

Delivering On The Promise of Human Rights — Where Are We And Where Do We Need To Be?

Roger Dunston¹

Setting the scene

Increasingly the concept of human rights is invoked as a language of challenge and conceptual counterpoint in a world in which dominant ideologies, in particular, economic liberalism, subjugate human and environmental agendas and priorities to economic agendas and priorities. That human rights have come to represent an almost universally accepted language of challenge reflects the impressive conceptual, legal and institutional developments that have occurred in human rights discourse and practice over the past fifty years.

Of particular significance have been the Universal Declaration of Human Rights 1948; the two International Covenants — Civil and Political Rights, 1976 and Economic, Social and Cultural Rights, 1976; the regional initiatives — the European Convention of 1950, the American Convention of 1969 and the African Convention of 1981; the Conventions on the Elimination of All Forms of Racial Discrimination, 1966 and the Elimination of all Forms of Discrimination Against Women, 1979; the Declaration on the Right to Development, 1986; the Convention on the Rights of the Child, 1989; the Declaration on the Elimination of Violence Against Women, 1993; the International Covenant on the Rights of Indigenous Nations, 1994; the Draft Declaration on the Rights of Indigenous Peoples, 1994 and, in the field of economic and social rights, the conventions and many recommendations emanating from the International Labor Organisation.

As a counterpoint to these significant initiatives there has also developed an increasing tension, a credibility gap, between what is articulated and required and what is achieved. Increasingly the active participation of governments is identified as critical to the achievement of satisfactory human rights implementation. Increasingly government action, when benchmarked against human rights standards, is seen as

1 Roger Dunston, Director of Social Work Services at Royal North Shore Hospital, Sydney. Undertaking doctorate research in Human Rights and Public Policy in the Department of Social Work, Social Policy and Sociology, Faculty of Arts, Sydney University.

inadequate, ambivalent and minimalist. Increasingly the efforts of human rights practitioners and organisations is directed towards encouraging, assisting, demanding and shaming governments to improve their human rights performance.²

This article seeks to provide an overview of this developing human rights culture; to identify the contours of contemporary debate and practice and, given the critical role of governments in relation to human rights achievement, seeks to understand their disappointing, ambivalent and minimalist performance. I will argue that governments are increasingly confronted with a series of complex and difficult public policy choices, in particular, choices about the positioning of governments and government policy in relation to the market, choices that are frequently reducible to the value and priority given by governments to either human rights priorities or economic priorities.

Where are we now — mapping the conceptual and practice territory of the past fifty years

By way of setting the scene for a discussion of government performance it is important to identify what, I will argue, is a discernible consensus in relation to a number of key human rights issues and debates. This consensus, which is articulated in the efforts of United Nations committees, conferences and world summits increasingly calls for an approach to implementation that requires human rights priorities to be integrated into all public policy development. Such an approach also requires that governments, at best, place human rights principles and priorities at the centre of public policy making and, at least, ensure human rights priorities are not made peripheral and secondary to economic and market priorities. This position is succinctly put in the most recent report of the Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade: "human rights standards ... should be the central driving force of all governments' policies".³

2 This schism between promise and reality is one of the most well developed and consistent themes of human rights literature. For instance, Philip Alston, in discussing the reality as opposed to the promise of economic and social rights implementation, remarks "... there is not a single important indicator that would show anything other than the relative neglect, and often also the absolute neglect, of economic, social and cultural rights in practice" "Economic and Social Rights" in Henkin L and Hargrove J L (eds) *Human Rights: An Agenda for the Next Century* (The American Society of International Law, Washington DC, 1994) p 149.

3 The Parliament of the Commonwealth of Australia Joint Standing Committee on Foreign Affairs, Defence and Trade *A Review of Australia's Efforts to Promote and Protect Human Rights* (AGPS, Canberra 1994) p xxxix.

Whilst at risk of over-simplifying many complex and contested debates, the contours of this developing human rights consensus can be discerned in: ⁴

- less discussion about whether human rights are *rhetoric* or *reality*, and more discussion that recognises human rights as “reality”. This view does not measure the impact or reality of human rights solely in terms of legislation or public policy but, rather, recognises that human rights concepts, language and practice is influential in all spheres of individual, social, cultural and political life, both nationally and internationally.
- less discussion about whether human rights implementation should be negative (protective/actor focused) or positive (enabling/structurally focused) and more discussion about integrated, complementary and expansive implementation.⁵ This development transcends the either-or, negative versus positive conceptual and practice dichotomy that for so long has been the implementation divide in relation to human rights. It recognises that both protective and enabling strategies are required and complementary, both strategies respond to different aspects and phases of implementation. I will refer to this integrated and complementary approach to implementation as an *expansive* and *normative* approach and contrast this to a *minimalist* and *discretionary* approach.
- less discussion about whether civil and political rights are the only *real* rights or are superior rights when contrasted with economic, social, cultural, environmental and development rights, and more discussion about the indivisibility of rights. Equally, the ownership or enjoyment of rights is discussed less in terms of rights only inhering in individuals, and more in relation to rights inhering in both individuals and social collectivities (the rights of nations and peoples). This development recognises the complementary function of groups of

