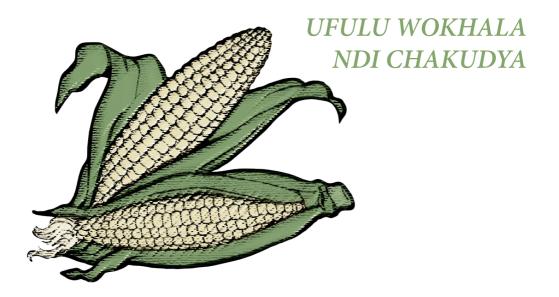Åbo Akademi
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Exploring the Role and Transformative Potential of Human Rights in Development Practice and Food Security: A Case Study from Malawi

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EXPLORING THE ROLE AND TRANSFORMATIVE POTENTIAL OF HUMAN RIGHTS IN DEVELOPMENT PRACTICE AND FOOD SECURITY

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"The whales do not sing because they have an answer, they sing because they have a song"

~ Gregory Colbert

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ABBRIVIATIONS

ADMARC	Agricultural Development and Marketing Corporation
CEDAW	Convention on the Elimination of All Forms Discrimination against Women
CSO	Civil society organisation
DBU	Development Broadcasting Unit
DCHR	Danish Centre for Human Rights
DEC	District Executive Committee
DFID	United Kingdom's Department for International Development
DPP	Democratic Progressive Party
ESCR	Economic, social and cultural rights
FAO	Food and Agriculture Organization of the United Nations
FFA	Food for asset
FFW	Food for work
FISP	Farm Input Subsidy Programme
GA	General Assembly of the United Nations
HRBA	Human rights-based approach
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
HIS	Integrated Household Survey
JEFAP	Joint Emergency Food Aid Programme
Malawi CARER	Centre for Advice, Research, and Education on Rights
MBC	Malawi Broadcasting Corporation
MCP	Malawi Congress Party
MDGs	Millennium Development Goals
MHRRC	Malawi Human Rights Resource Centre
MoAFS	Ministry of Agriculture and Food Security
MPI	Multidimensional poverty index
MVAC	Malawi Vulnerability Assessment Committee
NGO	Non-governmental organization
NORAD	Norwegian Agency for Development
OECD	Organisation for Economic Co-operation and Development
PRA	Participatory rural appraisal
PWESCR	Programme for Women's Economic, Social and Cultural Rights
RLC	Radio listening club
RBA	Rights-based approach
SGR	Strategic Grain Reserve
SIDA	Swedish International Development Agency
SHSLP	Shire Highland Sustainable Livelihoods Programme
UNDP	United Nations Development Programme
UDF	United Democratic Front
VDC	Village development committee
WFP	World Food Programme
WLAS	Women and Law in Southern Africa (NGO)
WMS	Welfare Monitoring Survey

PART I   RESEARCH QUESTIONS, CONTEXT, AND METHODOLOGY

1.1   Theoretical and methodological starting points

This research is interested in processes of change. Change is brought about by people and groups who have agency and a vision for the kind of society they want to live in. The theoretical starting point is the '*constructivist*' view that "individuals and groups are not only shaped by their world but can also change it," as expressed by Audie Klotz and Cecilia Lynch. New normative, cultural, economic, social, and political practices that change conventional wisdoms are set into motion by people,[1] who believe they can affect change in their lives, as a perquisite for agency. Constructivism is increasingly the lead paradigm in social science, with positivism no longer dominating except in economics and 'number-crunching' sociology.[2]

Another theoretical starting point is that human rights are *social constructions* created by people. This study relies on a *discursive* understanding of human rights, moving away from a positivist view according to which human rights are 'things' that can be measured.[3] Instead, human rights are seen as social constructions that are discursively constructed,[4] and therefore by definition change over time.

John Searle makes a distinction between 'brute facts' and 'institutional facts'. The former are physical or natural facts while the latter are created by human agreement, through a shared language. Institutional facts cannot exist as isolated units but only through being part of a larger system of relationships to other facts. Social reality is created by social acts – and in some sense this reality is only the continuous *possibility* to act.[5] Human rights are institutional facts that have come into existence through social agreement.

Constructivists claim that particular meanings become 'stable' over time, creating social orders called structures or institutions. In this context, rules and norms set expectations about how the world works, and what types of behaviour is legitimate.[6] As long as international human rights agreements are breached on such a massive scale as is the case today, one can probably not say that human rights constitute very 'stable' institutional facts, however, there is the continuous possibility for people and institutions (mainly states) to act according to the human rights ideal that has been manifested in legal agreements. At the same time there is also the possibility for individuals and groups to claim and demand respect for the human rights ideal. The position taken in this study is that human rights are constantly being negotiated and renegotiated, i.e., human rights are not static social constructions.

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[1] Audie Klotz and Cecelia M. Lynch, *Strategies for Research in Constructivist International Relations* (New York: M.E. Sharpe, 2007) at 1.

[2] Jan Nederveen Pieterse, *Development Theory: Deconstructions/Reconstructions* (London: Sage Publications, 2001) at 142.

[3] See Jim Ife, *Human Rights and Social Work: Towards Rights-Based Practice* (Cambridge: Cambridge University press, 2001) at 145.

[4] See Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009) at 10.

[5] Johan R. Searle, *Konstruktionen av den sociala verkligheten* (Uddevalla: Daidalos, 1997; Original title: The Construction of Social Reality, 1995) at 46, 49, 50.

[6] Klotz and Lynch, *Strategies for Research*, *supra* note 1, at 8.

Institutional facts are of course not independent from brute facts of materiality or physicality. Intuitional facts require some sort of physical realization, but the form they assume are not decisive. Human rights, "in all their many forms, have to assume some materiality or physicality for functioning as operative norms and standards." This can be called the 'material infrastructure'.[7] The material infrastructure of human rights includes international legal agreements, monitoring mechanisms, institutions, reports, etc.

When it is accepted that 'social reality' is being constructed and reconstructed, it is clear that a single text, such as the Universal Declaration of Human Rights, is open to multiple readings. *It is the reader rather than the author who 'makes sense' of it.* In this world view, these multiple wisdoms by the readers will be valued, "rather than single, unifying world views imposed from above."[8] As articulated by Baxi, no text may "claim the status of unique authorship and therefore claim axiomatic authority; the birth of the reader (as Roland Barthes said memorably) entails the death of the author."[9]

