status as a person, right to receive information, freedom of association and movement, right to work etc.), and others as "peoples" ' rights. Peoples' rights include the right to existence and self-determination, right to economic, social and cultural development, and the right to a general satisfactory environment favourable to their development.

### *3.2.1 Perspectives that challenge the antagonistic view of individual and community rights*

One struggle that has changed the terms of the debate on individual and collective rights is the struggle for the rights of indigenous peoples. In the early stages of its engagement with the international human rights arena, the struggle had to overcome immense ideological opposition (mainly from the US and Australia) to the use of the term "peoples" (plural) in the draft UN Declaration on the Rights of Indigenous Peoples (1994). The plural form – "peoples" – suggests group rights as opposed to the rights of aggregated individuals. The declaration is still being discussed by a Working Group of the UN Sub-commission on the Promotion and Protection of Human Rights.

Like the African Charter, it incorporates both rights regarded as belonging individually to members of indigenous communities (e.g. nationality, life, physical and mental integrity, liberty, security) and rights regarded as collective (e.g. right to live freely as distinct peoples). Some rights are phrased as both individual and collective. These include freedom from genocide and other forms of violence (such as the removal of children from their homes), deprivation of cultural values and identities, imposed assimilation and dispossession of their lands.

New developments have made it quite clear that there are some rights claims that can only be conceived of in collective terms. For instance, in arguing for compensation to indigenous communities for use of their knowledge in medicine, developing new plant varieties, or films and other forms of art based on oral traditions, it would be impossible to ascribe ownership to particular individuals. These claims have been framed in terms of packages or programs that benefit the community as a collective (Posey 1990). Thus, collective action by indigenous communities around these emerging issues calls into question the rigid distinction between individual and community in thinking about human rights.

In addition to the movement for indigenous peoples' rights, there have been other calls for a conception of rights that does not treat collective rights, such as the claims of family and kinship groups, as inherently antagonistic to individual rights. Contrary to the dominant tendency in liberal human rights discourse, which is to present state-citizen relations in abstracted individualist terms, people are constantly negotiating between an internal moral system (shaped by factors such as culture and religion, and represented by institutions such as kinship) and the formal legal regime of the liberal state (Khare 1998: 199). Far from subsuming individual concerns under community interests, "situated analyses of rights" point to people's own experience of these concerns and interests as overlapping and intertwined, sometimes in harmony and sometimes in tension.

One example is drawn from Khare's ethnographic work among "untouchable" women in a Lucknow neighbourhood in India (Khare 1998).[5] These women's perception of primary or fundamental rights integrated a vision for the individual and the community. They spoke of the most important right as the "right to survive", which consists of access to 'food, clothing, housing, education, and secure life, but *not* at the expense of [their] personal and community honour' (Khare 1998: 200). Concern about personal insult went hand in hand with concern about humiliation of their parents and husbands, as did concern for physical violence, including violence committed by those same parents and husbands. (Khare 1998: 201, 212). This latter concern points to the reality of simultaneous harmony and tension between individual and group rights. This is the lived reality.

Khare's account of the experiences of untouchable women reveals a more general point on the relationship between individual and group rights. When status as a member of a particular group (e.g. low caste) is so central to how one is defined and treated in a particular social context, it leaves little room to

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[5] Ethnographic method is particularly useful in unearthing "actor perspectives" because it 'exposes us to people's changing moral-jural reasoning while dealing with situations in real life'. (Khare 1998: 199).

speak of such an individual's rights without addressing the broader issue of the group's status as a rights-holding community.

Adopting the perspective of people situated within the reality of this complex web of relationships regulated primarily by social norms changes not only the way we think about human rights, but the way we 'do' human rights. This has certainly been the case for activists engaged in community-based human rights work with Muslim women, and for advocates of Islamic family law reform. A group of women's human rights activists from various Islamic backgrounds have developed a Manual for Women's Human Rights Education in Muslim Societies (Afkhami and Vaziri 1996). The manual covers a broad range of "rights situations" such as rights within the family, autonomy in family-planning decisions, rights to education and employment, and rights to political participation. What makes the manual different from conventional human rights education manuals is that its interactive and interpretive exercises interweave excerpts from international human rights agreements with verses from the Qur'an, *shari'a* rules, stories, idioms and personal experiences.