4 Exemplifying the trends identified in this section of the article is the work of the United Nations Development Program. Their annual Human Development Reports (Oxford University Press, New York 1990–1997) provide a strong conceptual base for what I will later identify as an expansive and normative approach to human rights implementation. A recent Australian publication by the Human Rights Council of Australia *The Rights Way to Development: A Human Rights Approach to Development Assistance* (Human Rights Council of Australia, Sydney 1995) also provides a succinct and Australian focussed approach to expansive and normative implementation. Similarly, the ongoing work of the United Nations Committee on Economic, Social and Cultural Rights has consistently argued for and developed an implementation framework supporting a normative and expansive approach.

5 The actor/structural distinction is developed later in this article and is taken from the work of Galtung J *Human Rights in Another Key* (Polity Press, Cambridge 1994) pp 26-55.

rights in relation to other groups of rights, it also recognises that an individual's enjoyment of her or his rights is strongly related to their participation in and experience of many social collectivities.⁶

- less discussion about the performance of states being tested against an individual right or group of rights and more discussion about a state's performance when tested against a broad spectrum of rights — civil and political, economic, social and cultural and development. Whilst the singular, or singular group of rights approach (eg civil rights or political rights) has and will always be important in focusing on particular types and strands of rights implementation, it ignores what I will later describe as the *cumulative implication* for states of their participation in a developing international, regional and national human rights culture. The conceptual and implementation sweep of development rights strongly reflects the cumulative implication.⁷
- less discussion about sovereign states standing in splendid political and legal isolation as the primary instigators and contexts pertaining to human rights implementation, and more discussion about the relationship between states and a variety of regional and international groupings and institutions and the relationship between states and a growing body of regional and international human rights jurisprudence.⁸

6 For instance, the International Commission of Jurists strongly develop the theme of indivisibility in their Bangalore Declaration and Plan of Action (Geneva, 1995) p 5, : "The Conference ... re-affirmed the fact that economic, social and cultural rights are an essential part of the global mosaic of human rights. ... resolved that jurists in the future should play a greater part in the realisation of such rights, than they have in the past, without in any way diminishing the vital work of lawyers in the attainment of civil and political rights."

7 All the recent United Nations World Summits — Human Rights, Social Development, Women, and Habitat, provide good examples of an expansive, indivisible and cumulative approach to implementation, an approach grounded in the broad conceptual and practice framework of the right to development applied to both developing and developed nations. During a recent discussion with an officer of the Australian Department of Foreign Affairs and Trade about the schism between civil/political rights and economic, social and cultural rights, "development rights" were described as providing a "healing" framework in which all other rights are required to co-exist (unpublished notes ,December 1996).

8 For an elaborated discussion of these matters see Randall KC *Federal Courts and the International Human Rights Paradigm* (Duke University Press, Durham 1990) and Rosas A "State Sovereignty and Human Rights: towards a Global Constitutional Project" in Beetham D (ed) *Politics and Human Rights* (Blackwell Publishers, Oxford 1995).

This final contour, the complex relationship between sovereign states and a variety of other political and legal bodies and jurisdictions, has significant and potentially positive implications for the future of human rights implementation and the strengthening of a global and expansive human rights culture. Writers such as Randall see such developments as constituting a “paradigm shift” in relation to sovereign states and human rights:

Creating norms to govern a sovereign states’ territorial behaviour is simply revolutionary... Although we may take the post-war developments some what for granted, they simply cannot be squared with the science of decentralised and exclusive sovereign governance. These developments have not restored the world order to the pre-conflict status-quo, but have dramatically changed the order, unfolding a new story of global issues and relations.⁹

As a counterpoint to this clearly articulated, expansive and normative conceptual consensus is a literature on human rights implementation which is permeated with accounts of immense effort and acute frustrations experienced by dedicated practitioners, activists, academics and Non-Government Organisations (NGOs).

