The rights-based approach in development
policies and strategies

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The so-called "rights-based approach" as applied in development policies and strategies treats international human rights law as a conceptual framework, accepted by the international community, that is capable of guiding policy formulation, implementation and evaluation in the field of development and, where international cooperation and aid are concerned, of providing guidance in relation to the obligations of donor and recipient governments, the extent of social participation and the oversight and accountability mechanisms required, both locally and internationally. This paper analyses certain points of connection and divergence between the development and human rights outlooks and seeks to establish some relationships between a number of fundamental rights (such as the right to equality, political participation and justice) and the concepts of inclusion, participation and accountability that development strategies often employ.

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I

Relationships and divergences between development and rights

This paper examines some issues that are currently the subject of debate in an effort to establish relationships between national and international development policies and strategies and international human rights law, and expresses some viewpoints concerning the relevance of this approach in the political, social and institutional context of Latin America.

Recently, many development agencies and international institutions, such as the Department for International Development (DFID) of the United Kingdom government, the Swedish International Development Cooperation Agency (SIDA), the United Nations Children's Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Development Fund for Women (UNIFEM) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), have discussed the need to strengthen this link and made major efforts in this direction, creating new conceptual frameworks for their action strategies that are based as far as possible on human rights principles, rules and standards.[1]

The so-called "rights-based approach" in development policies and strategies treats international human rights law chiefly as a conceptual framework that is accepted by the international community and that can provide a coherent system of principles and rules in the field of development. It also treats it as a broad guide to conducting the cooperation and aid process; social participation in that process; the obligations of donor and recipient governments; the method of evaluating aid; and the accountability mechanisms that need to be established at the local and international levels. One of the main advantages of this approach, then, is that it provides development strategies with an explicit conceptual framework that can yield useful inputs for thinking about the different components of that strategy: accountability mechanisms, equality and non-discrimination, and the involvement and empowerment of disadvantaged and excluded sectors. This conceptual framework could also be used to define more closely the obligations of States vis-à-vis the principal human rights involved in a development strategy: economic, social and cultural rights, and civil and political rights as well.

With the rights-based approach, broadly speaking, the view taken is that the first step towards empowering excluded sections of society is to recognize that they possess rights which are binding on the State. By introducing this concept, the idea is to change the logic of policymaking so that those for whom policies are intended are no longer viewed as people with needs who require help, but as possessors of rights who are entitled to demand particular forms of provision and conduct. Actions undertaken in this field are seen not just as a way of discharging a moral or political duty but as the method chosen to implement the imperative and enforceable legal obligations imposed by human rights treaties. Rights call forth obligations, and obligations need mechanisms to make them enforceable and put them into effect.

Although the various conceptual frameworks for the rights-based approach set out from different political and philosophical premises, and even differ in some cases in their definitions of poverty, what they do share is the idea that poverty deprives people of certain basic freedoms, both positive and negative, such as the freedom to avoid hunger, sickness and illiteracy, and that poverty is the result of economic but also cultural, social, legal and political factors. Although poverty is related to a lack of economic resources (personal income, for example), this does not necessarily mean that economic factors are the main drivers of poverty. Certain cultural practices and some political and legal frameworks that facilitate or encourage discrimination against certain individuals or groups, such as women,

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[1] See DFID (2000), UNHCHR (2004), Hunt, Nowak and Osmani (2002), Appleyard (2002), UNICEF (2001), UNESCO (2002) and SIDA (2001). Also, a distant forerunner of this approach is the gender view of development advocated since the 1970s by development agencies and multilateral organizations.

indigenous people or ethnic minorities, act as social exclusion mechanisms that cause or contribute to poverty.[2]

The different conceptual frameworks do not encompass all rights, but seek to identify those that are essential to development or poverty reduction strategies because they have a constitutive or instrumental relationship with poverty. Thus, for example, OHCHR (2004) specifies three different ways in which human rights can be relevant to these strategies: constitutive relevance, instrumental relevance and constraint-based relevance in respect of the content and scope of strategies. Some rights are of constitutive relevance because they relate to capabilities considered essential by the society concerned but are not enforced owing to a lack of economic resources (the right to food, for example, or the right to health). Other rights, such as certain civil and political rights, are of instrumental relevance because they help to prevent social or political processes that can lead to poverty. Thus, freedom of speech and the rights associated with the workings of representative democracy, with clean, periodic elections, make it less likely that society will tolerate situations of extreme poverty (famines, for example) without demanding responses from the government or activating mechanisms to impose social or political accountability. There are also rights that are of instrumental relevance because they facilitate social processes of consultation and evaluation that are essential when formulating anti-poverty policies or strategies: these are the rights of participation, information, and association or assembly. Lastly, certain rights are useful for strategies when they are able to restrict or limit the types of action permissible. Thus, for example, while it would be wholly reasonable for a very densely populated but resource-poor country to wish to adopt population control measures as part of its anti-poverty strategy, it would not be admissible for it to adopt measures like compulsory sterilization that violate people's physical integrity and privacy. In this way, certain rights whose non-enforcement is not itself a cause of poverty, and whose promotion may perhaps be without instrumental value for development and poverty reduction strategies, can have some influence on policy orientation by ruling out certain types of State intervention on the grounds that they are legally inadmissible.