Taking as an example the session on women's rights and responsibilities within the family: the session begins with an exercise whereby participants give their views on where rights come from, which opens a discussion on the family as a source of rights, and/or what role the family plays in protecting or denying rights. Then follows an exercise on 'talking to the men in your family', which teases out differences and similarities in the way various women in the group relate with their male family members. An exercise on 'negotiating your rights and responsibilities within your family' focuses on a woman's freedom to choose whom and when to marry. The exercise is facilitated through the story of a woman named Leila, her father and the man to who she has been betrothed. A series of questions based on the scenario culminate in a reflection on two verses from the Qur'an and Article 16(2) of the Universal Declaration of Human Rights (UDHR),[6] which invites the participants' comments on what aspects of their cultural and religious experience support women's rights within the family (Afkhami and Vaziri 1996: 5–9).

Recognition of the reality of community and of plural moral orders also forces us to think more broadly about sites for human rights engagement and come up with more innovative strategies. For instance, access to formal types of remedies under statutes and constitutional bills of rights may be placed beyond the reach of weaker social groups due to factors such as cost, bias or perception of the formal system as far removed from people's day-to-day lives. In addition, the social cost of pursuing formal remedies may be prohibitive, as in the case of a widow deprived of access to inheritance by her in-laws. She knows that she has legal standing to apply for the necessary letters to administer the estate, and that she has legal rights to the property as a widow, which she could enforce in court. But it is also in her interest and that of her children to maintain good relations with her in-laws, and this restrains her from taking legal action.

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[6] Article 16(2) of the UDHR guarantees the right to marry and equal rights between men and women in marriage.

Scenarios such as these have led to activist strategies and scholarship that engage with the norms that sustain and regulate these relationships (such as kinship) "on their own terms". This engagement with community norms (also referred to as customary law) has prompted attention to micro-level forums, such as intra-family and community-based dispute-resolution processes and made them sites for human rights struggles. These forums play a key role in enabling or constraining people's ability to claim whatever rights are available to them under custom, national laws or international human rights principles: (Anne Griffiths 1997 and 2001; Nyamu 2000 and 2002; Hellum 1999; Hirsch 1998; Stewart 1998).

The strategies adopted or proposed by activists and scholars engaging with these customary fora include:

- enforcing obligations recognised under the relevant customary law or community norms;
- gathering empirical evidence of flexibility and variation in customary practice, and its responsiveness to changing social circumstances, in order to challenge rigid, hierarchical and ahistorical assertions of custom;
- invoking general ideas of justice and fairness within a community; and
- challenging the disingenuous use of custom to preserve inequitable social arrangements.

The challenge is to craft a legal framework of rights and citizenship that adjudicates fairly in the complex reality of harmony and tension between individual and group claims. One that does not disregard the community context in which people are embedded, but at the same time does not legitimise a narrow definition of personhood that is based on status in hierarchical social relationships.[7] The latter would thereby deny the very agency that rights and citizenship should enable (Kabeer 2002: 20).

### *3.3 Indivisibility of rights: hierarchy between civil-political and economic-social rights*

In practice, people obviously do not experience rights or their deprivation in a bifurcated manner, distinguishing between rights of a civil-political nature and rights of an economic-social nature. In an organised protest in 1987, street vendors in Ahmedabad, Gujarat, expressed their struggle as being about "dignity and daily bread". Police harassment, irregular allocation of trading spaces, city laws enacted without public participation, uneven distribution of resource among neighbourhoods were all integrated (IHRIP and Forum-Asia, Circle of Rights 2000: v).[8]

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[7] States whose constitutions bar people from challenging discrimination suffered on account of the application of religious or customary family law (e.g. Kenya, Zambia and Zimbabwe) are examples of legal frameworks that fail to adjudicate fairly in instances of tension between individual and community interests. Examples of legal frameworks that try to do so fairly include the constitutions of Ghana, Malawi, Uganda, and South Africa, which recognise the operation of religious and customary laws subject to the fundamental rights guaranteed to all in the constitution. For further reading on the issue of balancing between individual rights and the recognition of cultural or religious norms see Nyamu (2000).

