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**‘New’ Global Development Cooperation Modalities and the
Rights of the Orphaned Child**

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Abstract

Baxi's observation that a 'trade-related' or 'market-friendly' discourse of human rights is gaining increasing dominance (Baxi 2002) raises concerns about the dignified life of vulnerable people. Such people have no bargaining power to benefit from a trade-related human rights discourse. The broad argument in this paper is that useful human rights and development cooperation discourses have to be responsive to vulnerable people. A poignant test case for such responsiveness is that of orphaned children. This paper examines both human rights and development cooperation discourses in the light of current trends related to orphanhood. In particular, the paper interrogates the dominant modalities for the delivery of development cooperation in the context of human rights and their correlative duties. In this regard, the paper joins Tan to question the dominant modalities of development cooperation (Tan 2005). The more specific argument in the paper is that there is a disconnect between 'new' development cooperation modalities and a human rights discourse based on dignified life for the orphaned child. The paper finds that the 'new modalities' are neither new nor legal nor effective for the dignified life of orphaned children.

Keywords:

Rights of the Child, Dignified life, Orphanhood, Development Cooperation, International Law, Global Development, Cooperation Modalities

1. Introduction

There has been growing hope that 'new' development cooperation modalities will result in increased solution of well-being related problems in the countries that are not economically developed (DfID 2004). There are three dominant 'new' modalities, in this regard. The first is direct budget support, where development cooperation is either generally or specially directed towards the implementation of recipient country budgets. DfID is among leading donor agencies that has adopted and is promoting this approach (DfID 2004). The second, known as Sector Wide Approaches or SWAs, aim at directing development cooperation for definite sectors as opposed to projects. The third, known as basket funding, aims at pooling resources into a fund type resource for use in development sector or programmatic themes.

This article uses the rights of orphaned children and examines whether such a hope is worthwhile. Like all children, orphaned children are vulnerable. The vulnerability of orphaned children is exacerbated by loss of parents, economic deprivation, discrimination, and mental trauma. cursory reference to globalized human rights and development cooperation discourses might indicate that the orphaned child matters. The Convention on the Rights of the Child encompasses the orphaned child. Articles 1 and 2 of the Convention require that every child must enjoy the rights stipulated in it. Article 20 recognizes rights for the child who has permanently or temporarily been deprived of her or his family environment. Such children, which include those orphaned, according to Articles 20 and 25 are entitled to special assistance from the state, alternative care, and periodic review if alternatively placed.

To realise such requirements, international law has, among other measures, at least since Article 55 of the U.N. Charter, insisted on cooperation between states. The increasing dominance of a "trade-related" or "market-friendly" discourse of human rights (Baxi 2002) is not centred on the enjoyment of human rights by orphaned children. In such a context, the feasibility of modalities for development cooperation need to be interrogated and judged according to the degree to which they contribute to the dignified life of vulnerable people, such as the orphaned child.

This paper is in four parts, of which this introduction is the first. The second part notes the trends of orphanhood and increasing levels of development modalities. The third part examines the response of human rights and development cooperation discourses to debilitating orphanhood and notes that the dominant modalities for development cooperation are neither new nor legal nor responsive to the realisation of the rights of the orphanhood. The last part is the conclusion. It calls for a discourse of development cooperation based on practical realisation of human rights and correlative duties at all societal levels. A real test for any development cooperation modality, the conclusion underlines, is to make maximum contribution to the dignified life of the orphaned child.

2. Human Rights, Development Cooperation, and Orphanhood

Human rights and development cooperation converge on at least one broad expressed human aspiration: progressive dignified life. The preambles of global human rights instruments underline such aspirations as survival, development, peace, dignity, participation, protection, freedom, progress, equality, justice, and respect. These are human aspirations for everyone. The quality of enjoyment of these life goals is never closed. However, enjoyment of life goals such as these is supposed to be progressive. This is because the goals are based on human needs, which are dynamic.

Dignified life signifies what every person must enjoy and how such a person should be treated. To these ends, the what and how of life, are dynamic, responding to changed conditions, aspirations, relations, and obstacles. Human rights discourses are about well-being in so far as they posit human goals, values and principles. Indeed, derivatives of the word 'right', 'righteous' and 'righteousness' capture the ideal gist of international human rights norms, one value of which is justice. In this sense, specific human rights such as food, shelter, education, and freedom of expression can be described as need-based entitlements that every human being must normally enjoy for a dignified life. Human rights principles such as universality, non-discrimination, respect for human dignity, participation, interdependence, and accountability relate to how every person must be treated and how decisions and actions must be approached and taken so that dignified life is not just preserved, but advanced. Development cooperation must comply with and promote specific human rights and principles in its contribution to the dignified life of orphaned children.

2.1. Orphanhood Vulnerabilities and Global Divisions

Orphanhood is often an example of an antithesis of dignified life or vulnerability (UNICEF, 2003). Indeed such is the situation in the countries most affected, such as Tanzania (Mhamba and Ndyetabula 2004; de Waal et al 2004; Chungu and Msuya 2004). Others have referred to Africa's orphaned children as 'a generation at risk.' (Foster, Levine, and Williamson 2005) or a 'lost generation' (Caruso and Cope 2006). This however needs not be the case. There exists a type of orphanhood that does not threaten individual and human development. Such is the case when biopolitical systems are adequately responsive to orphanhood. The second type of orphanhood, however, threatens individual and human development or well-being. This type of orphanhood can be described as debilitating. Viewed in this way, orphanhood is very much a social construct, constructed at particular societal levels through the failure or actions of duty bearers to prevent incidents of orphanhood, tackle its manifestations, and rehabilitate those adversely affected.

