

Constructing A New Rights Regime: Promises, Problems And Prospects*

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Abstract

This article reflects on the interface between issues of poverty and deprivation which is the life-condition of the large majority in the countries of the South, and the approaches to human rights which have attempted to take on board such issues. The article consists of three sections and an extended appendix. The first section is an introduction which presents the basic premise of the discussion in the article. The second section outlines the key elements defining the human rights and development debates. The third section examines in some detail approaches to litigation practices developed in India and elsewhere, which take into account notions of human rights and the right to development introduced in earlier sections of the article. The two extended appendices present moot case proceedings which exemplify the application of the novel legal notions introduced in the main body of the article.

I. Introduction: Human Rights as a Contentious Discourse

Human rights are the concrete result of historical and social development. They mirror the struggles and concerns of the dominant social groups in society at a particular time as these groups organise and reorganise to maintain their position. At the same time, rights formulation and articulation reflect, albeit in a subordinate position, the resistance of the dominated as they strive to change the status quo. Human rights, therefore, like any other systematised regime of articulated ideas, is a contested terrain.

Human rights discourse, as we know it, has its origin in the development of the West, and in particular it is the result of the Enlightenment period (see generally MacCormick & Bankowski, 1989). It carries with it the philosophical and ideological baggage forged in the crucible of bourgeois

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revolutions based on the autonomy of the individual commodity owner whose worth is constructed in the market place. It is the atomist individual so abstracted from real relations of society who is then presented as the individual being, the erstwhile bearer of rights.

The political overtones of internationalised human rights, however, are of more recent origins. The United Nations activity which gave us the first human rights standards in the form of declarations, covenants, resolutions, etc. was also the meeting point of contested global ideologies, in particular the capitalist and communist ideologies as represented by the then superpowers on the one hand, and the resistance of the peoples of the third world smarting under direct or indirect colonialism on the other. Human rights talk is deeply embedded in this global terrain of contested ideologies. It is this which forms the basic premise underlying this article, rather than some natural law conception of 'inherent' rights. Rights are historically and socially determined rather than absolute qualities or possessions which inhere in human beings (Shivji, 1989).

Section two of the article traces in broad strokes the development of human rights and developmental discourse. The thesis of this section is that the two major discourses of the post-war period with direct impact on the third world ran parallel and often at cross-purposes. The article then examines the attempts by writers, publicists and the legal community, both within the mainstream and that on the fringes, to take on board some of the developmental concerns of the South. This has had the effect of opening up the foundations of the dominant human rights discourse for closer scrutiny, and its rearticulation to address the demands and needs of different peoples in different cultural contexts and espousing diametrically opposed interests. This is what underpins the alternative models of development, democracy and governance, and which is the harbinger of the development of a 'new rights jurisprudence' examined in sections three and four of the paper.

Section three looks specifically at the model of social action litigation (SAL) developed by the Indian Supreme Court. Section four proposes an alternative approach to constructing a 'new rights regime' based on two fundamental rights: the right to life, and the right of peoples to self-determination. The thesis is that these rights, conceptualised as composite rights and contextualised in the contemporary international and national conditions of Africa, have the potential and potency of placing on the human rights agenda the fundamental problems of the large majority of the African people. The actually existing condition of the African social and political

formations is that they are smarting under the domination and hegemony of the North in the international arena, and the hegemony of their authoritarian states in the domestic arena. In other words, the reconceptualised and reconstructed new rights regime challenges the double hegemonic logic, i.e., imperialist and statist, while at the same time providing the necessary elements for legitimising people's resistance to the hegemonic logic.

The two appendices give an example of operationalising the 'new rights regime' in the language of judicial discourse albeit in the case of a Southern African Moot Court (Shivji, 1992).

2. The Fragmented Nature of Developmental and Rights Discourse on the Global Level

The Universal Declaration of Human Rights (UDHR) was born in the wake of the disastrous Second World War. Its human rights conceptions were formulated with a view to provide a counter ideology to the racist and fascist ideologies of Nazism (see the preamble). World hegemonies were also being reconstituted on the basis of a bipolar world divided between the two superpowers on the one hand, and anti-colonial struggles of the third world peoples on the other. Particularist ideologies of Nazism based on racial purity and superiority were being countered by universalist language of the Declaration. Ironically, Nazi racism was a logical extension of the racist ideology which had hitherto rationalised and legitimised the imperial project (colonialism) in the third world (Hayter, 1990: 19 *et seq*, Said, 1994: *passim*). For instance, when the imperial racist ideology was at its zenith, the West rejected Japan's attempt to 'include a clause on racial equality in the League of Nations Covenant' (Furedi, 1994: 5). This was the sign of the global ideological hegemony of the time which was rooted in the racial superiority and civilising mission of the white race. An ideological construct based on equal rights (human rights) then was a world war away.

Indeed, as Furedi rightly observes, Woodrow Wilson's principle of right of nations to self-determination applied eminently only to Europe.¹ Robert Lansing, Wilson's Secretary of State, could not be clearer when he said in the course of the Peace Conference:

¹ Contrast Lenin's exposition of the right of oppressed nations to self-determination which primarily applied to the peoples of the East (Lenin, 1970).

The more I think about the President's declaration as to the right of 'self-determination', the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be a basis for impossible demands on the Peace Conference and create trouble in many lands.

What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder and rebellion? Will not the Mohammedans of Syria and Palestine and possibly of Morocco and Tripoli rely on it? (quoted in *ibid.*: 13)

Thus, 'What was at stake was that sense of superiority which was so vital to imperial self-confidence.' (*ibid.*) Between the wars that self-confidence was undermined in different ways by the reconstruction of, and opposition to the then dominant racial ideology.

Firstly, as already argued, the imperial project could no longer be legitimised in racial terms. Hitler's Nazism made sure of that. Secondly, the participation of the coloured Japan in the war and its initial successes had weakened the underlying premise of racial superiority. For the colonised peoples, it was an eye-opener to see barbaric butchery between civilised whites, which had hitherto been reserved for the non-whites, and to witness a non-white race (Japanese) standing on its own, and on an equal military footing, against their masters. Subhas Chandra Bose's militant Indian Nationalist Army sought support from Japan and posed a greater and probably a more decisive threat to the British Raj than the passive and moderate Indian National Congress (Hobsbawm, 1994: 216). The colonised peoples in the Afro-Asian world spontaneously felt the need to 'purge' their consciousness of racial inferiority drummed up by colonial masters before they took up arms to regain their independence (Fanon, 1967).

Thirdly, the shift of the centre of gravity from Europe (possessing colonies) to the US (without colonies) as a global superpower further facilitated the reconstruction of ideological hegemony from the language of 'racial superiority' to that of 'human equality' (human rights). The fundamental limits of the universalising language of human rights were, however, immediately apparent.

First, the war did not end either imperialism or inter-imperialist rivalries on the global level. It placed both on a new level of the emerging 'cold war' (see generally Walker, 1993). For the United States and its allies, the Soviet bloc was perceived and presented as a threat to the 'free world'. It is the ideology of anti-communism and the 'free world' which was the standard text

during much of the 50s and 60s. The human rights debate arising in this context inevitably dovetailed into the politics and diplomacy of the 'cold war'. The sub-text of the 'free world' ideology was not so much to nurture, maintain and propagate freedom and rights of peoples, but strategically and economically to keep the states and peoples, particularly of the third world, within the sphere of the 'free world'. Thus the *right* of nations to self-determination proclaimed by the US President as early as the First World War was given the status of a political *principle* in the United Nations Charter, but had no place in the human *rights* document, the Universal Declaration of Human Rights. The four freedoms—freedom of expression and faith and freedom from fear and want—proclaimed by Roosevelt in 1941 as the basis of the new international order, and which inspired the UDHR, did not include people's freedom from oppression and exploitation. Even Soviet Union's narrow version of the right of peoples to self-determination to mean the process of formal independence continued to be opposed by the West, including the United States (Cassese, 1986: 416-7).

Second, Hitler's violence which had 'shocked the conscience of human beings world-wide, and laid the ground for a broad consensus that a new humanistic legal order would have to be established' (i.e. UDHR)(Alston, 1992: 10) did not mean that the new order would be without (universal) violence. There were two important differences though. The violence of the cold war era was far more ferocious and took place almost exclusively in the third world. From the Korean war, through Vietnam, Palestine and Mozambique to the Gulf, systemic violence killed, maimed and devastated third world peoples. But this violence was not supposed to shock the 'conscience of the human beings world-wide' because the third world people were being killed to protect them against the evil incarnate—communism—during the cold war, and in the interest of human rights in the post-cold war "New International Order".¹

Third, imperialism continued to support and nurture (through overt and covert violence) dictatorial regimes in the third world so long as the latter continued to keep their peoples and resources in the 'free world' (Chomsky & Herman, 1979). Under the spectre of anti-communism, even purely nationalist

¹ Compare the utter cynicism with which the president of the United States, George Bush manipulated human rights abuses by Saddam Hussein in the preparation for the Gulf War when it was the same president who had armed Hussein in the Iran-Iraq conflict. What is more, several of Bush's allies in the war—including Saudi Arabia, Turkey, Egypt and Gulf countries—were, and are, worst human rights violators (Aruri 1992).

regimes (from Nasser to Nyerere) with policies to retain their resources within their own countries evoked the wrath of Western states which at the same time presented themselves as the champions of democracy and human rights. No wonder then that for much of the 60s and 70s, third world states paid little heed to human rights arguments.

Over the first two decades of independence in Africa, the human rights discourse developed in opposition to the developmentalist discourse. Post-independence states were in a hurry to develop; to pull their peoples out of backwardness. True, developmentalism was used as an ideological cover to rationalise and justify the development of strong, authoritarian states by the ruling elites in Africa. Yet, it is also true that development was a central concern, and that an abstract advocacy of rights would have little meaning to the vast majority. The academic developmental discourse, contentious as it was, and the practical struggles underlying it, filtered into the United Nations system as well. Development thus found legitimacy in the global political discourse. The result was a spate of resolutions, declarations and covenants on development.

Within the UN system, the developmental discourse originating in the General Assembly and finding expression in declarations and resolutions was politically an extension of the domestic statist/developmentalist ideologies of many third world, particularly African states. Intellectually, that discourse was grounded in the unequal international political economy, while organisationally it took off from such groupings of third world countries as G77 and UNCTAD. This movement originally began in a negative fashion as a non-aligned movement (not aligned either to NATO or Warsaw Pact countries), but eventually took on the form of more positive economic bonding in opposition to what was perceived by third world leaders as unfair and inequitable practices of international trade and economic control. To some extent, therefore, it was an anti-imperialist movement, albeit statist in orientation. It seems to me that it is the underlying anti-imperialist stance of the third world development discourse which is what was centrally opposed by the dominant states of the North led by the US.