One element that the different conceptual frameworks have in common is their adoption of the principle of interdependence between civil and political rights on the one hand and economic, social and cultural rights on the other, although the different frameworks do not by any means all place the same emphasis on the different categories of rights.[3] The rights to be taken into account, and priorities likewise, are usually determined in the light of the different development strategies so that, a priori, no one category of rights is given precedence over any other. This stance is supported by examination of a core of negative and positive obligations common to all categories of rights, which are grouped into three levels: obligations to be respected, to be protected, and to be complied with. Conceptual frameworks define from the outset, in greater or lesser detail, the main obligations deriving from the rights identified as relevant to the strategy concerned. On the basis of these obligations they set possible development targets and indicators as a reference for the targets and indicators that would need to be established in each local participation process.

Paradoxically, although they are concerned with many of the same issues, particularly poverty and exclusion and the way these relate to the political dynamic and the workings of democratic institutions, the disciplines of development policy and human rights have run in parallel, with few points of contact or connection. Many of the concepts that are habitual in development language, such as poverty reduction, participation, inclusion, good governance and accountability, refer to the very issues described in the field of rights as being concerned by the rights to health, food, education, freedom of speech, political participation, equality and non-discrimination, and justice, among others. On occasion, the language of rights has been considered too political and lacking in neutrality by some development agencies, and it is actually prohibited by the terms of reference of certain international financial institutions, such as the World Bank; however, this has not prevented the agendas of

[2] See Hunt, Nowak and Osmani (2002, chapter 1).

[3] Thus, for example, the conceptual framework produced by the Office of the United Nations High Commissioner for Human Rights spells out obligations, goals and indicators for economic, social and cultural rights. The same is true of the UNICEF studies, as the Convention on the Rights of the Child does not distinguish civil and political rights from economic, social and cultural rights. The conceptual framework of the DFID, on the other hand, while it makes frequent mention of economic, social and cultural rights, is organized around three core ideas, namely inclusion, participation and compliance with obligations, and strategy is not defined in relation to rights in particular. The rights referred to are discussed in relation to each of these three concepts.

these institutions from addressing problems of poverty or institutional quality that are directly linked to these rights.

Among the most insistent of the doubts raised about the potential for development policies to adopt a rights-based logic concerns the ambiguity of the content of obligations arising from economic, social and cultural rights. The prospect of such rights becoming as enforceable as civil and political rights is also called into question.[4] Again, it is suggested that a rights-based approach to public policy may sometimes prove too rigid and thus unduly trammel the discretionary powers of those who formulate development strategies. This subject will be returned to in section III. First, though, it needs to be said that there is an argument of substance behind these objections, since the relationship between human rights (particularly economic, social and cultural rights) and public policies is a thorny matter for which there is still not a sufficiently sound and consistent basis, whether in international law or in the constitutional law of the Latin American countries. Rights do not tell us much about the content of policies, but they can say something about their general orientation and provide a conceptual framework to guide their formulation and implementation.

Advocates of the rights-based approach understand that changing the perspective does not imply radical or sudden shifts in the practices that development agencies have been following in recent years, since they build on the points of connection and synergy between the development field and that of human rights. They argue that the obligations laid down by human rights treaties are not excessive and do not crowd out policy, but rather highlight the minimum measures which it is the duty of the State to implement. They also suggest that the main contributions of the rights-based approach to development strategies are the way it links rights to the empowerment of poor sectors and the way it strengthens accountability mechanisms by employing the international and national "institutional infrastructure" that exists in the field of human rights. They also take the view that human rights treaties and their interpretation by international bodies provide a clear, explicit framework that is recognized by all countries and enjoys a powerful social and political legitimacy, something that can only enhance the effectiveness of development strategies and the scope for coordinating State and non-State actors on the local, national and international stage.

[4] See ODI (1999).

If this approach were adopted in Latin American development strategies, there would certainly be a solid infrastructure to support it. In the region, the concept of human rights arose as a way of placing limits on the abuse of power by the State, as a catalogue of the types of conduct the State ought not to engage in: torture, the arbitrary taking of life, interference in private and family life, discrimination. This conception was linked with the resistance to military dictatorships in the Southern Cone in the 1970s and Central America in the 1980s.

In recent years, the corpus of principles, rules and standards that make up international human rights law has fixed more clearly not only the negative obligations of the State, but also a series of positive obligations. In other words, it has laid down more precisely not only what the State must not do, in order to prevent violations, but also what it has to do if civil and political rights and economic, social and cultural rights as well are to be fully effective. Thus, human rights are now regarded not just as a restraint on oppression and authoritarianism, but also as a programme that can guide or orient the public policies of States and help to strengthen democratic institutions, particularly during transitions or in incomplete or weak democracies.

As well as monitoring State activities very closely, many human rights organizations in the Latin American countries have initiated rewarding dialogues with governments in the hope of influencing the orientation of their policies and improving the workings of public institutions. The purpose behind this change of approach is to supplement their traditional work of reporting massive or systematic violations of rights with preventive and promotional action to forestall such violations. Similarly, the bodies that carry out international supervision of human rights, whether globally or regionally, have sought not only to provide victims with redress in particular cases, but also to establish a body of standards and principles in order to influence the quality of democratic processes and the efforts afoot to create more integrated, egalitarian societies.

