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RESPONSIBILITY AND ACCOUNTABILITY OF STATES, TRANSNATIONAL
CORPORATIONS AND INDIVIDUALS IN THE FIELD OF HUMAN
RIGHTS TO SOCIAL DEVELOPMENT:
A CRITIQUE.

Shadrack Gutto

The Political Economy of Human Rights: The Theoretical and Analytical
Perspective and Scope

The "right to development" has become an established international legal and political norm. It is already attracting considerable scholarly attention even among those who adhere to liberal, non-Marxist-Leninist, philosophical viewpoints.¹ In the present contribution the "right to development" is seen to be worthy of serious discussion provided that it is conceived broadly as the right of all peoples to equal social development embracing the economic, social, political, civil, cultural, legal and other such disaggregated components.

In the current general and intensifying global struggles between socialism and capitalism and between "advanced" and less-developed societies, the latter being generally under imperialist domination, a lot of efforts have been made within the capitalist camp by many scholars, politicians and moralists of all kinds to disaggregate the "rights" with the sole purpose, conscious or unconscious, of supporting or justifying certain class and ideological positions. Thus in industrially advanced capitalist societies human rights are conceived narrowly to mean certain political and civil rights which however are hardly realised for the mass of the population. Such approaches are not irrational but are consistent with the bourgeois world outlook and are meant to reinforce the class divisions in society, to support exploitative relations and the domination of the minority property-owning classes over the majority of working people. The unsatisfactory nature of these approaches is now recognized and has been subjected to criticism even from those who hold liberal views. Examples of such criticisms are those in relation to the conceptualisation and practice of human rights in the U.S.A.² and also within the capitalist, Western European system.³

It can be argued, however, that because of the high level of development of productive forces within these societies and the profit derived from the third world the living standards achieved are acceptable to the majority of the population. This is only partially true. Inherent in such societies are institutionalized class inequalities, exploitation and oppression of the majority working people by the minority who control the basic means of production and the state apparatus. In addition, and because of the class nature of these societies, there is no single one of them with multi-ethnic populations where racism is not part and parcel of the oppressive social structures. The U.S.A., in the 1980's, offers a class example.⁴ Furthermore, the

wealth accumulated in the hands of the ruling classes in these imperialist societies is a measure of the systematic economic plunder and political and social repression of the workers and peasants in the less industrialized societies.⁵

In short, the right to equal social development of all peoples in these countries does not exist and cannot exist without revolutionary social transformation in the industrialized capitalist societies and their colonial and neo-colonial empires in the third world. The claims by ruling class ideologists, academic or otherwise, that these societies are the cornerstones of human rights and democracy is therefore unsupportable by concrete empirical evidence.

From the foregoing it should be apparent that a human right to equal social development of all peoples in the third world countries can only be looked at seriously in the context of the historically determined integration of the economies and social structures in these countries into those of the industrially developed capitalist countries. The class structures based on deformed and uneven development of capitalism in third world countries which are integrated in the imperialist system are central in determining the possibilities and levels of realisation of equal social development. The control of the means of production by a handful of local minority ruling classes and monopoly capitalist institutions based in the industrialised Western countries make it virtually impossible for equal social development to take place in those countries within the imperialist camp. Of necessity then, the third world countries under imperialism are structured as theatres of and for mass violations and denials of a human right to equal social development. Monopoly capitalism and its supporters in these countries are responsible.