Debilitating orphanhood results in other vulnerabilities for children. Due to the absence of parents, many orphaned children are heads of households, fending and providing for siblings. Child headed households and others affected by orphanhood, tend to be destitute. Old and often poor grandmothers are increasingly left with the responsibility of caring for orphaned grandchildren, as a result of AIDS. Many orphaned children are likely to be or work on the street. Deprived children are vulnerable to be in conflict with the law. Orphaned children are likely to be overburdened with domestic work in foster homes or suffer exploitative child labour. They are further likely to be subjected to or in especial danger of being physically and sexually abused or exploited. Many girls are forced to marry early and or to become teen mothers. Orphanhood is pervasively exacerbating global divisions between rich and poor countries.

The debilitating incidents of orphanhood are largely experienced in Sub-Saharan Africa, Asia, and Latin America and the Caribbean. With improved health and general quality of life, the levels and trends of orphanhood should have been decreasing (UNAIDS, UNICEF, USAID 2004). That trend has however been reversed in Sub-Saharan Africa, Asia, and Latin America and the Caribbean. In 2003, 93 countries from Sub-Saharan Africa, Asia, and Latin America and the Caribbean had 143 million orphaned children, largely because of AIDS (UNAIDS, UNICEF, and USAID 2004). The impact of AIDS is so great that between 2001 and 2003, the global number of orphaned children due to AIDS rose from 11.5 million to 15 million. Sub-Saharan Africa, hardest hit by AIDS and poverty, has the highest proportion of orphaned children, at 12.3%, 43.4 in absolute numbers. This was an increase of one third since 1990. By 2010, one in three children in the hardest hit 25 countries will be orphaned. Of these 25 countries, only one is not Sub-Saharan., with the highest country proportion in Botswana, at 20%. Although the rate for Asia is lower, at 7.3%, the region had the largest absolute number of orphans in 2003, 87.6 million (UNAIDS, UNICEF, and USAID 2004). The trends further show that not only is there disproportionate burdens on women, but that more and more female carers will die leaving orphaned children. Whilst there were more paternal orphaned children in 2000, there will be more maternal and double orphaned children by 2010. All these trends are not shared by any of the G8 and other high human development ranked countries.

The causes of debilitating orphanhood are largely mirrored in the structural causes of underdevelopment that prevail in most Sub-Saharan Africa. The persistent immediate causes of orphanhood include HIV and AIDS and its effects (UNAIDS, UNICEF, and USAID 2004). From AIDS and other preventable diseases, parents die. Many of those who die because of having been infected by HIV contract the virus mainly because of careless sex. The result is absence of or weakened duty bearers, when parents or willing relatives are dead or unable to care for the child due to illness. Governments are still unable to facilitate adequate access to ARVs. Health systems are weak in their management of illnesses, especially opportunistic diseases. In cases where the economy is in decline, such as Zimbabwe, orphanhood can easily become a major developmental problem (Government of Zimbabwe undated; Government of Zimbabwe 2003); UNICEF-Zimbabwe 2001(a); UNICEF-Zimbabwe 2001(b); UNICEF-Zimbabwe 2001(c)), (Bicego, Rutstein, and Johnson 2003), (Foster et al. 1997).

These global divisions make orphanhood one attribute that weakens Sub-Saharan Africa countries in their relationship with rich countries. . The need to counter debilitating orphanhood makes these countries vulnerable to the control of those that have resources to give. The susceptibility of many

orphaned children to disease, death, illiteracy, discrimination, and exploitation entail extra state expenditure and loss in productivity. Previously, Sub-Saharan Africa could have relied on its extended family social insurance systems. The scale of the problems and the effects of the cash economy however have so weakened both the nuclear and extended family that they are struggling to cope. In the words of a Kenyan widow,

In the past, people used to care for orphans and loved them, but these days they are so many and many people have died who could have assisted them and therefore orphanhood is a common phenomenon, not strange. The few who are alive cannot support them (UNICEF 2003, p. 3).

The dominant policy in Sub-Saharan Africa is still that orphaned children should be nurtured in families. The Global Framework indorses this view (UNICEF and UNAIDS 2004). The state's lack of well-directed resources has resulted in this policy being a tool for the state to abandon its duties. This contributes to the increase in family poverty (UNICEF 2003). As a result, there are continuing calls for more work and suggestions of 'better' frameworks (Subbaro and Coury 2004). Mere resort to international standards without contextualising them may result in continued dominance of harmful tradition mores in areas such as inheritance (Caruso and Cope 2006). Not surprisingly, there have also been calls for more 'aid' or development cooperation to respond to the debilitating manifestations of orphanhood (Stover, Bollinger, Walker, Monasch 2007).