This institution-building agenda has not always been a feature of the international oversight work carried out by the Inter-American Human Rights System, whose sole aim at times has been to provide a final legal recourse for victims of massive and systematic rights violations. However, this system does have intervention tools capable of significantly improving its conceptual contribution to public policymaking at the country level. Rulings by bodies in the system on a particular case have a heuristic value,

as interpretations of the treaties by which conflict should be governed, that transcends the particular cases of the immediate victims. This international case law also tends to be taken as a guide for subsequent domestic rulings by national courts, which thereby seek to prevent States from being exposed to claims and possible adverse rulings before the international oversight authorities.

This globalization of human rights standards has unquestionably influenced the transformation of justice systems in the region's countries, and has made State authorities pay more attention to principles and rules established at the inter-American level. It has also contributed to the gradual creation of a State bureaucracy accustomed to dealing with these issues (human rights offices and commissions, ombudsmen and specialized officials), something that tends to influence certain aspects of public administration. At times, decisions adopted in a particular case do not merely interpret the provisions of the treaties governing the system, such as the American Convention on Human Rights, but also require States to formulate policies to remedy the situation which gave rise to the complaint. Requirements of this kind may consist in changes to existing policies, legal reforms and, often, alteration of certain patterns of behaviour by some State institutions that result in violations (e.g., police violence, abuse and torture in prisons, State acquiescence in situations of internal violence).

In relation to individual cases, the system usually favours amicable solutions or negotiations in which States often agree to introduce institutional reforms. In addition, the Inter-American Commission on Human Rights issues thematic and country reports and the Inter-American Court of Human Rights can issue advisory opinions which provide an opportunity to look beyond its casework and examine concrete issues in a wider context, and to determine the extent of the State obligations deriving from the Inter-American Convention on Human Rights and other human rights treaties applicable in the inter-American system. The case law and interpretations of the inter-American human rights bodies, both the Commission and the Court, have been a decisive factor behind the introduction of major reforms to the workings and accessibility of justice systems, increased respect for freedom of speech and access to public information, the abolition of provisions that discriminated against women, and recognition of the right of indigenous peoples to their ancestral lands and to political participation, among other issues of key importance for development in the region's countries (Méndez and Mariezcurrena, 2000).

In short, as was suggested earlier, the value-added or potential contribution of the rights-based approach in the field of development is manifold and may vary greatly depending on whose viewpoint and interests, among the different actors involved in development strategies, are considered: development agencies and institutions that finance development policies, States and other donors and recipients, or the different social and political actors involved. Furthermore, this approach will have differing degrees of influence on the content and orientation of public policies and on their preparation, implementation and evaluation. This being so, it is not the purpose of the present study to arrive at any definitive conclusions about a possible connection between development and human rights. It seeks only to explore the areas where greater linkage and synergy are possible, and to look briefly at some of the objections that have been brought against the rights-based approach.

The first step will be to analyse what the recognition of rights signifies, and the relationship between this and the empowerment of excluded sectors; this will be followed by an examination of the relationship between human rights, the obligations that derive from them, and public policies, with special reference to economic, social and cultural rights. Lastly, an attempt will be made to relate three issues that are fundamental to any development strategy, namely inclusion, participation and accountability, with some current legal debates in the region concerning human rights, specifically the scope of the right to equality and non-discrimination, social and political participation, and access to justice.

II

The logic of rights, empowerment, and enforcement mechanisms

The essential idea behind the adoption of a human rights approach to development and poverty reduction is that the policies and institutions employed to pursue strategies in this direction need to be based explicitly on the provisions and principles laid down in international human rights legislation. International law thus provides an explicit and imperative regulatory framework to guide or orient the formulation of national and international policies and strategies.

The need to empower the poor and excluded has been widely acknowledged in development and poverty reduction strategies. The human rights approach aims, essentially, to achieve empowerment through the recognition of rights. Once this concept has been introduced in a policy context, the essential starting point for policymaking is no longer the existence of sections of society that have unmet needs, but of people who have enforceable rights, i.e., entitlements that give rise to legal obligations for others and, consequently, to the establishment of safeguard, guarantee or accountability mechanisms. The objective here is to change the logic of the relationship between the State (or providers of goods and services) and the future beneficiaries of policies. These are no longer simply people with needs who receive welfare benefits or other forms of discretionary provision, but possessors of rights who have the legal and social power to demand certain forms of behaviour from the State.[5]

Before going into the specific debate about the meaning and scope of a rights-based approach, it is helpful to ask what is meant by possessing a right and what the main implications might be when the language of rights is used in the field of development and anti-poverty policy. Although the language of rights has an ethical and political value of its own and can strengthen social demands in the face of situations of inequity, its concrete implications for social relationships are not always given due consideration, and this creates a risk that the rhetoric of rights may not be followed up, so that the minimum expectations to which the concept may legitimately give rise are left unmet.[6] Recognizing rights usually means establishing legal or other measures to enable their possessors to seek redress from a legal authority or other similarly independent body if the party bound by them fails to discharge the obligations concerned. In other words, the rights-based approach establishes correlative obligations, non-fulfilment of which will activate different accountability or guarantee mechanisms. Consequently, recognizing rights also means empowering their owners in a specific sphere, and it can thus provide a way of restoring balances in social situations that display marked disparities. Unquestionably, too, recognizing rights does set some limits on the freedom of action of those they bind, including the State, since in some measure it broadly defines what they can and cannot do.