Within, and because of, these concrete historically determined realities, there exist a variety of positions regarding human rights and social development. One of the approaches to human rights adopted in most of the third world countries which fall within the imperialist camp, involves legislative enactment of constitutional provisions that deal only with declarations of civil and political rights. Such provisions, many of them drafted for them by their former colonizers or present neo-colonizers, obviously amount to the entrenchment of grosser forms of social inequalities and deprivation in the developed imperialist countries since in these third world countries the working classes do not have access to the basic material requirements that would justify the exclusion of monitorable socio-economic goals and guarantees. The exclusion of socio-economic rights and duties which, from a materialist perspective, form the basis of other forms of rights, is often justified on the basis that socio-economic rights are not justiciable - thus reducing the argument to simple technical difficulties in the judicial processes.⁶ In typical double-talk, the very same people maintain that it is necessary, in the interest of development, to postpone civil and political rights.⁷

The other, and perhaps the most dangerous variant, of the reasoning used to explain the difficulty and even the impossibility of attaining social development and equality in backward Third World societies is that which maintains that these societies operate under communalistic "traditional" values which ensures that all wealth is shared!

It is necessary at this juncture to point out that among the socialist and socialist oriented countries, there is an uneven realisation of the people's right to equal social development. This is also historically determined. Socialism is a historical phase in the transition from capitalism to communism and to that extent it still embodies differing levels of attainment of social democracy, depending on the point at which different countries embarked on the socialist path to development as well as how long they have been socialist.⁸ From this scientific perspective, it ought to be clear that a society does not become an advanced socialist or classless communist society the moment it embarks on a socialist revolution and on reconstruction along Marxist-Leninist principles. If two countries at different levels in the development of productive forces begin to follow the socialist path at the same time, the manifestation of class contradictions faced by these two countries in their struggle to transform and create a new society will be different. The point we are making here is that socialist countries, particularly the young ones, are not classless communist societies, although the socialist transformation in all genuinely socialist societies necessarily leads to the only conditions wherein the human rights to equal social development of all peoples can be realised. In this regard, therefore, any analysis of the stages reached in the realisation of socialism must be based on concrete and specific evaluations of the societies involved.

On the basis of the foregoing, it needs to be understood that a few proponents of socialism have tended to be over anxious to demonstrate the observable superior capacity of socialism to achieve equal social development of all people. In their anxiety they have tended to over generalise and give the impression that there is little left to be done in socialist countries in raising the levels of attainment of social development in all spheres of life. Such approaches have been capitalised on by bourgeois scholars to denigrate socialism. It is, therefore, necessary that socialists be prepared to accept the challenges they face in realising the objects of socialist development of society. In other words, socialists should not be carried away by socialist successes.

It is also to be borne in mind that socialist countries and socialist state enterprises are involved in commercial, social and cultural exchanges with capitalist and other socialist countries. It is crucial then that these relations be subjected to open and honest assessment so as to raise the efficiency and benefits arising therefrom as well as assigning responsibility to specific juridical persons where these interactions may hinder the achievement of certain aspects of human rights.

In the context of what we have stated above regarding the concept of equal social development, it is proposed now to analyse some of the legal regimes and instruments that form the basis of the current global struggles for the creation of a new international economic and social order - specifically the United Nations General Assembly Declaration on the Establishment of a New International Economic Order (NIEO)⁹ the accompanying Programme of Action¹⁰ and the Charter of Economic Rights and Duties of States (CERDS).¹¹ The complementarity of these instruments is clearly expressed¹² and what shall be attempted here is to analyse how they define the role and responsibility of states, monopoly capitalist institutions (the transnational corporations) and state institutions for the promotion and protection of the human right to equal social development. The concern and task of what follows is, therefore, to describe and analyse:

- the adequacy or otherwise of present legal forms to identify and apportion responsibility and accountability to the major participants in the international and national socio-economic relationships.
- the extent to which the current efforts are meaningfully addressed to the necessary restructuring of production relations.

It should be pointed out that the transition from capitalism to socialism cannot be achieved in a few decades in all societies as it is an ongoing process wherein all the contradictions within capitalism must be used. The call for a new international economic and social order places demands on the capitalist world order and our task here is to identify from that standpoint the status and efficacy of various existing legal norms and institutions.

