

TRICKLE DOWN OR RIGHTS WAY UP? DEVELOPMENT, HUMAN RIGHTS AND INDIGENOUS PEOPLES

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Development has been conventionally associated with economic growth and priorities, with a kind of inevitable, linear progression of countries and communities towards modernisation and, usually, westernisation. The success of such development is then assessed by indicators relating to an increase in gross domestic product, average income or investment in industry. However, this method of understanding and measuring development rarely takes into account social or political dimensions, or reveals other factors such as the disparity between different groups within countries. It also rarely considers whether the kind of development taking place is culturally and locally appropriate and sustainable. In recognition of such limitations, human rights principles have been increasingly explored as a guiding framework for development. The United Nations General Assembly's 1986 Declaration on the Right to Development (DRD) defines development as a human right with social, cultural, civil and political as well as economic dimensions, and recognises individuals and peoples as rights holders – as subjects and not objects of development. Many United Nations (UN) and other development agencies now state that they use a human rights framework for their work.

Despite shifts in the international sphere, when the need for development is raised in relation to Aboriginal and Torres Strait Islander communities in Australia, many of whom experience conditions likened to those in very poor countries, a narrow concept of economic development is invariably proposed. The Australian Government's Indigenous policy identifies economic development as a key strategic focus, with the aim being to reduce Indigenous peoples' 'dependency' on 'passive welfare' through supporting greater participation in the private sector. However, there is little consideration of the social or cultural elements or impacts of development, or of approaches that move beyond electoral cycles or political ideology. This article considers the history of development and its intersection with the international human rights system, including the debates around the right to development and a human rights approach to development. It then reflects on the particular implications and relevance of these debates for Indigenous peoples in Australia.

HISTORY OF DEVELOPMENT THEORY AND PRACTICE

The governments of wealthy countries, international multilateral institutions and non-government agencies have been making development interventions in poorer and disadvantaged countries and communities for many

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decades. Various theories and models guiding such interventions have emerged during that time, influenced by debates on social policy and the role of the state, as well as by trade and world events. Development theory has been conventionally dominated by economists, with approaches focusing on economic growth as the primary goal of development.

The first noted occurrence of the expression 'economic development' was in an essay written in Australia in 1861 on 'the manufactures most immediately required for the economic development of the resources of the colony'.¹ It is significant that in this early example, economic development is synonymous with colonisation and exploitation. Colonising governments bringing their 'white man's burden' transplanted the model of generating economic growth through modernisation and industrialisation onto nations of non-white peoples and lands rich in natural resources.

In the twentieth century, the market was increasingly seen by development economists as a tool of social and economic management, with an emphasis on the role of the state through public sector and planned investment, along with rapid industrialisation.² Theories such as those of Jacob Viner made the argument that through trade, the growth occurring in developed countries would be transmitted to developing countries.³ Development strategies then became focused on full integration into world markets, with an emphasis on free enterprise.⁴ It was argued that the benefits of such strategies would 'trickle down' to everyone in society, and as a result their implementation did not require any political or social transformations to the status quo.⁵ The 'trickle down' theory, which has long been advocated by economists and politicians in wealthy countries, proposes that economic growth in itself creates employment opportunities, increases incomes and raises the standard of living of all people. Two exponents of this view were the Nobel Prize winners Arthur Lewis and Simon Kuznets, who both argued that although inequalities may emerge in the early stages of development, this was essential and inevitable but only short-term, and this inequality would be reversed in the later phases of development as incomes rose.⁶

The post-World War II years saw the establishment of the International Monetary Fund (IMF), the World Bank, and the General Agreement on Trade

¹ Arndt, H.W., 'Economic Development: A Semantic History', *Economic Development and Cultural Change* 29, No. 3, April 1981, 462, quoted in Pakdaman, N., 'The story of development thinking', in (ed), Salomon, J-J., Sagasti, F.R. and Sachs-Jeantet, *The Uncertain Quest: science, technology and development*, United Nations University Press, 1994, 3.

² Sheehy, O., 'The Discourse of Human Rights and Aid Policy, Facilitating or Challenging Development?', paper given at *The Winners and Losers from Rights-Based Approaches to Development*, IDPM, University of Manchester, 21-22 February 2005, 4.

<http://www.sed.manchester.ac.uk/idpm/research/events/february2005/documents/Sheehy.doc>

³ Viner, J., *International Trade and Economic Development*, Clarendon Press, Oxford, 1953.

⁴ Pakdaman, N., 'The story of development thinking', in (ed), Salomon, J-J., Sagasti, F.R. and Sachs-Jeantet, *The Uncertain Quest: science, technology and development*, United Nations University Press, Tokyo, 1994, 6.

⁵ Ibid.

⁶ Sheehy, above n 2, 4.

and Tariffs (GATT), known as the Bretton Woods institutions. They were initially established to address the economic problems that led to the depression of the 1930s; to avoid the reintroduction of measures such as protectionist trade practices or competitive currency devaluations as responses to an unstable international economic system; and to assist in the post-war reconstruction and development of Europe and its colonies.⁷ The IMF was established to promote international monetary co-operation, exchange stability, and to provide temporary financial assistance to countries to help ease balance of payments adjustment. The World Bank was established to regulate the global economy, providing loans to developing countries for technical assistance, redevelopment and to assist economic growth. The GATT was established to set the rules governing world trade, in particular to reduce national trade barriers.⁸

Throughout the 1970s and 1980s, the principal approach of governments and institutions such as the World Bank continued to be that of industrial development and infrastructure projects with a focus on economic growth.⁹ From 1986, the World Bank began to attach conditions to structural adjustment or policy-based loans to developing countries, requiring privatisation and trade and investment liberalisation,¹⁰ with the notion that this would create an environment conducive to economic growth. This increasingly reflected a neo-liberal approach to economics which encouraged the 'removal of government interference in financial markets, capital markets, and of barriers to trade'.¹¹ In contrast with the earlier Keynesian emphasis on the state as the key agent in development, the embrace of the free market underpinned the development aid approach of international financial institutions.¹²

Concerns began to be raised by non-government advocates and others regarding the level of debt of developing countries, and the impact of such policies on the standard of living of people, even in countries where GDP expanded.¹³ 'Dependency' theorists, particularly in Latin America, challenged the assumptions of the interconnection between capitalism and economic growth and argued that the causes of 'underdevelopment' or inequality in development lay in the structure of the world economy.¹⁴ The implementation

⁷ The roles and functions of these institutions have changed dramatically since their establishment; Orford, A., 'Globalization and the Right to Development', in Alston, P. (ed.), *People's Rights*, Oxford University Press, 2001, 147.

⁸ The World Trade Organisation (WTO) replaced the GATT in 1994, and has 148 member countries. It has a broader mandate than GATT, and is responsible for administering WTO trade agreements, provides a forum for trade negotiations and disputes, and provides technical assistance and training for developing countries.

⁹ United Nations Development Programme, *Learning and Information Pack: Gender Analysis*, January 2001, 86.

¹⁰ Orford, A., 'Globalization and the Right to Development', in Alston, P. (ed.), *People's Rights*, Oxford University Press, 2001, 149.

¹¹ Stiglitz, J.E., *Globalisation and Its Discontents*, New York, 2002, 59, quoted in Sheehy, above n 2, 8.

¹² Sheehy, above n 2, 8.

¹³ United Nations Development Programme, *Learning and Information Pack: Gender Analysis*, January 2001, 86-87.

¹⁴ Sheehy, above n 2, 4.

of structural adjustment programs has been critiqued as suggesting that economic reform should take priority over human rights, and requiring, even serving undemocratic means.¹⁵

It has become apparent over time that models and strategies that focus solely on economic indicators do not ensure that the population as a whole equally participates in and benefits from development. It has been demonstrated in developing countries, and also in developed countries such as Australia, that while economies may have grown steadily, so has inequality.¹⁶ Studies have demonstrated that when economic growth is the sole focus of development, without proactive intervention to ensure that the population as a whole participates, poverty and conditions of distorted development will persist.¹⁷ In the early 1970s, Adelman and Morris argued that the trend in inequality would not be reversed unless it was addressed by specific policies.¹⁸ While poverty is conventionally measured in terms of a lack of income or assets, theorists working in the field of development have identified different types of poverty.¹⁹ In the name of development, people have been subjected to a range of poverties - including poverty of freedom, of participation and identity.²⁰

Such analyses have led many working in the field to advocate a framework of 'social development': the integration of social and economic policies that requires that development result in tangible improvements in all peoples' well-being.²¹ The social development approach acknowledges that certain groups - such as women, children, Indigenous peoples, people with disabilities and from minority ethnic communities - do not have equal access to power and opportunity in most societies, and special measures are required to ensure their equal treatment and participation.

As a method of intervention, social development focuses on ensuring that people have the capacity and opportunities to build social institutions and political structures which will enable them to make decisions about their conditions and experiences.²² Development is then less something that is 'done' to communities by outside agencies, and more about a process whereby individuals and communities are empowered to share and enhance resources, and to bring about positive change. This framework has been likened to

¹⁵ Lal, D., 'The Poverty of Development Economics', *Hobart Paperback 16*, IEA, 1983, 33, quoted in Sheehy, above n 2, 10.