Yet, in human rights discourse 'from above' expert knowledge is given high value and emphasis. However, there can be no independent and quasi-objective concept without falling into a top-down practice in which "generalized truths are used to determine how to act in specific contexts."[10] Jim Ife notes that such top-down perspectives are characteristic of *modernity* and its search for certainty, order and predictability.[11] Merry notes that human rights conventions embody many of the ideals of modernity, offering a universal vision of just societies. A particular cultural system that is rooted in a "secular transnational modernity" is articulated in the human rights regime. Claims to 'culture' do not "justify deviation the culture of transnational modernity,"[12] an issue I will come back to later. It follows from the increasing relevance given to the international human rights system that 'human rights culture' is a core aspect of "a *new* global, transnational culture, a *sui generis* phenomenon of modernity." At the core of its structuring ideas lies, according to Cowan et al, its individualistic conception; addressing suffering through a legal/technical framework (instead of e.g. an ethical); and emphasizing certain aspects of human relationships over others (individual's rights over an individual's duties or needs). These are foundational ideas, even though they are contested, as the authors point out, for example through processes related to the African Charter on Human and Peoples' Rights.[13]

However, the world in which any human rights-based development programme operates is characterized by unpredictability and chaos.[14] Imposing order on chaos and predictability on uncertainty requires a lot of control, and often coercion,[15] that goes against the idea of agency and stifles initiative and 'from below' action. The actor-oriented and human rights perspectives from below, which are raised in this study as an alternative to the more

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[7] Upendra Baxi, "Politics of Reading Human Rights: Inclusion and Exclusion of Human Rights", in Meckled-García & Cali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human rights Law* (London: Routledge, 2006) 182-200, at 189.

[8] Ife, *Human Rights from Below* (Cambridge: Cambridge University Press, 2010) at 47.

[9] Baxi, "Politics of Reading", *supra* note 7, at 187.

[10] Ife, *Human Rights from Below*, *supra* note 8, at 134.

[11] *Ibid.*, at 30.

[12] Sally Engle Merry, "Constructing a Global Law-Violence against Women and the Human Rights System", 28 *Law & Social Inquiry* (2003) 941-977, at 945-946.

[13] Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson, "Introduction", in Cowan, Dembour & Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) 1-26, at 12.

[14] Chaos does, however, not mean randomness or the absence of order; "it refers to the unpredictability of the outcome of processes". Pieterse, *Development Theory*, *supra* note 2, at 143.

[15] Ife, *Human Rights from Below*, *supra* note 8, at 30.

conventional approaches, are *postmodern* perspectives that put emphasis on wisdom and change from below.[16]

The theoretical basis for an *actor perspective* is from development sociology, here represented by the work of Norman Long.[17] The theoretical basis of the actor-oriented perspective on human rights is in part from legal literature that does not position itself within the human rights tradition, but which calls for evaluation of legal principles in terms of their concrete effects in a social setting. Emphasis is on estimating consequences for less powerful groups and/or individuals in society. Celestine Nyamu-Musembi quotes Joseph Singer who says we must ask ourselves not only whether a social or legal practice works, but 'works *for whom*'? Due to power differences and hierarchical relationships in society there is need to look beyond abstract formal equality principles. Through asking the question 'works for whom?' and translating the question into action, people change the terms of institutionalized understandings of rights and make "the meaning of rights" real in their own context.[18] This is in accordance with the constructivist view that people have agency and are thereby capable of altering meanings, structures, and institutional facts.

Human rights is not a discipline in its own right and research on human rights is found within many disciplines. Human rights scholarship has historically been dominated by philosophy and law, while international relations and political science have more recently devoted growing attention to human rights.[19] The perspective of this thesis is from the field of international law, but due to the nature of the research subject it takes a multidisciplinary approach. Study and interpretation of legal texts, such as international conventions, and the activity of judicial or quasi-judicial institutions is only a small part of the research strategy chosen. The usual perspective on human rights in international relations and political science, that is to approach human rights as a state-centric practice,[20] is also not sufficient to answer the research questions on the role of human rights in development.

I have been especially inspired by research from the fields of anthropology,[21] and community development and social work,[22] and wish to mention these disciplines as I believe they can make considerable contribution to human rights studies. I have also been inspired by lawyers who apply anthropological methods.[23] Ethnography of human rights[24] is an area of scholarship that is essential for improving our understanding of the *practice* of human rights in transnational as well as local contexts. The book *The Practice of Human Rights: Tracking Law Between the Global and the Local* reveals that this practice is more complicated than previously assumed. What is even more crucial is that when such studies are undertaken, despite methodological challenges, they often suggest that the 'practice' being documented and analysed potentially "transforms the framework through which the idea of human rights

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[16] 'Postmodern' is a highly complex concept and examining its meaning is beyond the scope of this chapter. Moreover, postmodernists tend to avoid definitions that are seen as engaging with the qualities of rationality and objectivity that postmodernists deny. The Post-Modern Age is characterized by incessant choosing; pluralism is the 'ism' of our time, which is seen as both the great problem and the great opportunity. See Krishan Kumar, *From Post-Industrial to Post-Modern Society* (Oxford: Blackwell Publishers, 1995) 104-105.

[17] See e.g. Norman Long, *Development Sociology: Actor Perspectives* (London: Routledge, 2001).

[18] Celestine Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", 36 *IDS Bulletin* (2005) 41-51, at 41.

[19] Stammers, *Human Rights and Social Movements*, *supra* note 4, at 12.

[20] *Ibid*., at 12.

[21] Sally Engle Merry's work is important and also that of Marie-Bénédicte Dembour.

[22] See Ife, *Human Rights and Social Work*, *supra* note 3; Ife, *Human Rights from Below, supra* note 8.

[23] Celesetine Nyamu-Musembi's work is important here.

[24] See Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

itself is understood."[25] This is also a central thread in this study about human rights-based development practice.

'Discourse' is widely used in social theory and analysis, inspired, for example, by Michel Foucault, as a means of referring to different ways of structuring areas of knowledge and social practice.[26] The human rights community has its specific way of "talking about and understanding the world",[27] and thereby we can refer to 'human rights discourse'. While I do analyse and refer to 'discourse', this study does not apply methods of discourse analysis. Key approaches in discourse analysis are built on linguistics[28] and this way of studying social reality and change is not useful for the purpose of answering my research questions.

This study is 'critical' in the way that it tries to unmask dominant, taken-for-granted understandings of reality. It wants to destabilise prevailing systems of meaning, especially that of the human rights concept. It is when we see that our understandings of the world are merely that – understandings – not the world itself that we can transform them into objects of discussion and criticism and open to change.[29]

1.2   Research questions

An increasing number of people go hungry. Between 2007 and 2008 the number of undernourished increased by 8 percent in Africa.[30] At the same time as the number of the hungry has risen, the levels of cereal production have been breaking records on a worldwide basis.[31] This shows that Amartya Sen has been right in pointing out that increasing production will not solve global hunger.[32]

As the majority of the hungry live in rural areas and usually depend on small-scale farming or are employed on large plantations, it is through supporting them that changes can take place.[33] Hunger is a problem related to the lack of access to productive resources, the concentrated input of the providers sector and insufficient support to the poor, i.e., of *social, economic and political structures*. I agree with De Schutter et al that in the debates on hunger too little attention has been paid to the imbalances of power in the food systems and to the failure of the international economic environment. There are structural problems in the political economy of food production and distribution chains.[34] The question is whether human rights practice and discourse, through the right to adequate food and human rights-based strategies to food security, can contribute to challenging and transforming the structures that prevent small-scale farmers in the global South feeding themselves and their communities.