Philip Alston’s discussion of the difficulties and frustrations of attempting to monitor the performance of states in relation to the International Covenant on Economic, Social and Cultural Rights is representative of the types of issues identified by many writers and practitioners in relation to the implementation of all groups of rights:

Among the many factors that ... distinguish this task are: ... the ambivalence of most governments towards economic, social and cultural rights; the strong ideological undertones of the debate; ... the absence of national institutions specifically committed to the promotion of economic rights qua rights; the complexity and scope of the information required in order to supervise compliance effectively; the largely programmatic nature of some of the rights; the more limited relevance of formal legal texts and judicial decisions; and the paucity of non-governmental organisations with a developed and sophisticated interest in economic rights as such.¹⁰

The ambivalence identified by Alston in relation to normative and expansive human rights implementation is, arguably, the defining feature of the literature on government implementation. This ambivalence can be discerned in the most recent

9 Randall K, *op cit* p 200.

10 Alston P “The Committee on Economic, Social and Cultural Rights” in Alston P (ed) *The United Nations and Human Rights — A Critical Appraisal* (Clarendon Press, Oxford, 1992) p 474.

report of the Australian Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade into human rights implementation in Australia.

The majority report makes a range of important and forward looking recommendations. For instance, it recommends developing a regional dialogue on human rights through ministerial and other meetings; it recommends improving the links between Australia and various United Nations forums and processes; it recommends a greater involvement of the Australian Parliament in monitoring human rights performance and an improved integration between the states and the Commonwealth in relation to the treaty approval process; it recommends an inquiry into a Bill of Rights for Australia; it recommends a range of improvement initiatives in relation to the health and well-being of Aboriginal communities; it takes a strong advocacy position in relation to what are clearly identified breaches of human rights by various foreign governments.¹¹

Whilst all of the above are vitally important, they construct human rights in a particular and limited way. For instance, it is striking how little the report's recommendations call into question domestic and overseas economic and political arrangements that create and perpetuate inequality, that diminish the capacity of individuals, communities and nations to enjoy their human rights. Many of the recommendations, particularly as they relate to the domestic arena, are procedural — ratifying conventions, improving treaty processes, improving information flow, improving the tabling of documents and the working of committees. Even when the report makes strong recommendations in relation to the disadvantages experienced by Aboriginal and Torres Strait people, there are major omissions. These omissions are about the distribution of power and opportunity. For instance, there is no direct reference to land rights, a matter that is crucial to the well-being of Aboriginal and Torres Strait people.

These omissions are strongly highlighted and challenged in the minority report of Senator Dee Margetts. She comments:

I agree with the majority of the report and the direction and intent of its recommendations ... Nevertheless, the report is a political document, and as such is a compromise between views and priorities of the Committee's members. It is apparent that at least some of the compromises have been made with those having strong positions in support of (export) trade, military defence, military co-operation, and defence exports ... Support for such

11 The Parliament of the Commonwealth of Australia Joint Standing Committee on Foreign Affairs, Defence and Trade, *op cit* pp xxi-xxxix.

goals in the report have resulted in qualifications of stronger statements supporting human rights objectives ... [T]he entire issue of development and human rights went largely unchallenged. This is a significant and huge oversight. It is frequently assumed that the objective of economic growth justifies various human rights abuses as “temporary” and “necessary”... It (the report) does not look at the increasing gulf between rich and poor nations ... This report does not challenge the status quo in any way. In my opinion it does not go far enough.¹²

Such omissions are both surprising and disappointing given the committee’s own concluding analysis:

Human rights standards are aimed at improving the quality of life of ordinary people. They should be the central driving force of all governments’ policies. As this report testifies, this is patently not so. Governments are often the perpetrators of abuse ...¹³

The majority and minority reports represent radically different views of how governments construct and position themselves in relation to their human rights obligations. Whilst both reports argue a strong in-principle commitment to human rights, both adopt radically different positions as to the scope and priorities of satisfactory implementation. The majority report represents a pragmatic or discretionary view. From this perspective human rights are seen as one amongst many matters of importance to governments. Human rights are frequently relegated to a secondary, procedural or dependent position in relation to economic priorities and agendas. To refer again to Senator Margetts, the majority or discretionary position simply “does not go far enough”, it is, when tested against an expansive and normative approach, minimalist.

The minority report, on the other hand, represents a normative or expansive view. From this perspective human rights are made the central priority of public policy and are not conceived as dependent upon economic circumstances or achievements. Neither are they made subject to economic and political arrangements that generate and sustain inequality and disadvantage. This is not to say that economic circumstances or achievements are unimportant or unrelated to the achievement of human rights outcomes, rather, they are important because they *enable* the further realisation and enjoyment of human rights. From this perspective

12 The Parliament of the Commonwealth of Australia Joint Standing Committee on Foreign Affairs, Defence and Trade, *op cit* p 329-333.

