When Rights Go Wrong –
Distorting the rights based approach to development.

By Srilatha Batliwala
Research Fellow, Hauser Center for Nonprofit Organizations, Harvard University

Over the past fifty years of development history, we have seen the repeated distortion of good ideas and innovative practices as they are lifted out of the political and historical context in which they evolved and rendered into formulas that are "mainstreamed". This usually involves divesting the idea of its cultural specificity, its political content, and generalizing it into a series of rituals and steps that simulate its original elements, but usually end up without the transformative power of the real thing. Thus good ideas - evolved to address specific development challenges - are altered into universally applicable panaceas. Transferring the right rhetoric - buzzwords and catch phrases emptied of their original meaning - is a vital part of this legerdemain. This is not to question the transfer and replication of effective interventions for social justice and development, but the manner and motives for which it is done.

As the lack of genuine global commitment to poverty eradication and social justice increases, so does the desperation to find magic bullets and quick fixes which, it is hoped, can overcome the lack of political, social and economic will to address the deeper roots of lasting socio-economic transformation at international, national and local levels. The distortion of good ideas and strategies is both a cause and a result of this process. A good example of this syndrome is micro-credit, originally developed in the South Asian cultural and political context by pioneers like SEWA in India and Nobel laureates Grameen Bank in Bangladesh. Their idea was to give poor women access to credit to unleash their latent entrepreneurial skills and eventually to raise their household incomes. But in the last decade, micro-credit has been converted into a "movement," a universal anti-poverty and women's empowerment panacea. It is increasingly force-fed by development finance agencies into every poverty context, regardless of local culture, gender relations, social structure or political history. Many of the systems developed by the early pioneers have been mechanically replicated without much critical reflection on their viability or equivalents in other contexts. It is not surprising, then, that the results have been so mixed[1].

The most recent example of this phenomenon is the attempt to push the "rights-based approach to development", in which many development assistance agencies - private, bilateral, and other - are the leading players. Their hard-sell of usually vague and differently-interpreted versions of the rights-based approach - indeed, often what the particular donor agency representative thinks is the rights-based approach - to all their development "partners" is creating a situation where rights are going sadly wrong[2].

The heart of the matter

One fundamental problem is that the rights-based approach has been advanced before some of the very troubling matters at the heart of human rights themselves have been

[1] Ben Rogaly, 1996, "Micro-finance evangelism, destitute women, and the hard-selling of a new anti-poverty formula", Development in Practice, Vol.6, No.2, pp100-112
[2] SIDA, 2000, "Working Together: The Human Rights Approach to Development Cooperation", report of the workshop of donors and practitioners held in Stockholm, Sweden, October 2000, donor workshop report p.9, and NGO workshop report, P.7

addressed or resolved. In a compelling critique of the evolution of the current body of international human rights[3], Makau Mutua argues that not only have the current body of human rights been framed from an overwhelmingly European, Rousseauvian perspective of the individual as both the object and subject of rights, but that they have increasingly become the goal and instrument of a modern-day civilizing project in the non-Western world.[4] Mutua asserts that the philosophical underpinnings of the current body of human rights have not been evolved through a genuinely multicultural ground-up debate, distilling what is authentically universal from the highest values and ethical frameworks of societies around the world.

As a former feminist activist and native of Karnataka, I can strongly identify with this argument: if the values that imbued the revolutionary Veerashaiva movement of thirteenth century Karnataka had informed the construction of the international bill of rights, the struggle of the international women's movement against the androcism of the earlier rights framework[5] may not have occurred. Women's right to social equality and physical security were clearly articulated by Bhakti Saint Akkamahadevi in several of her *vachanas*[6] and gender equality was an integral part of the Veerashaiva struggle.
I raise this not with naïve chauvinism but to illustrate the rich and diverse sources that have existed - outside the West - for framing universal rights

The individual focus of the rights discourse is another inherent problem that has been widely critiqued. This has sought to be corrected by focusing on collective rights, but this does not negate the core problem of assumed universality. What is more, the experience of indigenous communities attempting to protect their customary rights to forests and land in the face of market forces indicates that collective rights are no more easily asserted or protected from violation than individual rights, and that even when they are, it is in terms that are far from traditional norms and values. Native Americans in the United States, for instance, have asserted their sovereignty over tribal lands through rights-based legal instruments, but are struggling to control and distribute revenues from gambling casinos with the collapse of customary governance and judicial systems and increasingly predatory external forces they are ill-equipped to confront:

> *"....additional problems are now arising in the reservations due to the lack of pre-existent law regarding the issues raised by open gaming and the impending collapse of traditional Indian courts of justice. This is becoming a major issue as cybercriminals and organized crime are seeing the lightly defended reservation gaming as open territory.*"[7]

Another problem with the rights discourse itself - and pertinent to the arguments I will later present in this article - is that the *responsibilities* side of the discourse has been

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[3] The Universal Declaration of Human Rights, The Covenant on Civil and Political Rights, the Covenant on Social, Economic and Cultural Rights, The Convention on Elimination of All forms of Discrimination Against Women, the Convention on Rights of the Child, etc., etc., collectively known as the Universal Bill of Rights.