States, finance capitalist institutions and the NIEO

The status of and relationship between states and dominant economic institutions and the effect of their individual and joint activities on the process of development in the Third World is decisive. Chapter II, Article 2(2)(a) and (b) of CERDS,¹³ Paragraph 4(g) of the Declaration on NIEO,¹⁴ and Parts II, V and X of the Programme of Action¹⁵ recognise and envisage certain roles for states and for certain economic institutions ("the foreign investors"). These are:

- the duty of capital-importing states to regulate activities of foreign investors in line with their "national objectives and priorities" and "economic and social policies";

- the implied duty of capital exporting states not to compel societies where they export their capital to grant preferential treatment to foreign capital;
- the duty of transnational corporations not to intervene in the internal affairs of the host states;
- the recognition of the central role of the World Bank Group in the envisaged restructuring of the international financial order;
- the undefined duty of states to co-operate among themselves for the purpose of achieving the above objectives.

Efforts to concretize these objectives have concentrated on developing essentially non-binding¹⁶ codes of conduct covering different aspects of activities of major capital institutions. The U.N. Commission on Transnational Corporations and the U.N. Centre on Transnational Corporations are the primary organs for co-ordinating activities in this direction. Among the existing codes and draft codes are:

- the Restrictive Business Practices Code (1980),¹⁷ originating from UNCTAD (1973). The Code is a simplistic attempt to apply anti-trust legal principles aimed at breaking the dominance or restricting the formation of monopoly capitalist institutions and also recommending preferential treatment for less developed countries. It further appeals, almost in a religious sense, to the "conscience" of these transnational corporations to allow free exchange of industrial information. Such an appeal directly contradicts the whole basis of bourgeois property and production relations. The code vests power of supervision in the World Trade Commission. The efficacy of the code is eroded by permitting states to exclude the application of its principles to specified trade and investment agreements and by excluding altogether agreements involving states:¹⁸
- the Infant Formula Code¹⁹ that require improved infant food formulae, restrictions on indiscriminate advertisements and correct

labelling methods. This Code is essentially in the same class as the 1977 ILO Guidelines on the Safe Use of Pesticides as well as the Code of Practice adopted by the International Chamber of Commerce in 1974;

- the public-relations type OECD Guidelines for Multinational Enterprises of 1976 (revised 1979) which cover principally the same ground as those found in the above-mentioned codes and guidelines and is equally non-binding;
- the ILO Principles of 1977²⁰ which essentially appeal to transnational corporations to consider social policies in their investments and treatment of workers as well as bestowing on states the onus of supervising adherence to the principles;
- draft codes; the International Code on the Transfer of Technology; the Code on Transnational Corporations; and the International Agreement on Illicit Payments. The book edited by K. Hossain²¹ and the Proceedings of the (60th) Montreal Conference of the International Law Association (1982)²² are instructive in this area.

At the time of writing, the above are the most significant of the efforts so far made at the international level in drawing up legal and quasi-legal instruments in line with the efforts geared towards the restructuring of the world economy. Although not directly incorporating justiciable rights and duties, they may be said to expose some of the production relations that require change as well as providing principles and norms that can be adopted and used to facilitate the achievement of development-oriented changes.

In spite of these advances, which are hardly exemplary given that it is now a decade since the Declaration on the NIEO and the CERDS, the assumptions underlying the 1974 Declarations and the subsequent Codes of Conduct require reassessment. As already pointed out, provisions such as those requiring transnational corporations to exchange industrial and trade information are absurd and unworkable; the same applies to the principles that attack concession gained by coercion. The latter principle is worthless in most third world countries where the leaderships are dependent on these same foreign interests for their social and political survival. It should be recognized that foreign investors are inherently part and parcel of the political economies within which they operate. To say that they should not "intervene" in the internal affairs of the countries they operate in is absurd and

demonstrates the nature of legal thinking that fails to recognize the integrated nature of foreign capital. Provisions on the duty of states to regulate activities of transnational corporations are also only relevant if one assumes a political leadership whose social interests and ideology stands in contradiction to those of such foreign institutions. With regard to restructuring international financial order, nothing seems to have been done since 1974 - hence the international financial and economic crisis of the 1980's that has affected the third world much worse than it has the developed countries.²³ Recently salvage operations have been attempted but by the very states and international monopolies that have been responsible for the current crisis.²⁴ We can only expect bad news from imperialist efforts to reform but the attempt itself shows the sharpening contradictions in the imperialist world.