13 The Parliament of the Commonwealth of Australia Joint Standing Committee on Foreign Affairs, Defence and Trade, *op cit* p xxxix.

economic achievement is not conceived as a desirable end in itself but as one important means to further human rights ends.¹⁴

Clearly, the position adopted by governments in relation to their human rights obligations — discretionary/minimalist or normative/expansive — will and does have profound implications for the scope, type and depth of implementation that will occur.¹⁵ The position taken by governments, discretionary or normative is, perhaps, the litmus test of whether human rights will exist as a language of challenge, an alternative political discourse, or be incorporated into mainstream political discourse and public policy.

State ambivalence — what drives the discretionary view of human rights implementation?

The discretionary view of human rights implementation, in particular, the subjugation of human rights priorities to economic priorities, is not only evident within the Australian situation but is a well documented and defining feature of international political discourse. Michael Pusey comments on the pervasiveness of this situation in relation to the issue of public sector reform:

14 The recent NGO Forum, United Nations Fourth World Conference on Women Beijing Declaration of Indigenous Women (Asia Indigenous Women's Network, 1995) para 10-11, which ran parallel to the main United Nations Fourth World Conference on Women, identifies a similar tension between the discretionary and normative positions. It also develops, as does Senator Dee Margetts, *ibid* pp 329–333, a critique of the discretionary position based on its subjugation to economic priorities. "It (the main conference Platform of Action) does present a comprehensive list of issues confronting women and an even longer list of actions which governments, the UN and its agencies, multilateral financing institutions, and NGOs should do ... However, it does not acknowledge that this poverty is caused by the same powerful nations and interests who have colonised us and are continuing to recolonise, homogenise, and impose their economic growth development model and monocultures on us. It does not present a coherent analysis of why is it that the goals of 'equality, development and peace', becomes more elusive to women each day in spite of the three UN conferences on women since 1975. ... It even underscores the importance of trade liberalisation and access to open, and dynamic markets, which to us, pose the biggest threat to our rights, to our territories, resources, intellectual and cultural heritage."

15 For a useful and concise discussion of policy choices confronting governments and, in particular, the implications of such choices for Australia see Saunders P *Towards a Balanced Vision: The Role of Social Goals, Social Policies and Social Benchmarks* (Social Policy Research Centre, University of New South Wales 1994).

In every country from the late 70s programs of public sector reform have been driven by a conservative agenda. Although the vigour and scope of these changes have varied from one nation to another, in every case they followed conservative liberal maxims about the “crisis” of “ungovernable democracies” and of “overloaded states” and always aimed at moving some of the coordination functions of nation — societies away from states and bureaucracies to economies and markets.¹⁶

At the core of this “conservative agenda” and its consequent manifestation in public policy directions, is a commitment to the rationality and mechanisms of the market as superior to the rationality and mechanisms of governments for coordinating and distributing valued economic and social resources and opportunities.

Taking a longer term view of this process, MacPherson, argues that any short term analysis of this phenomenon misses a vital historical point — the ascendancy of the economic has strong antecedents in longer term historical processes. Central to MacPherson’s argument is the view that “economic relations” have, since the seventeenth and eighteenth centuries, increasingly come to penetrate and dominate moral, social, political and rights relations.¹⁷

The outcome of these trends is well captured by Pusey:

We find that this state apparatus is caught within projections of reality that give primacy to “the economy”, second place to the political order, and third place to the social order. Indeed, perhaps the most central finding is that, since the 1970s, reality has been turned upside down and society has been recast as the object of politics (rather than, at least in the norms of the earlier discourses, as the subject of politics) ... The tail that is the economy wags the dog that is society ...¹⁸

The result is:

- the encapsulation of political discourse and practice within the economic;
- the uncoupling of social context, lived experience and political discourse and practice;
- the creation of individuals as the object as opposed to subject of politics.¹⁹

16 Pusey M *Economic Rationalism in Canberra* (Cambridge University Press, Cambridge 1991) p 3.

17 MacPherson CB *The Rise and Fall of Economic Justice and Other Papers* (Oxford University Press, Oxford 1985) pp 13-14.

18 Pusey M, *op cit* p 10.

19 *Ibid* pp 159-207 for a further development of these matters as applied to the place and role of the governments.

When these ideological trends and their resulting policies are considered in their connected totality they pose profound challenges to governments committing to a political and moral culture of expansive and normative human rights; to social justice and equity; to a robust and universal welfare state and to the concept of the state as containing and counterbalancing the play of market forces to achieve, as its primary goal, the creation of the political, social, cultural and economic conditions that enable individuals and social collectivities to realise and enjoy their human rights.

The challenge of expansive human rights

The enabling dynamics of normative and expansive human rights stand in stark contrast to the beliefs, dynamics and outcomes of economic liberalism. As such they represent a profound challenge to governments who have committed to an economic model of the world, the individual and of public policy.