[4] Makau Mutua, 2002, *Human Rights: A Political and Cultural Critique*, Philadelphia, University of Pennsylvania Press, Pennsylvania Studies in Human Rights Series.

[5] Which, till the mid-Nineties, did not recognize rape and domestic violence against women as human rights violations.

[6] Devotional song-poems that contained clear philosophical precepts and condemnations of social evils such as caste and women's oppression.

[7] See http://www.americanindians.com/article.htm?id=87&Native_American_Casinos for a discussion of the problems resulting from casinos.

very under-developed, especially the notion of collective or communal responsibilities[8]. Western-influenced rights advocates even in India fear that the notion of responsibilities is too weak, and used by oppressive forces to reassert their subordination of oppressed groups – women in India, for instance, are often reminded of their responsibilities rather than their rights.

The rights community speaks of rights-holders and duty-bearers, and in theory, at least, the rights-based approach to development acknowledges the critical role of informal mediating structures like communities and clans, and that duty-bearers include not only the state and its agencies, but a range of customary and informal social structures:

- The analysis aims to determine what i*mmediate, underlying and structural obstacles* there are to realising rights. This includes examining social, cultural, legal and administrative frameworks, which requires studying how people's claims are processed by authorities in the different arenas of negotiation (e.g. customary law, religious law, statutory law, constitutional law, etc.) (Moser & Norton, 2001; The Human Rights Council of Australia, 2001).

- A rights-based analysis must necessarily *identify responsible duty-bearers* (UN, 2003). Not only does this include the state at different levels, it also comprises the identification of other duty-bearers in society, including family, the community, corporate actors, etc. The capacities and resources of the duty-bearers to fulfil their duties should be assessed.[9]

Indeed, for most poor and oppressed social groups, the local social structures in which they negotiate their lives, resources and rights are the determining layer through which their individual circumstances are mediated. Even the rights of citizenship are mediated by communities and identity groups of various kinds – witness the phenomenon of "vote banks".

On the other hand, many cultures around the world accord a higher place to *collective duties and responsibilities* rather than to individual or collective *rights.* This is very significant for the implementation of the rights-based approach, which tends, in practice, to define state authorities and agencies as the primary duty-bearers in protecting and promoting rights, and emphasizes individual citizens as rights-holders. This is particularly true when donors have promoted the approach, since the visibility and possibility of measuring successful individual claims and implementation of state obligations shifts the focus to these actors rather than less visible mediating structures. I am not here advancing a cultural relativism argument, but merely pointing out that rights strategies – and particularly their assessments - have not yet been fully developed around how and where most people – particularly women and oppressed and marginalized groups - actually experience the affirmation or denial of their rights: the family, clan, tribe, caste group, etc..

There is also the knotty problem of the hierarchy of rights – wished away as false or politically motivated by rights advocates - that continues to plague us. Some people's rights – such as indigenous people's right to their traditional territories (the dam-affected

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[8] David Flynn, "Whats Wrong with Rights? Rethinking Human Rights and Responsibilities", *Australian Social Work*, Vol.58, No.3, pp244 – 256, September 2005
[9] Cecilia M. Ljungman, COWI, "Applying a Rights-based Approach to Development: Concepts and Principles", paper presented at the conference on Winners and Losers from Rights-based Approaches to Development, Nov.2004, p.10, accessed on Nov.12, 2006, at:
http://www.sed.manchester.ac.uk/idpm/research/events/february2005/documents/Ljungman_000.doc

in the Narmada Valley) – will apparently sometimes clash with the equally valid right to employment and food security of others (the drought-affected farmers and agricultural labourers in Kutch and Saurasthra)[10]. I do not want to get into the debate, here, of who is ultimately responsible for or gains from putting these rights into opposition – I am merely trying to show that there are a large number of very complex and unsettling issues at the heart of human rights, and therefore of rights-based approaches to development.

My point is that it is from this very contentious place, with its enormous and unresolved conceptual and strategic conundrums, that the *discourse* of the rights-based approach to development has emerged. It is useful to stress, however, that rights-based *strategies* themselves are much older than this discourse – one could argue, for instance, that all the anti-colonial struggles were rights-based approaches to development, and that a large number of the struggles of marginalized and oppressed groups in our country over the past fifty years – the movements of Dalits, peasants, workers, displaced people and women – were also rights-based struggles to access and equitable distribution of the fruits of development. So it is important to distinguish between the *discourse* of rights-based development and actual rights-based movements for equality, development, self-determination and participation, which are certainly much older.