The Unity between States and International Monopolies and Various Forms of State Supported Institutions and the Need for Expansion of their Legal Responsibilities and Accountability

The lack of legally enforceable guidelines and enforcement forums for dealing with anti-development or other harmful activities of states and private enterprise institutions is not accidental; it is a reflection of the anti-human rights position held by the minority ruling capitalist classes who control the major means of production and states. The status quo strategy here is centred, first on the lack of clear identification of the material unity that exists between states and major industrial institutions in all political systems. Secondly on an insufficient identification of activities inimical to development. The legal separation of the state from economic institutions is the bourgeois ideological extension of the separation of politics from economics which translates itself into a denial that the state is an instrument of the minority ruling economic classes.²⁵ The myths of "free enterprise", "free trade," "private foreign investments" are contrary to the reality that without the unity between states and major economic institutions international economic relations would not have developed.²⁶ As Lenin demonstrated, the export of finance capital and the creation of spheres of monopoly for various private capitalists relied on the imperialist state²⁷ and it is this alliance that we must look at in analysing the power of transnational corporations in the world as a whole and in the third world in particular.

It is important, in developing a coherent legal structure that clear and verifiable criteria be designed to be used in establishing the status and relationship between different social actors, in this case the states and major economic institutions whose activities may bear negatively on the human right to equal social development. The methodology suggested below, which is not meant to be comprehensive or arranged in hierarchical order of importance, is geared towards what may be loosely termed criteria for lifting state and corporate veils. Movement in this

direction is indicated by the shift from the old doctrine of state immunity in international law as being governed exclusively by principles of jure imperii to a doctrine which now separates state activities into acta jure imperii and acta jure gestionis.²⁸ The following form part of the phenomena that subject to further empirical analysis, may reveal the alliances between the states and various economic corporate entities and assist in securing accountability:

Ownership and/or/control: direct or indirect equity ownership or policy control of institutions and their activities. Examples here may include nationalised industries, parastatals, joint ventures, inter-governmental bodies. The World Bank, the World Health Organization, OPEC, British Leyland, the Kenya Commercial Bank, British American Tobacco (Kenya) and most state enterprises involved in economic activities based in socialist countries may fall into this category.

Active diplomatic support: where a state negotiates officially with another state or other economic institution on behalf of its so-called "private enterprise".²⁹ Examples abound here and should include relations that develop in situations similar to those anticipated when recently the British Prime Minister Margaret Thatcher, took computers and peddled these in the Japanese market³⁰ and also where President Mitterrand of France negotiated a deal for French nuclear reactors with China.³¹

Subsidies: Direct or indirect subsidies to industry to help in employment creation, industrial research, the use of social infra-structure by industry, etc.³²

Taxation and licensing: Tax exemptions and rebates, export and import licensing for trade or investment, etc.

Control of labour and price-fixing: direct and indirect wages and industrial action controls, price-fixing, marketing controls, etc.

Prospects for diplomatic intervention: almost all economic institutions and individuals get support and strength from the right of diplomatic intervention on their behalf by their home states;³³ in fact, the promise of some such intervention is sometimes put into treaty form by states.³⁴

Obviously more work is needed in this area but it should be clear that the exercise is useful in ensuring that most activities are properly accounted for and that some specific person, either a state, state organ or private body is held responsible where its act violates or undermines prospects for the realisation of the right to equal social development. Since states have appropriated to themselves legal personality and jurisdictional locus standi, it is only proper that a start be made with them.