In contrast to the uncoupling of social context and political practice and the creation of the individual as the object rather than the subject of politics, the discourse and practice of expansive human rights, metaphorically speaking, extends like an ecological web connecting and validating the many different contexts of human action and experience. The expansive human rights perspective recognises that significant linkages exist for good or ill between individuals and social collectivities and their social, cultural, environmental, economic and political contexts.

The types of social, political and economic values and arrangements that underpin the development of a normative and expansive human rights culture have, perhaps, been most fully articulated within the interlinked discourse of social justice. For instance, the British Commission on Social Justice Report notes:

The values of social justice are for us essential. They are: the equal worth of all citizens, their equal right to be able to meet their basic needs, the need to spread opportunities and life chances as widely as possible, and finally, the requirement that we reduce and where possible eliminate unjustified inequalities. Social justice stands against fanatics of the free market; but it also demands and promotes economic success.²⁰

Within the Australian context, Bettina Cass, has over many years developed a social justice model of government and public policy which is strongly underpinned by a

20 Commission on *Social Justice Social Justice, Strategies for National Renewal* (Vintage, London 1994) p 1.

normative and expansive human rights position. Her model requires that governments be concerned with and responsive to the “protection of the vulnerable”, the “provision of the conditions for autonomy” and the “provision of the conditions for social as well as political citizenship”.²¹

In a recent address Cass elaborates this view in relation to “three fundamental elements of a new social settlement” within Australia and poses this as a challenge to the economic liberalist position. She argues:

I will outline three elements which ... would challenge the unequalising trajectories of economic and labour market policies. These are the imperative to reduce unemployment and long-term unemployment; the development of a more comprehensive and adequate system of income support based on a considerably expanded definition of social and economic participation; and a strengthening of the collective and legislatively protected base of wage-fixation, so that enterprise agreements can proceed without the slide to a low-wage labour market for peripheralised workers and without the erosion of conditions central to living a human and sociable life.²²

Central to these views and policy directions, as it is central to the expansive and normative human rights position, is a recognition of the influential relationship that exists between political, economic and cultural arrangements and the experience and action of individuals and social collectivities.²³

Elaborating on the significance of these linkages Alan Gewirth argues that the enjoyment of human rights can only occur through the individual’s experience of the “necessary conditions of action”:

21 Cass B “Expanding the concept of social justice: implications for social policy reform in the 1990s” (Paper delivered at the conference on Social Issues in Town Planning, Department of Town Planning, University of New South Wales 1990).

22 Cass B “Contract state, social charter or social compromise towards a new Australian settlement” (Paper delivered at an Academy of Social Sciences seminar held at the University of Sydney 1995) p 19.

23 Saunders *Op cit* p 87 identifies what might be termed a growing consensus as to the need to productively connect the social with the economic: “There is a growing acceptance of the need to seek a new realignment of economic, social and political forces, both nationally and internationally. That realignment involves choosing a better balance between the economic and non-economic: one which combines material prosperity with social well-being; which protects the freedom of the individual but also encourages individuals to participate in the community.”

[a] very important reason for grounding human rights in the necessary conditions of human action is that this serves to emphasise that the ultimate purpose of the rights is to secure for each person a certain fundamental moral status. All the human rights, those of well-being as well as of freedom, have as their aim that each person has rational autonomy in the sense of being a self-controlling, self-developing agent who can relate to other persons on a basis of mutual respect and cooperation, in contrast to being a dependent, passive recipient of the agency of others. Even when the rights require positive assistance from other persons, their point is not to reinforce or increase dependence but rather to give support that enables persons to be agents, that is, to control their own lives and effectively pursue and sustain their own purposes without being subjected to domination and harms from others. In this way, agency is both the metaphysical and moral basis of human dignity. Consequently, when the human rights are held to have as their objects the necessary conditions of action, the connection of the rights with human dignity is not merely asserted but is explicated in terms of the autonomous rational agency that grounds this dignity.²⁴

Gewirth argues that human rights discourse and practice constitutes a set of normative relations that exist between the moral subject (the individual) and the object (the necessary conditions of action). In returning to Pusey's metaphor "the tail of the economy wags the dog that is society", expansive human rights contests this situation arguing a reversal of current power relations is required. A controlled and constrained individual, an individual wagged, cannot be an autonomous rational agent.