It is interesting to analyse this point in relation to economic, social and cultural rights and the techniques used to guarantee or protect these. The usual objection to their being recognized as rights, indeed, is that making certain social issues a matter of law may crowd out policy, limiting the ability of States to adopt effective anti-poverty and development strategies. The next section will deal synthetically with this issue. It should be said here, though, that the essential starting point for a rights-based approach is to recognize a direct relationship between the right, the correlative obligation and the guarantee, since this in turn will certainly contribute to the establishment of a conceptual framework for the formulation and implementation of public policies and accountability

[5] See Alsop and Norton (2004).

[6] Thus, for example, the Heads of Household Plan (Plan Jefes y Jefas de Hogar), the most important of the measures brought in by the Argentine government to alleviate the social crisis of 2001/2002, was presented as a way of recognizing the right of families to inclusion. Despite the use made of the term, though, there was no serious debate about the implications of recognizing a right to the benefits established by the plan, or about the difference –in terms of enforceability, for example– between this and the discretionary welfare benefits that had been the rule in earlier welfare policies (see CELS, 2004a).

mechanisms that can be considered compatible with the notion of rights. In short, when the language of rights is used in development strategies, there must be some kind of monitoring and accountability mechanism involving the actors in the policymaking process.[7]

III

Common obligations in the different categories of rights and the margin of discretion for public policy and development strategies

While the rights-based approach establishes a conceptual framework for the formulation and evaluation of development policies and strategies, it should not excessively trammel or limit governments' room for manoeuvre in their policymaking. The aim is not to force States or those upon whom rights impose obligations to go about things in a particular way, or to cramp the creativity of policymakers and strategists with rigid or inflexible systems. The prevailing view is that each State should have control of its own strategy, suggesting a relationship between the idea of "State ownership", rooted in the development sphere, and the right of self-determination. There are a number of ways to give effect to human rights in the framework of development policies and strategies. Thus, free-market systems and systems with greater State involvement in the economy can both meet the prescriptions of international human rights legislation.

The requirement arising from these rights, then, may be not specific measures but types of obligation that, while providing a direction, a route to be followed, a framework for decision-making, leave the State or those bound by the rights with a wide margin of discretion for selecting the specific measures that will be used to give effect to them. This is true both of civil and political rights and of economic, social and cultural rights, all of which entail a set of negative and positive obligations.

This is important as a starting point to provide a partial answer to doubts about the possibility of fully enforcing social rights, and to the criticism that political action is overly constrained by them. From this perspective, the differences between civil and political rights and economic, social and cultural rights are a matter of degree, not kind.[8] Obligations to act are the most visible facet of economic, social and cultural rights, and it is for this reason that they are sometimes known as "provision rights". When the structure of these rights is observed, however, it is easy to identify matching obligations to refrain from acting: the right to health entails a State obligation to do nothing harmful to health; the right to education entails an obligation to do nothing that worsens education; the right to preservation of the cultural heritage entails an obligation to refrain from destroying the cultural heritage. This is why the purpose of many of the legal enforcement measures taken in respect of economic, social and cultural rights is to correct State activity when it disregards obligations to refrain from acting. In summary, economic, social and cultural rights can also be described as a complex of positive and negative State obligations, although in this case the positive obligations are of greater symbolic importance in identifying them.

[7] An aid to understanding the problem is to follow the debate about the possibility of reading and enforcing the Millennium Development Goals, which do not use the language of rights, from a human rights perspective, to give them greater enforceability at the individual country level on top of the political commitment accepted by States (see Center for Human Rights and Global Justice, 2003).

[8] See Contreras Peláez (1994, p. 21): "There are, in short, no purely 'negative' obligations (or, better said, rights entailing exclusively negative obligations), but it does seem possible to posit a difference of degree as regards the relevance that benefits have for rights of one type or another."

Furthermore, the theoretical conception and even the practical legal regulation of a number of civil rights traditionally treated as "autonomy rights" or rights that generate negative obligations for the State has changed so much that some of the rights traditionally described as "civil and political" have acquired an unmistakably social cast. The way property rights have lost their absolute character when social considerations are at stake is the most complete example of this, although not the only one.[9] Current trends in tort law give a central place to the social distribution of risks and benefits as a criterion for determining the obligation of redress. The sudden emergence of consumer law has greatly altered contractual bonds when these concern the consumer and user relationship. The traditional consideration of freedom of speech and of the press has acquired social dimensions that are given substance when freedom of information is formulated as a right of any member of society, encompassing in some circumstances a positive obligation to produce public information. Freedom of enterprise and trade become conditional when their object or conduct affects health or the environment. In short, many rights traditionally classed as civil and political have been reinterpreted in the light of social considerations, making absolute distinctions meaningless in these cases as well. The jurisprudence of the international human rights protection bodies, in particular the European Court of Human Rights, has established a positive obligation on the part of States to remove social obstacles to jurisdiction, take appropriate measures to prevent environmental damage turning into a violation of the right to private and family life, and act affirmatively to forestall foreseeable and avoidable risks that may affect the right to life.

It might be said, then, that ascribing a particular right to the category of civil and political rights or to that of economic, social and cultural rights has a heuristic, organizing, classificatory value, but that a more rigorous conceptualization would reveal a continuum of rights in which the place of each was determined by the symbolic weight of the component of positive or negative obligations characterizing it.