¹⁶ Saunders, P., *Welfare and Inequality: National and International Perspectives on the Australian Welfare State*, Cambridge University Press, 1994.

¹⁷ See Korten, D., *Getting to the 21st Century*, Kumarian, Conneticut, 1990; Midgley, J., *Social Welfare in Global Context*, SAGE Publications, Thousand Oaks, 1997, 193.

¹⁸ Adelman, I. And Morris, C.T., *Economic Growth and Social Equality in Developing Countries*, Stanford, 1973, quoted in Sheehy, above n 2, 6.

¹⁹ For example, see Max-Neef, M., *Human Scale Development*, Apex, New York, 1991, as quoted in Ferguson, B., 'A model for University/non-government organisation (NGO) collaboration to promote social development in impoverished communities', *Social Development Issues* 21 (2), 1999, 66.

²⁰ Ferguson, above n 19, 66.

²¹ Midgley, above n 17, 180.

²² Ferguson, above n 19, 67.

approaches also referred to as 'human development' and 'community development'. These approaches often incorporate human rights principles to denote the significant shift from a 'basic needs' or 'welfare' paradigm to that of all people having 'rights' or 'entitlements' to a reasonable standard of living, dignity and quality of life. 'Sustainable development' is another concept that has emerged in recent decades, and is commonly used to refer to the integration of environmental conservation and protection concerns with social and economic development.

Development theory and practice has developed largely in relation to interventions in developing countries. However, the ongoing experience of disadvantage, discrimination and various kinds of poverty by Indigenous communities in Australia, means that there are lessons to be learned from the field of international social development.

HISTORY OF DEVELOPMENT IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM

Development theory and practice and international human rights law and policy have emerged from different institutional frameworks. The difference in focus between the two disciplines has been described in terms of human rights having as its subject 'norms, rules and duties together with their institutional foundations' in the context of international law, whereas development has focused on 'general processes of change, resource control/conflict, and resource allocation at its core'.²³ Human rights exposes abuses of power, while development has as its focus the promotion of economic growth and the satisfaction of basic needs.²⁴ Human rights principles and responsibilities are interpreted and monitored by UN bodies such as the Office of the High Commissioner for Human Rights (OHCHR) and regional, national and state legislation and agencies. Development policies are formulated and implemented by inter-governmental organisations such as the World Bank at the international level, and aid or foreign affairs agencies on a national governmental level, along with non-government aid and development organisations that operate around the world.

While the two areas have evolved quite independently of each other, the UN has played an important role in development policy and practice. In particular, the notion of the sovereign equality of states embodied in the UN system has meant that developing countries have had equal representation at international forums to press for reform at a time when they have been so marginalised by the world economic order.²⁵ While developing countries' efforts to redistribute economic power have included exploring different

²³ Sano, H., 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development', *Human Rights Quarterly* 22, The Johns Hopkins University Press, 2000, 742.

²⁴ Tomasevski, K., *Development and Human Rights Revisited*, Pinter, London, 1989, 113-114.

²⁵ Barsh, R., 'The Right to Development as a Human Right: Results of the Global Consultation', *Human Rights Quarterly* 13, 1991, 323.

multilateral channels, including trade regulation and financial negotiations over structural adjustment,²⁶ the UN system has provided one of the few avenues for them to directly challenge the dominance of wealthy powerful countries. While the IMF and the World Bank are made up of member states, contributions and voting structure are calculated in proportion to a nation's economic wealth, and as a result these institutions are dominated by powerful wealthy countries.²⁷

Although the understanding of and approach to issues of development has varied over time in the UN system, there has long been recognition of the importance of equal participation of all peoples in development as a crucial component of the realisation of human rights. Mrs Eleanor Roosevelt, head of the US delegation during the drafting of the Universal Declaration of Human Rights (UDHR), stated: '[W]e are writing a bill of rights for the world, and ... one of the most important rights is the opportunity for development.'²⁸ Article 28 of UDHR states: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' The UN Charter also provides for 'the promotion of the economic and social advancement of peoples', which it links with conditions of stability and wellbeing necessary for peace.²⁹

Soon after its establishment, the UN Secretariat began to play a role in providing technical assistance to developing countries. Such interventions were classified as a kind of social welfare and primarily directed towards nutrition, sanitation and medical support.³⁰ In the 1960s, the UN technical assistance programme was merged with other UN funding agencies to form the United Nations Development Programme (UNDP). In 1970, UNDP's Governing Council adopted a new approach of country-based programmes and 'indicative planning figures', which was the first systematic programme of allocating international assistance based on assessed need.³¹ The UNDP approach contrasted with that of many bilateral programmes, which allocated resources based on factors of politics, commercial self-interest, proximity, past colonial ties, religion and ideology, and also contrasted with multilateral institutions such as the IMF and World Bank with their requirement of adherence to 'market-friendly' policies and other forms of conditionality.³²

The UNDP remains the UN's primary development agency, working across 166 countries. The UNDP publishes annual Human Development Reports, which are compiled by drawing on information from a network of academics, government representatives and civil society advocates who contribute data, ideas, and best practice examples. The first Human

²⁶ Ibid.

²⁷ Arvanitakis, J., 'International Financial Institutions', *Human Rights Defender Manual*, Diplomacy Training Manual, February 2001, 2.

²⁸ Johnson, M.G., 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights', *Human Rights Quarterly* 9.1, 1987, 19-48.

²⁹ Mendez, R.P., 'United Nations Development Programme', *United Nations Studies at Yale*, <http://www.yale.edu/unsy/UNDPHist.htm>, 1.

³⁰ Ibid, 2.

³¹ Ibid, 8.

³² Ibid.

Development Report, published in 1990, diverged from the earlier economically inspired approach to poverty alleviation by placing the focus on human rather than economic development.³³ It included the proposal of a human development index (HDI) as an alternative measure to GDP, which took into account other indicators such as life expectancy, literacy levels and school participation rates, as well as income per capita. This reconceptualisation of development was influenced greatly by the work of Amartya Sen, who was involved in drafting this first Human Development Report. More recent Human Development Reports have conveyed the central message that the elimination of poverty should be addressed as a basic entitlement and a human right, and called for a framework for development, trade and investment that respects, protects and promotes human rights.³⁴ The Human Development Reports marked a shift to development being conceptualised in terms of the individual, rather than states.

Another key UN forum for debate on development issues has been the annual Conferences on Trade and Development (UNCTAD), first held in 1964. The creation of UNCTAD was also part of the post-war reformist era, stemming from the 'search for multilateral solutions to the economic challenges of an interdependent world to encompass development problems largely ignored at Bretton Woods'.³⁵ The Report to the first UNCTAD in 1964, entitled *Towards a New Trade Policy for Development*, illustrated that the free play of international economic forces would not by itself lead to the most desirable utilisation of the world's productive resources, given the structural obstacles to growth at the domestic and international levels.³⁶ Subsequent UNCTAD Reports have stated that rebalancing the international financial system required 'a strategic pattern of integration in line with levels of industrial development and favourable terms of market access, as well as appropriate levels of development finance'.³⁷ Through its programme on Globalization and Development Strategies, UNCTAD states that it promotes policies at the national, regional and international level that are conducive to stable economic growth and sustainable development.³⁸

In 1987, a World Commission on Environment and Development report advocated the concept of 'sustainable development' as a unifying theme in presenting environmental and social concerns about trends toward accelerated environmental degradation and social polarisation in the 1970s and 1980s.³⁹ The interdependence of environmental and socio-economic issues in the

³³ See <http://hdr.undp.org/reports/global/1990/en/>

³⁴ United Nations Development Program, *Poverty Reduction and Human Rights: A Practice Note*, June 2003, 2.

³⁵ United Nations Conference on Trade and Development, *Trade and Development Report, 2004*, United Nations, Geneva, 2004, 91.

³⁶ *Ibid*, 90.

³⁷ *Ibid*, 91.

³⁸ See <http://www.unctad.org/Templates/StartPage.asp?intlItemID=2874&lang=1>

³⁹ Barraclough, S., 'Towards Integrated and Sustainable Development?', *UNRISD Overarching Concerns: Paper No. 1*, United Nations Research Institute for Social Development, February 2001, 12.

development process began to be emphasised by various UN conferences and agencies.⁴⁰ The Rio Declaration on Environment and Development of 1992 and Agenda 21 that emerged from the UN Conference on Environment and Development urged nations to adopt appropriate integrated policies and to cooperate internationally in pursuing economic growth, eradicating poverty, reducing disparities in living standards worldwide and promoting environmental protection, and asserted that all of these goals were prerequisites for approaching sustainable development.⁴¹

The World Summit on Sustainable Development (WSSD) was held in 2002 to review progress since the 1992 conference. The WSSD's Johannesburg Declaration committed to speedily increase access to basic requirements such as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of bio-diversity' while also stating:

... we will work together to assist one another to have access to financial resources, benefit from the opening of markets, ensure capacity building, use modern technology to bring about development, and make sure that there is technology transfer, human resource development, education and training to banish forever underdevelopment.⁴²

Critics have suggested that there is a readiness by governments and international financial institutions as well as non-government development agencies to adopt the language of 'sustainable development' due to the vagueness of the term and its varying interpretations.⁴³ Yet there has not been the same readiness by many to adopt the language, principles and accountability mechanisms of human rights in the field of development.