This is very well borne out by the fact that the right to self-determination often became the bone of contention between the West and the official third world. Contrary to traditional belief reiterated in the dominant human rights discourse, it is not so much the issue of the divisibility of rights between political/civil and social/economic and the priority of the latter over the former, or trade-offs, as it is often expressed (Vincent, 1988), which

characterised the debate between the third world and the West, but rather the sense of autonomy, however partially expressed in the right to self-determination, which was the real ground of contention. This can be seen in the debates on the two Covenants.

The Universal Declaration itself did not dichotomise between political/civil and social/economic rights (see articles 22-26.) But it did not contain the right to self-determination. Self-determination was seen as a political and organisational *principle* embodied in the UN Charter rather than a *rights* issue. US objection to ecosoc rights was based more on the nature of the obligations of the state that this entailed rather than the nature of rights as such (Alston, 1992: 394-6). The dichotomy between these two set of rights became eventually entangled in the ideological war between the Soviet Union and the US. The Soviet Union retaliated against accusations of breach of political and civil rights in the Soviet bloc by pointing out breaches of social and economic rights in the US. The diplomatic cold war on the human rights terrain then (probably inaccurately) got extended to the West-South largely because the "socialist" and third world countries tended to vote together on many third world initiatives such as on processes of decolonisation, the Palestinian struggle for self-determination, etc.

The US objection to *both* International Covenants (1966) resulting in non-ratification was largely because of the inclusion of identical Article, 1(1) on self-determination. This reads:

All peoples have the right to self-determination.

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The second paragraph was found offensive because of the perception (quite correct in the circumstances) of the West that it was directed against the interests of foreign, largely Western, capital involved in the exploitation of resources in the third world, and transfer of profits from the South to the North. There was, indeed, the expansion of the meaning of the right of peoples to self-determination to include, what many third world publicists often called, economic self-determination (Cassese, 1979: 92-3). It is this aspect which was originally proposed by Chile to be included in the Covenants, and which began to find expression in the documents and declarations proposed by third world states and adopted by the General Assembly where the third world was in a majority. Thus we had the Resolution on Permanent Sovereignty of Natural Resources, 1962, Charter of

Economic Rights and Duties of States, 1974, and various resolutions and declarations to do with the New International Economic Order.

In spite of its original promise of strong resistance to external domination in both political and economic spheres, in the hands of third world states the principle of self-determination was narrowed in three respects. Politically, the right to self-determination was limited to colonial and colonial-like situations as in apartheid South Africa. The right was considered to have exhausted itself once a country became independent. It was not applicable to 'peoples' (nations) within an independent sovereign state. Secondly, so far as the right to economic self-determination was concerned, the term 'people' was conflated with 'state'. The right was seen as belonging to the state. It became both statist and developmentalist in conception, and in practice the right to economic self-determination at the international level was restricted to 'trade-union' type demands of the third world, i.e., demanding better and fairer terms of trade and laying claims to more aid. The potential within the right of articulating and legitimising a stronger version of political and economic democracy for the benefit of the large majority of the disadvantaged people in the South was understandably not in the interest of the third world states and, therefore, was not fully developed in the official discourse. Yet, to underscore once again, even in this limited form, the third world version found only cursory mention in the mainstream discourse of 'aman rights'. The dominant discourse, largely originating in and propagated by the West, continued to focus on the universality of individual rights with monumental disregard for the social, economic and political disempowerment affecting the large masses of people in the third world who suffered under despotic regimes, very often supported by the West.

Whatever the critique—and much of it was valid—of the preoccupation of African leaders with development at the expense of rights, the centrality of development could not be ignored. The dilemma was summed up well by Mwalimu Julius Nyerere when he asked rhetorically:

What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity (quoted in Shivji, 1989: 40)

This is then the point of my thesis so far. By and large, the dominant discourse in the third world, and that which the third world pursued internationally, was openly contentious, centrally developmental, probably economic and often inevitably intertwined with the then superpower rivalry (cold war). Nonetheless, it had achieved a measure of ascendancy and legitimacy for some of the major concerns of the peoples of the South. On the global terrain of social and political discourse, the developmental and the human rights discourses were locked in battle. They were polarised and became mutually exclusive. This meant that the developmental discourse and the human rights discourse ran parallel.

The dominant human rights discourse was couched in terms of individual rights grounded in the liberal jurisprudence of essentially free-market economies dominated by capital in pursuit of profit. Right by definition was (a) an individual claim or entitlement (b) on the state which could be (c) enforced in a court of law. Development, on the other hand, was seen and perceived as (a) a societal project (b) to be pursued by the state as (c) a matter of priority and urgency. In sum, the liberal theory ruled out of court any link between individual rights and economic justice, while developmental theory was prepared to sacrifice individual rights in the pursuit of socio-economic justice. Whatever the merits of each position, the truth was that the dilemma or tension between the liberal notion of individual rights constructed in the context of a developed capitalist economy and the real life-conditions of poverty, ignorance, disease and domination of the large mass of people in Africa was real and could not be wished away, nor could it be easily reconciled on the existing conceptual foundations. This is the dilemma which expresses itself in the dichotomy between the so-called social/economic rights and political/civil rights on the one hand, and the various attempts to reconcile the tension by reconceptualising the jurisprudence of rights, on the other.

From the human rights side, we had the development of such paradigms as the indivisibility of human rights, basic needs/right school, human rights as integral, etc. From the developmental side, we have such attempts as the Algiers Declaration (Shivji, 1989 *passim*; Cassese, 1979). Suffice it to say that these attempts to carve out a 'middle ground' between the human rights and development discourses became even more contentious because each side—and this is inevitable—approached it from its own premises and outlook reflecting real life social forces and interests. It is arguable if the most valiant attempt at integrating the two discourses—the UN Declaration on the Right to

Development—has been a roaring success or one gargantuan and meaningless diversion (M'Baye, 1979; Welch & Meltzer, 1984).

Be that as it may. It was against this background that the human rights/democracy discourse made its forceful entry on the African scene in the late 70s. Whatever the pundits may say, the immediate genesis of this entry lay in the Carter doctrine. It was ideologically charged and came with the cold war package, including its anti-developmental bias. This is so notwithstanding that the African Charter of Human and People's Rights embodied a strongly statist version of the right to development. The essentially neo-classical paradigm of the new emerging "development" discourse (as opposed to that of 60s and 70s grounded in political economy (Hyden, 1994), became manifest in the various structural adjustment programmes (SAPs) and liberalisation policies imposed on African states by the international financial institutions or IFDs (Gibbon *et. al.*, 1992a).

Larger issues of even official third worldist political economy—unfair terms of trade, inadequate aid, protectionism of Western markets, extraction of profits and resources by multinational corporations, debt burden and lack of basic services such as education, health, etc. —which were the common currency of the developmentalist discourse of the 60s and 70s—have not only disappeared but have been delegitimised. African states which were in the forefront of the demand for a New International Economic Order have been reduced to virtual supplicants with no say. In the Uruguay round, to cite one typical example, Africa was marginalised from the negotiations. Yet it is estimated that the continent (particularly sub-Saharan Africa) will be the net loser to the tune of US\$ 2.6 billion (*Third World Economics*, 1994, issues 88/89, 10).

From the human rights side, the radical fringes of the mainstream for some time now have tried to address the issues raised by the developmental discourse at the level of poverty alleviation and relief (minimalist), or empowerment (maximalist). So we have debates over the integration of political/civil and social/economic rights; basic needs as basic rights; right to aid (Tomasevsky, 1993), right to food (Alston, 1984; Kowalewski, 1985; Brockett, 1985), right to development, etc.

The intervention of the radical academia in the human rights discourse from the developmental perspective has been incoherent, inconsistent and more or less ignored. There is the work of the Permanent Peoples' Tribunal which uses mock litigation to highlight larger issues of international inequality. It was the Lelio Basso Foundation behind this Tribunal which

organised and proclaimed in 1976 the Universal Declaration of the Rights of the People (Algiers Declaration, 1976) (Cassese, 1979). Based on the right to self-determination, it organised a mock trial of the IMF and the World Bank in 1988. The IFIs were charged with breaching, among other things, the right of peoples to self-determination because of the conditionalities and structural adjustment programmes that they impose on third world states and peoples (Permanent Peoples' Tribunal 1988).

The tension between lack of basic development and proclamation of rights in the global human rights discourse summed up above has been felt even more starkly by practitioners and advocates of human (legal) rights at the level of domestic jurisdictions in the Afro-Asian world. The contradiction between declarations of individual rights rooted in human worth, and the reality of grinding poverty of millions mutilating human life itself in poor countries poses a challenge not only to the intellectual integrity of human rights jurisprudence but brings into question the legitimacy of the judiciary and legal profession presented as the founts of justice, fairness and equality (see Baxi, 1988: 32 on legitimacy). A Tanzanian judge, agreeing with his Indian brother judge, put it thus:

The former Chief Justice of India Mr. Justice Bhagwati in an article on the role of the judiciary in the changing society in developing countries has urged that the judiciary has a duty to fight for a just, social and political order in society. He says at p.65 of the magazine 'The Commonwealth Lawyer' of December, 1986 that:

This challenge is an important one, not only because judges are under a duty to create and mould a just society but also because the social and political legitimacy of a modern judiciary become questionable if it fails to make a substantial contribution to the issue of social justice.

For sure if the judiciary cannot come to the aid of a poor citizen when oppressed, then its existence is questionable. We can do without it and perhaps create other institutions for that noble purpose. (*Chamchua Marwa v Attorney General*, unreported, High Court of Tanzania, Misc. Crim. Cause No. 2 of 1988)

Coming to the aid of the 'poor citizen' has been the latent or patent consideration which has informed activist or new rights jurisprudence that has been developed by publicists and higher judiciary in some countries of the South, particularly India. We briefly consider this development in the next section.

3. The Dilemmas at Municipal Level: Directive Principles, Fundamental Rights, Accessibility and Justiciability

The tension between development and the regime of rights expresses itself in a number of dichotomies and levels: the division between economic and political/civil rights; the contrast that is often drawn between collective/group and individual rights; the characterisation of developmental rights as aspirations or objectives; political and civil rights as enforceable claims; and so on. While the debate gets polarised in this fashion, the truth, as argued, remains that no rights discourse, even at a more practical level of judicial activity, can remain passive to the fundamental societal goals of equity, social justice and economic democracy raised by the developmental discourse. It is in an attempt to reconcile the rift, while at the same time address the real issues and concerns raised by the two discourses, that 'a new rights regime' is developing (Baxi, 1994; Kothari & Sethi, 1989). To put it in another way, the developmentalists are seeking to reformulate their concerns in the language of rights, while the human right-advocates are taking on board developmental issues without which, they recognise, rights-talk can have little meaning to, and legitimacy with the vast majority of the people in poor countries of the South.