2.2. Orphanhood and Increased 'Aid' Following the MDGs

Orphanhood has contributed to an increase in development assistance and commitments. This is partly because there is realization that the Millennium Development Goals (MDGs) (United Nations 2000) may not be met if the causes and manifestations of orphanhood are not addressed. So galvanized has been the resolve to address orphanhood that a global framework for OVC (orphans and other vulnerable children) was published in 2004 (UNICEF, and UNAIDS 2004; United Nations 2002) at a time when the MDGs themselves have become tools for the mobilisation of economic resources. Since the MDGs were agreed, more economic resources have been promised (UNDP 2005). The estimate was that aid was at USD 78 Billion in 2004, USD 12 Billion higher than in 2000 in real terms. Between 2000 and 2004, the USA's ratio of aid to Gross National Income increased from 0.10% to 0.16%. The transition economies of Eastern Europe are becoming new donors, so are the oil-rich Arabic countries. In addition, there were pledges to increase aid at the Monterrey Conference on aid. The post-Millennium Declaration era has further been characterised by announcements for increased 'aid.' The USA, the largest donor in financial terms, announced its Millennium Challenge Account, to raise aid spending by 50%. This translated into USD 4 to USD 5 Billion annually by 2006. The European Union members' 2005 commitments to attain the 0.7% of GNI target could raise an additional USD 30 to USD 40 billion by 2015. Canada has pledged to double its 2001 aid base by 2010, whilst doubling its aid to Africa by 2008. In addition, philanthropic billionaires have since 2000 increased their support to meeting the MDGs (Schervish 2005). Specifically for orphaned children, the European Commission in December, 2007 donated 10 million Euros for orphaned and vulnerable children in Zimbabwe (UNICEF 2007).

Three types of motives help explain the concern about the possible failure to meet the goals. The first is that certain individuals are, by disposition, charitable and take altruistic decisions and actions. Pressed between a choice for personal interest and altruism, however, many such people display human frailty in favour of personal interest. The second, and most consistent with human rights discourse, is compliance with international law. States must render assistance to each other, according to international human rights law. Such motivation would recognize that children have to enjoy dignified life as a matter of right. There is, however, very little evidence to indicate the dominance of such motivation. Denmark, exceptionally, refers to the UN Charter as one reason for its development assistance (Act on International Development Co-operation as published in Act no. 541 of 10 July 1998). The third and dominant motive is enlightened self interest (UNDP 2005, ch. 3). Some give because they perceive orphanhood as a threat to their security. Giving is viewed as a way to prevent criminality and protect personal safety and security. Others view orphanhood as a drain on the national economy, since the State may incur heavy costs to care for people who have no or little means for sustenance. Others regard orphanhood as a threat to current or future markets, since such children may

develop with reduced capacities as actual or potential consumers and producers. None of these three motives reflect a sense of duty correlative to the realisation of the rights of the orphaned child.

3. The Response of Human Rights and Development Cooperation Law

The absence of a sense of duty correlative to the rights of the orphaned child is reflected in the law on human rights and development cooperation. Even the much hoped for MDGs do not seem to attract such a sense of duty. Despite the evidence of increased development assistance in financial terms, the prevailing view is that the MDGs are unlikely to be fully met in certain poor countries (United Nations 2006; The International Bank for Reconstruction and Development 2005). One category of children that will suffer most as a result of such failure is that of orphaned children. Despite such failures, a strong belief persists that 'aid' is still essential for human development in poor countries. The Human Development Report 2005 makes the following assertion:

Aid is a unique resource. It is the only international mechanism that can be directed to the poorest—to secure their rights to basic services, to promote equity, to address the enormous gulf in global living standards and to build human capacity, the foundation of wealth and opportunity (UNDP 2005, p. 208).

There is thus some acceptance of 'aid' as necessary to materialise development cooperation. This acceptance pervades both dominant discourses of human rights and the law on international development cooperation.

3.1. The Inadequacies of Dominant Well-being and Human Rights Discourses

There is currently a scarcity of conceptions on human rights and development that would sufficiently encompass orphaned children as people who must enjoy their human rights. Indeed, Baxi's (2002) observation that the "trade-related" or market friendly discourse of human rights has become dominant underlines a general tendency in well-being and development theories to underline contract doctrine, starting with the conceptualisation of 'development' itself. The Human Development Report's description of human development as 'a process of enlarging people's choices, by expanding human functionings and capabilities' (UNDP 2000, p 17) is underpinned by contract doctrine or a Kantian conception rights. Central to a Kantian conception of rights are wills, reason, actions and individual autonomy. Kant's view is that a right 'comprehends the whole of the conditions under which voluntary actions of any one Person can be harmonised in reality with the voluntary actions of every other Person, according to universal Law of Freedom' (Kant 1990) A right, according to him, co-exists with 'freedom of the will of each and all in action'. The aim of this contract-based conception of rights is the achievement of liberty and egalitarianism. It is a view of development that is too narrow for the dignified life of the orphaned child. To enjoy well-being does not exclusively entail expanded choices and capabilities. In the same vein, Amartya Sen's linking of human rights to development is narrow. Amartya Sen focuses on freedom and choice to determine well-being by his references to capabilities, freedom and choice. (Sen 1999 and 2000).

Unfortunately, an earlier alternative holistic view of well-being by the University of Helsinki with regard to measurement did not gain prominence. That perspective appears more holistic and inclusive for orphaned children. The University of Helsinki propounded a method termed as 'Having, Loving, and Being', a catch-phrase intended to stress that there are certain needs without which a human being is unable to survive, avoid misery, and participate in society (Allardt 1993, p. 91) 'Having', includes health, education, and economic resources. 'Loving' is a catchword for the need to relate to other people and form social identities. 'Being' connotes the need for integration into society and to live in harmony with nature. In this sense, the well-being of the orphaned child must relate to what she or he enjoys in life and how she or he is treated. How that child is treated will depend on the processes, strategies, modalities, decisions and actions that people and institutions take at various levels of society, including at the global level. In this sense, development cooperation should be recognised as a global-level strategy for dignified life, including for orphaned children.