In 1997, the UN Secretary-General issued a report on the mainstreaming of human rights within all UN activities, including those in the development area.⁴⁴ As part of that process of reform, a UN Development Group (UNDG) has been established which comprises the major UN development programmes and funds, and aims to co-ordinate development policies and decision-making.⁴⁵ The UN has also started to play an important role in highlighting the particular discrimination and disadvantage facing women in the development process. The 1995 Fourth World Conference on Women in Beijing brought attention to the fact that the great majority of people living in poverty in the world are women. It highlighted the fact that women's contributions and concerns are too often ignored in financial markets and institutions, labour markets, economic theory, economic and social infrastructure, taxation and

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² See <http://www.un.org/esa/sustdev/documents/Johannesburg%20Declaration.doc>.

⁴³ Barraclough, above n 39, iv.

⁴⁴ Report of the Secretary-General on Renewing the United Nation: A Programme for Reform, A/51/950, issued on 17 July 1997, para. 78, as quoted in Orford, A., 'Globalization and the Right to Development', in Alston, P. (ed.), *People's Rights*, Oxford University Press, 2001, p. 134.

⁴⁵ Ibid, para. 73.

social security systems, as well as in families and households.⁴⁶ This is the case for women in developing and developed countries, and particularly those women from Indigenous and other minority ethnic groups.

The Right to Development

The notion of a right to development emerged out of the concerns of developing countries in the 1960s and 1970s that the issues facing them were being marginalised by the dominance of East-West issues on the agenda of the UN Commission on Human Rights.⁴⁷ A right to development was first formulated as part of a proposal for a New International Economic Order (NIEO) by developing countries, by which the inequities in the international economic system were to be rectified by such methods as technology transfers and debt reductions.⁴⁸ Although the proposal for a NIEO was not taken up by international economic institutions or the governments of wealthier countries, in 1981 the UN Commission on Human Rights established a Working Group of Government Experts on the Right to Development.⁴⁹ However, even at this stage key delegations from governments of wealthier developed countries made it clear that they would not allow the declaration to create any entitlement to a transfer of resources.⁵⁰ The notion of a right to development remains contested and controversial.

After many years of debate and re-drafting, the General Assembly of the UN accepted the Declaration on the Right to Development (DRD) in 1986, with 146 'yes' votes, 8 abstentions by mainly Western industrial countries, and 1 negative vote by the US. The DRD was considered significant in that it moved the concept of development beyond the economic growth of a state and past earlier UN debates which were centred on development as a right among states.⁵¹ By casting development as a human right, the Declaration characterised it as a process that allows for the exercise of the full range of rights, and has as its goal the pursuit of self-determination of all people.⁵²

Development is defined in the DRD's preamble as:

⁴⁶ Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, UN Doc. A/CONF.177/20, para. 157.

⁴⁷ Marks, S., 'The Human Right to Development: Between Rhetoric and Reality', *Harvard Human Rights Journal*, Vol. 17, 2004, 141.

⁴⁸ Alston, P., 'Making Space for Human Rights: the case of the right to development', *Harvard HRYB* 1, 1998, 3, Paul, J., 'The human right to development: its meaning and importance', *John Marshall Law Review* 26, 1992, 25.

⁴⁹ Commission Resolution 4 (XXXIII), 21 February 1977.

⁵⁰ Marks, S., *Obstacles to the Right to Development*, Francois-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, Working Paper, 2003, 2.

⁵¹ Obiora, L.A., 'Beyond the rhetoric of a right to development', *Law and Policy* 18, 1996, 389, cited in Salomon, M.E. with Sengupta, A., *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, Minority Rights Group International Issues Paper, February 2003, 4.

⁵² *Ibid.*

... a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The declaration clearly sets out that the right to development is an individual as well as a collective right, and belongs to people rather than just to states. The right to development is characterised as a right in itself, but also as a means to realise all human rights.

The adoption of the right to development was perceived as countering the 'generations of rights' debate, whereby civil and political rights were considered first generation rights and economic, social and cultural rights were considered second generation, rights primarily due to the West-East division after World War II. The DRD recognises all rights and freedoms as 'indivisible and interdependent' and explicitly refers to the failure to observe civil and political as well as economic, social and cultural rights as an obstacle to development.⁵³ It counters the argument made by some governments that certain rights or a particular level of economic growth should be prioritised over other human rights.

The DRD clearly sets out the positive obligation on states to take measures to ensure the realisation of the right to development for all people. Article 8(1) states:

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.

In particular, it identifies the obligations on states regarding the elimination of human rights abuses, including the refusal to recognise the right of all peoples to self-determination. Article 5 states:

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

While the DRD provides that states have an important obligation to respect and promote the right to development, it also recognises that other actors such as international intra-governmental organisations can be responsible both for protecting and violating human rights.⁵⁴ For example, Article 3(3) of the DRD states:

⁵³ Salomon and Sengupta, above n 51, 6.

⁵⁴ Orford, above n 44, 141.

States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should fulfil their rights and duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest, and cooperation among all states, as well as to encourage the observance and realization of human rights.

Article 4(1) states that:

States have the duty individually and collectively to formulate international development policies with a view to facilitating the full realization of the right to development.

Both of these articles can be interpreted as requiring states to act to further the right to development as members of international economic institutions.⁵⁵

Key principles of the DRD

The DRD is a consensus document that is the result of a paragraph-by-paragraph negotiation. It is not a particularly neat, focused, or non-ambivalent declaration.⁵⁶ However, its key components are generally agreed to be as follows:⁵⁷

Comprehensive development – the DRD places the human person at the centre of development. Development is a ‘comprehensive’ and multi-faceted ‘process’ with social, cultural, political as well as economic elements.

Respect for all human rights – the development process should be respectful of all human rights and fundamental freedoms, and help the realisation of rights for all. Failure to observe rights constitutes an obstacle to development. The realisation of the right to development cannot justify violations of human rights.⁵⁸ Human rights are indivisible and interdependent, and should be addressed in an integrated manner.

Participation – the DRD requires that states and others responsible for development interventions formulate appropriate policies to ensure participation. As the human person is at the centre of development, the processes through which such policies are developed should themselves be participative. The right of women to participate, and the duty of the state to ensure their participation, is emphasised.

⁵⁵ Orford, above n 44, 142.

⁵⁶ Sengupta, A., *The Right to Development as a Human Right*, Francois-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health. Working Paper, 2000, p. 5.

⁵⁷ As set out in Piron, L.-H., *The Right to Development: A Review of the Current State of the Debate for the Department for International Development*, UK DFID, 2002, 10.

⁵⁸ Vienna Declaration and Programme of Action, paragraph 10.

Social justice – the DRD requires that the development process promote social justice, including the ‘fair distribution of the benefits’ for individuals, and ‘equality of opportunity for all’ in access to resources and services.

International co-operation – the realisation of the right to development requires appropriate national policies, but also the formulation of appropriate international development policies and the provision of effective international co-operation.

Self-determination - the DRD establishes that development ‘implies the full realisation of the right of peoples to self-determination’. The provisions on self-determination have been interpreted not just as referring to a reaffirmation of the independence and equality of nations, but also as strengthening the rights of Indigenous peoples to determine for themselves the processes and forms of development that are appropriate for their cultures and circumstances.

Interpretation of the Declaration on the Right to Development

A Working Group on the Right to Development met from 1981 to 1989 to explore its scope and content and to submit proposals for the implementation of the DRD. A Global Consultation on the Realization of the Right to Development as a Human Right (‘Global Consultation’) was convened by the UN in 1990 in order to ‘focus on the fundamental problems posed by the implementation of the Declaration, to look at the criteria which might be used to identify progress and to identify mechanisms for evaluating and stimulating such progress.’⁵⁹ Representatives from specialised development agencies, the UN Secretariat, international trade, development and financial institutions and NGOs attended though disappointment was expressed at the absence of several intergovernmental organisations dealing with trade (GATT, the UN Center of Transnational Corporations) and other specialised organisations (WHO, FAO, UNEP, WIPO, UNESCO).⁶⁰

The report of the Global Consultation concluded that, above all, ‘the concentration of economic and political power in the most industrialized countries’ was an obstacle to development, ‘perpetuated by the non-democratic decision-making processes of international economic, financial and trade institutions.’⁶¹ It noted that structural inequalities in international relations as well as within individual countries were a barrier to development.⁶² Those participating in the Global Consultation were especially critical of international development strategies that were oriented solely towards economic growth and financial considerations:

⁵⁹ ‘The Realisation of the Right to Development’, *Global Consultation on the Right to Development as a Human Right*, HR/PUB/91/2, United Nations, New York, 1991, quoted in Marks, above n 50, 8.