In line with this, authors such as Van Hoof and Eide[10] propose a system of interpretation that identifies the "layers" of State obligations seen as characterizing the complex of obligations by which each right is identified, irrespective of whether it is classed among civil and political rights or among economic, social and cultural rights. According to Van Hoof,[11] for example, four "layers" should be distinguished: an obligation to respect, an obligation to protect, an obligation to fulfil and an obligation to promote the right concerned. The obligation to respect takes the form of a duty on the part of States not to interfere with, hinder or impede access to the enjoyment of the goods constituting the object of the right. The obligation to protect consists in preventing third parties from interfering with, hindering or impeding access to these goods. The obligation to fulfil means giving the possessor of the right access to the good when he cannot obtain this by himself. The obligation to promote is the duty of creating conditions whereby possessors of the right can access the good.

As can be appreciated, the idea of "layers" of obligations is perfectly applicable to the whole spectrum of rights, whether these are classified as civil and political rights or as economic, social and cultural rights.

It should be repeated that it is wrong to regard economic, social and cultural rights as rights that establish exclusively positive obligations. Both civil and political rights and economic, social and cultural rights constitute a complex of positive and negative obligations. Negative obligations are those that require the State to refrain from carrying out a particular activity, such as preventing the expression or dissemination of ideas, violating correspondence, practising arbitrary detention, preventing people from joining a union, intervening in a strike, worsening the health of the population, or denying people access to education. As for positive obligations, some distinctions should be established to point the way to the type of measures that can be demanded. Almost automatically, the positive obligations of the State tend to be linked directly to the obligation to make funding available. This is certainly one of the most characteristic ways of discharging obligations to act or provide, particularly in fields such as health care, education or housing.

[9] See the American Convention on Human Rights (Pact of San José, Costa Rica), art. 21.1: "Everyone has the right to the use and enjoyment of his property. *The law may subordinate such use and enjoyment to the interest of society*" (author's italics).

[10] See Eide (1995, pp. 21-49, and 1989).

[11] See Van Hoof (1984, p. 99). The distinction was originally suggested by Shue (1980). In the field of international human rights law, this distinction was incorporated (with some alterations that reduced the classification to three categories: the obligations to respect, protect and fulfil) in the main documents produced by the Committee on Economic, Social and Cultural Rights (United Nations) to interpret the International Covenant on Economic, Social and Cultural Rights.

However, positive obligations are not exhausted by the provision of budgetary reserves to make a service available. Service provision obligations may be characterized by the establishment of a direct relationship between the State and the beneficiary. The State may, however, provide for the enjoyment of a right by other means, with an active role perhaps being played by other agents bound by it. The possible measures a State may take to discharge positive obligations are manifold. Among others, they include organizing a public service (e.g., operating courts, which gives effect to the right to jurisdiction; providing official defence counsel, which gives effect to the right to defence in court for those who cannot afford their own counsel; or operating the public education system); providing development and training programmes; establishing graduated forms of public/private coverage (for example, by arranging private contribution methods to maintain social systems that cover the right to health of people in employment and their families, and establishing a public health system to cover the right of people not protected by the employment structure); operating a public system of credit with variable subsidies (for example, mortgage loans for housing); providing subsidies; carrying out public works; and providing tax breaks or exemptions.

It can be seen, then, that the logic of rights does not constrain the public policy options available to governments for discharging their obligations. States have a wide margin of freedom to decide what specific measures they will adopt to give effect to rights, and indeed this is essential to reconcile the rights-based approach with national decision-making processes for development and anti-poverty strategies.

International instruments set standards which are meant to guide public policymaking and then become the yardstick for interventions by oversight mechanisms (or possibly the judiciary) to determine whether the policies and measures adopted conform to them or not (for example, standards of "reasonableness", "appropriateness", "progressiveness" or "equality", or of minimum content which may be established by the same international rules that establish rights). Thus, international human rights law does not specify policies, but lays down standards that serve as a framework for the policies set by each State. It is not the job of either oversight mechanisms or judges (should the case arise) to produce public policies; what they have to do is measure the policies adopted against the relevant legal standards and, if they find a discrepancy, ask the authorities to reconsider so that they can adapt their activities accordingly.

Faulty or failed policies do not always result in non-fulfilment of rights; this will only happen if the State ceases to comply with some or other of the obligations it has accepted. Conversely, there may be policies that are successful in achieving their objectives, but that embody measures which breach rights.

Without doubt, though, rights create frameworks for policy and thereby influence not just its content or orientation but also its formulation and implementation. To justify this assertion, it seems helpful to consider some legal debates concerning certain fundamental rights (such as the right to equality and non-discrimination, the right to political participation and the right to justice) that are now taking place in Latin America in relation to some of the problems raised by the application of certain core principles that guide public development strategies and policies, such as the principles of inclusion, participation and accountability.