Whilst I have so far referred to a significant overlap and similarity between the discourse of social justice and human rights there are, I believe, in the present economic rationalist climate conceptual and strategic advantages in developing a challenge to the dominance of the economic via a human rights as distinct from a social justice model. These conceptual differences are well identified by Mick Dodson, Commissioner, Aboriginal and Torres Strait Islander Commission on Social Justice, when he contrasts a "needs" or "comparative" based approach to an "entitlement" or "rights" based approach:

Policies and programs which rest primarily on a perception of need and powerlessness subtly reinforce the powerlessness of the recipients who are seen as being given justice rather than as receiving their rights. The recognition of entitlement is in itself an act of empowerment.

24 Gewirth A Human Rights, *Essays on Justification and Applications* (University of Chicago Press, Chicago 1982) pp 5-6.

The welfare-based model operates in an essentially comparative way. The less fortunate are compared with the more fortunate. Measures are taken to achieve a comparatively fairer outcome. This promotes the view that there are no absolute entitlements, merely comparative entitlements.²⁵

“Entitlement” and “absolute entitlement” are at the core of human rights, they inhere within the individual, they are not negotiable. Such concepts are not congruent with discretionary or needs based policies, not are they congruent with market approaches — they cannot be purchased, acquired or lost via market transactions. When human rights entitlements are placed into a market context they are no longer human rights entitlements.

Whilst many social justice theorists argue the moral basis of social justice theory and, therefore, argue against discretionary and market based policy approaches, the human rights approach with its moral and entitlement base linked to and supported by a growing body of national and international law and jurisprudence is likely to support more effective challenges to the subjugation of human, social and moral concerns to economic priorities.

How can we test government performance — concepts and indicators

Whilst there is no clear or easy answer to this question there is a growing literature that, firstly, identifies ways of thinking about satisfactory performance and, secondly, identifies critical standards and public policy indicators that can be used to monitor the performance of governments.

Actor and structural implementation

A useful contribution to the debate as to what constitutes satisfactory performance has been made by Johan Galtung²⁶ through his distinction between “actor” specific and “structural” specific implementation approaches.

Actor specific approaches tend to focus on the individual — a grievance or complaint is identified and tested with compensation as the remedy. The practice of legal standing ensures that participation in such matters is confined to a particular individual or group. Whilst having focus, specificity, evidence related

25 The Human Rights Council of Australia, *op cit* p 30.

26 Galtung J *Human Rights in Another Key* (Polity Press, Cambridge 1994) pp 26-55.

to a particular grievance and outcome, the actor approach, except in limited and specific class action situations, has no way of arraigining broad and interlocking political, economic and social arrangements or conditions that may be in breach of a state's human rights obligations. As Galtung notes in elaborating on the actor-specific approach: (this) "perspective is ... silent on the structure between actors".

A structural approach, on the other hand, addresses the implementation and monitoring of human rights commitments via structure — political, social and economic arrangements. A structural approach seeks to create the conditions that support the realisation of human rights. It is concerned with enabling, with the structure between actors, with the impact of interlocking institutional arrangements on the ability of individuals and social collectivities to act effectively and independently. Galtung is not arguing that one approach to human rights implementation is preferable or should be exclusively applied, rather that a complimentary process will always be required: "One perspective tends to be structure-blind. But the other tends to be actor-blind." (Figure 1 provides a schematic distinction between these two perspectives. This schema draws strongly, but with some modification, on Galtung's work).

FIGURE 1

ACTOR/NEGATIVE	STRUCTURAL/POSITIVE
Focuses on the 'real' individual in context.	Focuses on the 'nominal' individual within the collective/aggregate.
Focuses on lack of impediment, of protection of the space to act and experienced grievance.	Focuses on enabling, on contextual and structural conditions and arrangements. Focuses on the necessary conditions of action and agency.
Draws on the legal concept of 'standing'.	Draws on the policy concept of 'entitlement'.
Uses mediation, conciliation and adjudication as resolution of grievance.	Use of public/social policy and direct action in relation to mechanisms of resource/opportunity allocation and distribution.
Outcome — lack of impediment and compensation — references non-discrimination in an individual/actor sense	Outcome — re-distribution of valued resources and opportunities in the direction of greater equality — references non-discrimination in a collective sense.
Sensitive to actor within collective identity — eg; a women, a disabled person; a person of NESB, an Aboriginal person, a child etc;	Sensitive to collective identity — women; disabled; NESB; Aboriginal; children etc.

Historically and conceptually, the actor specific approach is generally associated with civil and political rights implementation. I will refer to this approach as *first level* implementation. First level, in both its historical sequence, and conceptually in its linkage with the protection focus of civil and political rights. The structural and complementary actor/structural approach fits well the requirements of economic, social and development human rights and to what is a complex and developing culture of expansive human rights. I refer to this approach as *second level* implementation. The developmental and historical momentum toward second level implementation, a momentum that sees actor/protective and structural/enabling implementation as both complimentary and inseparable, is well identified in the literature.²⁷

What are governments required to do — to respect, to protect and to enable

Eide identifies three levels of implementation obligations applicable to governments — “primary level — respect”; “secondary level — protection” and, “tertiary level, the state has the obligation to fulfil the conditions under which everyone can enjoy their rights.”