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[25] Mark Goodale, "Locating Rights, Envisioning Law Between the Global and the Local", in Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007) 1-38, at 4.
[26] Norman Fairclough, *Discourse and Social Change* (Oxford: Polity Press, 1992) at 3.
[27] Definition of 'discourse' in Marianne W. Jørgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (London: Sage Publications, 2002) at 1.
[28] Fairclough, *Discourse and Social Change*, *supra* note 26, at 1.
[29] See Jørgensen and Phillips, *Discourse Analysis as Theory and Method, supra* note 27, at 176 and 178.
[30] Food and Agriculture Organization, *The State of Food Insecurity in the World 2011* (Food and Agriculture Organization of the United Nations: Rome, 2011) at 8.
[31] Olivier De Schutter and Kaitlin Y Cordes, "Accounting for Hunger: An Introduction to the Issues", in De Schutter & Y Cordes (eds), *Accounting for Hunger: The Right to Food in the Era of Globalisation* (Oxford: Hart Publishing, 2011) 1-24, at 6.
[32] See for example Amartya Sen & Jean Drèze "Hunger and Public Action", in *The Amartya Sen & Jean Drèze Omnibus* (Oxford: Oxford University Press, 1999).
[33] De Schutter and Cordes, "Accounting for Hunger", *supra* note 31, at 6.
[34] De Schutter and Cordes, "Accounting for Hunger", *supra* note 31, at 7.

This thesis believes that human rights law is not a tool that is going to re-shape the economic domain. Although human rights law makes clear that the state has some responsibilities in the economic sphere (at a minimum supervision), which places it in evident contrast with the neo-liberal paradigm of the non-interventionist state, and even to the managerial, good governance state; it remains, however, a fact that human rights operates on the margins of real economic power.[35] Paul Gready rightly points out that in the ongoing financial crisis there has been an almost complete absence of human rights references in political or popular discussions. Moreover, not even the successes of human rights discourse – Gready refers to the Treatment Action Campaign in South Africa and the Right to Food Campaign in India – have challenged the prevailing market-led economic model in these countries.[36] Due to the limited impact and potential I see for human rights in challenging and transforming the dominant economic structures, nationally and internationally, this thesis will explore what other, if any, transformative potential human rights have in *development processes* and *contexts*. It explores the role of human rights in general and the right to food in particular in development cooperation policy and practice. It does *not* investigate the question of whether human rights-based development approaches lead to better development *outcomes*.

The starting point is that a rights discourse can have liberating effects at one moment and can facilitate domination at another.[37] Therefore, there is need for research into specific contexts where human rights are used to further a development agenda. In part III, I will give an analysis of three specific projects in Malawi in order to demonstrate the diverse roles that human rights play in development processes.

A second starting point is that in the name of human rights advancement, a huge number of schemes for transformation, regulation, and 'governance' have been established all over the world.[38] Some kind of transformation is indeed taking place and there are authors who call this an expansion of modernity.[39] It is less clear whether the expansion of the human rights idea contributes to change that contest the status quo in favour of oppressed and marginalized people and groups. This thesis investigates whether human rights, as they are further integrated into development, contribute to transforming development practice and structures that prevent agency for the poor and marginalised. Is it possible for human rights to be a counter-hegemonic force in the face of hegemonic development? (I agree with Rajagopal that as 'development' has been expanded to include everything from poverty alleviation, democratization, rule of law, human rights, environmental sustainability to anti-corruption, 'development' has come to assume a hegemonic function.[40]) Are human rights creating space

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[35] Paul Gready, "Reasons to Be Cautious about Evidence and Evaluations: Rights-based Approaches to Development and the Emerging Culture of Evaluation", 1 *Journal of Human Rights Practice* (2009) 380-401, at 385, 388, 399.

[36] *Ibid.*, at 382, 386. I partly disagree that the Right to Food Campaign has not challenged the prevailing economic model: it has challenged it but the structural changes sought have not been successful. See chapter 2.3.4.

[37] Mahmood Mamdani, "Introduction" in M. Mamdani (ed.) *Beyond Rights Talk and Culture Talk: Comparative Essays on the politics of Rights and Culture* (New York: St. Martin's press, 2000) 1-13, at 6. One of the major conclusions in the book *Contested States* is that "the power of law is at once hegemonic and oppositional." See Mindie Lazarus-Black & Susan f. Hirsch (eds) *Contested States. Law, Hegemony and Resistance* (New York: Routledge, 1994) at 20.

[38] Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010) at 227.

[39] Merry, "Constructing a Global Law", *supra* note 12, at 945-946; Cowan, Dembour and Wilson, "Introduction", *supra* note 13, at 12.

[40] Balakrishnan Rajagopal, "Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy", in R. Falk, B. Rajagopal & J. Stevens (eds), *International Law and the Third World:*

for agency and empowerment? In order to answer these questions it is necessary to examine more closely how the human rights concept has been defined, and by whom it has been defined.

It is also necessary to be to be aware of the various forms that the so called human rights-based approaches to development assume. There is no single definition of the concept 'human rights-based approach to development' and, therefore, I agree with Patrick Twomey that it makes sense to talk of human rights-based *approaches* instead of one approach.[41] In this thesis most variations of human rights-based and rights-based approaches appear in one form or the other, and the ambition is to make the distinctions clear whenever necessary.

Moreover, there are clear tensions between human rights-based approaches to development *cooperation* and to *national development policy*. For instance, the Indian MP Jaipal Reddy makes clear that "a rights-based approach in public policy is a moral imperative" for India but that a human rights-based approach to development cooperation is patronizing in its assumption that donors know what it in the best interest of the South. Such an assumption aims at introducing a rights-based approach to public policy from the *outside*, and "bring about empowerment through the planning, programming and implementation activities of a donor agency." This approach seeks to bring about empowerment through external pressure and is based on the conviction that to achieve poverty eradication there needs to be 'good leadership', 'good governance' and the empowerment of ordinary people. Reddy highlights that a rights-based approach to public policy, that comes from *within* the country is more desirable as movement away from political, economic, and social oppression can only be sustainable when it springs from within a society.[42]

This dilemma – human rights as a form of imperialism – cannot be avoided when investigating the possible transformational role of human rights in development. It is further perpetuated by the problem of the lack of accountability on the part of donors.[43] According to the human rights-based language now widely used in international cooperation and aid circles, the people in the recipient countries are seen as rights-holders, and the national state is seen as the primary duty-bearer, but it is not clear where the funder countries position themselves in the 'right-duties' equation.[44]

While being sympathetic to human rights-approaches to public policy, it is the more interventionist human rights strategies that are the main focus in this thesis. Therefore, a second set of questions arise concerning development *planning* and *programming*. What difference do human rights make as they enter into development programmes and projects, what new elements are brought in, and what value is added? What are the characteristics of the so called human rights-based approaches to development cooperation, compared to 'good development practice'? How are 'legal approaches' to be regarded? (A legal approach to human rights is internally diverse but a central feature is that the idea of human rights must be legislated, legally recognised, and codified.[45]) I will approach these questions on a general

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Reshaping Justice (London: Routledge-Cavendish, 2008) 63-79, at 65. "Hegemony" is the social, cultural, ideological, or economic influence exerted by a dominant group.