In an increasing number of constitutions in the South, the dichotomy expresses itself in the division between directive principles of state policy or national objectives, and fundamental rights. One of the earlier statements of directive principles is to be found in the Indian constitution. A number of later day constitutions, including that of Nigeria (1979), Tanzania (1977), Namibia (1990) (for an overview see Cottrell, 1991) and lately Uganda (Uganda, 1995) have followed suit. Relation between directive principles and fundamental rights has not been an easy one. It has reincarnated the tension and dichotomies discussed above. Governments have sought legitimacy for some of their actions and legislation, which on the face of it were in breach of fundamental rights, in directive principles.¹ The Indian Supreme Court itself in the first decade assumed a pretty conservative posture giving pre-eminence to fundamental rights and striking down affirmative actions in favour of untouchables, land reform and nationalisation measures taken by the state as being in breach of the 'equality clause' (Singh, 1994:298 & Kidder, 1977:604). Eventually the Supreme Court beat a retreat in its phase of what Baxi calls 'judicial populism' (1988:32) holding that both directive principles

¹ It is interesting that in the Constitution of Tanzania, 1977 some of the developmental objectives reappear in derogation clauses generally limiting fundamental rights and freedoms.

and fundamental rights were fundamental and part of the basic structure of the constitution (*Kesavananda Bharati v State of Kerala* AIR, 1973 SC 1461), and that they should be interpreted in a fashion that would harmonise those two parts of the constitution (*Minerva Mills v Union of India* AIR, 1980 SC 1789).

Giving a dissenting opinion in *Minerva Mills* for different reasons, Bhagwati, J. formulated a rationale which has become in a sense the harbinger for the Indian Supreme Court to develop social action litigation going beyond simply liberal enforcement of individual rights. That rationale needs to be quoted *in extenso* because it sums up the dilemma the courts find themselves in, in resolving the tension discussed above which in turn has acted as the primary push for reconceptualising and reconstructing the foundations of human rights regime in third world countries.

Merely because the Directive Principles are non-justiciable, it does not follow that they are in any way subservient or inferior to the Fundamental Rights. The Directive Principles impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have the bare necessities of life and who are living below the poverty level. It is not correct to say that under our constitutional scheme, Fundamental Rights are superior to Directive Principles or that Directive Principles must yield to Fundamental Rights. Both are in fact equally fundamental and the courts have therefore in recent times tried to harmonise them by importing the Directive Principles in the construction of the Fundamental Rights. If a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude

and dimension, because the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice (at p. 1791).

This judicial approach, which underlies social action litigation, has been usefully categorised by Wambali (1996) as the 'social justice' approach, in contradistinction to the 'natural justice' approach of the liberal Anglo-American jurisprudence. The latter is premised on the notion of *equal opportunity* or treatment (see, generally, Dworkin, 1977) which in judicial discourse translates into a number of procedural rights often labelled as principles of natural justice. Whether Indian judges have managed to take their social justice approach to its logical social conclusion in their judicial decision-making, or have willy-nilly fallen into simply a more radical version of 'natural justice approach', will become clear when we examine the practice and critique of social action litigation below.

The core of the social action litigation has been to expand and relax the rule of *locus standi* in two respects. One, that the litigant need not have a direct or sufficient interest in the matter brought to the court. Two, that the victim of the violation may be a social group or a collective identified only by its disadvantaged position in society, often called by Indian judges the weaker or oppressed sections of society. Thus there has been SAL brought by journalists, professors, public spirited individual lawyers and lawyers' associations on behalf of bonded labour, pavement dwellers, quarry workers in unhealthy conditions, oppressed women and children, undertrial prisoners, etc. (Cottrell, 1993: 107 *et. seq* & Gomez, 1993 *passim*). Besides relaxing the rules of *locus standi*, the Indian Supreme Court has gone further in ignoring formal procedures by asserting what is called *epistolary jurisdiction* 'where the Court can be moved by just addressing a letter on behalf of the disadvantaged class of persons.' (Bhagwati 1987: 25).

Relaxing of *locus standi* rules has spread to African jurisdictions as well, although the higher judiciary there has not gone as far as the Indian Supreme Court. In a Tanzanian case of *Rev. Mtikila v. The Attorney General*, (unreported, High Court Civ. Case No. 5 of 1993) Lugakingira, J., after reviewing British, Canadian, Nigerian and Indian authorities, concluded that in matters where a public interest was at stake, it was not necessary for the petitioner to show sufficient personal interest. He found support in the constitutional provision which places a duty on every citizen to protect the

constitution. The judge cited illiteracy, lack of right-awareness, poverty and mono-party culture as factors which constrained people from seeking redress of their rights in courts. "Given all these and other circumstances", Mr. Justice Lugakingira argued, "if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing." (at p. 12) Whether African courts will go as far as the Indian Supreme Court in asserting epistolary jurisdiction remains to be seen. But it is interesting to note that in one of the most recent African constitutions, the Uganda Constitution of 1995, art. 50(2) explicitly provides:

Any person or organisation may bring an action against the violation of another person's or group's human rights.

Besides relaxing the rules of *locus standi*, the Indian Supreme Court has imaginatively combined the reading of directive principles and fundamental rights to reconceptualise and give new meaning to the content of rights as well as forge new remedies. In this regard, to cite one important example, the right to life as a basic right has been given much wider meaning. In the case of *Tellis v Bombay Municipal*, (1987) LRC (Const) 351 the Court argued that right to life was wide and far-reaching, and that it included the right to livelihood 'because no person can live without the means of living, that is, the means of livelihood.' (at p. 368). This has opened up the potential for extending the right to life to right to wholesome living as a human being, and therefore the assertion of the right to be human (Baxi, 1985). We will return to this argument in the subsequent section.

Another problem that social action litigation faced was that of proof. Realising that it would be futile to permit public spirited individuals and bodies to move the court through simple procedures on behalf of 'weaker sections', if the individual or body concerned could not marshal sufficient evidence for lack of resources, the court has in such circumstances appointed socio-legal commissions of inquiry to find facts and report back to the court which material is in turn placed before the parties and scrutinised as if it was valid evidence before the court (Bhagwati, 1987:27). And for remedies, again, the court has gone quite far in giving directions to public agencies,

appointing monitoring agencies to report back to court on whether or not their orders and directions are implemented.¹

All in all, the contribution of the Indian Supreme Court in forging social action litigation and the jurisprudence of new rights regime which goes far beyond anything hitherto known to the common law world is now widely recognised. This does not mean that social action litigation has all been a roaring success without its problems and critiques. This paper will not look in any detail at the obvious dangers of abuse that SAL presents. It may be, for example, deployed by middle class persons for whom it is not meant or for ulterior political, social and private motives (see, generally, Cottrell, 1993:122). The Supreme Court has been quick to realise this as it observed in the *Judges Transfer* case that 'we must be careful to see that the member of the public who approaches the court in cases of this kind is acting *bona fide* and not for personal gain or private profit or political motivation or other oblique considerations.' (quoted *ibid.*: p. 123). But more important is the critique as to whether the court is best suited in terms of resources, competence and political mandate to address the kind of large systemic problems of exploitation, oppression and resultant poverty that confront the disadvantaged. Where special problems of the disadvantaged are inherent in the system affecting millions, a few hundred court actions can have little more than symbolic value. As one commentator has perceptively observed:

... the new role that the courts have assigned to themselves must be seen as their attempt not to correct the social reality, but to correct the legal system. Trying to redeem the system of not having kept up its laudable objective—justice for all ...

Once it is recognised that the courts cannot bring about social change, or at any rate, cannot replace social movements, the only role they can play is to aid social movements ... The courts can only free an ailing Naxalite prisoner, or bail out a labour leader, or free one group of the endless stream of bonded labour. (quoted in Cottrell, 1993:124)

This undoubtedly raises a fundamental critique which goes to the root of the nature, role and social character of state organs in a capitalist society divided into classes. The limits of the judicial process in addressing basic

¹ I believe the Tanzanian Basic Rights and Duties Enforcement Act, no. 33 of 1994, gives wide ranging enabling power to the court under which a creative bench may be able to forge innovative remedies. It stipulates that the High Court has original jurisdiction to hear and determine any application brought under the Act and 'may make such orders and give directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of section 12 to 29 of the Constitution, ...' (s.8(1)b). For a contrary view see Mwaikusa, 1995.

systematic social issues is dramatically illustrated by the very case in which the Indian Supreme Court gave the right to life an extended meaning discussed above. In the case of *Tellis* a number of pavement and slum dwellers in the city of Bombay who had been forcibly evicted and their dwellings demolished by the Municipal Council petitioned, through Public Interest Litigation, the Supreme Court for redress. They argued that their fundamental right to life had been infringed. While the Court held that right to life included right to livelihood, the right was not absolute, and that a person could be deprived of livelihood provided the procedure stipulated by law was followed and that such procedure was fair and reasonable (*ibid.* p.371 *et. seq.*). In the case before the court, while the petitioners had not been given prior notice, they had been given ample opportunity to be heard before the court and therefore, in effect, the court dismissed the petitions with some directions extending the time within which the pavement dwellers ought to vacate. This is an interesting case in that it illustrates how the social justice approach made the court give a wide and substantive meaning to right to life, while in the actual decision made this was reduced to a *procedural* right of being heard.

This obviously raises more fundamental issues in terms of law and social change, and the role of new rights regime to which we will return in the conclusion. Suffice it to say that commentators and writers have taken cue from SAL to develop further the jurisprudence of new rights regime so as to capture (and hopefully address) some of the problems raised by the development discourse. This is looked at briefly in the next section in which I make a proposal for directions in which the alternative human rights discourse may be advanced.