⁶⁰ Ibid.

⁶¹ Quoted in Barsh, above n 25, 326.

⁶² Ibid.

These models largely ignore the social, cultural and political aspects of human rights and human development. Limiting the human dimension to questions of productivity, they foster greater inequalities of power and control of resources among groups and lead to social tensions and conflicts. Those tensions and conflicts are often the pretext used by States to justify placing restrictions on human rights.⁶³

The report noted that what constitutes 'development' is largely subjective, and in this respect must be 'determined by the people themselves and adapted to their particular conditions and needs.'⁶⁴ An analysis of the evidence presented to the Global Consultation noted that in this context, the right to development is not so much a right to the improvement of material conditions, but 'the right to have a voice in, and share control over the economic environment'.⁶⁵ It also noted that the DRD is not 'an apology for a liberal, laissez faire state in which there is simply an absence of public restraint on private self-interest'.⁶⁶

The recommendations of the Global Consultation included the appointment of a committee of independent experts to report annually to the General Assembly through the Commission on Human Rights and the Economic and Social Council on progress made on the implementation of the Declaration. The recommendations further called for this committee to ensure 'the effective participation of non-governmental organisations and groups active in development and human rights, including Indigenous peoples, workers' organizations, women's groups and other organizations.'⁶⁷

The right to development was subsequently reaffirmed by the international community in Paragraph 10 of the Vienna Declaration and Programme of Action arising from the 1993 World Conference on Human Rights. Following this, a new branch was established within the Office of the High Commissioner for Human Rights, the primary responsibilities of which include the promotion and protection of the right to development.⁶⁸ The UN Commission on Human Rights established an open-ended Working Group on the Right to Development as a follow-up mechanism aimed at furthering methods by which the right to development may be implemented, and to report on the progress of implementation.⁶⁹

In 1998 an Independent Expert on the Right to Development, Indian economist Professor Arjun Sengupta, was appointed.⁷⁰ The Independent Expert has analysed and elaborated on the rights in the declaration. In particular, he has described the right to development as entailing the right to a particular

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ 'The Realisation of the Right to Development', *Global Consultation on the Right to Development as a Human Right*, HR/PUB/91/2, United Nations, New York, 1991, quoted in Marks, above n 50, 9.

⁶⁸ GA res. A/Res/50/214, para.37, 23 December 1995.

⁶⁹ The Working Group on the Right to Development was set up by the Economic and Social Council decision 1998/269, and held its first session in September 2000.

⁷⁰ UN Commission on Human Rights res. 1998/72, 22 April 1998.

process of development, which is significant in that it refers to the realisation of all rights and freedoms as well as the specific rights articulated to promote and protect the rights of minorities and Indigenous peoples, children, women and other entities identified as warranting particular attention under international law.⁷¹

The Independent Expert has stated that characterising development as a human right requires authorities to fulfil the obligations that flow from that through the adoption of appropriate policies:

If the rights to food, education, and health are regarded as components of a human right to development, the state has to accept the primary responsibility of delivering the right either on its own or in collaboration with others. It has to adopt the appropriate policies and provide for the required resources to facilitate such delivery because meeting the obligation of human rights would have a primary claim on all the resources — physical, financial, or institutional — that it can command.⁷²

The Independent Expert has made it clear that growth is not incompatible with the right to development. He noted in his third report that ‘we must include the growth of resources, such as GDP and technology, as an integral element in the vector of rights that constitute the right to development.’⁷³ However, in his formulation, growth cannot be at the expense of equity: ‘As considerations of equity and justice are primary determinants of the right to development, the whole structure of growth will have to be determined and reoriented by them.’⁷⁴

The Commission on Human Rights and the General Assembly have passed a series of resolutions on the DRD since its proclamation. For example, the Commission on Human Rights has spelt out certain strategies for working towards equal rights and opportunities for women in the context of the right to development – for example, access to bank loans, mortgages and other forms of financial credit, such as micro credit.⁷⁵ In adopting the recommendations of the Working Group on the Declaration on the Right to Development, the Commission at its 1996 session urged states to ‘pursue the promotion and protection of economic, social, cultural, civil and political rights and the implementation of comprehensive development programmes, integrating these rights into development activities.’⁷⁶

⁷¹ Fourth Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2002/WG.18/4, para 2.

⁷² Sengupta, above n 66, 6.

⁷³ *Third Report of the Independent Expert on the Right to Development*, Mr Arjun Sengupta, Submitted in Accordance with Commission Resolution 2000/5, U.N. ESCOR, 57th Session, U.N. Doc. E/CN.4/2001/WG.18/2 (2001).

⁷⁴ *Fourth Report of the Independent Expert on the Right to Development*, Mr Arjun Sengupta, Submitted in Accordance with Commission Resolution 2001/9, 55, U.N. Doc. E/CN.4/2002/WG.18/2 (2001).

⁷⁵ The Right to Development, Commission on Human Rights Resolution 2001/9 (Independent Expert’s Mandate Extended for Three Years), para. 14.

⁷⁶ E/CN.4/1996/L.11

Implementation of the Declaration on the Right to Development

The DRD has been endorsed by the General Assembly of the United Nations, and reaffirmed in later conferences, including the UN Millennium Summit. It was a Declaration that clearly addressed the equality of economic, social and cultural rights with civil and political rights. The DRD had the potential to re-frame the way that development policy was conceived and implemented, nationally and internationally. One issue that the debate around DRD firmly countered was the claim that development should somehow take priority over respect for human rights, or that the realisation of human rights must await a certain level of development.

However, the Right to Development remains a right that is rarely engaged with outside of the UN system, for example, in mainstream international economic or development forums such as the World Trade Organization's *Doha Ministerial Declaration*.⁷⁷ World summits and conferences often refer to the right to development, but rarely include it in their plan of action.⁷⁸ While the World Bank representative to the United Nations has made a number of contributions to the debate on the RTD, their argument is that poverty eradication is the most effective way to implement this right, and do not integrate it into their policies or programs.⁷⁹ Indeed, approaches adopted by institutions such as the IMF and the World Bank have serious implications for the right to development.⁸⁰ The IMF and the World Bank show little recognition of their obligation to protect the right to development and human rights more broadly as part of the development process, and no inclination to use human rights obligations as a means for determining or evaluating their actions in their recent activities or policy documents.⁸¹

There is an international consensus around the Millennium Development Goals (MDGs), following the endorsement of the UN Millennium Declaration by heads of states in 2000. They have also been endorsed by international organisations such as the Organisation for Economic Co-operation and Development (OECD), the IMF and the World Bank. The main goal of the MDGs is the objective of halving the proportion of people living in poverty by 2015. Poverty is defined in a multidimensional way that measures capabilities and opportunities as well as income. While the UN Millennium Declaration states: 'We are committed to making the right to development a reality for everyone and to freeing the entire human race from want',⁸² in reports by the Secretary General following the Millennium Summit, the role of the right to development is not mentioned.⁸³

⁷⁷ Piron, above n 57, 23.

⁷⁸ Marks, above n 50, 15.

⁷⁹ Alfredo, S-Y., Special Representative to the United Nations and the World Trade Organization, the World Bank, 'Will the RTD ever be fully implemented?', *Statement to the Open-Ended Working Group on the Right to Development*, February 2001.

⁸⁰ Orford, above n 44, 152.

⁸¹ Ibid, 155-156.

⁸² United National Millennium Declaration, 2000, paragraph 11.

⁸³ Marks, above n 50, 15.

The WSSD provides another example where the opportunity to integrate human rights and development was lost. During negotiations with governments, references to human rights - including the right to development - were removed from the WSSD's declaration, and replaced with the statements: 'We commit ourselves to build a humane, equitable and caring global society cognizant of the need for human dignity for all'.⁸⁴

The Human Rights Council of Australia (HRCA) has identified the obstacles to the implementation and realisation of the DRD as:

- A reluctance to give the implementation of the Declaration of the Right to Development the priority it warrants;
- The absence of strategies and programs at the international and national levels to address the realisation of the right to development;
- The social consequences of international economic policies such as structural adjustment programs and foreign debt;
- The lack of democratic participation in the formulation and evaluation of development programs at both the multilateral level and of civil society;
- Insufficient cooperation and coordination together with inadequate resources allocated to the realisation of the right to development; and
- Inadequate attention to the environmental impact of development.⁸⁵

The HRCA have also identified that a general lack of co-ordination between UN agencies and the failure to place its implementation on the agenda of the Economic and Social Council - together with the tendency to separate economic development from social development and macro-economic policies from social objectives - has hampered progress in the UN system.⁸⁶

It is clear that the inequities between developed and developing countries that led to the drafting of the DRD remain. In recent years, the UN General Assembly has reiterated that developing countries continue to face barriers to participating equitably in the processes of globalisation, in particular in the international trade system, and that many risk being marginalised and excluded from its benefits.⁸⁷ The Commission on Human Rights has also emphasised the need for policies and measures at the national and international levels to respond to the challenges and opportunities of globalisation if this process is to be made fully inclusive and equitable.⁸⁸ However, the governments of wealthy countries in particular have been reluctant to engage with, develop policy regarding or resource the principles underpinning the DRD, or the suggestions put forward by the DRD's Working Group and Commission on Human Rights.