[41] Patrick Twomey, "Human Rights-Based Approaches to Development: Towards Accountability", in Mashood Baderin (ed.), *Economic, Social and Cultural Rights in Action* (Oxford: Oxford UP, 2007) 45-69, at 49.

[42] Statement by Mr.S. Jaipal Reddy, Member of Parliament on the agenda item 88, Operation activities for development at the Second Committee of 57th UNGA on October 28, 2002. Available at http://secint04. un.org/india/ind661.pdf, visited 4 December 2011.

[43] *Ibid*.

[44] Andrea Cornwall and Celestine Nyamu-Musembi, "Putting the 'Rights-Based Approach' to development into perspective", 25 *Third World Quarterly* (2004) 1415-1427, at 1424-25.

[45] Goodale, "Locating Rights", *supra* note 25, at 6.

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level as well as on a more particular level, looking at proposed human rights-based approaches to *food security*.

It should be noted that this study is not restricted to exploring the role of human rights *law*, but rather that 'human rights' is seen as a phenomenon much broader than a formalistic and legalistic understanding of the human rights concept would entail. We can distinguish between internationally recognized human rights in legal documents and human rights in social relationships and as cultural practice. Naturally there is no strict division between the two, but having this picture in mind can help when reading my work. As the human rights idea enters into development work, it is not only or even primarily in the shape of legal texts. In human rights-based strategies for development, human rights ideas inform and inspire the whole working process, and this process takes place in social relationships within communities, families, households, workplaces and public spaces. This study is concerned with the processes of 'development' that set out to claim and achieve human rights through different channels. In this context, 'the law' and 'legal' has a social theory definition. Social theory focuses on law as a 'social process' – not solely a text or formal legal structures.[46]

1.3   Literature on the 'added value' of human rights-based approaches to development

This thesis is not limited to exploring the so called human rights-based approaches to development cooperation but since the immediate need to answer questions on the 'value added' by human rights has partly sprung from the growing popularity of such approaches attention is devoted to whether human rights-based approaches make a difference. In this overview, I will review what other authors have suggested in terms of the new and added value of various human rights-based approaches to development.

The fact that the Vienna Declaration and Programme of Action of 1993[47] stressed the link between human rights and development was a window of opportunity for further integration of the two discourses. With the trend within human rights of embracing much broader concerns for human dignity, such as access to resources (i.e., economic and social rights), came the need among human rights groups to engage with development actors and with civil societies and social movements.[48]

In the report Renewing the United Nations: A Programme for Reform, which was launched in 1997, the Secretary General made the following statement: "A major task for the future will be to enhance the human rights programme and integrate it into the broad range of the Organization's activities, including in the development and humanitarian areas."[49] This ambition gradually led to the so called Stamford consensus document of 2003 in which

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[46] Caroline Moser and Andy Norton, *To Claim Our Rights: Livelihood Security, Human Rights and Sustainable Development* (Overseas Development Institute, 2001) at 21. This view has a bases in the anthropological concern with 'law as process' aimed to get away from a concern with rules as such in order to focus on how those rules were implemented or not. Olivia Harris, "Introduction", in O. Harris (ed.), *Inside and Outside the Law* (London: Routledge, 1996) 1-15, at 4. Critical social theory of law (with thinkers such as Bourdieu, Foucault and Gramsci) tries to show the contribution of law to resilience and pervasiveness of domination in hegemonic and counter-hegemonic processes. See Boaventura de Sousa Santos and César A. Rodríguez-Garavito, "Law, Politics, and the Subaltern in Counter-Hegemonic Globalization", in de Sousa Santos & Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 1-26, at 6.
[47] Adopted by the World Conference on Human Rights, 25 June 1993.
[48] Jethro Pettit and Joanna Wheeler, "Developing Rights? Relating Discourse to Context and Practice", 36 *IDS Bulletin* (2005) 1-8, at 2.
[49] UN doc. A/51/950, 14 July 1997, para. 196.

participating agencies agree on a Common Understanding on a Human Rights-based Approach to Development within the UN system.[50]

In early 2000, there was a debate between Peter Uvin and Hugo Slim about the potential of further integration between human rights and development. Uvin stated that much of the policy declarations and exhortations for the need for integration "risks being little more than rhetorical, feel-good change, further legitimizing historically created inequalities and injustices in this world."[51] While Uvin was very critical of this agenda, he did see a *potential* in the so called human rights approach to development, in which "the mandate of development itself may be redefined in human rights terms, potentially bringing about a fundamental rethinking of the development paradigm itself".[52] In this 'new paradigm' the boundaries between human rights and development would disappear, and both become conceptually and operationally inseparable parts of the same process of social change.[53] As he saw very little evidence that this was taking place, Uvin's conclusion was that there is less to the emerging human rights approach in the development regime than meets the eye. He was concerned that the status quo is not being challenged sufficiently.[54] The question is whether today there is more evidence to support the claim that hegemonic development is challenged by human rights arguments.

We should keep in mind that the question of new dimensions and value added can be approached from many different angles and perspectives. It can be looked at from the perspective of either the development actors (donors, states, NGOs, etc) or the target groups ('beneficiaries') of development aid.[55] Clearly more studies have been devoted to the first perspective rather than the second. I argue that the questions should be looked at holistically, since whatever is changed in the practices of development actors also will have an impact on target groups. However, it is more challenging to measure concrete benefits and impacts in the lives of target groups compared to studying policy and practice of agencies and organisations.

Uvin raised doubts whether further integration of human rights and development can have any impact on *donor* practices and he claimed that it is merely rhetorical repackaging of 'old wine into new bottles'.[56] Slim, on the other hand, identified potential in *NGOs* that have strong links to marginalised groups and start basing their efforts on human rights-based approaches, thereby supporting genuine *struggles for rights*.[57] Hans-Otto Sano made a similar argument a few years later. He claimed that human rights have become increasingly important as a source of inspiration for local development efforts and for local advocacy.[58] Examples of this are presented in the Malawi case-study in part III.

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[50] The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies, developed at the Inter-Agency Workshop on a human based approach in the context of UN reform, 3-5 May 2003, Stamford. Available at http://hrbaportal.org/?page_id=2127, visited 10 May 2012.

[51] Peter Uvin, "On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise", XVII *PRAXIS The Fletcher Journal of Development Studies* (2002) 1-11, at 1.

[52] *Ibid*., at 2. See also Peter Uvin, *Human Rights and Development* (Bloomfield: Kumarian Press, 2004).