4. The New Rights Regime: Composite Rights

We have already seen one direction of the development of a new rights regime. This has largely been in the direction of integrated rights, basic rights, minimum core of rights on the one hand, or formulation of new rights such as right to food, right to shelter, right to good environment, right to development, on the other hand. I have argued elsewhere that this mainstream attempt to salvage the rights discourse from the challenge posed by the development discourse has one main characteristic. It is constructed on the same liberal foundations of liberalism and the hegemonic logic of the North (Shivji, 1989). The point is not simply to take-on board the development discourse by adding on more rights of economic, social and collective nature to the existing catalogue of rights. It seems to me the task of reconceptualising

and rethinking of human rights and constructing a new rights regime should involve integrating a new conceptual and political apparatus which would at once expose and focus attention on the fundamental issues of the day. It is my submission that this could probably be done by zeroing on two rights and conceptualise them as composite rights. This is the right to life and the right of peoples to self-determination.

Both rights, unlike some new rights, have the advantage of being part of the recognised mainstream rights. What we need to do, therefore, is to reconstruct them as opposed to inventing new rights.

4.1 Right to Life

We have already seen that the Indian Supreme Court has extended the meaning of right to life to include the right to livelihood. Jurisprudentially this is a significant advance. This means that the right to work or livelihood appears within the purview of what is accepted as a basic right which is invariably included under fundamental (and in many cases non-derogable) rights in constitutional schemes. Right to work, as we know, is considered an economic right placed probably as an aspiration or a goal in non-justiciable provisions of many constitutions. In the 1966 International Covenant on Economic, Social and Cultural Rights, its observance (like other social and economic rights) is subject to progressive realisation 'to the maximum of ... resources' available to a State Party, unlike civil and political rights which are required to be given effect immediately by adopting necessary legislative and other measures (art. 2(2) of the Covenant). By making the right to work a part of the right to life, the qualification of 'available resources' is not applicable. What is more, the dichotomy between ecosoc rights and political/civil rights which has bedevilled the human rights debates is also overcome.

Writers have further expanded the meaning of the right to life to include such things as right to shelter, right to food and, therefore, right to land in agricultural communities (see the Farmers' Charter, 1993¹); even right to

¹ A Charter of Farmers' Rights was drawn up by leaders of Indian farmers' organisations meeting in New Delhi in 1993. Clause 1 of the Charter says:

1. The right to land

Farmers across the country are being displaced to give way to factories, mines, dams etc. Under the new liberalisation regimes of the Structural Adjustment Programme, the Land Acquisition Act is being used to

education and good governance on the basis that human living means wholesome living in dignity. In other words, right to life is the *right to be human*. In a word, right to life is constructed here as a composite right which, to borrow the words of Mathew, J. in *Kesavananda*, is an "empty vessel(s) into which each generation must pour its content in the light of its experience" (Singh, 1994:300). Mwalimu Nyerere summed this up well when he said:

Life is the most basic human right. If justice means anything at all, it must protect life. That should be a constant underlying purpose of all social, economic, and political activities of government at all levels. ...

To have food, clothing, shelter, and other basic necessities of life; to live without fear; to have an opportunity to work for one's living; freedom of association, of speech, and of worship. All these things together are among the basic principles of living as a whole person in 'Freedom and Justice'. In other words, all are almost universally accepted as basic 'Human Rights'. (*Daily News*, 27/9/93)

It is submitted that *human* life in the right to life means, implies and stands for human being as a *social* being as opposed to an *individual* being. Human being, it was argued in the first moot court judgement appended to this paper, is not seen as existing and living apart or isolated from his/her community and society. Therefore his/her right to life is not an individualist claim against society, but the very core of his/her living as a social being. Society lives in him or her as much as s/he lives in society. This way of conceptualisation, which, it is submitted, is consonant with the spirit expressed in the African Charter of Human and Peoples' Rights, overcomes another dichotomy: that between individual and collective rights. In much of the mainstream debate, the collective is seen simply as an aggregate of individuals. The point of

appropriate land from farmers and transfer it to multinational corporations. Farmers have a fundamental right to land. Prime farm land should be protected for social and environmental reasons and not to be acquired for non-agricultural purposes. No agricultural land should be acquired without the farmer's consent and no agricultural land should be made available to multinational corporations.

This has immediate echo in many African countries. In Tanzania the report of the Presidential Commission of Inquiry into Land Matters (Tanzania 1994) catalogued many incidences of "grabbing of agricultural and pastoral lands". In terms similar to those of the Charter, the Commission recommended democratisation of the land tenure system and constitutional entrenchment of villagers' right to land.

reference and departure continues to be the individual. The reconstruction suggested here questions that philosophical assumption by arguing that a human being is a social being, not an individual being. The assertion of a right of a human being therefore is not a claim possessed by an atomist individual, but a reflection and an embodiment of social relations in the language of rights.

The second composite right with a far reaching potential is the *right of people to self-determination* (see, generally, Twining, 1991; and Cassese, 1979). This right is to be found in both the International Covenants and the African Charter on Human and Peoples' Rights. It has two aspects, external and internal. State practice has recognised its political external aspect whose core content is the right of colonised people to become independent and form their own states. The economic external aspect is what is called economic self-determination, and the right to 'freely determine their political status and freely pursue their economic, social and cultural development.' This is the phraseology which allowed Afro-Asian states to argue in favour of the sovereignty of their states in determining their economic policies, including to assert sovereignty over natural resources. It was the building block of the Universal Declaration of Peoples Rights or the Algiers Declaration, 1976, and the basis for the People's Tribunal to organise their mock trials of the structural adjustment policies (SAPs) imposed on African countries by the IFIs. In other words, the right to self-determination is a potent weapon within the human rights discourse to focus on the domination of the South (the hegemonic logic of the North as Falk (1992) calls it) by the North in the so-called World Order. With the processes of globalisation at work in the post-cold war era, where the basic sovereignty of the peoples of the South is at bay, the assertion of the right to self-determination has become even more important. As a well-known Malaysian human rights activist puts it:

It is particularly important at this juncture in history to continue to remember the blood-soaked pages of our past. For as new forms of colonial domination and control are institutionalised and legitimised in the name of globalisation, the centres of power in the West are forcing a sort of amnesia upon the rest of us which, in very subtle ways, persuades the victims of grave historical injustices to forget how they were oppressed and exploited not so long ago—often by geopolitical, geoeconomic and geocultural forces similar to those that lord over humanity today. (Muzaffar, 1995: 53)

Addressing the UN General Assembly on consultations on UN Agenda for Development, Mwalimu Nyerere forcefully reasserted the centrality of the right of people to self-determination, particularly its external economic and political aspects. He pointed out the ever-widening inexorable North-South divide in the international order. Nyerere argued that if humanity were a single nation, the North-South divide would make it an unviable, unstable "feudal" entity torn by internal conflicts. He suggested that the UN Agenda for Development should try to redress the North-South divide, and should be based on two principles:

First, a UN Agenda for Development must be a plan of action to end poverty throughout the world. It must say, 'We, the Peoples of the World, determined to save succeeding generations from the scourge of war, poverty, and underdevelopment, do hereby adopt this plan of action.' It must not say, "We, the Bankers of the World, determined to extract maximum profit from the poor, do hereby ..."

Secondly—and in a sense following from that requirement—it must not purport to provide a universal development policy prescription. Each country must be able to determine its own policy balances in accordance with its own needs, its own value systems, its own level of development, its own history, and its own cultural inheritance.

Drawing up a UN Agenda for Development based on those principles would constitute a reassertion of *the right of each country—however poor or weak—to determine its own policies* according to the requirements of its own historical experience, culture, and circumstances. But an assertion of a Right to national equality is not the same as ensuring that the right is recognised in practice. (emphasis supplied) (*Daily News*, 20/06/1994)

The internal aspect of self-determination has two facets. One relates to the rights of minorities, nations and nationalities within state boundaries to self-determination. Here self-determination has a spectrum of meaning from the right to practise one's culture, language, etc., to the right of an oppressed nation to secede. The latter is much more controversial. This is not a place to go into the issue (but see, generally, the collection in Twining, 1991). Here I am more concerned with another internal facet of the right to self-determination which is least theorised. This relates to the right of a people to determine their 'self' politically in terms of participating in major decision-making processes that affect their lives. Conventionally, the right to self-determination has not been given this meaning, yet there is enough material to enable a reconceptualisation along the direction suggested here. It is suggested

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that the term 'people' should be given a contextual meaning. Thus a people of a country entitled to self-determination means that they have a right to organise their own political system in a democratic fashion.

On the other hand, within the country such *collectives* as village communities and suburban groups could also be considered 'people', whose right to self-determination would include the right to participate in, and be consulted on, decisions affecting their lives. Just as principles of natural justice require an individual to be given a hearing, so the principle of self-determination requires that the affected people be consulted on issues and decisions affecting them. In the *Tellis* case, without using the concept of self-determination but expanding on the concept of right to a hearing, the Court came very close to asserting such a right of consultation. Speaking through Chandrachud, C. J., the Court said:

The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity that expresses their dignity as persons. (...) (right of the poor to participate in public processes.) (at p. 376)

The *right of the (poor) to participate in public processes*, it is submitted, constitutes the core element of one of the two internal aspects of the right of people to self-determination. It must be noticed, though, that the right to be consulted as asserted by the judges in the *Tellis* case is built on the conceptual foundations of individual rights. In other words it does not challenge the bourgeois, liberal epistemology. The right of people to be consulted as a part of the right of people to self-determination takes off from a different, socially based epistemology. It has a potential to make a paradigmatic shift in the human rights discourse. In the moot court case given in the appendix, I argued that the group of squatters who were removed from a squatter settlement because the government wanted to build an airport for economic development were entitled to be consulted *as a people* prior to the decision being taken¹ on the basis of the right to self-determination.

It is true that African domestic constitutions do not provide the right of people to self-determination. Yet, it seems to me, such a right can be derived

¹ It is now well-established in law that consultation has to be prior to the decision being taken otherwise it has no meaning. See, for example, the case of *Hamisi Ally Ruhondo & 115 Others v. Tanzania-Zambia Railway Authority*, unreported, Court of Appeal (Tanzania), Civil Appeal No. 1 of 1986.

from a more radical reading of the overall democratic scheme of these constitutions which invariably have such formulae as 'all power belongs to the people ...' etc. (Uganda 1995 Constitution art. 1(1)).

The development of the right to self-determination as a composite right as suggested in this article has the other advantage of taking on board the current discourse on democracy and accountability. Indeed, it has the possibility of taking us beyond the current formula of multi-party, parliamentary democracy, which invariably operates as a top-down state structure, and integrating alternative discourses on popular participatory democracy from below involving consultation and participation at 'people's' level in the continuous process of decision-making. It thus counters the statist/elitist logic so pervasive in much of the human rights, development and democracy discourse current in Africa today.