The rationale that gave rise to the rights-based discourse somewhere in the late Nineties is important to understand. It was intended to move development out of the realm of a *privilege* that benevolent regimes might – or might not – provide their citizens to enjoy, to a *right* that could be "legally enforced", claimed and asserted. It was intended to remove the element of voluntary fulfilment of basic human needs by benign states – what Ake called the "modest privilege of protection from the power of the state"[11], and replace it with the legal *obligation* of regimes to enable and actualize the basic rights of their citizens. But most of all, the rights-based approach was originally developed by several international activist NGOs (such as OXFAM) in order to link human rights and development, and to surface the link between poverty and rights.

The rights approach is viewed as being closely allied to the achievement of the Millennium Development Goals of the UN, and the Poverty Reduction Strategies of the World Bank. Advocates of the approach argue that poverty eradication and the right to adequate income, health, education, peace, security and participation in governance should not be a matter of privilege, benevolence, or development goals, but the basic right of all human beings. As some rights advocates would have it, the rights based approach was developed to enable people to *fulfil their basic needs by demanding basic rights*. Although social and economic rights are obviously at the core, the approach is usually described as encompassing a much broader and more holistic notion of human well-being. Clearly the rights-based approach to development has many important strengths, but there are four basic processes through which it goes wrong in practice:

A conceptual cloud

Firstly, the rights-based approach has been defined so broadly as to almost blunt it of its usefulness, since almost any duty-bearer could claim that rights are being integrated into

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[10] see, for instance, Gail Omvedt's arguments in her Open Letter to Arundhati Roy, August 1999, http://www.narmada.org/debates/gail/gail.open.letter.html

[11] Claude Ake, 1996: "Mistaken Identities: How Misconceptions of Relations between Democracy, Civil Society and Governance Devalue Democracy", Keynote Address, International Conference on Governance, Getulio Vargas Institute, Sao Paolo, Brazil, November 1996.

their policies and actions. Examine the following definition of the approach taken from the website of the UN High Commission on Human Rights[12]:

Box 1: What is the Rights-Based Approach?

"A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights……. Essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development……..The norms and standards are those contained in the wealth of international treaties and declarations. The principles include equality and equity, accountability, empowerment and participation. A rights-based approach to development includes the following elements: an express linkage to rights, accountability, empowerment, participation, non-discrimination and attention to vulnerable groups.

 "Rights-based approaches are comprehensive in their consideration of the full range of indivisible, interdependent and interrelated rights: civil, cultural, economic, political and social. This calls for a development framework with sectors that mirror internationally guaranteed rights, thus covering, for example, health, education, housing, justice administration, personal security and political participation.

"Rights-based approaches focus on raising levels of accountability in the development process by identifying claim-holders (and their entitlements) and corresponding duty-holders (and their obligations). In this regard, they look both at the positive obligations of duty-holders (to protect, promote and provide) and at their negative obligations (to abstain from violations). They take into account the duties of the full range of relevant actors, including individuals, States, local organizations and authorities, private companies, aid donors and international institutions.

"Such approaches also provide for the development of adequate laws, policies, institutions, administrative procedures and practices, and mechanisms of redress and accountability that can deliver on entitlements, respond to denial and violations, and ensure accountability. They call for the translation of universal standards into locally determined benchmarks for measuring progress and enhancing accountability."13

As we can see, this offers a very comprehensive framework and some useful possibilities for those attempting to hold states and other powerful institutions more accountable for implementing equitable and effective development policies and programs and progressive legislation. At the same time, it is clear that its elements are more easily embraced and monitored at the level of law and policy, but less so in terms of administrative procedures and practices. Most of all, it would be very difficult to hold communities and traditional social structures, whose hierarchies and authority systems are not controlled by formal law, to account for violations or positive change. In this sense, the rights-based approach is not necessarily more empowering than other

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[12] See Guidelines of the Unitedd Nations Office of the High Commissioner for Human Rights, www.unohchr.org
[13] ibid.,

strategies in moving from formal to substantive equality, though that is one of its intentions. The example of the development of gender-sensitive school textbooks, while the drop-out rate for girls remains high or Dalit children are made to sit outside the classroom - due to factors largely unrelated to schools and textbooks - is a good example of this gap. The right to education for all is guaranteed by Indian law and policy, but is in fact mediated by intersecting institutions like the family, clan, caste, economic status, and so forth.