[8] Citing Sheila Rowbotham and Swasti Mitter (eds) (1994).

The founding document of international human rights, the UDHR, makes no distinction between rights of a civil-political nature (e.g. fair trial, freedom of movement, association, expression) and rights of an economic-social nature (e.g. adequate standard of living, right to work). It provides for rights in both categories. The debate on hierarchy between civil and political rights on the one hand, and economic, social and cultural rights on the other originated in the post-UDHR attempt to draw up a single binding charter of rights, and became a defining feature of the international human rights discourse throughout the cold war era. The conflict resulted in the enactment of two separate human rights covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.

On the one hand, the Soviet Union and states allied to it argued for the primacy of economic and social rights. Civil and political rights such as the freedom of speech would have no meaning for people lacking in basic necessities such as food and shelter. They dismissed civil and political rights as Western ideology that had no relevance to societies with different political structures.

Western European and North American states and their allies on the other hand, viewed civil and political rights as the only rights of a truly "legal" nature, as opposed to economic and social demands which were not justiciable (i.e. could not be enforced in court against the state). (Steiner and Alston 2000: 237). According to this position, the recognition of economic and social claims as rights would obscure the philosophical coherence of human rights.

Some recent academic accounts still continue to contest the "rights status" of economic and social concerns and their relevance to discussions on citizenship rights. The exclusion of "so-called social rights" from a study on the link between social movement activities and the enjoyment of citizenship rights was explained as follows:

> Whatever the virtues of these rights (and there are many), they do not qualify as integral to the discourse of rights, and therefore cannot serve the purposes of a comparative study of citizenship.
>
> (Foweraker and Landman 1997: 14)

The authors go on to argue that while civil and political rights are universal and amenable to formal expression in the rule of law, "social rights" are

> fiscally constricted and require distributional decisions [and therefore] they are best described not as equal and universal rights but as "conditional opportunities"
>
> [more realizable in the developed welfare capitalist states]
>
> (Foweraker and Landman 1997: 15)

All rights require the allocation of resources, including civil and political rights that are presumed in this quote to be free of distributional consequences. For instance, guaranteeing the right to a free trial and the right to vote require resources, as do rights to health and education.

There have been some significant attempts to institutionalise the idea that all human rights are inter-linked; that rights guaranteeing political freedom and civil liberties are dependent on rights guaranteeing sustenance or economic and social development and vice versa. One example is the 1986 UN Declaration on the Right to Development. The declaration recognises that development is a comprehensive economic, social, cultural and political process, whose purpose is the improvement of the well-being of all individuals on the basis of meaningful participation and fair distribution of the benefits of development.

The declaration was proposed by developing countries and opposed by some Western ones. The Western states were opposed to the framing of some of the rights as belonging to states. Article 2(3) for instance, gives states 'the right and the duty to formulate appropriate national development policies'. But the real opposition at the adoption of the declaration was to the overall radical politics of the New International Economic Order that spawned the declaration. This is expressed in the strong language on peoples' sovereignty over their natural resources, which was viewed suspiciously as reminiscent of past nationalisation policies.

By the time of the UN Conference on Human Rights held Vienna in 1993, the idea of interdependence of rights was being popularised increasingly in the post-cold war human rights circles. Paragraph 5 of the 1993 Vienna Declaration states that '[A]ll human rights are universal, indivisible, interdependent and interrelated' and calls on the international community to treat all rights fairly and equally, on the same footing and with the same emphasis. Recent focus on a 'rights-based approach to development' suggests further significant attempts to bridge the gap between freedom and sustenance.