As has been observed by more astute writers (see, for example, Amin, 1993), the liberal premises of the current democracy discourse fall far short of addressing the real problems of the large majority of the people in Africa. In a forceful piece reviewing the democracy debate among African intellectuals, Archie Mafeje argues that African intellectuals who inscribe the debate within liberal paradigms know neither the history of the concept of democracy in Europe, nor understand the contemporary balance of social forces in Africa. As he puts it:

Historically and substantively, liberal democracy has been superseded by other modes of bourgeois democracy. Liberalism was for all intents and purposes dead but for its letter, the term itself had become a swear-word both on the right and left of the contending forces. What has obscured the social and political significance of this is that the form it has inaugurated has remained. The rules of the game prevailed—call them parliamentary democracy and individual rights or 'human rights', to use the current jargon of the right in America and Europe. So, in insisting on liberal democracy, some African intellectuals can be accused of mistaking the form for its substance. If elsewhere the major battles are being fought between social democrats and representatives of monopoly capitalism personified by Western leaders like Reagan, Thatcher, Bush and Kohl, how can they sound their clarion call for battle in such reactionary and antiquated terms?

Should not African intellectuals identify more clearly the contending social forces in their societies so as to be able to determine in a non-arbitrary fashion what kind of democracy is at issue on the continent? (1995:118-19)

Mafeje argues that, to be of any relevance under present conditions in Africa, the debate must raise and answer at least two questions at the minimum: the national question which of necessity is an anti-imperialist issue, and the question of social equity (not equality). In his own words:

Regarding the present conditions in Africa, this can refer only to two things: first, the extent to which the people's will enters decisions which affect their life chances, and, second, the extent to which their means of livelihood are guaranteed. In political terms the first demand does not suggest capture of 'state power' by the people (workers and peasants) but it does imply ascendancy to state power by a national democratic alliance in which the popular classes hold the balance of power. The second demand implies equitable (not equal) distribution of resources. Neither liberal democracy, imposed 'multi-partyism' nor 'market forces' can guarantee these two conditions. It transpires, therefore, that the issue is neither liberal democracy nor 'compradorial' democracy but social democracy. (ibid.: 26).

It is the position of this paper that the reconceptualisation of the right to life and right to self-determination places on the human rights agenda precisely the issues of social democracy discussed by Mafeje.

In sum, the right to life and the right of people to self-determination, constructed on conceptually different social foundations and reformulated as composite rights, have the potential to integrate the major problems, issues and concerns raised by the development and human rights discourse. In Appendix 1, I have given an example, albeit in a moot-court judgement, which illustrates the translation of the 'new rights jurisprudence' suggested here into judicial language. The hypothetical problem in that moot is fairly representative of the real life-conditions and political processes in many African countries, and brings into sharp focus some of the tensions and contradictions discussed in this paper.

Appendix 2 provides an interesting contrast in the 'judgement' of Cullins, J. (the then Chief Justice of Lesotho) who gave judgement on behalf of the panel of judges. With respect, Cullins, J., uses the conventional approach but at the end of the day arrives at same conclusions. The question that may be validly raised, and is illustrated in this moot problem judgements, is: Does it make any practical difference to the enforcement of rights whether one uses 'new rights jurisprudence' or conventional human rights approach in judicial decision-making? If not, what is then the significance of constructing a new rights regime proposed in this paper? That brings me to the conclusion where we try to evaluate briefly the judicial and publicists' attempts to address social

and developmental problems raised by the development discourse through the human rights discourse.

5. Conclusion

One of the major critiques of SAL developed by the Indian Supreme Court is implicit in the observation by one commentator that:

Typically, PIL is initiated and controlled by elites and is governed by their own priorities and choices. These activists have different agenda and ideologies. Most of them lack sustained commitment to any specific victimised groups. Nor have they any enduring relationship with such groups. (Parmanand Singh, quoted in Cottrell, 1993:124)

Implicit in this observation is the fundamental critique of legal activism that it is an elitist top-down project, in many ways paternalistic, in which good-hearted and sensitive judges substitute themselves for the people; and that, ultimately, a few hundred favourable decisions in SAL are only a drop in the ocean of systemic processes which are responsible for the deprivation, dispossession and disempowerment of the large majority of people in the developing countries of the South. In a word, judicial decisions—even those based on populist perspectives—are no substitute for a major social transformation which can only be brought about by the organised activity of the people themselves from below. The same criticism may be directed at the academic and professional jurists involved in developing a new rights regime.

It is true that rights activity per se, whether this is at the level of the bench, the profession or the academia, cannot bring about major social transformation.¹ This is probably not the role of the institutions and social groups concerned. The aim, it seems to me, of activist lawyers in constructing a new rights regime and persuading the courts in that direction is essentially two-fold: one, to focus on and expose the real problems of the large majority, and the incapacity of the existing structures to resolve this, and two, to legitimise and give moral credence to the organised activities of the people themselves to transform their life-conditions while at the same time to

¹ Latin American activist lawyers have been much more sensitive in agonising over these issues than Indian or African lawyers. The Tanzanian legal community, by and large, seems to have uncritically taken on board the current dominant rights discourse without interrogating it. One hopes this initial enthusiasm will eventually give way to more critical and sober appreciation of the prospects and limits of human rights/constitutional activity. For Latin America see Rojas 1988. For a critical debate on law and rights see Corrigan & Sayer 1981; Fudge & Glasbeek 1992; Herman 1993 and Shivji 1995.

delegitimise the reaction of the forces of the status quo. In this regard, what is important is not the outcome of a few hundred SAL cases but the discourse constructed around it which, when done in open courts, have a far greater visibility and, hopefully, impact on a larger societal level.

By the same token, it is important that issues are joined with the dominant human rights discourse paradigmmed on Western jurisprudence and pleading innocence regarding the inequities of the international order dominated by the North. Here, the reconceptualisation and construction of a new rights regime plays the role of an ideology and consciousness of resistance which in turn expands the capacity of the oppressed and victimised to defend themselves. The role of alternative ways of legal activism and reconstruction of human rights paradigms is captured succinctly by Hiroko Yamane who, summarising the new approaches to human rights in South East Asia, notes:

The strictly individualistic character of the legal system which was introduced during the colonial period is under scrutiny, due to its shortcomings in solving the problems of massive poverty and of the access to the essentials: food, water, land and forest resources. ... Problems of massive poverty often depend on agrarian or other structural reforms for their solution. A new legal approach to this problem, consisting of conscientizing the community concerned and developing plans to help the local community to stand up for their own rights, has been developed in South and South-east Asia. In order to cope with the paralyzing aspect of an often individualistic outlook of law, defence of specific collective rights over water, land and other means of production has been carried out, under the slogan "people's rights" or "people's law".

...
Whether the defence of their rights is done in the name of human rights or under other names is less important than the real question of how the peoples of Asia would increase their capacity to defend themselves from oppression of all kinds.

The reconceptualisation of human rights being attempted here has precisely this aim of enlarging the capacity of the masses to defend themselves intellectually and ideologically from oppression of all kinds.

References

- Alston, P. & K. Tomasevsky. (eds). 1984. *The Right to Food*. Nijhoff.
- Alston, P. ed. 1992. *The United Nations and Human Rights: A Critical Appraisal*. Oxford: Clarendon.
- Amin, S. 1993. The Issue of Democracy in the Contemporary Third World. In Gills, B., J. Rocamora & R. Wilson eds. *Low Density Democracy*. London: Pluto.
- Aruri, N. 1992. Human Rights and the Gulf Crisis: The Verbal Strategy of George Bush. In Phyllis Bennis & Michel Moushabeck. eds. *Beyond the Storm: A Gulf Crisis Reader*: 305-324. Edinburgh: Canongate.
- Baxi, U. 1985. Law, Struggle and Change: An Agendum for Activists. *Social Action*, 35.
- Baxi, U. 1988. Taking Suffering Seriously. In U. Baxi. ed. *Law and Poverty*. Bombay: Tripathi.
- Baxi, U. 1994. *Mambrino's Helmet: Human Rights for a Changing World*. New Delhi: Har-Anand.
- Bhagwati, P. N., 1987. Social Action Litigation: The Indian Experience. In Tirucklvam & Comaraswamy eds. *The Judiciary in Plural Societies*.
- Brockett, C. D. 1985. The Right to Food and International Obligations: The Impact of U.S. Policy in Central America. In George W. Shepherd & Ved P. Nanda eds. *Human Rights and Third World Development*:125-147. Westport: Greenwood.
- Cassese, A. 1979. U. N. Law/Fundamental Rights: Two Topics. *International Law*. Netherlands: Nijhoff.
- Cassese, A., 1986. *International Law in a Divided World*. Oxford: Clarendon.
- Charter of Farmers' Rights. 1993. *Third World Resurgence*. No. 39:28-29.
- Chomsky, N. & E. S. Herman 1979. *The Washington Connection and the Third World Fascism: The Political Economy of Human Rights*. Boston.

- Corrigan, P. & Derek Sayer. 1981. How the Law Rules: Variations on Some Themes In Karl Marx. in Bob Fryer *et. al.* eds. *Law, State and Society*, London: Croom Helm.
- Cottrell, J. 1991. The Constitution of Namibia: An Overview. *Journal of African Law*, 35, 1 &2: 56-78.
- Cottrell, J. 1993. Third Generation Rights and Social Action Litigation. In Abdul Paliwala & Sammy Adelman eds. *Law and Crisis in the Third World*. 102-126. London: Hans Zell.
- Dworkin, R., 1977. *Taking Rights Seriously*. Cambridge: Harvard University Press.
- Falk, R. 1992. Human Rights and State Sovereignty. In Claude, R. F. & B. H. Weston eds. *Human Rights in the World Community: Issues and Action* 2nd edn. Philadelphia: University of Pennsylvania. (?)
- Fanon, F. 1967. *The Wretched of the Earth*. London: Penguin
- Furedi, F. 1994. *The New Ideology of Imperialism*. London: Pluto.
- Fudge, J. & H. Glasbeek. 1992. The Politics of rights: A Politics with Little Class. *Social and Legal Studies*. 1. 1:45-70.
- Gibbon, P. *et. al.* 1992a. *Adjustment, Authoritarianism and Democracy: the Politics of Economic Liberalisation in Africa*. Uppsala: Scandinavian Institute of African Studies.
- Gibbon, P. 1992b. The World Bank and African Poverty 1973-91. *Journal of Modern African Studies*, 30. 2:193-220.
- Gomez, M. 1993. *In the Public Interest*. Colombo: Legal Aid Centre.
- Hayter, T. 1992 2nd. edn. *The Creation of World Poverty*. London: Pluto.
- Herman, D. 1993. Beyond the Rights Debate. *Social and Legal Studies*. 2. 1:25-43.
- Hettne, B. 1990. *Development Theory and the Three Worlds*. London: Longman.
- Hobsbawm, E. 1994. *Age of Extremes: The Short Twentieth Century, 1914-1991*. London: Michael Joseph.