At present, many activities inimical to human rights go without redress. It has been established in Kenya, for example, that certain transnational corporations have reduced the people's nutritional intake by their manufacturing activities;³⁵ that through advice from the World Bank, the Kenya Government undertook major irrigation schemes that have turned into expensive white elephants,³⁶ and that some transnationals have been damaging people's health by selling teeth-damaging fluoride toothpastes.³⁷ Who is responsible and accountable for the injuries caused and what enforcement fori are there? These are the basic questions confronting advocates of human rights to which lawyers can contribute. The codes we have reviewed do not deal with most of these areas, and particularly not the responsibilities of service industries.³⁸

Conclusions

I hope that the analysis presented here has shown that the human right to equal social development is a task that requires the transformation of many aspects of production relations as they exist today, both within and across national boundaries. Simple declarations will not do. Rather, we need to participate in mobilising revolutionary forces for change of the social conditions that today only benefit a small minority class. We must expose the inadequacies of the existing law while at the same time mastering sufficient courage to propose changes. As Professor Brownlie has noted, we should always mobilize international and national machineries simultaneously.³⁹ The state both in capitalist and socialist countries, developed and underdeveloped, plays a central role in development and therefore the transfer of political control to the working people as opposed to the exploiter classes is central in the struggle to create a new international and social order and to the establishment of the right to equal social development. As efforts in these areas are taking place in the context of the class struggle, contributions such as those in the juridical and quasi-juridical instruments and institutions need to be assessed and strengthened.

FOOTNOTES

1. See T.C. Van Boven in Development, Human Rights and the Rule of Law, Oxford, 1981.
2. L. Henkin, "Rights, American and Human" (1979), 79 Colum. L. Rev. 405 and "Economic Social Rights as "Rights": A United States Perspective" (1981), 2 H.R.L.J. 223.
3. F.G. Jacobs, "The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights" (1982), 3 The Human Rights Review 166.
4. See S.B.O. Gutto, "African Americans: Constitutional Entrenchment of Their Oppression and Inequality in the Political Economy of the U.S.A." (1980), 12 Zambia Law Journal, 23-37.
5. N. Chomsky and E.S. Hermann, "The United States Versus Human Rights in the Third World" (1977), 29 Monthly Review, 22 and The Washington Connection and Third World Fascism: The Political Economy of Human Rights, Vol. 1, Boston, 1979; for a contrary view see I. L. Horowitz, "Military Origins of Third World Dictatorship and Democracy" (1981), 3 Third World Quarterly 37.
6. See a critique of the human rights provisions in the 1979 Nigerian and Ghanaian Constitutions in Tsatsu Tsikata, "Human rights and Human Development", University of Nairobi, Faculty of Law Staff Seminar Paper No. 2, 1980/81 (unpublished).
7. A.G. Mower Jr., "Human Rights in Black Africa: A Double Standard?" (1976), 9 Human Rights Journal 39.
8. See generally V. Afansayev, Fundamentals of Scientific Communism, Moscow, 1982, Chaps. 6-10; (eds. R. Kosolapov et al.), Developed Socialism: Theory and Practice, Moscow, 1983.
9. U.N.G.A. Res. 3201 (S-VI), May 1, 1974.
10. U.N.G.A. Res. 3202 (S-VI), May 1, 1974.
11. U.N.G.A. Res. 3281 (XXIX), December 12, 1974.
12. Principle 6 of the Declaration on NIEG, Part VI of the Programme of Action and Para. 4 of the Preamble to CERDS.
13. note 11, supra.
14. note 9, supra.