IV

The inclusion principle and standards on equality and non-discrimination

The inclusion principle which usually governs development policies can be strengthened if it is linked to legal standards on equality and non-discrimination. International human rights law can be of service here by supply clearer concepts to serve as parameters for defining and evaluating public policies. What is required from the State is not only a non-discrimination commitment but also, in some cases, the adoption of affirmative measures to guarantee the inclusion of population groups or sectors that have traditionally been discriminated against. Although most of the region's countries have signed the main human rights treaties laying down standards for equality and non-discrimination, it is important to stick to the course laid down by the Inter-American Human Rights System in this area. Thus, in the *Morales de Sierra* case, the Inter-American Commission on Human Rights, in its interpretation of article 24 of the Inter-American Convention on Human Rights relating to equality before the law, established it as a principle that certain forms of difference or distinction in treatment (for example, those based on race or sex) created a strong suspicion of illegality, and that the State would have to put forward very weighty reasons to justify them. When the distinction concerned one of the factors or categories that aroused this suspicion (race, sex, national origin), the regulation or policy employing them would be subject to "heightened scrutiny". The case cited shows the potential of the system: it forced Guatemala to reform its civil code, which gave husbands exclusive administration of the marital union and imposed severe limitations on a married woman's right to work outside the home.[12] The same criterion applies to immigrant workers in the sphere of labour relations.[13] This has enormous political implications, given the situation of certain sections of society that have clearly been the victims of discrimination and exclusion through history, such as indigenous peoples in the Andean area or the black population in Brazil.[14]

The importance of all this lies in the fact that the inter-American system did not just uphold a formal notion of equality or confine itself to requiring objective and reasonable criteria of distinction and prohibiting unreasonable, capricious or arbitrary differences of treatment, but moved towards a material or structural conception of equality, setting out from the recognition that certain sections of the population required special measures of equalization. This implies the need to provide differentiated treatment when the circumstances affecting a disadvantaged group mean that equal treatment can only be achieved by restricting or worsening access to a service or good, or the exercise of a right.[15] The concept of material equality is a tool of enormous potential, both for examining the rules that confer recognition of rights and for orienting public policies that may uphold them or, sometimes, undermine them. In respect of individual members of groups that are vulnerable or likely to be discriminated against in their economic, social and cultural rights, the United Nations Committee on Economic, Social and Cultural Rights has established that the State has the obligation to bring in regulations that will protect them from this discrimination and to adopt special measures which include active protection policies.

One of the main obligations of the State is to identify groups that need priority or special help to exercise their economic, social and cultural rights at a given point in history and to see that its action plans incorporate concrete measures to protect these groups. This has been established, for example, by the Committee on

[12] Report no. 4/01, Case 11.625, *María Eugenia Morales de Sierra v. Guatemala*, 19 January 2001, Inter-American Commission on Human Rights.

[13] See Inter-American Court of Human Rights, *Advisory Opinion OC-18/03*, 2003.

[14] See Fry (2002, pp. 191-212) and Arias, Yamada and Tejerina (2004, pp. 215-236).

[15] For an analysis of these ideas, see Ferrajoli (1999, pp. 73-96), García Añón (1997), Fiss (1999, pp. 137-167) and Saba (2004, pp. 479-514).

Economic, Social and Cultural Rights in relation to a number of rights, in particular those concerning housing and public health. Before formulating its plans or policies in the social field, therefore, the State, as well as identifying sectors traditionally discriminated against in access to particular rights, will need to determine which are the sectors that require priority attention (for example, the inhabitants of a particular geographical area in the country, or people in a particular age group) and take measures to compensate them or strengthen their rights.

This obligation for States to adopt affirmative measures to support the exercise of social rights has important implications (for the type of statistical information that needs to be produced, for example). Preparing properly disaggregated information to identify sectors that are neglected or disadvantaged in the exercise of their rights not only helps ensure the effectiveness of a public policy, but is indispensable to allow the State to discharge its duty of giving special and priority attention to these sectors.

The principle of equality and non-discrimination will influence budget allocation and social spending criteria. Discrimination in access to rights may derive, for example, from disparities between geographical regions. In some Latin American countries, the decentralization of public-sector education and health care has heightened inequity in access to public services of comparable quality between the inhabitants of different geographical regions. An interesting exercise for measuring the usefulness of the rights-based approach is to review the impact of these public policies in the light of international standards on equality and non-discrimination. In respect of this, the Committee on Economic, Social and Cultural Rights has stated that the existence of acute disparities in spending policies that result in a different quality of education for the inhabitants of different areas may constitute discrimination for the purposes of the International Covenant on Economic, Social and Cultural Rights.

V

The participation principle and its relationship with civil and political rights

The participation principle is crucial to development strategies and policies, as a method of identifying needs and priorities at the local or community level. This core principle can be delineated by its link with the exercise of particular civil and political rights and, in particular, by the content and scope of some of these rights as specified by international human rights protection bodies. There are also some concrete rights of participation and consultation in public policy decision-making processes that are explicitly defined in international or constitutional norms.

It is essential, then, to analyse the extent to which certain sectors that are subject to discrimination or social exclusion in Latin America, and that are usually identified as beneficiaries of development measures, are especially hindered from exercising some of these rights, since this severely limits the success of the formal consultation and participation mechanisms usually provided for in development strategies.

Unquestionably, the political participation necessary in a democracy requires more than an institutionalized system of clean, periodic elections. It is essential for people to have the opportunity to exercise certain other rights that are, in their way, prerequisites for a more or less smoothly functioning democratic process: the right of association and assembly, freedom to unionize, and freedom of speech and information, among others. If these rights can be exercised in practice then the poorest sectors will be able to influence political processes and the stance of government decision-making, but the ability to exercise them will be conditioned or constrained by the degree to which these sectors are actually in a position to assert their economic, social and cultural rights.