- Howard, R. 1983. The Full-Belly Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from sub-Saharan Africa. *Human Rights Quarterly*. 5, 4:467-490.
- Hyden, G. 1994. Changing Ideological & Theoretical Perspectives on Development. In Ulf Himmelstrand, Kabiru Kinyanjui & Edward Mburugu eds. *African Perspectives on Development: Controversies, Dilemmas & Openings*. 308-319. Dar es Salaam: Mkuki na Nyota.
- Kidder, R. L., 1977. Law and Order or Law and Freedom?. In Richard Vuylsteke. ed. *Law and Society: Culture Learning Through the Law*. Honolulu: East-West Centre.
- Kothari, S. & H. Sethi. 1989. *Rethinking Human Rights: Challenges for Theory and Action*. Delhi: Lokayan.
- Kowalewski, D. 1981. Transnational Corporations and the Third World's Right to Eat: The Caribbean. *Human Rights Quarterly*. 3:45-64.
- Lenin, V. I. 1970. The Discussion on self-determination Summed Up. *On the National Question and Proletarian Internationalism*. Moscow: Novosty.
- Mafeje, A., 1995. Theory of Democracy and the African Discourse: Breaking Bread with my Fellow-Travellers. In Chole, E. & Jibrin Ibrahim. eds. *Democratisation Processes in Africa*. Dakar: CODESRIA.
- Muzaffar, C. 1995. Human Rights, the State and the Secular Challenge. *AMPO: Japan-Asia Quarterly Review*. 26.3:47-53.
- M'Baye, K. 1978. *Emergence of the Rights to Development as a Human Right in the Context of a New International Economic Order*. Doc. SS-78/CONF.630/8. Paris: UNESCO.
- Mamdani, M, 1994. A Critical Analysis of the IMF Programme in Uganda. In Himmelstrand et al eds. op. cit. 128-136.
- MacCormick, N, & Z. Bankowski. eds. 1989. *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy*. Aberdeen.
- Mwaikusa, J. T. 1995. *Towards Responsible Democratic Government: Executive Powers and Constitutional Practice in Tanzania, 1962-1992*. Ph.D. Thesis submitted to University of London, SOAS.

- Nyerere, J., 1970. *Stability and Change*. Dar es Salaam: Government Printer.
- Nyerere, J. 1993. Life is a Basic Right. *Daily News* 27/09/93.
- Nyerere, J. 1994. Address to UN General Assembly on UN Agenda on Development. *Daily News*. 20/06/1994.
- Permanent Peoples' Tribunal 1988. *On the Policies of the IMF and the World Bank*.
- Rojas, F. 1988. A Comparison of Change-oriented Legal Services in Latin America with Legal Services in North America and Europe. *International Journal of the Sociology of Law*. 16:203-256.
- Said, E. 1993. *Culture and Imperialism*. London: Vintage.
- Shivji, I. G. 1989. *The Concept of Human Rights in Africa*. Dakar: Codesria
- Shivji, I. G. 1991. Contradictory Developments in the Teaching and Practice of Human Rights in Tanzania. *Journal of African Law*. 35. 1&2:114-127.
- Shivji, I. G., & Cullinan, P. 1992. Judgements by Panels of Deans and Chief Justices. In Raymond Sakala *et. al.*, v the Government of the Kingdom of Caprivia. *Lesotho Law Journal* 8.1:1-16.
- Shivji, I. G. 1995. The Rule of Law and Ujamaa in the Ideological Formation of Tanzania. *Social & Legal Studies*. 4.
- Singh, M. P. 1994. *V. N. Shukla's Constitution of India*. 9th edn. Lucknow: Eastern Book.
- Tanzania, United Republic of, 1994. *Report of the Presidential Commission of Inquiry into Land Matters*. vols. I & II, Uppsalla: SIAS
- Third World Economics*. 1994. Issues No. 88/89.
- Tomasevsky, K. 1993. *Development Aid and Human rights Re-visited*. London: Pinter.
- Uganda, Republic of. 1995. *Constitution of Uganda, 1995*.
- Vincent, R. J. 1986. *Human Rights and International Relations* (Ch.5 on Human Rights in North-South relations). Cambridge: Cambridge University.

- Walker, M. 1993. *The Cold War: And the Making of the Modern World*. London: 1
- Wambali, M. K. B. 1996. *Democracy and Human Rights in Tanzania Mainland*. Ph.D. Thesis, Warwick University, March 1996. ch. XII.
- Welch, C. E. & R. I. Meltzer 1984. *Human Rights and Development in Africa*. Albany.
- Yamane, H. ?, Approaches to Human Rights in Asia. in [citation misplaced]

APPENDIX 1:

Introductory Note

The 'judgment' that follows was delivered by the author on behalf of the Panel of Deans at the Southern African Moot Court Competition. In this judgment I have tried to translate my argument for an alternative human rights discourse in *The Concept of Human Rights in Africa* (1989) into resolving a particular human rights dispute before a court of law using the traditional techniques and the language of judicial discourse.

Judgement by a Panel of Deans/Representatives

***In the Southern African Court of Human Rights
Lusaka, Zambia***

In the matter between:

Family Sakala 1st Applicant

Brian Sakala 2nd Applicant

and

The Government of the Kingdom of Caprivia ... Respondent

Shivji, J:

Background

This matter has been brought before the Court by the Sakala family and Brian Sakala. Various reliefs sought for the individual members of the family are in the title of the family. Briefly, the material facts which are not in dispute, are as follows:

Raymond Sakala, a national of Kunenia, was married to Winfred, a national of Caprivia, in 1965. They lived in Kunenia until 1991. They have three children. Brian was born in 1969, Constance in 1974 and Alfred in 1977. Mr. Raymond Sakala was a lecturer in a teachers' training college, and Brian a graduate from the same college. Both Mr. Sakala and his son Brian were active in oppositional politics. They reliably learnt that they were likely to be detained for their political activities, and therefore had to flee from Kunenia with the family and seek asylum in Caprivia.

Raymond Sakala was granted refugee status while Brian was given asylum. Mr. Sakala found a job in the capital of Caprivia, Lusando, while Brian remained unemployed and continued to live as a dependent. The family occupied a shack in Tintatown, a settlement for informal housing on state land where none of the occupants had obtained permission from the government to build their shacks. Even after marriage, Mr. Sakala continued to support Brian who had in the meantime built his own shack.

The government, claiming that it wanted the land occupied by the inhabitants of Tintatown for building an international airport which was likely to contribute to the economy of Caprivia, resettled the inhabitants of Tintatown in various locations in terms of the Prevention of Unwarranted Squatting Act 44 of 1990. The Sakalas were allocated a piece of land 50km from Lusando in an area where, as a result of the inadequacy of public transport, Mr. Sakala was forced to give up his job in Lusando. He could not find any other work and remained unemployed. The family's financial position deteriorated rapidly. Brian and his wife, who accompanied the family to the new settlement, went to live with the wife's parents in a remote rural area, some 200km away. Constance was eventually sent to live with Mr. Sakala's parents in Kunenia, and Alfred had to go and live with Mrs. Sakala's parents in Lusando. There was no money to pay for the education of the two youngest children.

It is not in dispute either that Mrs. Sakala contracted tuberculosis as a result of the appalling conditions in which they were living, and Mr. Sakala was badly in need of psychiatric treatment for a condition directly related to the deterioration of his personal circumstances.

We notice that the Constitutional Court of Caprivia, while refusing to declare the Prevention of Unwarranted Squatting Act (which will be referred as the Squatting Act hereinafter) unconstitutional, nevertheless held that those adversely affected by its operation were entitled to "reasonable compensation". On the strength of that finding, the Sakala family filed their applications in the Caprivian Supreme Court for the following orders against the Government of Caprivia:

1. Provision of housing for the Sakala family and Brian.

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2. Provision of free medical and psychiatric services for the members of the family in need of it.
3. Provision of education for the two youngest children.
4. \$10 000 compensation for the loss of Mr. Sakala's job.

While denying liability, the respondent have admitted that the quantum, \$ 10 000, claimed would be reasonable in the circumstances.

The Supreme Court dismissed the applications. That decision was confirmed on appeal, and now the applicants have approached this Court claiming all the reliefs claimed in the lower Court and, in addition, their Counsel have further pressed this court to declare the Squatting Act unconstitutional.

Although it was a common cause between the parties that this Court has jurisdiction, we would like to make some observations of our own on the issue.

The Convention setting up this Court enjoins the Court to determine disputes on the basis of articles 1-29 of the African Charter on Human and People's Rights. Reading the Charter as a whole and considering its underlying principles, we find that the Charter provides for, and protects *collective* rights in addition to individual rights. In the event, we have no hesitation in holding that the Sakala family has *locus standi* to appear before this Court in the title of the family.

The second issue with regard to jurisdiction is more contentious. The Counsel on both sides did not address us on this issue but we are of the view that under the Convention, Article 1, this Court cannot be seized of jurisdiction unless the rights alleged to have been breached are (1) fundamental and (2) incorporated in the domestic constitutions of the countries parties to the Convention. These two conditions are conditions precedent, and have to be established at the outset before the Court can embark on the investigation of the dispute brought before it. Once the jurisdiction of the Court is established, however, there is nothing to prevent the Court from seeking aid of the jurisprudence on other rights—other than those which fall within those two conditions—to understand better the rights alleged to have been breached. Similarly, I would not hesitate to make findings collaterally on rights which are not provided in the constitutions but are to be found in the African Charter once the Court is satisfied that the core rights alleged to have been breached meet the jurisdictional conditions set out above.

Although the applicants did not argue before us that the conditions precedent had been met in the instant case, for reasons we will give in the course of the judgment, we were of the firm opinion that the necessary conditions had been met, and therefore we proceeded to hear the matter on its merits.

The Counsel on both sides addressed us on many and varied interesting issues. The arguments were refreshing and showed great diligence. However, we will exercise

our minds on only substantive issues which we consider to be material for the disposal of the matter before us. I now turn to these.

1. Constitutionality of the Prevention of Unwarranted Squatting Act, No. 44 of 1991.

The Constitutional Court of Caprivia refused to grant a declaratory order that the Squatting Act was unconstitutional, but the applicants have once again urged us for such an order. If we understood their arguments, the Counsel for the applicants sought the order on the grounds that the implementation of the Act had resulted in the infringement of various rights of the Sakala family entrenched in the Caprivian Constitution and the African Charter. In other words, as the applicants' Counsel eventually conceded, they were seeking to persuade us to grant the order on the basis of the effects of the implementation of the Act on the Sakala family. We are unable to accede to that argument and we believe it is flawed.