### *3.3.1 Rights-based approach to development*

The 1995 Copenhagen Declaration on Social Development seeks to use the framework of rights to achieve goals such as poverty eradication. Among the aspirations in employing this "rights-based approach" is that groups hitherto disadvantaged socially and economically will be empowered (Ghai 2001). An underlying proposition is that a society that is committed to achieving social justice must implement social and economic rights. This seems common-place on the face of it, but is proved controversial by the lack of political will in making this simple idea a reality (Ghai 2001: 49).

The rights-based approach suggests an integrated view of sustenance (economic and social rights) and freedom (civil and political rights) as complementary; each one is necessary for the full realisation of the other. Again, a fact that should be self-evident but one which has been obscured by cold war politics and decades of controversy within the human rights movement. Naila Kabeer (2002) writes of this linkage from the perspective of the *purpose* of rights. The purpose of rights is to ensure "freedom of action". Viewed from this perspective, both freedom from coercion (civil and political rights) and the freedom to access material resources serve the complementary purposes of *protection* and *promotion* of the ability to act. None is adequate without the other.

The Human Development Report 2000 had as its theme this linkage between human rights and human development, emphasising that although these two fields have followed separate disciplinary paths, they share the same goals: securing freedom for a life of dignity and expanding people's choices and

opportunities. (UNDP 2000). A rights-based approach adds an element of accountability and culpability; an ethical/moral dimension to development. It therefore, demands a shift from viewing poverty eradication as a development goal to viewing it as a matter of social justice; as the realisation of a right and the fulfillment of a duty.[9]

Within the framework of a rights-based approach to development, NGOs and bilateral programmes committed to its implementation have come up with lists of rights they regard as basic, which cut across the spectrum of economic, social, cultural, civil and political rights.[10] However, systematic inquiry needs to be conducted among these organisations to generate answers to the question 'how does the adoption of a rights-based approach make us "do development" differently?'[11] For Medha Patkar of the Narmada Bachao Andolan movement, a rights-based approach will only be effective and transformative if it changes the starting point of development altogether. In the context of development projects that threaten to displace people (such as damming the Narmada river in India), the inquiry must begin from the rights of the communities whose livelihood is tied to the river, rather than from a "risk assessment" which immediately limits the inquiry to compensation packages. A "rights assessment" will raise the fundamental question of the right to participate in the very process of development planning in the first place.[12]

### *3.3.2 Expanding the rubric of rights: environment, knowledge and participation*

Groups working on the implementation of economic and social rights have become involved in community struggles against economic injustices such as environmental degradation, threats to health posed by industrial and mining activities, and the exploitation of indigenous knowledge about natural resources by pharmaceutical companies and seed developers.[13] This has contributed to the articulation of these issues as rights concerns, thus expanding the range of "moral claims" that can be termed rights, as well as expanding the content of existing rights. One example of such expansion of meaning has been the broad interpretation of the right to life and the right to an adequate standard of living (which are provided

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9 Amartya Sen's work has been influential in making a link between "development" and "freedom" and his views influenced the conceptual premise of the HDR 2000 (Sen 1994; 1999).

10 See e.g. Caroline Moser and Andy Norton, *To Claim Our Rights* (ODI 2001). Moser and Norton develop a functional classification of rights into three categories: rights necessary for survival and dignified living (e.g. life, social protection, work, privacy); rights and freedoms for human dignity, creativity and intellectual and spiritual development (e.g. education, expression, association, political participation); and rights necessary for liberty and physical security (e.g. physical integrity, freedom from torture, freedom from arbitrary arrest, freedom from slavery). The rights listed in each category fall both within civil & political and economic, social and cultural rights. Development NGOs such as Oxfam and ActionAid have participated in the drawing up of a charter of ten basic rights, which integrate political and socio-economic rights.