The right of association, and the freedom to unionize in particular, are very important in securing social participation and the exercise of basic social rights for the poor. Now that the Protocol of San Salvador has come into force, the inter-American system has the opportunity to examine cases concerning union freedom (including the right to strike and the right to collective bargaining) from most of the Latin

American countries and to establish uniform jurisprudence in this area that is binding throughout the region. The Inter-American Court of Human Rights, indeed, has already pronounced on a case from Panama concerning the freedom to unionize.[16]

Another key to the political participation of excluded sectors in Latin America is the scope of the rights of assembly and free speech, given the practice in some countries of placing restrictions on public demonstrations. In a recent report, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights sought to balance the civil rights at stake with the interest of the State in maintaining public order by laying down the principle that criminalization (i.e., the use of criminal prosecutions to deal with social protests) should be a last resort, used only if an imperative public interest has been demonstrated.

One issue that has aroused concern in the inter-American system has been indigenous peoples' exercise of the right to be consulted on policies that might affect their cultural territories, such as those that result in economic and natural resource exploitation, and to conduct discussions with State authorities and other social actors through their own political representatives (Aylwin, 2004, pp. 153-222). The Inter-American Court of Human Rights has established that States are obliged to have appropriate participation and consultation mechanisms for indigenous peoples in relation to decisions that may affect the use of their natural resources or in some way alter their traditional territories.[17] The Court has also reaffirmed the obligation of States to adopt positive measures to ensure that members of indigenous communities can participate on equal terms in decision-making about matters and policies that affect or may affect their rights and the development of these communities, so that they can be represented in State bodies and institutions and participate directly and in proportion to the size of their populations in the management of public affairs through their own political institutions and in accordance with their values, usages, customs and forms of organization.[18]

To include all sections of society in political and social development processes, an essential tool is proper access to public information and the steady release of the kind of information needed for evaluating and monitoring policies and decisions which directly affect them. Although access to information is a clear principle of development strategies, approaching the subject from the standpoint of rights may improve the orientation of transparency policies and create pressure for the institutional changes that are needed in the different countries of the region. Paradoxically, even though most of these countries have ratified the main international instruments embodying civil rights, very few have laws on public information access or domestic regulations that go beyond minimum legal standards in this area. Recently, some useful studies have set out to establish the scope of the fundamental right of access to information held by the State, as enshrined in international human rights law. One of the most important of these studies is that produced by the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights on the basis of article 13 of the American Convention on Human Rights, as it provides a parameter to which laws on public information access in the region's countries should conform.

[16] Inter-American Court of Human Rights, *Baena Ricardo et al.* case, judgment of 2 February 2001, Series C, No. 72.

[17] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community* case, judgment of 31 August 2001, Series C, No. 79.

[18] Case of *Yatama v. Nicaragua* of 23 June 2005.

VI

The accountability principle and mechanisms for enforcing rights

To explore the potential of the relationship between rights and development policies, it is essential to consider accountability mechanisms. This is because the logic of rights, as already pointed out, necessarily requires that there be mechanisms to enforce them. These mechanisms help strengthen policy oversight, public services and the actions of both governments and the other social actors involved in development strategies. What is meant here by rights enforcement mechanisms are not just systems for administering justice, although these might have a very important role; the concept also includes, among other instruments, administrative procedures whereby decisions are reviewed and citizens exercise oversight of policies, user and consumer complaint procedures, parliamentary bodies that monitor policy and specialist institutions that protect fundamental rights (ombudsmen, consumer protection and competition authorities, etc.). Particular consideration is merited by the rights protection systems operating at the international level, such as the Inter-American Human Rights System and the thematic committees and rapporteurs of the United Nations, among others. It is clear that the suitability of the different mechanisms for monitoring public policies and ensuring that these respect rights depends not only on their institutional characteristics, but also on their appropriation by social organizations and the existence in civil society of actors with the desire and resources to use them. We shall now highlight some aspects that are deserving of analysis.

International human rights rules are quite specific about the right to legal and other resources that offer an appropriate and effective channel for actions over breaches of fundamental rights. The State has not only a (negative) obligation not to hinder access to these resources but also, and vitally, a (positive) obligation to organize the institutional machinery in such a way that everyone, and especially those who are in a situation of poverty or exclusion, can access these resources. To discharge its duty, it must remove any social or economic obstacles that hinder or limit access to justice and, in some cases, even take it upon itself to provide legal advice or establish systems to exempt people from legal costs.

Before anything else, it needs to be remembered that social policies, and indeed State education and health provision, have not been guided in their organization and operation by the logic of rights. Indeed, services have mostly been organized and provided in accordance with the opposite logic, that of welfare, so that, subject to certain institutional controls, this field of action for public administrations has traditionally been the preserve of policymakers acting on their own discretion. The subject is complex and cannot really be understood in the same way in all the region's countries. The expansion of the social functions of the State (in areas such as health, housing, education, work, social security, consumption and measures to encourage participation by disadvantaged social groups) has not necessarily translated, technically speaking, into the specific configuration of rights.