A possible perspective that would help link development cooperation with the human rights of orphaned children is the theoretical quest for global justice, often in the context of globalisation. Singer has called for a 'global ethics', to reflect that human beings live in one world (Singer 2002). Such ethics could easily have come from the globalized human rights discourse. However, there is increasing debate as to whether the globalized human rights discourse can contribute towards global justice. Some regard such a discourse as an example of imperialistic hegemony. For example, Ghai observes that human rights, as a programme, has not contributed much to social progress (Ghai 2001). Baxi has observed that though largely globalized, the human rights discourse as represented by the Universal Declaration of Human Rights (United Nations 1948) is increasingly dominated by human rights that are 'trade-related' and 'market-friendly' (Baxi 2002).

The domination of 'trade-related' human rights certainly results in the exclusion of many vulnerable people, including orphaned children. While orphaned children can use human rights discourse to claim the enjoyment of dignified life, the power constraints embedded in the discourse makes such claims impracticable.

A key reason for this difficulty is the domination of the Kantian or contract doctrine-based discourse of human rights. The Kantian conception of human rights has at least two flaws related to the enjoyment of human rights. The first is that it conflates having and enjoying human rights. Difficulties in enjoying rights do not necessarily entail absence of such rights. In the case of children, such as those who have just been born, difficulties in enjoying their rights lie in the inability of the dominant discourse of human rights to make physical, psychological, and economic capacity conditions for such solidarity. The second is that this negates the notion that human rights are necessary because people are human, as the conclusion may have to be that children are not human. It can be argued however that human rights inhere in every person. When this is accepted, a distinction emerged between posited and inherent human rights. Struggles for the enjoyment of human rights, in this sense, are justifiable because the rights already exist but are not enjoyed.

This argument though does not dispute the position that Baxi shares with others such as Fitzpatrick that there is a certain ambivalence about human rights. Whilst they may result in exclusion, human rights may be used to address issues related to dignified life. Fitzpatrick (2000), however, has argued that although both globalization and human rights are exclusionary in set-up and imperialistic in use, they can be quite useful. mainly because there is a common humanness in the world. Fitzpatrick underlines that the human rights contained in the Universal Declaration of Human Rights appear to be based on such common humanness. Needless to state that such common humanness is applicable to orphaned children. Fitzpatrick concludes in the following terms:

Yet, like any legal artefact human rights can always be otherwise than what they are. They exist not just in a determinant particularity but also in an illimitable responsiveness – nursing the 'unconquerable hope' [quoting a phrase from Arnold, 1956]. In that lies their involving promise, yet also their seductive oppressions (Fitzpatrick 2000)

There is a further addition to notion that in as far as human rights are ambivalent, they may be used to ensure dignified life on the basis of common humanness. The human rights contained in the Universal Declaration of Human Rights, as all other rights, correlate to duties (Hohfeld 1913). The correlation of human rights to duties entails a basis for insisting that certain decisions and actions must be taken or done. It is a worthwhile question to consider whether the correlation of human rights to duties can be applied to development cooperation. The application of the notion of duty to global justice with regard to economically poor countries has been vigorously posited by Pogge (Pogge 2002a) He views global governance as a hegemonic strategy mainly against the poor. From a perspective of moral universalism (Pogge, 2002b), his analysis of well-being often involves reference to human rights. To him, development assistance is not mere help or charity, but a matter of duty. Unlike many who are optimistic, Pogge regards the MDGs to eradicate poverty as 'go slow' (Pogge 2004). The scope of Pogge's central argument is that there is a duty to ensure that the well-being of the poor extends to development assistance and aid, as a strategy for well-being. It further encompasses the orphaned child, a vulnerable person. Development assistance and aid, according to Pogge, are necessary because of the injustices rich countries and institutions have inflicted on the poor and other vulnerable people. The global political and economic order, according to Pogge, harms people in economically poor countries. Pogge rejects the shifting of blame to such countries, perceiving the main causes as global. In this light, Pogge stresses that those in position to provide 'aid' or development

assistance have negative duties 'not to uphold injustice, not to contribute to profit from the unjust enrichment of others.' Such people are implicated regarding the misery of the poor (Pogge 2005b). The question, according to Pogge, is not to help the poor or vulnerable, but rather to protect 'them from the effects of global rules whose injustice benefits' those that are better-off (Pogge 2002). Such rules include international law, which he describes as recognising and violating the rights of the poor (Pogge 2005a).

Pogge's arguments have attracted much academic response (Pattern 2005), but it shows a perspective that can start making orphaned children more visible in international law, human rights, and development cooperation. There are at least two strong points to underline from Pogge's thesis, with regard to the well-being of orphaned children. The first is the energy of the direct language to connect misery with people's decisions and actions. Such direct use of language allows necessary linkages of the well-being of the orphaned child and those who may be guilty of not performing the relevant negative duties. Causes of poor well-being are linked to actual role players. An orphaned child, who dies, for example, does not just die. She or he is killed by or dies as a result of decisions and actions taken or not taken by specific individuals. Though contested (Satz 2005), Pogge rightly links the causes of poor well-being to non-performance of duties. This makes Pogge's discourse practical in that specific actions can focus on the capacity strengths and gaps of duty bearers, to have them perform their duties. The second point is that Pogge calls for a radical reform of the current global governance and institutionalisation processes and systems. The glaring indicators on global inequalities are a case that the current globalized politico-economic systems and processes are either causing or failing to address the misery of the vulnerable.