An Act of parliament, couched in general terms as is the one under consideration, cannot be declared unconstitutional on the grounds of its effects. The remedy there lies in redressing the actual wrongs suffered by a party in the implementation of the Act, but not in declaring the Act unconstitutional. This is so because the effects of the Act may differ from person to person depending on circumstances, and need not be adverse in all cases. In the instant case, for instance, if the Sakala family had been allocated a plot closer to Mr. Sakala's place of work and children's schools, the Sakala family would have had no cause of complaint.

We would like to underscore that the Act on its face does not breach any of the rights canvassed by the applicants. The applicants' Counsel argued before us that the Act is deficient in that it does not provide a procedure, presumably a procedure for hearing a party before he is resettled, and therefore the Act offends the *audi alteram parte* rule. Again, we do not think that is a sufficient ground for declaring the Act unconstitutional. The requirement for a hearing can be read into the Act by the Court in a particular matter before it, as indeed the courts often do with regard to principles of natural justice. It is now well settled that a court in appropriate circumstances would supply the omission of the legislature with regard to the need to observe the principles of natural justice unless the legislature has expressly stipulated otherwise. The omission by itself therefore cannot render the Act unconstitutional.

Nonetheless, we are of the opinion that the Squatting Act is unconstitutional on other grounds, which, regrettably, were not argued before us by the Counsel.

On a careful reading of the Act, we are convinced that it does not provide for, and indeed breaches, the right of peoples to self-determination. The Caprivian Constitution does not expressly stipulate the right to self-determination. Yet reading

the Caprivian Bill of Rights as a whole, we have formed the view that it recognises the core aspects inherent in the right to self-determination, such as a people's right to determine their own social and political status, and to participate in their own governance.

The right of peoples to self-determination is comprehensively stipulated in the African Charter whose provisions in terms of the Convention "shall prevail over the provisions of national instruments for the protection of human rights" such as the Caprivian Constitution. Article 20 of the African Charter provides:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Both the International Covenants of 1966 also provide for the right to self-determination. We are aware that the right to self-determination has had a chequered and controversial history in the customary jurisprudence of international human rights instruments.¹ Its external political and economic aspects—that is to say, political and economic self-determination—are now well recognised, particularly by the Afro-Asian community of states.² The internal aspect of self-determination was for the first time expressed in clearer terms in the Helsinki Accords (1975), and since then has been elaborated and commented upon by writers and publicists.³ "Internal self-determination", the distinguished writer Mr. Antonio Cassese explains, "usually means that a people in a sovereign State can elect and keep the government of its choice, or that an ethnic, racial, religious or other minority within a sovereign State has the right not to be oppressed by central government."⁴ We adopt this as a working definition of "internal" self-determination but construe it further in the light of new rights jurisprudence evident particularly in the African scholarly writings and civil society.⁵

Under the African Charter and the 1966 Covenants, the right of peoples to self-determination belongs to a 'people'. We are aware that none of these instruments defines the term 'people' and wisely so. 'People', we hold, has to be given a

¹ See Issa G. Shivji, 'The Right of Peoples to Self-determination: an African Perspective' in William Twining (ed.) *Issues of Self-determination*, Aberdeen, 1991.

² See Ian Brownlie, *Principles of Public International Law*, Oxford, 1979 (3rd edn.)

³ See, for instance, Antonio Cassese, 'Political Self-determination—Old Concepts and New Developments' in Antonio Cassese, *UN Law/Fundamental Rights: Two Topics in International Law*, The Netherlands, 1979.

⁴ *Ibid.*, p.137.

⁵ See, in particular, Issa G. Shivji (ed.) *State and Constitutionalism: an African Debate on Democracy*, Harare, 1992. See, also, the Algiers Declaration, 1976 reproduced as an appendix in Issa G. Shivji, *The Concept of Human Rights in Africa*, Dakar, 1989.

contextual meaning, which means it depends on each concrete situation. Depending on the situation before the Court, 'people' could refer to a nation, a nationality, a community, an ethnic group or social entities such as neighbourhoods or inhabitants of a village or a town. In the light of its context, and in the circumstances of the matter before us, a community described as 'squatters' in the Squatting Act, constitute a 'people' entitled to the right to self-determination.

Except for the core elements, the content of the right to self-determination cannot be determined in an a priori fashion either. The penumbra, so to speak, of that right too depends on particular circumstances to be decided from case to case, and as the new jurisprudence and human circumstances develop. At the minimum, though, the right to self-determination embraces the right to be consulted upon, and the right to participate in the making of major decisions affecting the people in question. This is, in our view, the kernel and substance of the various declarations and proclamations of African states in recent times on participatory, grass-roots democracy, 'people-centered' development, or what has been called the 'empowering of people'.¹ In the case before us, the resettlement of the 'squatters' (the people) under the Squatters Act ought to involve prior consultation of the community involved. Since the Act does not provide for mandatory consultation of the 'squatters' proposed to be resettled, and the procedure for doing the same, we hold that it is tainted with unconstitutionality in that it breaches the right of peoples to self-determination as stipulated in the African Charter. We therefore declare the Prevention of Unwarranted Squatting Act, No. 44 of 1991, null and void.

Since the Government derived legal authority to resettle the inhabitants of Tintatown, including the Sakala family, from the Squatting Act and the said Act has no validity, the Government had no lawful authority to do what they did. In the event, the Sakala family is entitled to be compensated for all the losses it suffered as a result of the wrongful act of the Government of Caprivia.

We therefore grant the following claims made by the Sakala family:

1. Provision of housing to the family and Mr. Brian.
2. Compensation in the sum of \$ 10 000 for the loss of Mr. Sakala's job;
3. Medical treatment for the family members as appropriate.

With regard to the provision of education for the two younger children, as there is not sufficient evidentiary material before us to determine actual loss of education

¹ See the *African Charter for Popular Participation in Development and Transformation* which emanated from the Arusha Conference held in Arusha in February, 1990, sponsored by the Economic Commission for Africa and later adopted by the OAU Heads of State. See also the Report of the South Commission, *The Challenge to the South*, Oxford, 1990.

and educational opportunities, we submit the matter to the Honourable Attorney-General of Caprivia with the following directions:

1. In consultation and negotiations with the Sakala family, to determine the loss of education and provide for an appropriate compensation either in monetary terms or in kind, as may be agreed; and
2. To provide free legal counsel to the Sakala family for purposes of the said consultation and negotiations.

We would have been inclined to dispose of the matter on the ground of unconstitutionality alone but the counsel on both sides have addressed us with great industry on the alleged infringement of a series of specific rights, namely, right to family life, right to shelter, right to medical care, right to work, and right to education. We will make a few observations on these rights in terms of the arguments addressed to us by the Counsel.

2. Civil and Political Rights versus social and economic rights

There was common cause between the Counsel for both sides that the family of rights that the applicants sought to establish in their favour constituted social and economic rights, or the second generation rights ('red rights', as they have been called in the human rights literature) as opposed to civil and political rights, or the first generation rights ('blue rights'). In brief, the applicants sought to persuade us that the social and economic rights were rights *stricto sensu*, or positive rights, and enforceable by the Court. The respondent, on the other hand, argued that the so-called social and economic rights were no rights at all but a declaration of aspirations at best. In any case, they asserted, the granting of these so-called rights was contingent on means available to the Caprivan Government. The Government itself rather than the Court, the respondent urged upon us, was the best judge as to whether or not it had the means to satisfy those rights.

We would like to approach this issue differently. While we are aware of the voluminous debate on the distinction between the first and second generation rights emanating from the Western world, we also take cognisance of the emerging writings of publicists who consider this distinction outdated and part of the "cold war" ideological discourse. This distinction has been, to a large extent, overtaken by events and by the emerging new human rights jurisprudence. The new jurisprudence sees this family of social and economic rights as integrated or basic

rights without which a human community cannot live with dignity.¹ We accept this position because we find that it underlies the African Charter, as is amply demonstrated by the Preamble to the Charter. The preparatory material which went into the drafting of the right to development which is embodied in the Charter shows that the right to development itself was, and is seen as, an integral right which does not make a distinction between the first and second generation rights. We will quote the relevant paragraph from the Preamble which says,

... it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

We would therefore have had no hesitation to consider the breach or otherwise of these specific rights of the Sakala family. But, in the instant case, we are constrained from considering these rights as separate rights on jurisdictional grounds because, with the exception of freedom of movement and freedom to choose residence, the other rights claimed by the Sakala family, namely, the right to shelter, education, medical care and work are not provided expressly in the Constitution of Caprivia. As we observed earlier, in that case, to the extent that these specific rights are alleged to have been breached, we would have had no jurisdiction because they are not stipulated as separate rights in the Constitution.

We observe, however, without deciding, that we were far from persuaded by the applicants' Counsel that the Sakala family's freedom of movement and right to choose residence were directly violated. In any case, the grounds advanced before us were tenuous. Particularly, the Counsel for the applicants failed to make a distinction between the 'choice of residence' stipulated in the Caprivian Constitution, and the right to shelter or housing provided in the African Charter. The two are not the same, nor can one be conflated with the other.

Having said this, we are nonetheless of the view that we have jurisdiction to hear and determine the alleged breach of the family of rights claimed by the Sakala family not as separate specific rights, but as part of and integral to the right to life. Right to life is a fundamental right and is stipulated both in the Caprivian Constitution as well as the African Charter.

¹ See, generally, the papers presented to the *African Seminar on Human Rights and Development*, National Institute of Development Research and Documentation, University of Botswana, Gaborone, May 24-29, 1982.

We hold that the Sakala family's right to life was breached in that the family was disintegrated; Mr. Sakala lost his job; both Mr. and Mrs. Sakala suffered medical ailments, and the two young children were deprived of education. Right to life, in our opinion, is an integral right to live as whole human being in dignity. The forceful formulation of this right in the African Charter carries the spirit of wholesome living as inherent in the right to life. Article 4 provides:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

The use of the term 'human being' in the African Charter in contrast to the traditional phrases such as 'individual', 'person', 'everyone', etc., and the use of phrases such as 'integrity of the person' and 'dignity', in our opinion, are significant. They convey the message that the framers of the Charter sought to protect the human being in all his or her humanity, as a whole and wholesome human being.