11 This inquiry is the subject of an IDS Participation Group project on 'Linkages and Gaps between Rights and Participation'. Preliminary findings from the project will be available starting June 2003.

12 Medha Patkar, 'Mobilizing for Social Justice', seminar presentation at IDS, Sussex, 16 May 2002.

13 For specific examples see *Basic Rights*, the newsletter of the Center for Economic and Social Rights for notes on various ongoing projects. One example is support to community resistance to a series of gold mining projects in Honduras, which threaten the environment, water quality and health by releasing cyanide into the underground water and lowering the water table (Volume 1 No 1, Spring 2001).

for under existing human rights treaties) in order to embrace the right to a clean environment, which is not expressly provided for in a binding instrument.[14]

The horizons of rights discourse have also been expanded by contestation over "knowledge rights". These have taken place largely within the context of natural resources, where two types of questions have arisen. First, how should local (indigenous) knowledge be valued and adequately compensated when used for commercial purposes?[15] This question has been made all the more urgent by the strong protection of the intellectual property rights of commercial entrepreneurs under the Trade Related Aspects of Intellectual Property (TRIPS) agreement under the WTO framework. Community awareness and activism has been awakened. In 1999 a coalition of indigenous communities living in the Amazon successfully prevailed upon the US Patent and Trademark Office to revoke a patent that had been awarded to a US citizen over an Amazonian plant that held religious significance for the communities (IHRIP and Forum-Asia 2000: 131). The stakes in such conflicts are both political and economic: indigenous peoples' rights to information and full participation in the relevant policy processes, and their right to the tangible economic benefits that derive from any commercial use of their knowledge, since entrepreneurs clearly "piggy-back" on indigenous knowledge.

Second, how should policy making balance between local knowledge and "scientific knowledge" in making key decisions? It is now becoming common-place to state that these matters are democratic and not technocratic, as Geof Wood remarks with respect to water management in Bangladesh (Wood 1999). People have demanded broadened participation, not one that is narrowed down to those who claim to have scientific and technocratic expertise. [16] Conceiving of participation as a right has politicised economic and social rights. It is no longer a "welfarist" concern with provision of services to passive beneficiaries. Rather, it is the participation of empowered citizens in the key processes of decision-making that enact policies on how to distribute social and economic resources, a process that is inherently political (Cornwall 2000).

Notwithstanding the apparent acceptance of the inherent link between freedom and sustenance, and the need to expand the rubric of rights to include knowledge and participation, state practice in general suggests continuing hierarchy, and an unclear status for economic and social rights. Not many national constitutions contain provisions guaranteeing rights such as education, health, food, shelter and work. South Africa is one exception. Some constitutions incorporate such provisions as non-binding "directive

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14 The right to a clean environment is recognised in non-binding declarations such as the 1972 Stockholm Declaration and the 1992 Rio Declaration on Environment and Development. Some national constitutions recognise the right to a healthy environment. These include South Africa, Philippines, Peru, Ecuador, Hungary and Portugal. See IHRIP and Forum-Asia (2000: 291).

15 See for example William Lesser (1994); Darrel Posey (1990).

16 The folly of relying on narrow scientific expertise is illustrated in the case of water management in Bangladesh by over-concentration on agriculture in rural flood control measures, yet in the 1988 flood 66 per cent of the damage was to housing and only 2 per cent to agriculture – favouring production over livelihood Wood (1999: 741).

principles" of state policy, not integral to the bill of rights guaranteed to every citizen. Examples include India and Nigeria.[17]

On the NGO front, there has been a considerable increase in the number of human rights NGOs dedicated to the practical realisation of economic and social rights, and the development of a methodology for measuring states' progress in the implementation of these rights.[18] Some of these NGO's have developed a manual on activism in the area of economic and social rights (IHRIP and Forum-Asia 2000). This can only begin to compensate for several decades of exclusive focus on civil and political rights in the work of mainstream human rights NGOs.