[53] Uvin, "On High Moral Ground", *supra* note 51, at 6.

[54] *Ibid*., at 10.

[55] Hans-Otto Sano, "Does Human Rights-Based Development Make a Difference?" in Salomon, Tostensen & Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Antwerp: Intersentia, 2007) 79-63, at 63.

[56] Uvin, "On High Moral Ground", *supra* note 51, at 2 and 4.

[57] Hugo Slim, "A Response to Peter Uvin, Making Moral Low Ground: Rights as the Struggle for Justice and the Abolition of Development", XVI *PRAXIS The Fletcher Journal of Development Studies* (2002) 1-5, at 4.

[58] Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 68.

In the struggle for rights, Sano believes that human rights-based approaches potentially can "strengthen national strategies and social and political movements on account of a shared foundation of norms and rights".[59] As will be seen in the chapter on rights-based approaches in Malawi, it is, however, not very clear that the human rights concept always offers a shared foundation.

There is, moreover, a risk of romanticising local NGO work in the area of human rights and development. Paul Nelson and Ellen Dorsey remind us that NGOs invoke human rights as a source of power; and in NGOs' search for sources of power it is difficult to disentangle *organisational* and principled political objectives.[60] Srirak Plipat also finds evidence that the potential of rights-based approaches is diminished because NGOs interpret and use these approaches in ways that correspond with their organizational backgrounds and expertise.[61]

Nelson and Dorsey find more evidence of human rights playing a role in *mobilization* for resistance against policy changes such as privatisation than of human rights arguments succeeding in pressing governments to provide *services* more equitably, adequately and effectively.[62] Sano finds similar question marks and areas where it is difficult to show what impact and value added human rights and human rights-based approaches to development have. He finds it challenging to prove that poor and marginalised target groups achieve improvements in their economic, social and political conditions through a human rights-based strategy.[63]

It seems easier to show that human rights-based strategies bring in new dimensions to advocacy on poor people's claims in the form of right's defence and promotion than to show concrete improvements in the protection of rights of poor and marginalised individuals. The interaction between legal standing and social mobilization around economic and social rights has, according to Nelson and Dorsey, powerfully contributed to new rights (the right to water), to new understandings of the implications of these rights, and to new strategies and language for their promotion by NGOs outside of the historic human rights field.[64] What is less clear is the impact of these new strategies on achieving social change in favour of disadvantaged people, either through the work of social movements or in development programming.

Darrow and Tomas raise five interrelated points on what comparative *advantage* a human rights-based approach brings to development *programming*: (1) a normative basis for values and policy choices that otherwise are more or less negotiable; (2) a predictable framework for action that is objective, determinate and defines the appropriate legal limits; (3) an empowering strategy for the achievement of human development; (4) legal means to secure redress for violations; and (5) a basis for accountability.[65] The other authors referred to above have raised similar points, but with less focus on accountability and redress. This argument on

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[59] Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 68.
[60] Paul J. Nelson and Ellen Dorsey, *New Rights Advocacy: Changing Strategies of Development and Human Rights NGOs* (Washington DC: Georgetown University Press, 2008) at 170.
[61] Srirak Plipat, "Developmentazing Human Rights: How Development NGOs Interpret and Implement a Human Rights-Based Development Policy" (Dissertation, University of Pittsburg, 2005) at 6. Available at http://etd.library.pitt.edu/ETD/available/etd-02222006145152/unrestricted/Srirak_Plipat_2006_dissertation_ all_ chapters.pdf, last visited 26 January 2012.
[62] Nelson and Dorsey, *New Rights Advocacy*, *supra* note 60, at 182.
[63] Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 68.
[64] Nelson and Dorsey, *New Rights Advocacy*, *supra* note 60, at 172.
[65] Mac Darrow & Amparo Tomas, "Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation", 27 *Human Rights Quarterly* (2005) 471-538, at 485-486.

the value added by the human rights framework was nevertheless raised early in the debates on the human rights-approach to development assistance.[66]

I agree that the two first points are, in theory, what human rights-based approaches, as defined e.g. in the so called Common Understanding among UN agencies,[67] set out to do, but I am hesitant to whether this is an advantage that can be generalised. While human rights violations in the name of development should never be accepted, I question the value in having a framework that is 'objective' and 'determinate' because this inevitably leads to top-down approaches, an issue I will return to.

The forth point is quite straightforward, at least in theory. In practice there are many obstacles for socially weak groups to seek redress for human rights violations. On the fifth point, it is again, in theory, quite clear that human rights potentially function as a basis for demanding accountability but from whom and in what forum is not at all straightforward, as will be shown in the section on accountability. Similarly, the question as to whether human rights are 'an empowering strategy of human development' will be debated in chapter 2.4.7 and it should be explored more deeply in further research. These questions should always be answered in a specific context where political, legal, historical, and financial factors all play a role.

In addition, Siobhán McInerney-Lankford sees that the answer to the question of 'added value' of human rights discourse lies in the realm of accountability and *obligations*.[68] She notes that human rights should be integrated more systematically into development policy and practice, inter alia, because human rights treaty obligations are legally binding States parties, as a matter of *public international law*, and as such they should be respected in all contexts, including development. The assumption, as expressed by McInerney-Lankford, is that "greater reliance on human rights *law* might provide one effective way to promote a more systematic, explicit and coherent approach to the integration of human rights in development".[69] While valuing an emphasis on obligations, this thesis is concerned that a legalistic approach is unrealistic and elitist in most Southern contexts and has little value on the local level. I share Gready and Ensor's concern about what they call the 'legal reflex' within human rights discourse, i.e., the assumption that the "resort to law is the most effective and perhaps only form of protection and remedy". This is not to deny the importance of the law, but equal importance should be given to political and social processes in securing human rights.[70] In Nelson's and Dorsey's study, NGOs find that the *political power* of human rights stems from their role in social movements while their *legal power* depends on their status as internationally recognised legal standards. NGOs use human rights as a way of reframing debates and as a tool for resisting neo-liberal economic norms and intellectual property rights.

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[66] See The Human Rights Council of Australia, *The Rights Way to Development: A Human Rights Approach to Development Assistance* (The Human Rights Council of Australia, 1995); Birgitte I. Hamm, "A Human Rights Approach to Development", 23 *Human Rights Quarterly* (2001) 1005-1031.
[67] Common Understanding, *supra* note 50.
[68] Siobhán McInerney-Lankford, "Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective", 1 *Journal of Human Rights Practice* (March 2009) 51-82, at 53.
[69] *Ibid.*, at 52.
[70] Paul Gready and Jonathan Ensor, "Introduction", in Gready & Ensor (eds), *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (London: Zed Books, 2005) 1-44, at 9. This is also discussed in Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 66; and Jeremy Holland, Mary Ann Brocklesby and Charles Abugre, "Beyond the Technical Fix? Participation in Donor Approaches to Rights-Based Development", in Samuel Hickey & Giles Mohan (eds), *Participation: From Tyranny to Transformation* (London: Zed Books, 2004) 252-268, at 255.