⁸⁴ The Johannesburg Declaration on Sustainable Development, 4 September 2002, United Nations, New York, 2002, Report of the World Summit on Sustainable Development, A/CONF.199/20, Resolution 1, Political Declaration, Annex, paragraph 2, quoted in Marks, above n 50, 15.

⁸⁵ Human Rights Council of Australia, *The Realisation of the Right to Development*, <http://www.hrca.org.au/Realization.htm>.

⁸⁶ Ibid.

⁸⁷ General Assembly Resolution 56/150, para. 20.

⁸⁸ Commission on Human Rights Resolution 2002/69, para. 13.

Criticisms of the Declaration on the Right to Development

The DRD has continued to be a controversial and widely debated instrument. Even after more than 30 years of scholarly writing and diplomatic efforts to understand the DRD, and 18 years after the Declaration was adopted, debate remains polarised and confused.⁸⁹

Some states and commentators have interpreted the right to development as a right of states to pursue a narrow economic model of development over the human rights of the people of the state invoking the right.⁹⁰ Critics of the DRD's ability to be interpreted in this way argue that it moves away from the appropriate focus on the individual as the proper subject of human rights, to groups as subjects of rights.⁹¹ Donnelly, for example, argues that human rights should derive from the idea of 'innate personal dignity' rather than from notions of solidarity or community, and that as membership of a community or group is not necessarily an aspect of being human, and thus collective human rights are not logistically possible.⁹² However, other commentators have argued that our fate as individuals is connected to the fate of the others in whose social context we find ourselves, and especially where members of a group suffer disadvantage or oppression as a result of membership of that group, there is a strong case for the proposition that group members should be able to exercise collective rights.⁹³ The debate around collective rights in relation to Indigenous peoples will be further discussed later in this paper.

The challenge of working with the DRD has from the beginning been to translate its hopeful but arguably ambiguous language into concepts that are meaningful to economists and useful to addressing inequity in the development process.⁹⁴ The DRD puts forward that 'states realize their rights and fulfil their duties in such a manner as to promote a new international economic order', however this is then placed in the context of being 'based on sovereign equality, interdependence, mutual interest and co-operation among all states, as well as to encourage the observance and realization of human rights.'

The DRD has been criticised for offering a rather general concept of development, embodying a perception of development as a worldwide quasi-linear progress which does not take into account any limitations that may arise from the need for sustainability.⁹⁵ Other commentators have criticised the DRD for its focus on economic issues. For example, Hilary Charlesworth has stated:

⁸⁹ Marks, S.P., 'The Human Rights Framework for Development: Seven Approaches', *Francois-Xavier Bagnoud Center Working Paper* No. 18, 2003, 15.

⁹⁰ Orford, above n 44, 135.

⁹¹ See Donnelly, J., 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development', *California Western International Law Journal*, 15, 1985, 492, quoted in Orford, above n 44, 137.

⁹² *Ibid.*

⁹³ Orford, above n 44, 137-138.

⁹⁴ Marks, above n 89, 14.

⁹⁵ Hamm, B., 'A Human Rights Approach to Development', *Human Rights Quarterly* 23, The Johns Hopkins University Press, 2001, 1009.

While the formulation of the right to development does not rest on a simple economic model of development, and includes within it a synthesis of all recognized human rights, redress of economic inequality is at its heart. An assumption of the international law of development is that underdevelopment is caused by a failure to meet the model of a capitalist economy. Development means industrialization and westernization.⁹⁶

It has been argued that using the language of development then risks legitimising the very agendas and programs that the right to development is aimed at subverting; reproducing the legitimacy of 'developmentalism' as a framework for understanding the world and as an alibi for exploitation.⁹⁷

Despite limitations such as those outlined above, the DRD is important in that it engages directly with the language and concerns of neoclassical economics, while attempting to renegotiate their meaning.⁹⁸ It is also a right that has been underutilised by academics, practitioners and advocates in countries such as Australia in relation to the rights it embodies that have significance for Indigenous peoples.

Indigenous peoples and the right to development

The notion of a right to development has particular significance for Indigenous peoples. Indigenous peoples have throughout history been the victims of activities carried out in the name of imperial or national development, and Indigenous peoples are often the least able to participate in and benefit from development, even that which may utilise their land and natural resources. In Australia, as in many countries, Indigenous people on average have lower educational and employment participation, poorer health, lower incomes and access to capital, and a greater dependence on the state as a source of income.

In the 2001 report of the UN Working Group on Indigenous Populations, Special Rapporteur Erica-Irene Daes noted that Indigenous peoples were not just affected by development policies, they were imperilled by them – their very existence was threatened by development.⁹⁹ The Independent Expert on the Right to Development has stated that '[g]rave human rights violations continue, both as a result of 'development' and as a result of the failure of duty-bearers to secure a process in which the right to development can be realized.'¹⁰⁰ The Independent Expert's work on the DRD has been described as 'build[ing] on the traditional process of the expansion of

⁹⁶ Charlesworth, H., 'The Public/Private Distinction and the Right to Development in International Law', *Australian Year Book of International Law* 12, 1992, 196-197, quoted in Orford, above n 44, 145.

⁹⁷ Orford, above n 44, 180.

⁹⁸ Ibid.

⁹⁹ Daes, E-I., 'Prevention of discrimination and protection of indigenous peoples', *Report of the Working Group on Indigenous Populations*, UN Doc. E/CN.4/Sub.2/2001/17, para 26.

¹⁰⁰ Salomon and Sengupta, above n 51, 47.

wealth and allocation of resources, incorporating concerns of equity and justice along with human rights standards'.¹⁰¹ This approach is critical to the realisation of the rights of Indigenous peoples, who are often the unequal recipients of resource distribution, even during periods of high growth in both developed and developing countries.¹⁰²

The Independent Expert on the DRD has been outspoken on the importance of Indigenous peoples and the right to development:

As a right that aims at the realization of all human rights and fundamental freedoms, the right to development cannot be realized for anyone within a state if the right of minorities and indigenous peoples – such as the right to non-discrimination, to effective participation and to cultural identity – are not also respected in the process of national 'development'.¹⁰³

In the Global Consultation on the Right to Development as a Human Right, Indigenous organisations drew a clear parallel in argument or action between the situation of Indigenous peoples in developed or wealthy countries and that of people living in developing countries.¹⁰⁴ The report of the Global Consultation proposed that UN emphasis would be on direct involvement with 'the people and groups directly or indirectly affected through their own representative organizations', including Indigenous peoples.¹⁰⁵ The right to development was envisaged as 'a process of empowering individuals and groups within the state by giving them standing to participate in international economic cooperation'.¹⁰⁶ The UN Working Group on Indigenous Populations has noted that the DRD provides for a shift in development thinking from 'development as charity' or 'good intentions' to 'development as a human right' that includes corresponding obligations. This challenges states to ensure that there is a paradigm shift from Indigenous policies based on welfare models to policies based on rights.¹⁰⁷

Elsewhere in international law, the right of Indigenous peoples in relation to development is set out. The UN Draft Declaration on the Rights of Indigenous Peoples makes reference to the collective and individual rights of Indigenous peoples, and makes specific reference to development. The preamble states:

Indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands,

¹⁰¹ Statement by Arjun Sengupta, Independent Expert on the Right to Development, at the 58th Commission on Human Rights, 22 March 2002.

¹⁰² Salomon and Sengupta, above n 51, 7.

¹⁰³ Ibid, 4.

¹⁰⁴ Barsh, above n 25, 324.

¹⁰⁵ Quoted in Barsh, above n 25, 327.

¹⁰⁶ Ibid.

¹⁰⁷ Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Peoples: Indigenous peoples and their right to development including their right to participate in development affecting them, UN Doc. E/CN.4/Sub.2/AC.4/2001/2, para. 4.

territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

Article 23:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development...

Article 30:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources...

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) Committee's General Recommendation on the Rights of Indigenous Peoples (1997) includes reference to the provision by states parties of conditions that 'allow for sustainable economic and social development compatible with their cultural characteristics'; to ensure 'equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'; that recognise and protect 'the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources traditionally owned or otherwise inhabited or used without their free and informed consent'. The preamble to ILO 169 also recognises 'the aspirations of these peoples to exercise control over their ... ways of life and economic development'.¹⁰⁸ The UN Working Group on Indigenous Populations discussed development for two consecutive years in 2001/2002, and globalisation and transnational corporations in 2003.¹⁰⁹

The Independent Expert on the DRD has set out what the right to development means in practice for policy development in relation to Indigenous peoples:

... the policies for their development should be designed as sub-plans of a national programme for development, with special provisions for meeting the requirement of those groups in terms of, for example, the preservation of areas they inhabit and with regard to traditional ways of life as related to work, which the usual national policies for development of all individuals may not take into account. The rights of peoples, including indigenous peoples, to self-determination and the right to full sovereignty over natural resources, is recognized in the DRD.¹¹⁰

The key rights of Indigenous peoples within the right to development can be closely linked to several broad international legal standards and principles: the

¹⁰⁸ CERD GR XXIII (51), HRI/GEN/1/Rev.5, 18 August 1997.