### *3.4 Expanding human rights accountability*

Another issue that has attracted a lot of debate in international human rights is the question whether human rights obligations should extend beyond states to bind non-state actors directly. International human rights treaties impose obligations on states, as the primary subjects of public international law. They mediate the relationship between a state and its own citizens. But people may suffer deprivation of their rights due to the conduct of non-state actors. To what extent should citizens have a right to hold other citizens (individuals and corporations) directly accountable for violations of rights guaranteed to them under international human rights agreements, particularly when national laws are inadequate? How far-reaching is the state's obligation to regulate the conduct of private parties so as to prevent human rights abuses?

Scholars and activists committed to the extension of human rights obligations to the acts of non-state actors have argued for such extension in a variety of contexts. Significant gains were made in 1988 when the Inter-American Court of Human Rights decided the *Velasquez-Rodriguez* case on "disappearances". The problem of "disappearances" and murders committed by informally organised state operatives had escalated in many Latin American countries in the 1980s. The family of Velasquez Rodriguez filed a petition on behalf of families of "disappeared" persons against the Honduras government before the Inter-American Court of Human Rights, arguing that the disappearances violated the American Convention on Human Rights. The court ruled that the acts of the abductors could be imputed to the government. Further, the court concluded that even if the disappearance was actually caused by private actors unconnected with the government, the state could still be held liable on account of failure to investigate thoroughly and lack of due diligence to prevent the violation, which in effect aided the private persons.

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17 India is in the process of enacting legislation to provide for a fundamental right to education. See Ramya Subrahmanian (2002).

18 The NGOs and individuals involved in this effort have launched a network – the International Network on Economic, Social and Cultural Rights. See www.escr-net.org for a list of organisations and links to information on their work.

The decision fuelled calls for the extension of this expanded interpretation of state responsibility to other areas, such as state responsibility for domestic violence[19] and transnational legal responsibility of corporations.

The need for the latter (transnational corporate accountability) is viewed as urgent due to the current context of increased mobility of capital and the rising trend in privatisation of basic services, which have meant that the activities of corporations have a more direct impact on people's lives.

The surest way to hold corporations accountable for adverse human rights consequences of their activities is for the host governments to incorporate human rights standards (including minimum standards on labour and environment) into their domestic law. Corporations are bound to observe the law of the states in which they operate. The reality of most poor countries is different. International human rights agreements have not been ratified into domestic law and made directly enforceable. Governments are unwilling to regulate MNCs' labour and environment practices too strictly, for fear of losing investment to other poor countries with lower standards (Steiner and Alston 2000: 1349; Newell 2001; Muchlinski 2001).[20]

Thus, one stream of scholars and activists have turned their attention on non-binding measures in the form of corporate codes of conduct. Self-regulation, either by a corporation itself working together with non-governmental "watchdogs" or by an industry-wide body is widely viewed as more feasible. However, critics of this approach insist that it amounts to privatisation of the implementation of national labour legislation and international labour standards. The codes almost always fall below international labour standards, and almost always exclude workers' right to organise and bargain collectively. (Kearny 2000). In addition, critics note, MNCs' adoption of these codes is driven largely by consumer pressure. The approach is therefore ineffective for MNCs in sectors that are not in direct contact with consumers in the supply chain (Newell 2001). Another ground for criticism has been that although MNCs involve NGOs in drawing up the codes and in verifying compliance with them, the NGOs can hardly be said to be fully representative. In general, the process often excludes poor people who would be impacted the most by the MNCs' activities (Newell 2001).

Inter-governmental bodies such as the OECD have issued guidelines for MNCs, as have international human rights NGOs such as Amnesty.[21] The guidelines are non-binding but they provide

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19 See e.g. Celina Romany (1993); Dorothy Thomas and Michele Beasley (1995); Cook (1993).