However, Pogge's thesis is not sufficiently practical with regard to human rights, or correlatively, duties to realise human rights. There are four shortfalls in the thesis, in this regard. The first is its obsession with negative duties. Such duties are undeniably important. However, positive duties are necessary for dignified life, if the world is viewed as one (Gilbert 2005). Such type of duties would constitute the reformed systems that Pogge advocates. The second shortfall is that Pogge does not underline that having a duty entails fiduciary performance. Each duty, positive or negative, must be discharged in a fiduciary manner. In the Common Law, a fiduciary must not have her or his duty conflict with her or his interests (*Bray v Ford* [1896] AC 44, p 41). She or he must further prudently manage resources entrusted within the scope of the duty (*Speight v. Gaunt* (1883) 22 Ch. D. 727, p 739). The fiduciary must further act and allocate resources fairly to those who must benefit from the fiduciary relationship (*Simpson v. Bathurst* (1869) 9 Ch. App. 193, at 202). Such principles, as developed by the Common Law, would help cement the practical ethos of the duties whose discharge must benefit the vulnerable such as orphaned children. The third shortfall is that Pogge does not articulate the causes for poor well-being per societal level and the consequent synergies. A cogent network of duties and duty bearers is essential to ensure that the vulnerable enjoy human rights. Such a network of duties and duty bearers would link duty bearers and rights holders in way that lower level duty bearers can become rights holders against upper level duty bearers. The fourth shortfall is that Pogge's thesis does not underline the centrality of accountability for any duty bearer with regard to the enjoyment of human rights or, indeed, any right. Any reformed global system and processes cannot truly claim to be proper if it does not have effective mechanisms and accessibility to ensure that rights holders can demand the enjoyment of their rights.

3.2. Orphanhood and the Weakness of 'Duty' in Development Cooperation

Although the international law on development cooperation alludes to the performance of duties, its respect for the notion of sovereignty makes any benefits of the notion of duty weak in relation to the dignified life of orphaned children. Article 55 of the UN Charter requires the 'the creation of conditions of stability and well-being.' Articles 55 and 56 attempt to commit member States 'to take joint and separate action in cooperation with the United Nations' (United Nations 1945). On its part, the International Covenant on Economic, Social, and Cultural Rights is not as emphatic. The duty, according to Article 2 of the Covenant, is on the State 'individually and through international assistance and co-operation.' Article 22, on international technical assistance, requires a duty to bring to the attention of other UN organs and member states matters related to international technical assistance (United Nations 1966). The General Comment on Article 2 attempts to make international assistance an obligation for all states (Committee on Economic, Social and Cultural Rights, 1990). 'It is particularly incumbent upon those States which are in a position to assist others in this regard', the General Comment insists (Committee on Economic, Social and Cultural Rights, 1990, Para 14). The

General Comment underlines the importance of the Declaration on the Right to Development. The Declaration places primary responsibility on state parties 'for the creation of national and international conditions favourable to the realization of the right to development.' Article 3(2) of the Declaration attempts to combine the notions of duty and sovereignty. In its terms,

States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order 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. (United Nations 1986)

The 'duty to cooperate' in ensuring development has so far not been followed by binding modalities for compliance. Subsequent binding standards and Declarations have largely repeated the tenets in the UN Charter and Article 2 of the International Covenant on Economic Social and Cultural Rights 1966. An example is Article 4 of the Convention on the Rights of the Child, which merely repeats Article 2 of the 1966 Covenant (United Nations 1989). More elaborate standards are contained in Declarations, regarded merely as expressions of good intentions, dependent on good conscience. The Copenhagen Declaration on Social Development and the Millennium Development Declaration are two prominent examples. These, if ever they are to be indisputably regarded as international law, have to await the slow process of becoming customary international law or the quicker direct incorporation into domestic law by those States that willingly desire to be effectively bound. The evidence of such direct incorporation is, so far, weak. Not all countries among those referred to as the G8, the eight richest, have clear legislation on development cooperation compatible with the international standards. Those that have passed legislation on development cooperation have not reflected the duty to render development cooperation, as envisaged by international law. For example, although the United Kingdom's International Development Act makes poverty reduction the core of British development assistance, sections 2, 4, and 7 place on the Secretary of State wide discretionary powers to determine the nature, direction, quantum and mode of aid. Outside the G8, there are encouraging examples from Scandinavia. Denmark's Act on International Development Co-operation (Act No, 541 of 10 July, 1998) refers to the Commitments in Articles 55 and 56 of the UN Charter. However, the Act is largely administrative. It requires the minister responsible to present plans for development assistance for the approval of Parliament. There is yet, even in Denmark, to be national legislation to require that development assistance should constitute 0.7 per cent of Gross National Income of donor countries, as first advocated by the Pearson Report (Commission on International Development 1969) and ever since a call from those deeply concerned with global inequalities (UNDP 2005, ch. 3).