Eide notes the fulfilment of this tertiary obligation may take two forms:

- Assistance in order to provide opportunities for those who do not have them under existing circumstances (empowerment), including employment opportunities;
- Provisions of resources, through educational and health services for all, through planned and co-operative social security arrangements, and through safety nets when no other possibility exists for persons whose basic needs would otherwise not be met.²⁸

Whilst debate exists around the exact phrasing and intent of each element in this schema, there exists considerable consensus as to it being a useful context in which

27 Well developed examples of this approach to implementation are presented in the United Nations Development Program's Human Development Reports (1990-1997) and have been consistently developed in the comments and recommendations of the United Nations Committee on Economic, Social and Cultural Rights.

28 Eide A “Future protection of economic and social rights in Europe” in Bloed A, Leicht M, Nowak & Rosas A (eds) *Monitoring Human Rights in Europe* (Martinus Nijhoff, London 1993) p 188.

to elaborate more detailed levels of implementation and satisfactory performance. For instance, Katrina Tomasevski,²⁹ further elaborates this schema as to satisfactory performance by governments. She comments on the need to look beyond a simple analysis of “effort” but rather evaluate the overall “real commitment” of governments, that is, what governments actually do, as demonstrated in a systematic way across the broad range of government policies and practices.

In keeping with the schemas and comments outlined above, a contemporary response to what constitutes satisfactory implementation performance requires governments to:

- construct and act in relation to their human rights obligations as a pre-eminent system of commitments and obligations, obligations that should take centre stage in the development of government policy;
- develop an approach to human rights implementation that is expansive, that conceives of the various levels or phases of human rights development as indivisible;
- respond to the overall development of a complex human rights culture — the cumulative implication;
- act to respect, protect and enable;
- use complementary actor and structural strategies — strategies that are both particular and general, actor specific and structural broad.

With reference to such a normative and expansive approach, it is possible to identify six requirements or indicators of satisfactory performance. These indicators can be used to profile and evaluate the implementation activity of governments in relation to their human rights obligations. (These requirements and indicators are, I believe, representative of a broad consensus within the literature.)

1. *Satisfactory performance requires that human rights are mainstreamed.*

That is, human rights considerations must be applied to all areas of state activity and policy that shape — support or diminish — the political, social and economic conditions that effect the enjoyment of human rights by individuals and social collectivities. This indicator would assess a government’s preparedness through legislation and policy to co-ordinate the major mechanisms of resource and opportunity creation and distribution within society and ensure these mechanisms

29 Tomasevski K *Development Aid and Human Rights* (Pinters Publishers, London 1989) pp 128-130.

are directed to achieving the outcomes of expansive human rights. That is, they would respond to the cumulative implication. Critical to this mainstreaming will be a preparedness to contain and co-ordinate market mechanisms. All major areas of policy — health, education, housing, employment, income support, industrial relations, the environment — will significantly impact and will need to be tested in relation to human rights obligations.³⁰

2. *Satisfactory performance requires evidence of government activity to create and influence the political, economic and social conditions in ways that increase, strengthen and support the realisation of human rights.*

This test builds from the first but reaches far beyond intent. It seeks to test the direction and degree of effort governments expend in seeking to achieve expansive human rights outcomes. All government activity shaping the mechanisms of resource and opportunity distribution will need to be considered as to direction and effort. For instance, Kathleen Pritchard in her study of what facilitates the achievement of human rights outcomes noted the significant role of government revenue:

Other things being equal, it (the study) suggests that increasing national government revenue may go a long way in improving human rights conditions ... Given an awareness of the potential impact of government revenue on human rights conditions, it could inform internal budgeting, foreign assistance and international aid processes and priorities, potentially resulting in improved human rights conditions.³¹

Such a revenue position would clearly challenge the current bi-partisan political view held in Australia that taxes should not be increased!