In many cases, the State took on these functions as a result of discretionary initiatives or methods of organizing activities –such as the provision of public services, or the creation of targeted social plans or programmes– whose social and economic effects are not intended to discharge a duty towards possessors of rights, whether individual or collective. What has often happened is that types of provision or action considered to be entitlements by national constitutions or human rights covenants have been treated by States as discretionary or manipulated for purposes of political patronage.[19] It is not impossible either in theory or in practice, however, to design enforceable rights in these fields as well, thereby supplementing institutional, administrative or political supervision mechanisms with such oversight as may be exercised over providers or

[19] See Ferrajoli (2003, pp. 11-21). One possible reading of current efforts to dismantle welfare States from this perspective would emphasize not just cutbacks in social services but also the weakening of the legal bond between the State and the intended beneficiaries of the social policies concerned. A clear instance of this is the shift from universal social policies based on recognition of subjective rights to targeted and temporary social programmes based on discretionary interventions by the public authorities. See Lo Vuolo, Barbeito and others (2000, pp. 191-202).

officials by people exercising rights linked to this type of social provision.

The purpose of recognizing rights in constitutions and treaties is to impose obligations on the public authorities, whence the need to require that these rights be configured in such as way as to make them enforceable. There is absolutely no reason not to recognize the possibility, at the social policy level, of demanding civil rights such as the right to equality and non-discrimination and the right to information, and social rights that create frameworks and minimum standards for these policies. Unquestionably, the inclusion of a rights perspective in the design of plans ought to mean that basic criteria of due process are incorporated into their institutional engineering, including a reasonable time limit, the right to know the reasons for a decision, the right to review by an independent authority (ultimately perhaps the judicial authority), the right to information about the resources available, and the principle of equality of arms.[20]

In the European Union (EU) there have been some notable experiences involving the creation of conceptual frameworks for access to justice and the enforcement of social rights, which serve as a parameter for oversight by EU bodies of the workings of individual countries' social services and policies.[21] Frameworks of this kind could also be produced in Latin America, guided by the standards of the inter-American system.

At the same time, recognizing that these policies and services are the fulfilment of economic, social and cultural rights will also mean recognizing appropriate mechanisms for enforcing these individual and collective rights. This issue should be given the highest priority in the region's legal reform agenda, to improve access to justice and social participation in the oversight of State policies and of the actions of private agents that affect the exercise of these basic rights. Among the mechanisms for securing access to justice on issues related to development and anti-poverty policies, reference may be made here to collective actions brought on the grounds of unconstitutionality (*amparo*) or class actions, which can be used to challenge the legality of certain aspects of public social policies or public service provision on the basis of constitutional or international standards. By means of such actions, some environmental organizations, user groupings, indigenous peoples and women's and human rights organizations have successfully influenced the orientation of social policy; held to account public service companies and, in some cases, private businesses and groups engaging in activities with environmental effects; and indeed demanded information and participation mechanisms so that they could become involved in the preparations for policymaking or the awarding of concessions for potentially harmful economic activities.

Another key to improving accountability mechanisms in development and anti-poverty strategies is the enhancement of international protection systems for human rights, not just as a final resort when national legal systems have failed, but as a means of establishing uniform standards for the rights enshrined in treaties. These standards would subsequently be applied by national legal systems and would help strengthen local democratic institutions. The idea, then, is to improve the protective workings of international mechanisms, but at the same time to steer governments towards compliance with these rights and strengthen the mechanisms used to protect individuals within countries, the application of treaties by national courts, the incorporation of the jurisprudence built up by the system in the rulings of constitutional courts, and use of the principles underlying this jurisprudence to guide public policies (via specialized agencies such as human rights ministries and ombudsmen, for example). The duty of States to adapt their policies and legal systems to the obligations accepted under international treaties can have very real implications for accountability systems. One positive instance of this kind is the work undertaken by UNICEF to implement the Convention on the Rights of the Child at the national level, and the concern to generate standards and rules for the proper interpretation of its provisions at the local and international levels. The experience of the so-called Aarhus Convention[22] may also be useful to the region; it set minimum common

[20] See CELS (2004b) at www.cels.org.ar. This study analyses the administrative procedures for assigning social pensions from the standpoint of the due process standards laid down by Argentine constitutional jurisprudence and the inter-American system of human rights. Social oversight systems based on the logic of rights may have points of contact, but also differences, with the social accountability mechanisms traditionally considered by international financial institutions. See Ackerman (2004) for an examination of these differences.

[21] See the document by the Group of Specialists on Access to Social Protection (n/d). CDCS (2004) may also be consulted. See likewise Daly (2002).

[22] The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark, 1998) was originally approved at the United Nations and then adopted as a guide by the European Union. Of particular interest is the work done by the working group of signatory States on implementation of the Convention at the national level.

standards for information access, civic participation and access to justice in environmental matters, and has served as a guide for international oversight of national policy formulation and implementation in this field.

In summary, it is not difficult to build bridges and establish relationships between the field of human rights and the principles that usually orient or guide development policies and strategies. Whether these two spheres actually come together as they might will largely depend on whether the decision is made to change the logic behind certain public policies and their levels of universality, transparency and oversight. Also crucial to this potential encounter will be a deepening of the role that international human rights monitoring bodies can play by setting clearer and more precise minimum standards for matters of common interest and thereby providing a framework for State policies and a yardstick for their oversight and evaluation.

(Original: Spanish)

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