20 One strategy that is being used to get around the inadequate laws in poor countries is the filing of suits against corporations in their countries of origin. In some cases the strategy has succeeded in getting courts in developed countries (in these cases, the US) to accept jurisdiction. Examples include *Doe-v-Unocal* (1997) [challenging Unocal's complicity in the Burmese government's use of slave labour on a pipeline project]; *Wiwa –v-Royal Dutch Petroleum Co.* (2000) [using the Alien Tort Claims Act and the Torture Victim Prevention Act to challenge Shell's support of state repression and torture of the Ogoni people in Nigeria's Delta region, through Shell's financing and arming of the Nigerian military]. The strategy was unsuccessful in the case against Union Carbide for the Bhopal disaster. For further discussion of these cases and on transnational litigation against MNCs generally, see Muchlinski (2001); Newell (2001).

21 See OECD (1976, revised 2000); Amnesty International, Codes of Conduct for Business, AI Index ACT 70/04/99 (at www.amnesty.org).

activists with a benchmark against which to assess corporate or industry codes of conduct and actual corporate behaviour. The OECD guidelines require that MNCs observe non-discrimination in their labour practices and respect the rights of people affected by their activities 'consistent with the host government's international obligations and commitments'. Advocacy efforts are best aimed at achieving host governments' ratification of international agreements, and implementation in the domestic setting. It is also equally important that the governments of the rich countries in which the MNCs are based enact laws spelling out minimum standards of human rights and social responsibility for their corporations operating abroad. The centrality of the state is therefore evident, contrary to the view that the state's role has or should become marginal in the context of globalisation and liberalisation.

With regard to the privatisation of basic services such as water, electricity and telecommunications, making legally binding accountability mechanisms transferable has been the answer in some countries, such as Uganda and Namibia. This means that members of the public still have recourse to public bodies such as the Human Rights Commission and the national Ombudsman's office to file complaints notwithstanding the fact that services that were once government-delivered have now been privatised to a corporation (Muchlinski 2001: 37).

From the perspective of a person or community whose rights have been violated, the reality of a violation and the need to have it redressed adequately overrides any conceptual concerns over whether the injury resulted from a state or non-state actor. Thus, whatever the agreed balance is between binding legal accountability mechanisms and less formal mechanisms such as codes of conduct, the core challenge is to achieve meaningful participation of the people whose rights and livelihoods are most directly affected or likely to be affected by the activities in question. Efforts aimed at increased rights awareness and opening up of deliberative and consultative fora (such as "citizen juries") to strengthen people's voice must go hand in hand with efforts geared toward standard setting and design of appropriate state mechanisms for enforcement of those standards. If these processes are not inter-linked, we will end up with the doubly tragic result that John Gaventa warns against, namely voice without influence, and formal mechanisms without responsiveness to people's concerns (Gaventa 2002).

## 4 Reflection: sign-posts for a research agenda on citizenship, participation and accountability

> Citizenship must be an active condition of struggling to make rights real.
>
> (Phillips 1991)

The discussion so far bears witness to the relevance of this statement. Specific social movement struggles at particular times have been crucial in moving the discourse and practice of human rights beyond the impasse of conventional debates, and shaping actor-oriented perspectives. These struggles have transformed the defined normative parameters of human rights, questioned established categories, expanded the range of claims that could be characterised as rights, and in some cases altered institutional

structures.[22] The insights arising from these social movements cut across all of the debates discussed above. Indigenous peoples' struggles have transformed approaches to group rights as well as broadened the arena of rights to cover issues of ownership of knowledge and a more robust interpretation of the right to a healthy environment. Communities' challenges to multi-national corporations continue to expand spaces for holding powerful non-state actors accountable, both through formal legal processes (such as public interest law suits) and informal non-binding measures such as codes of conduct, "citizen juries" and street protests. Demands for "dignity and daily bread" reject the compartmentalisation of rights into the political and economic spheres. Rights claims in a rapidly changing world continue to expand the rubric of rights to cover new concerns such as knowledge rights.