3. *Satisfactory performance requires evidence of government activity being grounded in non-discrimination as to race, gender etc.*

In addition it requires evidence of positive discrimination where historical or current circumstances/arrangements can be shown to constrain or limit the realisation of human rights by particular individuals/groups when compared with other individuals/groups. This test addresses the reality of complex social, political and economic stratification. It tests intent, direction and effort in relation to those who are

30 Saunders P *op cit.*

31 Pritchard K "Comparative human rights: promise and practice" in Cingranelli D (ed) *Human Rights, Theory and Measurement* (St Martins Press, New York 1988) pp 150-151.

vulnerable through personal circumstances or as a result of structural factors. It looks for associations between structures and the experience and actions of individuals and social collectivities.³² This indicator focuses strongly on the structural-actor interface and requires considerable research effort and sophisticated research methodologies, both qualitative and quantitative, to assess whether the demonstrated effort makes a significant difference. In relation to assessing outcomes Tomasevski notes the deficits in this area:

Most studies which deal with the realisation of economic and social rights use quantitative data to measure changes in literacy rates, school enrolment ratios, nutrition levels, unemployment, or size of landholdings. Such studies tend to blur distinctions between human needs and human rights by subsuming the realisation of human rights under the satisfaction of needs. Also, they tend to neglect the effort of the government concerned, as a result of cross-national comparisons, whereby less developed countries are continuously at the bottom of the variables measured.

The main disadvantage of such studies is the lack of a conceptual framework which conforms to human rights. The nature and scope of the rights is not specified, therefore a yardstick for measuring the realisation of human rights is missing ... The process of measurement, though, goes far beyond human rights law: it is transdisciplinary. It necessitates the incorporation of research approaches and findings from a variety of disciplines.³³

4. *Satisfactory performance requires evidence of government activity to create and sustain mechanisms of accountability and complaint registration for individuals/groups in relation to their experience of human rights and, additionally, of government compliance with the reporting requirements established by the various human rights covenants.*

This indicator complements the non-discrimination indicator and seeks to respond to the experience of actors in the broadest sense — actors being individuals, groups and communities — those who should ultimately benefit from human rights implementation. Establishing accessible, meaningful and empowering mechanisms of accountability, complaint registration and reporting

32 Tested against this indicator, the current Australian government's vacillation and ambivalence in relation to issues such as, Aboriginal land rights, the funding and role of the Human Rights and Equal Opportunity Commission, affirmative action policies, is profoundly disappointing and disturbing.

33 Tomasevski K *op cit*, pp 139-140. See also the work of the United Nations Development Programme.

has been one of the most resisted aspects of human rights implementation. A report from the Committee of Experts on monitoring human rights in Europe gives considerable emphasis to ensuring effective complaint procedures, streamlining and coordinating these, extending the right of access to NGOs and ensuring the dissemination of information about human rights achievements and deficits.³⁴ Similarly, the UN's Committee on Economic, Social and Cultural Rights has also proposed an optional protocol to the International Covenant on Economic, Social and Cultural Rights.³⁵

5. *Satisfactory performance by governments in relation to evaluation requires evidence that implementation outcomes have been conceived in a complex way, involving both a consideration of overall effort, allocation of resources, integration into mainstream policy and the measurement of the outcomes for intended beneficiaries — individuals and social collectivities.*

Of necessity, such evaluation will involve the creation and maintenance of complex minimum data sets and processes for the carrying out of multi-disciplinary research that seeks both quantitative and qualitative answers. Additionally, it requires support for organisations at arms length from government to carry out such evaluations.

6. *Satisfactory performance by governments requires evidence that intended beneficiaries and other relevant parties have been meaningfully involved in the processes of policy making, implementation, evaluation and reporting.*

This indicator looks for an empowering, consultative and participatory approach to the implementation and evaluation of governments' human rights activities. Whilst there exists a strong in-principle commitment to such policy consultation, it is clear that many consultations leave much to be desired both in terms of scope of involvement and the felt effectiveness of such consultations:

Essential would be the widest possible participation by citizens, community base organisations and NGOs. The lack of such involvement is now widely recognised.³⁶

34 Bloed A Leicht M Nowak & Rosas A (eds) *Monitoring Human Rights in Europe* (Martinus Nijhoff, London 1993) pp 319-323.

35 Committee on Economic, Social and Cultural Rights *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (UN doc:GENERAL E/CN.4/1997/105, 18 December 1996).

36 Bloed A *op cit* p 213.

A concluding comment — governments at the crossroads

Whilst the fine detail of what constitutes satisfactory performance for any particular government in relation to its human rights obligations will always require individual interpretation, there are, I believe, three concluding points that can be drawn from the above analysis. Firstly, the requirement placed on governments to respond in a normative and expansive way to their human rights obligations has never been stronger. Secondly, that any satisfactory response must, as a minimum, incorporate human rights priorities in both actor protective and structurally enabling ways across all major areas of public policy. Thirdly, if governments are to perform more effectively in relation to their cumulative human rights obligations they will need to replace their policy and political commitments to the primacy of the economic with policy and political commitments that give primacy of place to human, social, cultural and environmental concerns. ●