¹⁰⁹ See Indigenous Peoples and their Relationship to the Land, working paper prepared by Erica-Irene A. Daes, UN Doc E/CN.4/Sub.2/2001/21, 11 June 2001.

¹¹⁰ Ibid, 13.

right to self-determination, participation rights and recognition and implementation of related group rights, such as those pertaining to land and natural resources.¹¹¹

Self-determination

The right to self-determination is explicitly recognised in the DRD as integral to the realisation of the right to development, and includes ‘the exercise of [the inalienable right of peoples] to full sovereignty over their wealth and natural resources’. The provisions on self-determination in the DRD strengthen the rights of peoples to determine for themselves the forms of development that are appropriate to their cultural values and, as such, self-determination in development includes the right to participate as a group in the design and implementation of a sustainable system of development and the policies that drive it. Another important element regarding the promotion and protection of the rights of Indigenous peoples in relation to the right to development is the recognition of their rights as a group, including as peoples.¹¹²

Self-determination within the right to development addresses a right of ‘self-determined development’.¹¹³ It is a right that facilitates the enjoyment by Indigenous peoples of the right to their cultural identities, and their ability to determine their own economic, social and political systems through democratic institutions and actions.¹¹⁴ It has long been established that proactive policies are necessary to ensure that Indigenous peoples can fulfil their rights. For example, the right to education is part of the right to development; however, the mere provision of physical infrastructure and an overall increase in access to education provides no guarantees that education will be accessible and appropriate for Indigenous peoples who suffer from discrimination and exclusion.¹¹⁵

Participation

One important role of the Global Consultation was refining the concept of ‘participation’. The report stated that: ‘Fundamental to democratic participation is the right of individuals, groups, and peoples to make decisions collectively and to choose their own representative organizations, and to have freedom of democratic action, free from interference.’¹¹⁶ Participation was identified as being ‘effective in mobilizing human and natural resources and combating inequalities, discrimination, poverty and exclusion’, however ‘should be viewed both as a means to an end and as an end in itself’.¹¹⁷ The

¹¹¹ Ibid, 18.

¹¹² Salomon and Sengupta, above n 51, 18.

¹¹³ *UNDP Policy Note, UNDP and Indigenous Peoples: A Policy of Engagement*, UNDP, August 2001, 8.

¹¹⁴ Salomon and Sengupta, above n 51, 36.

¹¹⁵ Ibid, 39.

¹¹⁶ Quoted in Barsh, above n 25, 326.

¹¹⁷ Ibid.

Human Rights Council of Australia has argued that participation as a right means that people should have control over the development process, rather than just being consulted about projects or policies that have already been decided on.¹¹⁸

CERD's Concluding Observations on Australia report stated that there is a need to 'ensure effective participation by indigenous communities in decisions affecting their land rights' and 'the importance of ensuring 'informed consent' of indigenous peoples', given discrimination against Indigenous peoples and the deprivation of their rights not only at the hands of colonists, but by 'commercial companies and state enterprises'.

Collective rights

There is extensive debate in the international human rights sphere regarding the notion of collective or group rights. The collective rights of Indigenous peoples has been increasingly debated and recognised in international law, most recently at the Working Group on the Draft Declaration on the Rights of Indigenous Peoples. Human rights jurisprudence accommodates the potential conflict between the right of the individual and the right of the group in the application of the principles of proportionality, reasonableness and objectivity.¹¹⁹

While the right to development is a collective right of all people in a particular state, the rights of Indigenous people are best fulfilled:

... within the right to development as recognized group rights within the greater collective. It is the protection of their rights as groups that offers the best method by which their right to development can be realized. Considered as groups, the policies for their development should be devised to meet their particular rights and requirements and then integrated into a national programme for development.¹²⁰

The Independent Expert has stated that 'while the beneficiary of the right to development is the individual, protecting indigenous economic production systems, recognition of lands, territories and resources, and traditional knowledge and lifestyles' as well as distinct linguistic and cultural rights, are rights of the group within the broader process of state development.¹²¹

Future implications of the Right to Development for Indigenous peoples

The François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health and the Center for Development and Human Rights, New Delhi, are running a Right to Development Project which supports the mandate of the United Nations Independent Expert on the Right to

¹¹⁸ Human Rights Council of Australia, *The Rights Way to Development: A Human Rights Approach to Development Assistance*, 1995, 118-121.

¹¹⁹ Salomon and Sengupta, above n 51, 11.

¹²⁰ Ibid, 5.

¹²¹ Salomon and Sengupta, above n 51, 30.

Development, Arjun Sengupta.¹²² The main focus of the project is to expand on how the right to development can be incorporated into various countries' development planning and processes. The project has produced many publications which elaborate on the DRD and further explore a human rights framework for development, including on the particular issues facing Indigenous peoples.¹²³

The right to development continues to be debated and promoted in various UN forums. In 2001, the UN Commission on Human Rights recognised in its resolution 2001/9 'that in the process of the realisation of the right to development, special attention should be given to persons belonging to minorities [including] indigenous people'. However, in 2002, this paragraph was not repeated.¹²⁴ The UN Commission on Human Rights decided in 2003 to request its Sub-Commission on the Promotion and Protection of Human Rights:

... to prepare a concept document establishing options for the implementation of the right to development and their feasibility, inter alia an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership, based on the Declaration on the Right to Development, including issues which any such instrument might address.¹²⁵

Forty-seven countries voted in favour of the resolution – Australia, the United States and Japan cast the only negative votes.¹²⁶ This is representative of a broader shift in Australia's position in international human rights forums, which has seen a more conservative stance on many issues the government had previously supported.

There is a lack of awareness in Australia amongst human rights agencies and advocates about the right to development,¹²⁷ and regarding the potential to use the principles and interpretations of the DRD to further debates around Indigenous rights in Australia. There is an urgent need to expand the discourse around human rights and development given the ongoing experiences of discrimination and disadvantage by Indigenous people, the abolition of ATSIC and other Indigenous-specific programs and agencies, and government reforms around welfare that disproportionately impact negatively on Indigenous people.

It is also important to note that international trade agreements are increasingly impacting on the capacity of governments such as Australia's to regulate and control health, welfare and environmental policy. There are

¹²² http://www.hsph.harvard.edu/fxbcenter/rtd_overview.htm

¹²³ http://www.hsph.harvard.edu/fxbcenter/research_publications.htm

¹²⁴ Ibid, 3.

¹²⁵ Commission on Human Rights Resolution 2003/83, U.N. Doc. E/CN.4/RES/2003/83, 2003.

¹²⁶ Marks, above n 50, 140.

¹²⁷ Recent work by the Aboriginal and Torres Strait Islander Social Justice Commissioner in relation to native title is a notable exception – see Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Promoting Economic and Social Development Through Native Title' and *Native Title Report 2003*, Human Rights and Equal Opportunity Commission, 2004.

particular ramifications for Aboriginal and Torres Strait Islander people given their lower socio-economic status and the lack of protection for cultural, intellectual property and other rights.¹²⁸ The Independent Expert on the DRD has also noted the impact of multilateral treaties on Indigenous peoples, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the World Trade Organisation. He has stressed that such treaties need to be weighed against the ability of states to fulfil their obligations in relation to the rights of Indigenous peoples within the right to development.¹²⁹

A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT

The 1990s saw an increasing integration of human rights principles and frameworks into development theory and practice. This emerged from a recognition of the limitations of earlier development models with a narrow economic or 'basic needs' focus, and from criticisms that development agencies had failed to address human rights consistently or comprehensively in policy and practice. Development and human rights agencies and practitioners began to explore the potential of applying the international standards and accountability mechanisms of the human rights system to development work. Increasingly, those working in these fields were doing so with overlapping interests and approaches in relation to issues of poverty eradication, community development, empowerment, participation, government accountability and non-discrimination. There is a reasonable body of research and analysis on the relationship between human rights and development.¹³⁰ However, there remains different interpretations and applications of this relationship, and what in reality is meant by a rights-based approach to development in development programs and practice.

There has been little analysis of the differences or overlap between the right to development and a human rights-based approach to development. The right to development has been described as both more encompassing and more limited than a rights-based approach. Stephen Marks of the Francois-Xavier Bagnoud Center for Health and Human Rights states that a right to development encompasses 'a critical examination of the overall development process, including planning, participation, allocation of resources, and priorities in international development cooperation' and the 'human rights-based approach to development is part of the right to development.'¹³¹ However,

¹²⁸ Behrendt, L. and Davis, M., 'Adverse effects of free-trade deal will hit indigenous groups hard', *Sydney Morning Herald*, March 8 2004, <http://www.smh.com.au/articles/2004/03/07/1078594233872.html?from=storyrhs>

¹²⁹ Salomon and Sengupta, above n 51, 39.