At the individual level they use human rights as a source of empowering language and concepts.[71]

Some argue that the main value added by so called human rights-based approaches to development is that they can potentially *re-politicize* areas of development work.[72] It is argued that redefining development work as based on human rights claims rather than charity or benevolence is not a neutral act. Poverty is not natural or inevitable but created by deep-rooted or structural inequalities and unequal power relations. Moreover, it is the work of politics to focus on underlying causes of poverty and to challenge asymmetries of power.[73]

As the political character of human rights in development is recognised, this creates the fear that these approaches can be too *interventionists*. While the tension between the rights of states and the rights of citizens, who may be oppressed within these states, is not new in human rights debates, the expansion of human rights-based approaches in various shapes and forms brings in new dimensions to these tensions. Uvin applauds "the move away from the dominant reductionist and technical [development] approaches of the past", but he recoils from the "thought of the limitless intervention seemingly condoned if not morally justified by the emerging agenda."[74] He fears that the legitimacy of the human rights standards may be put into question as the West intervenes "ever more frequently but ever more inconsistently in the affairs of other societies".[75] In order to deal with this fear, Uvin suggests a *radical capacity building approach,* which entails a transfer of the power of initiative and conceptualization to local actors.[76] (See section on 'alternative development'.) I suggest that an *actor-oriented perspective* on human rights should be part of such a radical approach so that the local actors also have the power to contribute to giving meaning to the human rights concept. When human rights enter into development as ready-made concepts with predetermined goals this stifles initiatives from local actors.

Uvin, McInerney-Lankford, Sano, and Gready and Ensor seem to agree that strengthening the human rights perspective in development is not an answer to all the shortcomings of the development enterprise. We should be clear about the limits of the overlaps between the two fields. The relevance of human rights to development processes may not be generalized, nor involve all human rights.[77] Sano summarizes some critical perspectives on human rights-based approaches to development with the statement that there is, inter alia, a risk of exaggerating the strategy's potential. This may occur especially in the area of transforming power relations and when addressing the so called root causes of poverty.[78] This thesis supports the fact that there is reason to be careful in drawing conclusions on the role of human rights in transforming power relationships, especially if more conventional definitions of 'human rights' are accepted. However, I find that these difficult questions cannot be avoided when studying the potential transformative power of human rights in development. Human rights have little value if they have no impact on the relationship between rights-holders and duty-bearers. Similarly, if structural reasons for poverty and human rights failure are not addressed human rights-based approaches will be used to maintain the status quo rather than

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[71] Nelson and Dorsey, *New Rights Advocacy*, *supra* note 60, at 169-172.
[72] Slim, "A Response to Peter Uvin", *supra* note 57, at 3; Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44; See also Gready and Ensor, "Introduction", *supra* note 70, at 23.
[73] Gready, "Reasons to Be Cautious", *supra* note 35, at 389-390.
[74] Uvin, *Human Rights and Development*, *supra* note 52, at 195.
[75] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), at 19.
[76] Uvin, *Human Rights and Development*, *supra* note 52, at 198.
[77] McInerney-Lankford, "Human Rights and Development", *supra* note 68, at 58.
[78] Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 67 and 79.

challenging it. I agree with Gready and Ensor that an engagement with rights should stimulate a political transformation rather than seeking only technical and quantifiable outcomes.[79]

The above summary of some of the attempts to answer the question regarding the possible added value of human rights in development cooperation indicates the importance and need for further research in this area. As will be shown in this thesis, and as has been shown by other studies, it is clear that different actors use human rights in general, and human rights-based approaches to development in particular, in various ways. Therefore human rights play diverse roles in development, depending on the context and the actors involved. It is difficult to make generalisations about, for instance, the so called added value of human rights-based approaches as the question can only be answered in a specific context.

1.4   Purpose and assumptions

This thesis provides empirical data on the role, meaning, and value of human rights in the effort to confer food security in Malawi. The *purpose* is to: (1) identify the *role* of human rights, particularly the right to food, in three development efforts with the aim to strengthen food security in Malawi; (2) identify what is *characteristic* of the three case studies representing charity-based, rights-based and legal approaches to food security; (3) identify the possible *value added* of human rights and principles that are said to come with them in these efforts in terms of the *transformative* potential.

The *assumption* I had before going to Malawi to gather data for the analysis was that human rights offer a new way of working, thus also adding value to 'good development practices', in three interrelated ways: (1) *human rights language* changes the mindset of the actors in development, underlining the legally binding nature of addressing food insecurity, and contributing to empowerment of rights-holders; (2) *human rights-based situation analysis* implies that a complete range of new and different questions, which have a basis in the normative human rights framework, are raised in a development context; (3) human rights offer a platform to demand *accountability* of duty-bearers. These assumptions were the starting point when going into the field to collect data. The assumptions are presented here in the way they were formulated in the early phase of the research process. When drawing conclusions the assumptions are evaluated.

It is clear that many development organisations have realised the power of using human rights language, and that by using this language they can increase the legitimacy of development. Some would even argue that development agencies implement human rights-based approaches *only* on a rhetorical level, changing the language of their programme description documents but not the logic behind their work.[80] This is perhaps true in some cases. The assumption I had in the beginning of this research was, however, that human rights-based approaches have potential to change the business of development on more than the surface level. The shift to rights-based language, according to which poor people are 'rights-holders' instead of 'beneficiaries', may contribute to a sense of *empowerment*: efforts are made to create an environment in which people can mobilise, express and raise concerns and ultimately claim and realise their human rights.

The second assumption builds on the importance of careful situation analysis. When problem analysis raises questions such as who is responsible for taking steps towards progressively

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[79] Gready and Ensor, "Introduction", *supra* note 70, at 23.
[80] See e.g. Emma Harris-Curtis, Oscar Marleyn and Oliver Bakewell, *The Implications for Northern NGOs Adopting Rights-Based Approaches* (England: INTRAC, Occasional Papers Series No: 41, 2005) at 18.

realising the right to food and what obstacles are hindering these steps from being taken, focus is directed to *structural* issues such as legislation and policy, power and politics, action and non-action by institutions, exclusion and marginalisation as well as rights-holders' lack of possibilities to participate.[81] One can say that the normative human rights framework gives a road map for development, directing situation analysis (and therefore also the so called interventions) onto a new path. Focus is shifted from short-term technical solutions (e.g. service delivery) to promoting long-term structural change. It is especially useful to identify the structural causes of food insecurity, i.e., to look beyond for instance drought, at issues such as lack of access to livelihood resources, government social security, and other entitlements, which could enable people to cope with natural disasters.[82] This is related to the entitlement dimension of human rights, meaning that human rights imply entitlements to action by government.[83] This second assumption is connected to one important element of a human rights-based approach highlighted in the so called Common Understanding, i.e., identifying *rights-holders* (and their entitlements) and corresponding *duty-bearers* (and their obligations) and working towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations.[84]

The third assumption is that focus on holding duty-bearers accountable is what really makes the human rights-based approach to development a new way of working.[85] The implications for addressing accountability, however, need to be investigated.[86] Which actors are seen as accountable to whom and on what grounds? What kinds of strategies are used to achieve accountability?