15. note 10, supra.
16. "...one thing is certain about all the existing Codes, and may still apply to those still being developed: they are "legally non-binding" - P. Saunders, "Implementing International Codes of Conduct for Multinational Enterprises" (1982), 30 Am. J. Comp. L. 241, 243.
17. The Set of Multilaterally Agreed Equitable Principles and rules for the Control of Restrictive Business Practices, U.N.G.A., U.N. Doc. TD/REP/Conf./10/Rev. 1, (1980).
18. For a detailed descriptive analysis of this code, which suffers from the authors' patent misconception of socialist principles, see W. Fikentscher, "United Nations Codes of Conduct: New Paths in International Law" (1982), 30 Am. J. Comp. Law 577.
19. International Code on Marketing of Breastmilk Substitutes", 34th W.H. Ass. Doc. What 34.22 at 3, Annex (1982).
20. Tripartite Declaration of Principles Concerning Multinational Enterprise and Social Policy (1977).
21. (ed. K. Hossain), Legal Aspects of the New International Economic Order, London, 1980.
22. ILA, 60th Montreal Conference, Final Second Report of the International Committee on Legal Aspects of a New International Economic Order, 1982.
23. See the position taken at the Seventh Non-Aligned Summit in Delhi (1983) in Altaf Gauhar, "Editorial", South May 1983; Fidel Castro, The World Economic and Social Crisis: Its Impact on Underdeveloped Countries, Its Sombre Prospects and the Need to Struggle if we are to Survive, Report to the Seventh Summit Conference of Non-Aligned Countries (Havana, Publishing Office of the Council of state, 1983) Chapter 4.
24. The latest attempt in this direction was in Williamsburg Summit in May 1983; the World Bank President, Mr. Tom Clausen, has been roaming the world campaigning for more power and a larger role for the World Bank/IMF/IDA Group with banks and leaders of powerful capitalist states - see The Guardian April 15, 1983, 17 and The Times April 22, 1983, 12.
25. F. Engels, The Origin of the Family, Private Property and the State (4th ed. 1891) London, 1981, Ch. 9; V. I. Lenin, The State and Revolution, New York, 1932; R. Martin, Personal Freedom and the Law in Tanzania Nairobi, 1974, 11-26.

26. P.M. Sweezy, "Corporations, The State and Imperialism", C.1978, 30 Monthly review; A.Z. Astapovich, The Strategy of Transnational Corporations, Moscow, 1983 Chapters 1 and 6.
27. V.I. Lenin, "Imperialism, The Highest Stage of Capitalism", Selected Works, Moscow, 1977, 169-262.
28. For example, for the U.S.A. position see the famous Tate Letter (1952) and the Sovereign Immunity Act 1976 and, for the U.K., the State Immunity Act of 1978.
29. E. Nukhovich, International Monopolies and Developing Countries, Moscow, 1980, Chap. 2; "U.S. Trade and Investment in Africa", Topic No. 148, 6-8 gives a very graphic form of this relationship.
30. The Observer, May 8, 1983, 25.
31. The Times, May 5, 1983, 8.
32. Nukhovich, op. cit., note 29 indicates at 53, how foreign "assistance" is used by the imperialist states to develop infra-structure in the Third World countries for the benefit of private investment.
33. See for example Barcelona Traction, Case (Belgium v. Spain), I.C.J. Reports 1970, p. 3.
34. A classic case here is the Convention on the Settlement of International Disputes Between States and Nationals of Other States (1965), 4, I.L.M. (1) 532-544; for the first reported work under the treaty see P. Lalive, "The first 'World Bank' Arbitration (Holiday Inn v. Morocco) - Some Legal Problems (1980), 51 B.Y.B.I.L., 123.
35. R. Kaplinsky, "Inappropriate Products and Techniques: Breakfast food in Kenya" (1980), 14 ROAPE, 90.
36. Africa Now, April 1983, 69-70.
37. Bryan Pearson, "The Toothpaste row that rocked Kenya", The Guardian, April 29, 1983, 17.
38. See the report by Rod Chapman in The Guardian, Nov. 30, 1982, 17.
39. I. Brownlie, "The Reality and Efficacy of International Law" (1981), 52 B.Y.B.I.L., 1.