In other words, the rights-based approach as currently articulated by donors does not adequately or explicitly place the analysis of social power, and strategies to shift power relations, at the center, though its principles certainly emphasize such analysis. It is also unclear how the rights-based approach is superior to its predecessors – what is the added value? – over the awareness-building/empowerment/organizing approaches that many of us used decades ago in our grassroots work, though rights-approach advocates acknowledge these as the foundations from which it has sprung.[14] The only advantage appears to be that many traditional NGOs, engaged in poverty alleviation or sustainable development work, and who did not explicitly incorporate power analysis and rights into their approaches, are now compelled to do so at least in their rhetoric.

Rhetoric or practice?

This brings us to the other way in which rights go wrong: the *rhetoric* has assumed greater importance than the practice. Writing proposals and progress reports that are liberally sprinkled with the language of the rights-approach - viz., "claim-holders", "duty-bearers", "assertion", "violations", etc. etc. - has become vital to mobilizing resources from donors that have adopted the approach. Old approaches are often rebottled in the rights rhetoric. And the obverse of this phenomenon is the dismissal of even the most impressive empowerment strategies and movements because they do not package their work in the rights language[15]. This is a worldwide phenomenon – as one activist from an organization that has mobilized hundreds of Kenyan women to claim their land rights from tribal councils after being widowed by AIDS put it: "They tell me that I must use the 'rights-based' approach. Is not our work rights-based unless we use that word? Is our work not rights-based because we have changed only the customary inheritance system, and not some written law?"[16]

Rights vs Justice - respecting other discourses

 And this brings us to the most troubling dimension of the rights discourse and the way the rights-based approach is interpreted. The experience of grassroots activists from India and other parts of the world shows that in many cultural contexts, the translation of several words at the center of the rights approach is problematic for people and communities on the ground. In India, for instance, terms like "haq" and "adhikaar" are loaded, and in the more feudal contexts in which highly marginalized and oppressed people live, they could trigger premature and aggressive repression of their struggles for change. In my own experience, poor women often preferred the terminology and tools of negotiation ("unko samjhayenge" "nyay maangenge" "unki zimmedari samjhayenge"), because their reality involved constantly negotiating and re-negotiating their power. They

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[14] ibid.

[15] Personal communications of a range of grassroots activists and community-based organizations with whom the author has interacted over the past two years.

[16] Identity withheld at speaker's request

opted for persuasion and consensus-building more often than confrontation They chose very carefully when to use the language and strategies of "claiming", "demanding" and "asserting" – often when they had achieved a critical mass of mobilization and conscious politicization - because the terms themselves signalled readiness for confrontation. Women always moved very carefully from negotiation to confrontation, because they would have to bear the cost of possible backlashes from state- and non-state actors in local power structures.

The film by Deepa Dhanraj [17]on the Nari Adaalats of Gujarat illustrates these patient, powerful but negotiative strategies extremely well, and the power and legitimacy in adjudication that the Nari Adaalats have gained with the community as a result. The film also illustrates that women are both more comfortable and more confident in using a discourse of *justice and injustice*, and the *responsibility* of a range of duty-holders to deliver justice, than of rights and their assertion. This may appear a fine distinction, but these culturally specific modes of realizing formally-enshrined rights and transferring them into socially-sanctioned norms and practices are extremely powerful modes of change. They are often derided and dismissed because their modalities appear less militant or too soft to some rights advocates. The aggressive rights rhetoric in fact alienates a number of what are in reality rights-based movements, because it rejects their emphasis on the responsibilities side, and those who don't wish to associate with it.

Who retains agency?

Finally, and perhaps most significant of all, these culturally-specific alternatives place a much greater degree of *agency* in the change process in the hands of those most marginalized by existing power structures. The rights approach – whether to development or civil and political rights – often shifts agency into the hands of intermediaries (such as lawyers, bureaucrats, NGO leaders and elected representatives) whose accountability to the marginalized is, in contexts like ours, weak at best. And rights inevitably go wrong if those with the greatest stake in their rights become dependent on external actors for interpreting, asserting, and realizing their claims for a better deal. Modes of assertion based on demanding justice and fulfilment of responsibility, which don't always use formal systems of redress, are often less visible, involve more negotiation, and address a full range of power structures, but don't necessarily lend themselves to quick and tangible measurement. Most of all, they use local forms of engagement and articulation that are not familiar to advocates of the rights-based approach.

There is clearly an urgent need, particularly among development assistance agencies, to broaden, deepen and nuance the understanding of rights themselves and of rights-based approaches, and particularly so at the level of action strategies. There are no magic bullets or fast tracks to social justice. It is time to move away from formulas and rhetoric that focus on elite modes of expression and on formal governance and redressal systems. We must listen more to how people engaged in struggle articulate their goals and strategies. We must build not our own mantras about the right or wrong approach, but a greater respect for the wide repertoire of means employed by marginalized people, exercising their own agency and articulation, that result in the actual realization of sustainable rights.

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[17] Deepa Dhanraj

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