It is useful at this point to reflect on these insights and draw out specific issues that are of particular relevance for a research agenda that explores the linkages between rights, citizenship, participation and accountability.[23]

### *4.1 Situated citizenship*

First, there is need to incorporate into such research pluralistic approaches to citizenship and rights, which capture the every-day experiences of citizenship as mediated by factors such as gender, ethnicity, caste, and kinship structure. Such a holistic analysis of citizenship and rights ought to explore how these expressions of diverse and overlapping identities function simultaneously as forces of inclusion and exclusion (Kabeer 2002).

The discussion on universality and cultural relativism, as well as the debate on harmony and tension between individual and group rights provide a departure point for thinking in a balanced way about "situated citizenship". While paying attention to the particular, as defined by gender, ethnicity, religion etc., we should not lose sight of the relevance of "across the board" notions of citizenship and how the mutual interaction between these notions of citizenship enables or constrains agency. It is crucial to ask, for instance, how formal state law (public) has validated and reinforced structures of inequality that have come to be viewed largely as resulting from or being dictated by (private) custom or religion.

### *4.2 Non-hierarchical but interdependent rights*

The lesson from this debate is to guard against a dichotomous and hierarchical model of rights, while at the same time being attentive to the reality that at times the realisation of one right is contingent on the

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22 Resistance to the Sardar Sarovar project to dam the Narmada river in India led to the establishment of an Inspections Panel within the World Bank in 1993 to oversee projects' compliance with the Bank's own Operating Procedures. The panel is still operational to date. It receives complaints from any individual or groups who have suffered as a result of such non-compliance and investigates them. Information on the Inspection Panel, including up-to-date summaries of requests received can be viewed on the bank's website. In the Narmada project, the bank's guidelines on resettlement and rehabilitation had been disregarded in the planning and implementation of the project. (Rajagopal 2000; Fisher 1995)

23 This is the theme being explored by the Development Research Centre on Citizenship, Participation and Accountability (based at IDS, Sussex: www.ids.ac.uk/ids/drc-citizen). These "signposts" were developed with the centre in mind, but the research agenda proposed is not necessarily restricted to the centre's concerns.

existence of another. Some researchers in the IDS-based Development Research Centre on Citizenship, Participation and Accountability have already encountered this reality in their work. For instance, research by the Society for Participatory Research in Asia (PRIA-India) among nomadic communities in Rajasthan set out to explore their understandings of citizenship so as to work (in conjunction with a local NGO) toward enabling their participation in local governance.

It soon became clear that the right to participate in the *Panchayat* (local government) was tied to residence; accessing the benefits guaranteed to them as tribal people depended on possession of the official ration card, which too requires one to have a fixed address. Being nomadic they are perceived as having no fixed residence, and therefore they have neither ration card nor representation in local governance structures. The NGO is therefore undertaking a campaign for land as the priority right that establishes the basis for other rights claims.[24]

From the outset it is instructive to approach the inquiry with an open question about how people articulate rights claims in specific situations, rather than ask which types of rights are important and how they reinforce or weaken each other. The open question is more likely to bring out the complex overlap between demands for rights as "things" and demands for the power to make decisions concerning the "things" (participation).

### *4.3 Conceptualising accountability for human rights*

In order for rights to translate into reality, a broadened understanding of human rights accountability that goes beyond state structures to broader engagement with private sector institutions and civil society organisations is necessary. Our discussion under this theme has shown that practices seeking to expand the accountability of non-state actors have explored options beyond conventional legal channels, such as public interest litigation. Some of the options, such as citizen juries and civil society participation in the design and verification of corporate codes of conduct exist on or outside the margins of legal obligation, but play an important role where few legal avenues exist. What implications do such tools have for a politicised conception of rights that offers a real challenge to power? How do we ensure that they do not simply become avenues for voice that do not translate into any real influence?

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[24] Nandini Sen and Mandakini Pant, PRIA, Presentation at Meeting of DRC Working Group on Meanings and Expressions of Rights, Dhaka, Bangladesh, 31 January 2002.

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