We cannot imagine that it suffices for a human being simply to exist as a biological entity. To live as a social being means to live in a wholesome family; in a decent dwelling; and to be accorded the opportunity to be informed and receive knowledge which is what education is all about. Without family life, a decent shelter and education a human being only 'exists' but does not 'live'; it is only a 'being' without being 'human'. Right to life inexorably implies to live human life as a human being. As was said by the Supreme Court of India in *Tellis and Others v Bombay Municipal Corporation and Others* (1987) LRC (Const) 351 at page 368:

"Life", as observed Field, J. in *Munn v Illinois* 94 US 113 (1877), means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh v State of UP* (1964) 1 SCR 332.

Under the circumstances, we consider right to family life, right to shelter, right to work or livelihood and the right to education as integral to, and inherent in, the right to life, and we so hold.¹

Therefore the family of rights claimed by the Sakala family to have been infringed have indeed been infringed as part of the family members' right to life. The

¹ For discussion on 'livelihood' as inherent in the right to life, see *Tellis* case already cited and for right to shelter as integral to right to life see P. B. Sawant, 'Right to Shelter as Human Right' in E. Venkataramiah, (ed.) *Human Rights in the Changing World*.

qualification as to the right to housing and medical care being subject to means available to the Government of Caprivia, stipulated in the Caprivian Constitution, and on which the respondent's Counsel addressed us at great length, is not applicable to the right to life, and therefore we consider it unnecessary to dwell on it at any length.

For these reasons too we would make the orders as we have done above.

3. Individual and Community Rights

The other level of arguments addressed to us revolved around the distinction between individual and community or collective rights. The respondent sought to convince us that *community rights override individual rights, and that in the instant case, the building of the international airport, which was in the interest of the economic development of the Caprivian society as a whole, overrode individual human rights of the Sakala family.* The applicants rebutted that argument by taking the position that *individual rights ought not to be sacrificed at the altar of community rights or economic development.*

We do not consider it necessary to go into any great depth on this debate which we understand has been long-standing in the human rights discourse. In our reading of the African Charter, which is the primary instrument which ought to guide us, the contest between individual and communal or collective rights has to a large extent been overcome. We deem that debate as irrelevant both to African circumstances and to the underlying principles of the Charter as can be gleaned from the specific language and formulations of the Charter. We proceed to explain briefly this position.

The fundamental right to life embodied in the Charter belongs to a 'human being' and not to an individual. The Charter upholds the *dignity and integrity* of a human person, not simply an atomist individual. It is significant that in this regard the language and formulations in the Charter depart significantly from the Universal Declaration of Human Rights which uses the individualistic, aggregative term 'everyone' (see, for instance, Article 3 on the right to life). We believe this departure to be of great significance in the light of the Preamble of the Charter which in a summary form succinctly sums up the centuries long history of oppression of the African people.

African peoples as a people, and the African human being as a human, have been denied their humanity for five long centuries through the processes of slavery, colonialism, neo-colonialism and apartheid, referred to in the Preamble. In each

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one of these systemic processes the African human being was not considered a human being. He/she was a chattel under slavery; a native under colonialism; a beggar to be rescued under neo-colonialism, and a kaffir under apartheid. Understandably, therefore, in asserting the right to life of the African human being, the framers of the Charter consciously asserted the right to life of a whole human being in a human community.

Philosophically and conceptually, this is a far cry from the Western jurisprudence of "individual rights" based on the liberal outlook of *individualism*. In the African concept, as we read it in the Charter, there is no distinction between a human being and the human community. Indeed, a human being does not live above, prior to, or apart from a human community. He or she would not then be a human being. There is no Robison Crusoe or a Friday in the African concept, nor an aggregate sum of Crusoes and Fridays. Rather you have social entities and communities which could be described as a social class of Crusoe and Friday.

We do not have to search very far for concrete social reality to support our reconstruction of the underlying and guiding conception of the Charter. In the very case before us the plight of the Sakala family represents the plight of a community, the thousands of inhabitants of Tintatown who were arbitrarily resettled. The Tintatown community was never accorded a *human treatment*, because, among other things, it was never involved and consulted on its own fate. It was denied its humanity and dignity, the qualities of a human community constantly underlined in the African Charter. For this reason too, the acts of the Caprivian state were in breach of Article 4 of the Charter and its underlying principles, as well as the Caprivian constitution, and we so hold.

In the result, the application is allowed with costs. We make Orders and Directions as already enumerated in the body of our Judgment. Since my brother Judges and sister Chief Justice agree with the conclusions, Orders and Directions, it is so ordered by the Court.

Delivered at Lusaka this 11th day of July, 1993.

APPENDIX 2:

Introductory Note

The judgement that follows was delivered by a panel of Chief justices and Judges on the same problem as detailed in Appendix 1.

Judgement By Panel Of Chief Justices/Judges

Raymond Sakala, Brian Sakala, the Family of Raymond Sakala
V
The Government of the Kingdom of Caprivia
(The Southern African Court of Human Rights, Lusaka, Zambia).

Cullian, J.

Background

In the time available to us, it is not possible to recite all the facts pertaining to this case, with which all present are in any event familiar.

At the outset we wish to express our sincere appreciation of the assistance rendered by Counsel for both parties and of their formidable research and extensive submission. In the time available we cannot hope to deal in depth with all of such submission, which we have nevertheless carefully considered.

Submissions for Applicant

The Applicant's claim is fourfold. They seek an order:

1. Declaring the Prevention of Unwarranted Squatting Act 1990 of Capriva ("The Act") to be unconstitutional;
2. Compelling the respondent to compensate the Applicants in the amount of \$ 10,000 for the loss of Raymond Sakala's job;
3. Compelling the respondent to provide:
 - (a) Housing for the family
 - (b) Medical and psychiatric care for members of the family in need of kit.

Unconstitutionality of Unwarranted Squatting Act

As to the first prayer, Section 8 of the Act provides for the resettlement of squatters on government land, should the government need such land, "for a purpose likely to

contribute to the development of the economy of Caprivia". The Applicant's claim that the latter purpose is an extremely vague standard, that appears to place no restraint upon the Respondent. We cannot however see that the legislation could be couched in a more specific manner. The Respondent will in any given case suffer at least the restraint of establishing, to the Court's satisfaction, that the particular purpose for which the land is required, complies with the provisions of the Act. The Act undoubtedly conflicts with the constitutional freedom of movement and residence, but such freedom, under Article 12 of the African Charter on Human and Peoples' Rights ("The African Charter"), is qualified by the proviso that the individual "abides by the law". The act of squatting per se cannot be said to be an act of abiding by the law, and the Act cannot then be said to be unconstitutional on that ground.

The Applicant's also submit that where an Act derogates from a constitutional right, "it (the derogation) must be prescribed by a procedure which is fair and reasonable" (see *Maneka Gandhi v Union of India* 1970 S.C.R. 621) and that the act under consideration must therefore be unconstitutional, as it "allows for haphazard resettlement, without compensation for any adverse results of such resettlement". Without defining the nature or extent of the right, or licence of a squatter on state land, we observe that the legislature has in any event clothed any such claim with some status, by conferring on squatters the right, if displaced, too be resettled. We do not agree that such resettlement should necessarily be haphazard or without compensation. Indeed, we observe that the Constitutional Court found that the Act was not unconstitutional, but that "reasonable compensation" was payable to those detrimentally affected by its operation. We respectfully agree with, and adopt that finding.

Compensation for loss of employment

Inherent in that finding is the premise that if the Caprivan Government acknowledges the duty of resettling an individual, displaced in the public interests, then such resettlement must be carried out in a fair and reasonable manner. If a person, displaced by Government action, is to be "resettled", then he must be placed in a position as near as may be to that which he previously enjoyed. Otherwise he will not be "resettled", but will, as we see it, be unsettled.

It is not necessary for us to decide as to whether it is Government's duty to take inquiries in every case and attempt to reproduce identical conditions of residence, employment, etc. We can however say that a movement of residence of some 50km, resulting in loss of employment and the breaking up of the family, which by all international conventions, Government is required to protect, does not constitute a "resettlement" envisaged under the Act. We hold therefore that Mr. Raymond Sakala is entitled to compensation for the loss of his employment.

The learned Counsel for the Respondent submits, incidentally, that the Court by the grant of such compensation, would be giving retrospective effect to an international Convention. As we see it, however, such compensation is by necessary inference payable under the Act itself, and no question of retrospectivity therefore arises.

As to the amount of compensation, the Respondent concedes that the claim of \$10 000 is reasonable. We accordingly order the Respondent to compensate Mr. Raymond Sakala in that amount.

Housing and medical service

Art. 33 of the Caprivan Constitution provides that:

"The state *recognises* the population needs for housing and medical services and undertakes to provide these *in accordance with available means*" (italic supplied). Learned Counsel for the Respondent lays stress on the words, "recognizes" an "in accordance with available means". There is accordingly, he submits, no absolute duty on the state in the matter under the Constitution. We observe however that Articles 16 and 18 of the African Charter place an immediate duty upon the State in the matter of medical care and indeed of protecting the family as "the natural unit and basis of society", without any reference to "available means". Further, the Government must be taken under the Act to have waived the Constitutional proviso as to "available means".

Quite clearly, the provision of adequate housing is necessary to the preservation of the family as a unit. Furthermore, where the Government has statutorily undertaken the duty of resettlement, then the family must be resettled at a reasonable distance from the original settlement, in reasonable housing. We appreciate that the original housing was but a shack. Nonetheless we consider that the provisions of the Act should endure for the benefit, and not the detriment of those displaced. We say no more therefore than that Government should provide adequate housing to the displaced family, and also free medical care in all its forms.

In any event, we observe that Raymond Sakala was given refugee status. Government thereby undertook to offer him and his family all reasonable assistance in starting a new life in Caprivia. Adequate housing and medical care are essential to such assistance.

Learned Counsel for the Respondent would seek to differentiate between Raymond and Brian Sakala, as one granted refugee status, and the other granted asylum. But Article 2 of the African Charter makes no distinction in the matter, and as we interpret it, includes non-citizens. The Charter applies to "every individual"... without distinction of any kind such as ...national and social origin... birth or other status". In this respect, we accede to the submission that the word "family" in the African Charter, means the extended family, and we hold therefore that Brian Sakala, as an

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immediate child of the family, even though a major, should enjoy the same protection as the rest of the family.

Conclusion

We are satisfied therefore that the Applicants are entitled to adequate housing and free medical care. Accordingly we dismiss the first prayer for a declaration, and grant the second, third and fourth prayers. We consider that the Applicants have substantially succeeded and we accordingly grant costs in favour of the Applicants.