The first assumption deals more with possible benefits for the rights-holders than for development actors, although no strict division is made. The assumption is that when and if rights-holders start *demanding* various services that are relevant to food security as a human rights issue, duty-bearers are forced to deal with issue of food security as a matter of fulfilling a human rights duty.[87] This contributes to a sense of empowerment among rights-holders. The analysis is not trying to *measure* possible tangible benefits for the poorest as this would demand the use of quantitative methods in the form of socio-economic indicators.[88]

The question of demanding services and action from duty-bearers is related to the third assumption about accountability. It is a question of relevance for both development actors and beneficiaries. In most cases, beneficiaries are not in the position to demand accountability from power holders on their own but need the support by local, national, and sometimes even

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[81] Similar list provided in Office of the United Nations High Commissioner for Human Rights, "Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation", 2006, at 27.

[82] Supriya Akerkar, "Rights, Development and Democracy: A Perspective from India", in P. Gready and J. Enson (eds), *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (London: Zed Books, 2005) 144-155, at 151.

[83] George Kent, *Freedom from Want: The Human Right to Adequate Food* (Washington D.C.: Georgetown University Press, 2005) at 93.

[84] Common Understanding, *supra* note 50, para. 3.

[85] Uvin makes the argument that concerns with mechanisms of accountability are what distinguishes charity from claims. Uvin, *Human Rights and Development*, *supra* note 52, at 131. See also Amparo Tomas, "Reforms that Benefit Poor People – Practical Solutions and Dilemmas of Rights-Based Approaches to Legal and Justice Reform", in P. Gready and J. Enson (eds), *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (London: Zed Books, 2005) 171-184, at 173.

[86] Sano points out that "the demand for accountability during the last 15 years has not done very much to clarify precisely where the accountability lies". Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 72.

[87] 'Services' that are based on human rights entitlements can be interpreted broadly to mean material goods, protection and respect. See Kent, *Freedom from Want*, *supra* note 83, at 93.

[88] See Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 75.

international groups. The second assumption about the potential added value of human rights in situation analysis has more to do with changing strategies in programming, and it could be assumed that it is therefore more relevant for the development actor than for beneficiaries. However, the analysis has shown that it is in fact rights-holders themselves that, with some assistance, do this kind of analysis that then leads to mobilizing efforts to demand for changed and improved practices. When fulfilled, these demands do bring tangible benefits for the rights-holders, e.g. in the form of agriculture extension services, improved water outlets or teachers.

All three assumptions try to pinpoint the *transformative* potential of human rights and a human rights-based approach to development. Can human rights contribute to societal, legal, and political change that strengthens the position/voice of the rights-holders?

1.5   The food security situation in Malawi

Malawi is commonly known among tourists as the Warm Heart of Africa. It is a landlocked country south of the equator in Sub-Saharan Africa. Malawi is among the poorest countries in the world, ranking 171 in the UNDP's Human Development Index 2011,[89] despite recent annual growth rates of 6.8 percent (2004-2010).[90]

It is beyond doubt that food insecurity in Malawi is a *chronic* problem that is caused by a complex web of factors, including diminishing farm size, weak access to markets, high prevalence of HIV/AIDS, weak governance,[91] and *chronic poverty*. Around 2005 about 52 percent of the population was living below the national poverty line and 22 percent were classified as ultra poor who could not afford to meet the minimum standard for recommended daily food requirement.[92] According to UN sources this figure has not improved: the *Human Development Report 2011* reports that more than 52 percent of the population are affected by multidimensional poverty,[93] a concept that is reviewed in chapter 2.3.1 of this study. Forty-four percent of children under five are chronically malnourished and around 20 percent are unable to meet their minimum food requirements.[94]

The Welfare Monitoring Surveys (WMS) conducted by the National Statistical Office in Malawi does, however, show a reduction in poverty from 50 percent in 2005 to 39 percent in 2009. This reduction took place over the implementation period of the Farm Input Subsidy Programme (FISP) and may be due to the increase in maize production under FISP, but analysts also speculate that the WMS is not reliable since it is based on imputed consumption

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[89] UNDP, *Human Development Report 2011: Sustainability and Equality, A Better Future for All*, at 126. Available at http://hdr.undp.org/en/media/HDR_2011_EN_Tables.pdf, visited 30 August 2012.
[90] Richard Mussa and Karl Pauw, "Poverty in Malawi: Current status and knowledge gaps", International Food Policy Research Institute, Policy Note 9, December 2011, at 1. Available at http://www.moafsmw.org/ocean/docs/Research/masspn9-CurrentStatusOfPoverty.pdf, visited 14 September 2012.
[91] Eunice G. Kamwendo, "Knowledge Review and Gap Analysis: Hunger and Vulnerability in Malawi", a report by Regional Hunger and Vulnerability Programme, July 2006, at 1 and 7. 'Hunger' is the inability to meet the minimum daily recommended food requirement. *Ibid*, at 3. Available at http://www.wahenga.org/news/news_item.php?news=88, valid as of 6 June 2008.
[92] See Republic of Malawi, National Statistical Office, "Integrated Household Survey 2004-2005", October 2005, at 138-139. The national poverty line is a subsistence minimum expressed in Malawi Kwacha and comprised of two parts: minimum food expenditure based on food requirements and critical non-food consumption.
[93] UNDP, *Human Development Report 2011, supra* note 89, at 144.
[94] UN Development Assistance Framework, UNDAF Malawi 2008-2011, at 11. Available at http://www.unmalawi.org/reports/undaf/undaf_malawi_2008-2011.pdf, visited 20 August 2012. See also The World Bank, Malawi Country Brief 2012. Available at http://web.worldbank.org/, visited 20 August 2012.

expenditures rather than actual values.[95] The most recent Integrated Household Survey (IHS) shows an improvement in welfare in terms of basic needs. While the second IHS (2005) reported that almost 57 percent of households felt they had inadequate food consumption, the report published covering the period of 2010-2011 indicates that this figure has fallen to 38 percent.[96] The same report shows that poverty and food insecurity in Malawi takes on a distinct *gender dimension*: 46.3 percent of female headed households reported inadequate food while the same figure for male-headed households was 35.8 percent.[97] Paradoxically, women are the main food producers: about 70 percent of agriculture labour is carried out by women.[98]

There is persistent lack of economic opportunity either to produce one's own food through subsistence farming or to exchange labour for an income that is needed to purchase adequate, safe and nutritious food.[99] There is a cycle of poverty where farmers lack input because they do not have cash, so they work in other people's fields (*ganyu*), and this leads to a situation where the household suffers from a lack of labour.[100] As an end result the household does not have enough food