The notion of duty in development cooperation remains very weak as can be gathered from the language normally used. Notions such as 'assistance', 'aid', 'relief', 'debt forgiveness', 'donors', are not compatible with a discourse of duties. In this sense, Pogge is right to argue that the globalized politico-economic system is too weak to address global injustice. These are examples of language from a world of charity, pity, or benevolence. In contrast, a duty-based discourse would entail that there should be maximum contribution to dignified life. This would be compatible with the duty placed on states at the national level by international law that the use of resources to realise human rights must be to the maximum extent. Making maximum contribution to the realisation of the rights of the orphaned child is what can help realise their dignified life.

The weakness of the notion of duty in development cooperation is largely a result of the dominant human rights discourse, which appears inarticulate with regard to duties. Not only is the simple notion that rights correlate to duties often forgotten, but the practical implications for development work are not expressed beyond some duties that may be contained in international human rights instruments and General Comments. In this regard, there are five unarticulated implications of the notion that the rights of the orphaned child correlate to duties that must practically be properly performed.

The first is that duties correlative to a human right are often a mixture of legal and non-legal norms. Duties correlative to the realization of child rights are dynamic, as realisation depends on what 'should be done' and by whom, to address a manifestation and its synergistic causes. In contrast, the prescribed law depends on systematic formulation and establishment. As such, it cannot keep pace with what must be done to maintain dignified life. Prescribed legal norms are usually made at the corporate level by

fallible human beings who may lack the ability to predict actual situations. In this case, reflexive legal systems tend to provide frameworks and processes from which duties can be generated and performed. Further, the international law on development cooperation has a tendency of leaving potentially effective duties at the Declaration level. Such has been the case with the Millennium Declaration. Furthermore, international law of development cooperation lacks legal mechanisms to use the legal and non-legal norms to make maximum contribution to the well-being of the vulnerable, such as orphaned children.

The second often unarticulated tenet of the correlation of rights and duties for dignified life is that duties and duty bearers exist in a pattern across societal levels (Jonsson 2003). At each level, from the individual to the global, certain duties have to be performed to realize rights at the individual or household level. The orphaned child as a rights holder would immediately depend on the performance of duties by adults at the household and community levels. To perform their duties properly, duty bearers at the household and community levels, are in turn, rights holders against upper level duty bearers. The realization of the rights of the orphaned child therefore cannot be just at one level, as the globalised development cooperation discourse seems to imply. Human rights discourse realises this important point. Thus in the Convention on the Rights of the Child, duties are placed not only on states, but other duty bearers such as parents (Articles 5, 14, 20, and 27), extended families (Article 5), schools, the media (Article 17), State organs (Article 3), international organisations (Article 4). In contrast, the international law on development cooperation seems obsessed with States and international cooperation, without guidance on standards that can address the patterns of duties and duty bearers within and between countries. Such patterns may be broken, as would be the case in situations where decentralisation is weak or non-existent.

The third tenet is that correlative duties, what should be done for dignified life, have to be performed properly. In many poor countries, duties correlative to human rights are often neglected. Such neglect is the main cause of the poor enjoyment of human rights in those countries. If performed, the duties are usually discharged improperly. In some cases, duty bearers may actually be playing negative roles, such as in situations where orphaned children are disinherited. International law on human rights, as a discourse, expects States, as primary duty bearers, to ensure that all duty bearers perform their obligations properly. This is why accountability is important with regard to human rights. However, international law's system for checking the execution of such primary obligation by the State is weak. It is largely dependent on a reporting system, as is the case with child rights (Article 44; Committee on the Rights of the Child, 1991).

The fourth tenet of the correlation between human rights and correlative duties is that it is necessary to ensure that there are sufficient capacities for demand and supply of human rights enjoyment. This entails the ability of rights holders to demand the enjoyment of their rights. As lower duty bearers are rights holders against upper level duty bearers across the societal levels, they too must have sufficient capacities to make effective demands against upper level duty bearers. At the same time, all duty bearers must have sufficient capacities to perform their duties. This means that the practical implication of a human rights discourse from development cooperation should be to address the capacity strengths and gaps of both the supply and demand side of rights enjoyment. This partly entails empowering the orphaned child and in solidarity with her or him to demand the enjoyment of her or his human rights.

The fifth often unarticulated tenet of the correlation between a human right and duties is that people who are vulnerable are unlikely to make effective demands. They are likely to depend on others for the demanding of the enjoyment of their human rights. This would entail, practically, that a legal system should have processes and systems that can facilitate access to justice. For many orphaned children, the dependency is exacerbated by the fact that many would not have the requisite physical and economic capacities to access justice. International human rights law's view of justice, in relation to children, is often juvenile justice, as exemplified by Article 37 of the Convention on the Rights of the Child. It lacks norms to ensure that a legal system has effective processes and systems to facilitate the delivery of social justice to orphaned children.

3.3. Nothing is New for Orphaned Children about the 'New' Aid Modalities

The term 'new aid modalities' can be traced as far back as 1998, when the World Bank launched its Comprehensive Development Framework (CDF) (World Bank 1998) following its study on aid ((Wolfensohn and Fischer 2000). The CDF ushered a series of policies and guidelines by development

agencies increasingly to use the project approach in favour of sector and macro/global approaches. The term 'new aid modalities' has since then been used to distinguish sector and macro/global approaches from the project approach.