¹³⁰ For example, see The Human Rights Council of Australia, *The Rights Way to Development: A Human Rights Approach to Development Assistance*, Sydney, 1995; Tomasevski, K., *Development Aid and Human Rights Revisited*, Pinter, London, 1993; Overseas Development Institute, 'What can we do with a rights-based approach to development?', *ODI Briefing Paper*, (3) September 1999; Marks, above n 81; Uvin, P., *Human Rights and Development*, Kumarian, Bloomfield, 2004.

¹³¹ Marks, above n 81, 16.

others writing in this field stated that 'the right to development cannot function as a substitute for a human rights approach to development, because of its vagueness, lack of legal obligation laid down in an international treaty, and lack of consensus.'¹³²

A human rights-based approach to development is generally considered to place human rights as the main objective of development, using the principles and language of the international human rights system as the framework of development policy. The Human Rights Council of Australia's *The Rights Way to Development: A Human Rights Approach to Development Assistance* analysis is one of the most oft-cited in work on the human rights-based approach to development. Their approach is premised on the fact that international human rights law is the only agreed international framework which offers a coherent body of principles and practical meaning for development cooperation, and this provides ...

... a comprehensive guide for appropriate official development assistance, for the manner in which it should be delivered, for the priorities it should address, for the obligations of both donor and recipient governments and for the way that official development assistance is evaluated.¹³³

The HRCA's resources in this area outline how development agencies can work towards the realisation of all human rights through dialogue with community partners, through ensuring genuine participation of those who are affected by their work, and by basing country and sectoral strategies, project design and monitoring and evaluation on the international human rights framework.¹³⁴

Having done extensive research in this area, the UK-based Overseas Development Institute describes a rights-based approach to development as setting 'the achievement of human rights as an objective of development, [using] thinking about human rights as the scaffolding of development policy. It invokes the international apparatus of human rights accountability in support of development action.'¹³⁵ One important aspect of the approach has been identified as the way that it may force development practitioners to face up to the tough questions of their work, namely matters of power and politics, exclusion and discrimination, structure and policy.¹³⁶

While the early analysis of a human rights-based approach to development took place in the non-government sector, including by academics

¹³² Hamm, above n 95, 1010.

¹³³ The Human Rights Council of Australia, *The Rights Way to Development: A Human Rights Approach to Development Assistance*, Sydney, 1995. HRCA have also produced a manual by André Frankovits and Patrick Earle, *The Rights Way to Development: Manual for a Human Rights Approach to Development Assistance*, Marrickville, 1998.

¹³⁴ The Human Rights Council of Australia, 'Rights Way to Development Manual', *Human Rights and Development*, 1998, 1.

¹³⁵ Overseas Development Institute, 'What can we do with a rights-based approach to development?', *ODI Briefing Paper*, (3) September 1999, p. 1.

¹³⁶ Uvin, above n 130, 3.

and human rights and development agencies, it has since been explored and adopted by many governments and inter-governmental bodies, including the UK Department for International Development and various United Nations agencies. Kofi Annan, Secretary-General of the United Nations, in the *Annual Report on the Work of the Organization*, 1998 stated that:

The rights-based approach to development describes situations not simply in terms of human needs, or of developmental requirements, but in terms of society's obligation to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance where needed.

The Office of the High Commissioner for Human Rights defines its rights-based approach to development as integrating the 'norms, standards and principles of the international human rights system into the plans, policies and processes of development', and including 'express linkage to rights; accountability; empowerment; participation; non-discrimination and attention to vulnerable groups'.¹³⁷

The UNDP defines its 'human rights approach to development' as focusing 'on the realization of human rights through human development', and also states that 'the successful implementation of this strategy depends on the ability of countries to progressively and systematically mainstream human rights concerns into national legislation and governance programs, and base them on human development goals'.¹³⁸ One important aspect identified by the UNDP is that a human rights-based approach means that 'poor people become the principal actors and engaged subjects of development, rather than its passive recipients' and 'are considered central partners, rather than 'target groups', in pursuit of human rights entitlements'.¹³⁹ Both the UNDP and the World Bank have published policy papers on development and human rights.¹⁴⁰

At a workshop on Globalization, Income Distribution and Human Rights organised by the UN Non-Governmental Liaison Service (NGLS) in 1998, it was noted that 'the most immediate benefit of a human rights approach is to help overcome discriminatory policies and practices on gender, ethnic or religious grounds. But it was also stressed that a major value of integrating development policy into a human rights framework is its potential to shift priorities in the political economy of resource allocation and distribution'.¹⁴¹

Human rights has been described as a useful framework for development because it is based on a broad consensus over the content of human rights; it implies a change in perspective because of the legal obligation;

¹³⁷ See <http://www.unhchr.ch/development/approaches-04.html>

¹³⁸ See <http://www.undp.org/rbap/rights/Nexus.html>

¹³⁹ UNDP, *Poverty Reduction and Human Rights: A Practice Note*, June 2003, p. 6.

¹⁴⁰ UNDP, *Integrating Human Rights with Sustainable Human Development*, 1998; World Bank, *Development and Human Rights: The Role of the World Bank*, 1998; UNDP, *Human Development Report: Human Rights and Development*, 2000, quoted in Piron, above n 57, 27.

¹⁴¹ NGLS Roundup, 'Human Rights Approach to Development', <http://www.twinside.org.sg/title/hrdev-cn.htm>, November 1998, 2.

and it influences the agents and changes the policy dialogue between donors and recipients.¹⁴² The introduction of the human rights framework to development practice potentially challenges service providers to examine the philosophical basis and long-term outcomes of the work they undertake. In particular, it challenges governments to take responsibility for development interventions within their own country and internationally to ensure that they proactively address human rights issues, including marginalisation and discrimination against women, children, Indigenous and other minorities, with accountability, participation and adequate resourcing.

A rights based-approach to development in practice

There are differences of opinion regarding whether a shift to using a human rights framework for development signals a new paradigm for development by challenging existing approaches and providing a coherent normative framework derived from human rights law, or simply perpetuates the prevailing orthodoxy regarding development as determined by the international financial institutions.¹⁴³ While the bridging of the intellectual and operational gap between the fields is applauded, it is accompanied by concerns that this risks becoming little more than 'rhetorical, feel-good change, further legitimizing historically created inequalities and injustices in this world'.¹⁴⁴ Uvin makes the point that there is much scholarship that argues that discourse changes can have real-world impacts, and indeed that this is a key proposition of international law – that even in the absence of enforcement mechanisms, actors' perceptions, calculations, reputations and norms can be affected.¹⁴⁵ It is important that the motivations of international multilateral institutions and other powerful players in engaging in such discourse are critiqued, however it is also important to recognise the benefits that could flow for disadvantaged countries and communities from a genuine intersection of the two fields.

The main challenge for development agencies and practitioners is identifying and acting on what a human rights framework in their work actually means in practice. One development agency that has adopted a human rights framework in recent years is Oxfam Community Aid Abroad (OCAA). OCAA states that it

... employs a multifaceted approach to the realisation of human rights including working towards the empowerment of communities to determine their own futures, lobbying and advocating for fairer policies and practices, and educating and raising awareness in the Australian community of the myriad occurrences of poverty, and the

¹⁴² Hamm, above n 95, 1012.

¹⁴³ Sheehy, above n 2, 15.

¹⁴⁴ Uvin, P., 'On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise', *The Fletcher Journal of Development Studies*, Volume XVII, 2002, 1.

¹⁴⁵ Ibid, 2.

fundamental factors behind its institutionalisation and ongoing spread throughout the world.¹⁴⁶

OCAA stresses the responsibility of national governments in establishing an environment where human rights are promoted, protected and institutionalised, and calls on corporations, the business and community sector to ensure that the development that they are involved in are supportive of the realisation of human rights.¹⁴⁷ OCAA's International Youth Parliament also uses a human rights framework in its campaigning, outlining its importance as a conceptual mechanism and advocacy tool.¹⁴⁸

OCAA groups human rights into five areas, which it states are central for 'true and sustainable development':

- The right to a sustainable livelihood;
- The right to basic services;
- The right to life and security;
- The right to be heard;
- The right to an identity – gender and diversity.¹⁴⁹

Apart from life and security, these are not human rights contained in international covenants or declarations. Grouping human rights in such a way arguably provides a simple, coherent campaigning and advocacy approach which is important for an international non-government organisation such as Oxfam. However, there is some danger in moving away from using the precise language of the international human rights system, as the international law and accountability mechanisms relate to the rights in specific treaties rather than an approximation or summary of those rights. It is important that practitioners have a good understanding of the detail of international covenants and declarations if adopting a human rights framework for their development work.