The CDF represented the World Bank's shift from structural adjustment programmes that had been heavily criticised in the 1980 and 1990s (Tan 2005). The criticisms in the World Bank study that led to the adoption and promotion of the CDF were less about structural adjustment than about the dominant modality for the delivery of development cooperation, the project approach. The CDF stressed, firstly, the need for long-term strategic vision at the country level, promoted through the use of poverty reduction strategies, secondly, country ownership, thirdly, country-led partnership and fourthly, that development cooperation should be results-focused. These four principles are so similar to those in the Paris Declaration that the World Bank has asserted that implementing the Paris Declaration 'is tantamount to implementing the CDF' (World Bank, 2002). The reason, in the World Bank's view is that 'the Paris Declaration underscores a clear resolve to work towards similar goals: stronger country ownership of development policies, alignment of external partners' assistance, harmonization of procedures, managing for results and mutual accountability' (World Bank 2002).

Viewed from the objectives of the CDF, the project approach was found inappropriate to promote country ownership and alignment with national policies and priorities. The criticisms of the project approach start with its characteristics. Because it has specific and predefined objectives and activities, it promotes a short term approach. This logic, applied to orphaned children, would mean that it is inappropriate for a long term problem such as growing rates of orphanhood. As a project tends to have a management that is separate from government's usual system, it weakens national ownership and hence lessens effectiveness. The urgency of the problems associated with orphanhood requires as much effectiveness as can be mustered. Since a project tends to have a defined budget allocated to a set of detailed activities, it is inflexible and cannot match the dynamism of the need to respond to incidents of orphanhood in different changing contexts. As projects tend to be time-bound, chances of failure are high where a governmental sense of duty and accountability is low and when implementation is inefficient or subject to procurement and other forms of bureaucracy. The financing modalities for a project approach are often the grant and procurement procedures of the donor and hence impose a bureaucratic burden on the receiving country.

At the time of the CDF, the World Bank endorsed sector and macro approaches. A sector approach (or SWAp) is presented as a way for working together between government, development partners and other key sector stakeholders in one sector. As a process, it aims at instilling and developing national ownership of public sector policy, resource allocation. It is argued that when this is done, there will be coherence between policy, spending, results and the reduction of transaction costs. A sector approach can take the form of a sector programme (SP), designed to implement a sector strategy based on a sector budget, a sector coordination framework, and a sector medium term expenditure framework. A sector approach could also take the form of a sector policy support programme (SPSP), which can be adopted to support the development of a sector policy that can result into a sector programme. The financing modalities for a sector wide approaches are as follows budget support (when the aid is advanced into a national budget for the sector), pool funding (when more than one donor and the recipient country pool their funds into a basket or some fund), and the grant and procurement procedures of the donor. The possibility for pooled funds is regarded as advantageous as the resources base is widened rather than scattered as is often the case when there are several projects in the same sector. This could take the form of a sector budget support programme.

The presentation of sector-wide approaches can easily appeal in the context of growing debilitating orphanhood. The approaches is said to adopt a country holistic view on entire sector, helps make external development partners to be better coordinated, ensures mutual trust and accountability, use of local procedures, and underlines learning by doing. In the end, this is deemed as effective, coherent, and aligned to national priorities and processes.

The macro/global approach, involves, firstly, the transfer of funds to the partner ACP country's Treasury to be used according to financial management rules of the receiving country (Europeanid 2007b and c). In theory, the financial resources transferred become the global resources of the receiving country. The financing modalities for a macro/global approach are the similar to those for sector approaches though under this approach, direct budget support is possible and desirable.

Despite the increasing consensus that 'new' development cooperation modalities will make greater contribution to dignified life for the vulnerable, the dominant modalities are not fit for the realisation of the rights of the orphaned child. These modalities have not been devised pursuant to binding standards. Instead, there are devices that those that provide development cooperation think will be better for the delivery of development cooperation. No new modality has been resulted from an international law making process. None can be spared criticism and scepticism regarding the failure of development assistance effectively to contribute to development (Ellerman 2005), (Thomas 2003; Roberts 2004).

It is often wrongly thought that the 'new' development cooperation modalities have resulted from growing international developments to make aid more 'effective'. In particular, the Paris Declaration on Aid Effectiveness is sometimes regarded as the reason for the 'new modalities'. Advocates of the 'new' modalities view them as fit means to realise the goals of Effectiveness, Ownership, Harmonization, Alignment, Results and Mutual Accountability stated in the Paris Declaration. It appears that one reason for presenting these modalities as new is to give hope that they may respond to escalating new social problems such as debilitating orphanhood. The modalities however are not new, only their presentation is "new". They have been in use well before the Paris Declaration was adopted. It is true that the Monterrey Consensus (UN 2002) and the Paris Declaration were significant agreements, but only in pushing a neo-liberal agenda that was in place as early as 1998.

It is instructive to note that although the Paris Declaration spells out clear commitments for donors and partners, it does not spell out aid delivery modalities that would help realize its immediate and underlying objectives. Instead, the practice to implement the Declaration has merely adopted dominant development cooperation approaches that were advocated before the Paris Declaration was agreed.