An investigation by the Oxfam International network found that in some respects Indigenous Australians' rights lag behind those of Indigenous peoples in similar industrialised countries and in a number of developing countries.¹⁵⁰

Unlike Canada, the United States and New Zealand, Australia has never had any treaties, formal settlements or compacts with the Indigenous peoples that might record Indigenous rights and the terms upon which Indigenous and non-Indigenous people will live together...

¹⁴⁶ Oxfam Community Aid Abroad, 'Human Rights Approach to Development', *Oxfam Community Aid Abroad Policy*, http://www.oxfam.org.au/about/policy/human_rights_development_pol.html

¹⁴⁷ Ibid.

¹⁴⁸ Oxfam International Youth Parliament, 'The Youth Commission's Human Rights Framework', *Highly Affected, Rarely Considered: IYP Youth Commission into Globalisation Report*, Sydney, 2003, 13.

¹⁴⁹ Oxfam Community Aid Abroad, above n 146.

¹⁵⁰ Ensor, J., 'Overseas experience tells us that Reconciliation must be more than practical', *Online Opinion*, <http://www.onlineopinion.com.au/view.asp?article=1059>, January 15, 2001.

Unlike India, Australia has no provision for limited Indigenous self-government. Unlike Guatemala, our constitution does not guarantee Indigenous rights. Unlike Bangladesh and Malaysia, our constitution allows negative discrimination, rather than providing for positive discrimination for Indigenous peoples.¹⁵¹

OCAA is one of the few international development agencies that works with Aboriginal and Torres Strait Islander communities, although it is a relatively small component of its budget – in the last annual report, 5% of its project money was spent on staff and projects dedicated to Indigenous Australia.¹⁵² OCAA's key program areas in Australia involve partnerships and initiatives around the key areas of Aboriginal Health; Indigenous Youth, including youth life skills and leadership; and Indigenous self determination, including governance, civil and political participation and economic independence.¹⁵³ OCAA state that they aim to work in partnership with Aboriginal and Torres Strait Islander community groups to support community development activities and in order to create opportunities for Indigenous men and women to exercise their rights to basic social services, a sustainable livelihood, a strong voice and cultural diversity.¹⁵⁴

One example given by OCAA of their Indigenous Australia program is the support they provide to the Western Australian Aboriginal Community Controlled Health Organisation (WAACCHO). WAACCHO is made up of 19 Aboriginal community controlled health or medical services in Western Australia, which take a holistic view of health, considering the emotional, cultural, spiritual, economic and social health of the community.¹⁵⁵ Oxfam has provided WAACCHO with the resources to employ a business planning and development officer who has worked with the network of health services to develop business plans that clearly articulate the specific health needs and aspirations of Aboriginal people.¹⁵⁶

OCAA also play a policy role in advocating for the rights of Indigenous peoples. For example, in their submission to the Australian Senate's Select Committee on the Administration of Indigenous Affairs, OCAA advocate for the need for a distinct elected Indigenous body to ensure the meaningful involvement of Indigenous people in decision-making affecting their lives and communities, and as putting into practice the right to self-determination.¹⁵⁷

Development and Aboriginal and Torres Strait Islander communities

¹⁵¹ Ibid.

¹⁵² https://www.oxfam.org.au/about/annual_report/2003-2004.pdf

¹⁵³ Oxfam Community Aid Abroad, *Indigenous Australia: County Overview*, <http://www.oxfam.org.au/world/pacific/australia/index.html>

¹⁵⁴ Ibid.

¹⁵⁵ Oxfam Community Aid Abroad, 'A voice for better health', *Oxfam News*, May 2004, 1.

¹⁵⁶ Ibid.

¹⁵⁷ Oxfam Community Aid Abroad, *Submission to the Senate Select Committee on the Administration of Indigenous Affairs*, August 2004, p. 3.

Aboriginal and Torres Strait Islander people experience standards of health, education, employment and housing that are regularly likened to people living in very poor countries. There is an acknowledgement by governments and many others that this is unacceptable and that Indigenous peoples have the right to a standard of living equal to other Australians. Yet there is a lack of understanding of a concept of development and related international human rights principles and policy frameworks that go beyond a narrow economic definition of development to also encompass people's social, cultural, civil and political rights. There is also a lack of analysis of the particular issues facing Indigenous peoples in terms of the impact of development strategies and processes that focus specifically on economic outcomes.

Development is generally understood as funding and technical assistance to disadvantaged and poor communities to support the building or enhancement of capacity, knowledge and institutions in those communities. The United Nations Development Programme states that development is about 'creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests', and thus 'about expanding the choices people have to lead lives that they value'.¹⁵⁸

Fundamental to enlarging these choices is building human capabilities —the range of things that people can do or be in life. The most basic capabilities for human development are to lead long and healthy lives, to be knowledgeable, to have access to the resources needed for a decent standard of living and to be able to participate in the life of the community.¹⁵⁹

The integration of social and economic factors that the social development approach proposes acknowledges that certain groups, such as Indigenous peoples, do not have equal access to power and opportunity, and special measures are required to ensure their equal treatment and participation.

There are a number of Australian non-government organisations that are accredited by AusAID to receive funding to do development work overseas. Some of them, such as World Vision, the Fred Hollows Foundation and Oxfam, do work with Indigenous communities in Australia. While many other Australian development NGOs have experience and expertise that could benefit Aboriginal and Torres Strait Islander communities, historically few have been willing to do so.¹⁶⁰ The possible reasons for this have been described as:

- They are not funded to work in Australia, particularly where funding comes from the Australian Government through AusAID;
- Their focus is 'foreign aid', often due to the belief that there is sufficient domestic funding and capacity;

¹⁵⁸ <http://hdr.undp.org/hd/>

¹⁵⁹ Ibid.

¹⁶⁰ Jerry Schwab and Dale Sutherland, 'Philanthropy, non-government organisations and Indigenous development', *Discussion Paper No. 242*, Centre for Aboriginal Economic Policy Research, ANU, 2002, 13.

- The perception is that there is no need for 'development' work in Australia, as Australia is part of the developed world;
- A fear of Australian Indigenous politics, given that it is a highly politicised area with constant media attention;
- The Australian welfare state, as few NGOs have experience in relation to undertaking work in a political context where poverty is ameliorated by welfare;
- The diversity of Indigenous Australians in terms of location, conditions and experience; and
- There are few models or precedents for NGOs entering into development activities with Indigenous communities.¹⁶¹

It is certainly the case that NGO development work should be no substitute for adequate government funding and responsibility for ensuring that Indigenous communities have the capacity and support to run programs and services in an appropriate and sustainable way. However, the poverty, disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander communities clearly require new approaches that draw on experience regarding effective, tested and targeted responses.

Government policy in Indigenous affairs is generally determined by government electoral cycles and political ideology. There is an inherent focus on short-term projects at the expense of long-term, visionary, bi-partisan approaches. There are occasionally innovative pilot programs, however these are not regularly translated into effective, adequately resourced policy that can take into account the diversity of Indigenous communities.

Development NGOs are arguably more attuned to the realities of the necessity for long-term commitment and local or regional targeting of development programs, and can be more flexible and take more risks than governments.¹⁶² There are a range of development programs and strategies – such as locally-focused capacity building; small income-generation schemes; and community education; as well as approaches to monitoring and evaluation – that could greatly benefit Indigenous communities. Much of the language of international development work has been co-opted by governments and others working in the sector in Australia, however little of it genuinely engages with the theory and experience of that sector.

Important questions about the aim of development arise in the context of Aboriginal and Torres Strait Islander communities that can be assisted by using a human rights framework. For example, whether the aim should be to enable Indigenous communities to participate equally in the market economy and broader society; to be assisted to live a subsistence or independent lifestyle; or to be supported in being culturally distinct and self-determining. There is merit in engaging with the debates and critiques of a human rights approach to development in Australia, both to encourage productive and appropriate

¹⁶¹ Ibid, 14.

¹⁶² Ibid, 15.

engagement of development NGOs with Indigenous communities, and to better inform government policy.

Conclusion

The merits and interpretations of the relationship between human rights and development have been increasingly explored and contested in recent years. The two disciplines have largely emerged within different theoretical and institutional frameworks and involved different personnel. However, those working in these fields have been increasingly doing so with overlapping interests and approaches in relation to issues of poverty eradication, empowerment, participation, non-discrimination and government accountability. In particular, this has played out in relation to UN and other international agencies working in developing countries. As Australia is perceived as a developed country, there is little engagement of international development approaches with the disadvantage and poverty experienced by many Indigenous communities. Government Indigenous policy and programs focus on short-term economic strategies and outcomes as solutions, however this rarely takes into account social and cultural elements, or the particular historical experience of Aboriginal and Torres Strait peoples. There is a demonstrated lack of respect for the rights of Aboriginal and Torres Strait Islander peoples to self-determination, collective rights, non-discrimination, effective participation and a cultural identity. While the international development field has its own critics and failures, the ongoing discrimination and disadvantage experienced by Indigenous communities surely supports stepping outside the current domestic government policy focus to learn from the frameworks and approaches of this field.

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Culture, Law and Colonialism

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