The source of the influence of the 'new' aid modalities was the World Bank's Comprehensive Development Framework (CDF). The philosophy in the CDF has been reflected in a series of policies, papers and guidelines by development agencies increasingly to use the project approach sparingly in favour of sector and macro/global approaches (Examples: DfID 2004; Bandstein 2007; Ministry of Foreign Affairs of Denmark 2005; Norwegian Ministry of Foreign Affairs 2007 a and b; Nordic Plus 2007; Development Assistance Committee 2007). The new aid modalities have not been easy to achieve the results for which they have been increasingly approbated by donors. This is because the technical requirements for each approach and each modality have not been easy to be attained in developing countries. For example, the European Union (EuropeAid 2007a) gives the following as the requirements for a sector-wide approach:

- The presence of a sector strategic purpose, defined and owned by the country;
- A sector policy and medium term expenditure programme;
- A common management and reporting system within the sector;
- A Government-led collaborative work between donors and national sector partners; and
- An agreed participatory monitoring system

In many developing countries, one or more of these attributes for a sector approach is missing. The reason is that many of the assumptions on the part of assisted countries and donors are still missing or made to appear as missing. Assisted countries lack holistic clear vision, strong government leadership, sufficient human resource capacity, prudent or fiduciary management systems, effective procurement systems, and a credible public finance management system. In respect of donors, the blocks include: inflexible mandates and financing procedures, a set agenda, weak coordination, separate financing procedures, and the desire for visibility at the country level.

One constraint for macro/global approach is that that many donors deem the assisted country as lacking right priorities and effective decentralised systems and processes. Many donors further doubt that the assisted country has a proven record of prudent resource management. Donors will often question sufficient capacities and systems for rights holders to demand accountability, to avoid fungibility and corruption. These constraints are exacerbated if the Government is deemed not to have a strong sense of duty to its people. On their part, the donors are still unable to separate funding conditions from their own political agendas. Donors still find aid making predictably slow and timeliness of such aid difficult. The second tenet of a macro/global approach is compliance with agreed conditions for payment by the assisted country. Donors insist that for this condition to materialise, the assisted country must be known for its low corruption levels and prudent management of funds. Donors tend to exert undue influence, burdensome conditions, and are usually unable to disburse funds in a timely fashion. The third tenet of a macro/global approach is that the transferred funds are used according to

financial management rules of the assisted country. This assumes that there are low corruption levels in the country, low fiduciary risks, and fiduciary management systems. There is also an assumption that donors will be able to deliver untied aid and agree to refrain from imposing burdensome conditions.

For each modality adopted for either the macro/global or sector-wide approach, however, the use of conditions has negated the expressed intentions of the Paris Declaration. There have been many criticisms against the use of conditions, including those associated with the Paris Declaration (examples: Sen 2007; Menocla and Rogerson 2006; Berthélemy 2006; Wright-Revolledo 2007; and Bural, et al. 2006). Interestingly, the World Bank has joined in expressing skepticism about the effectiveness of the "new" aid modalities (World Bank 2007). Indeed, several evaluations and studies have noted very slow progress towards the realisation of the indicators in the Declaration (OECD 2007; Bissio 2007; AFRODAD 2007a, b, c, d, and e). An emerging view is that the feasibility of a project approach or the 'new approaches' varies from context to context (Jai 2007; Cordella and Ariccia 2007). This is particularly important because many assisted countries are still to develop right conditions for the satisfactory implementation of the 'new modalities' in their current form. Performances on the other Paris Declaration dimensions were low or moderate in 2007 (OECD 2007).

More critically, the crosscutting nature of the needs of orphaned children seems to have made it difficult to have a sector that solely accommodates orphaned children for a sector or macro/global approach. Sector approaches appear to have been applied to conventional sectors such as education and health albeit with great difficulty. Programmes for orphaned children tend to be in 'social services' where few if any attempt have been made to conjure a sector. Even thematically, orphancare tends to be overshadowed by the response to HIV/AIDS. Thus the OECD has figures on aid allocated and disbursed for HIV/AIDS control, but this data is not disaggregated to reveal how much has been allocated for the realisation of the rights of orphaned children. The OECD data shows that Development Aid Committee (DAC) countries' bilateral aid to support the control of HIV/AIDS rose to USD 5 Billion in 2007 (OECD 2009). The figure rises USD 7.3 Billion, if multilateral contributions, such as donor aid through the Global Fund, are taken into account. It is not clear however how much of this allocated for orphancare. Anecdotally though, non-governmental organisations, orphanages and adoptions to 'help' orphaned children are rising.

After years of the CDF and the Paris Declaration, the 'new' modalities are still presented as 'new', but there is evidence that they have become ends in themselves, neglecting the need to address the realisation of people's rights and the causes for poor realisation of such rights, such as debilitating orphanhood.

4. Conclusion

Debilitating orphanhood provides a test case for both human rights and development cooperation as processes for realising dignified life. The increased consensus for greater effectiveness in development cooperation, however, has too quickly adopted old modalities as 'new' ways to deliver development cooperation. These modalities are neither legal nor effective. The main reason is that they negate the practical implication that human rights correlate to duties at all societal levels. The bases of development cooperation have been charity, philanthropy, pity, or enlightened self-interest. Very little can be attributed to the quest for dignified life based on the performance of duties correlative to human rights at all levels of society. The incidents and causes of debilitating orphanhood however have continued to increase in economically poor countries, particularly in Sub-Saharan Africa. The realization of the human rights of the orphaned child is unlikely if there are no reflexive legal mechanisms and processes for the demand and supply of rights enjoyment at the global, national, and local levels. Human rights discourse has long lacked this emphasis, much as it increasingly prefers trade and markets.

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