Numerous reports analysing the problem and possible solutions have been produced. In a report from 1994, the problems discussed were low maize productivity, poor weather, and population growth. Policy issues raised were land policy, marketing and pricing policy, research and technology, agricultural input policies, and employment and wages policy.[101] In the Food Security Policy of 2006 many of these issues reoccurred: promoting irrigation was a priority together with ensuring access to fertilizers. Land policy and the new Land Bill were briefly referred to.[102] On the operational level, the Ministry of Agriculture and Food Security was working with no less than 45 policies.[103] The Technical Secretariat within the Ministry was coordinating 150 food security projects.[104]

During my interviews with representatives of relevant ministries, donors, and NGOs working to improve food security, a long list of causes for the persistent hunger problem was given. Lack of rain[105] was mentioned by almost everyone as being one factor leading to the recurrent food crisis situations facing Malawi in the past ten years. A typical statement was: "The cause

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[95] Mussa and Pauw, "Poverty in Malawi", *supra* note 90, at 2.

[96] Republic of Malawi, National Statistical Office, "Integrated Household Survey 2010-2011", September 2012, at 140. Available at http://www.nso.malawi.net/images/stories/data_on_line/economics/ ihs/IHS3/IHS3_ Report.pdf, visited 19 September 2012.

[97] *Ibid*., at 143.

[98] Asiyati Lorraine Chiweza, "The Challenges of Promoting Legal Empowerment in Developing Countries: Women's Land Ownership and Inheritance Rights in Malawi," in Dan Banik (ed.) *Rights and Legal Empowerment in Eradicating Poverty* (Surrey: Ashgate, 2008) 201-216, at 205.

[99] Food Security Policy, produced by Ministry of Agriculture and Food Security, Malawi, August 2006, at 4.

[100] It should be noted that in subsistence agriculture everyone depends solely on manual labour, there is almost no use of animal power or tractors.

[101] Louis A.H. Msukwa, "Food Policy and Production: Towards Increased Household Food Security", Centre for Social Research, March 1994.

[102] The issue of land policy reform is sensitive in Malawi and during my interviews I was given conflicting information as to its relevance for food security. A top official in the MoAFS argued that "land is not a major issue in Malawi" (Interview No. 23 with Ministry of Agriculture and Food Security, Malawi, December 2006), while officials involved in the reform made the opposite statements (Interview Nos. 25 and 34, Malawi, December 2006. FSD2727.)

[103] Malawi Agriculture Policy Framework: Logical Framework for Agriculture Sector Policy Documents, May 2006.

[104] Field diary, notes from discussion with Adviser in Technical Secretariat, 12 December 2006.

[105] During the past ten years at least five severe droughts have damaged the harvests.

of the food shortage was quite natural: the rains were not just there."[106] Only rarely did the informant link past policy decisions to the food security situation in the country today ("this problem is a result of accumulated effects of wrong actions, wrong decisions, wrong policies"),[107] thereby linking food shortages to the responsibility of those involved in deciding on policies. This sort of shift in the awareness and analysis of the food insecurity problem, away from seeing it as 'natural', would be critical when moving from a charity-based to a rights-based approach to development, i.e. putting legislation, policy and practice in place that supports the realisation of the right to adequate food. According to Amartya Sen famine is always a social phenomenon and classifying famines into 'man-made' and 'nature-made' is often misleading. Even when the prime mover in a famine is a flood or drought, what the impact will be on the population would depend on how society is organised.[108]

Land policy (or the lack thereof) is one example of how food insecurity has been made worse by past policy decisions. From independence in 1964 until 2002 there was no comprehensive land policy in the country. During the 1970s and 80s, when tobacco growing was profitable, land was continuously transferred from customary ownership to private tenure for the estate sector, the result being a declining size in land holdings.[109] Bias in favour of the estate production has led to shortage of arable land in some regions. Failure to deal with land policy has no doubt contributed to current problems of poverty, food insecurity, and inequalities in access to arable land.[110] Increased land fragmentation has contributed to a situation where farmers with less than one hectare, which is more than half of all farmers,[111] have been identified as a category of food insecure households in need of special support.[112]

The problems created by unclear and non-existing policies were being addressed at the time of the interviews as there was a land policy reform underway in 2006. A Special Law Commission had reviewed all land related laws and drafted one comprehensive Land Act based on the policy from 2002. The Land Bill was in the process of being reviewed in Parliament at the time of my field research. One proposal was that all land, including customary land, is privatized and titled.[113] Sixty-five percent of the land in Malawi is customary land that the 'owner' has the right to use but has not a formal title to,[114] and allocation of rights to such land is the responsibility of traditional leaders.[115] The policy seeks to encourage customary landowners to register land holdings as private customary holdings with land tenure rights.[116] It remains to be seen if these quite radical proposals will be adopted as law, and what impact it will have on food security. This sensitive issue has taken many

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[106] Interview No. 33 with NGO that is member of JEFAP, Malawi 2006. FSD2727.

[107] Interview No. 1 with Malawi Human Rights Commission, Malawi 2006. Also Interview No. 3 with donor, Malawi 2006. FSD2727.

[108] Sen and Drèze "Hunger and Public Action", *supra* note 32, at 46.

[109] Msukwa, *supra* note 101, at 5; Interview No. 25 with Ministry of Lands, Physical Planning and Surveys, Malawi 2006. FSD2727.

[110] Government of the Republic of Malawi, Malawi National Land Policy, January 2002, para. 2.4.2.

[111] *Ibid.*, para. 2.1.4.

[112] United Nations, Common Country Assessment of Malawi, March 2001, at 8. Available at http://www.undg.org/documents/1676-Malawi_CCA_-_Malawi_2001.pdf. See also Kamwendo, "Knowledge Review", *supra* note 91, at 5.

[113] About 65 percent of all land in Malawi is categorized as customary land. Interview No. 25 with Ministry of Lands, Physical Planning and Surveys, Malawi 2006; Interview No. 34 with Special Law Commission on Land Reform, Malawi 2006. FSD2727.

[114] Interview No. 25 with Ministry of Lands, Physical Planning and Surveys, Malawi 2006. FSD2727.

[115] Malawi National Land Policy, *supra* note 110, para. 5.3.1.

[116] Chiweza, "The Challenges of Promoting Legal Empowerment", *supra* note 98, at 209.

years to process and the Customary Land Bill, existing since 2010,[117] had not yet been adopted in 2012.

The human rights civil society in Malawi was not actively working on land-related policy issues in 2006, despite the fact that land policy potentially has a considerable effect on food rights. Olivier De Schutter, Special Rapporteur on the right to food, has pointed out that in the context of increasing commercial pressure on land, it is essential from a human rights perspective to improve the protection of livelihoods in rural areas by strengthening security of tenure. However, he believes that an exclusive emphasis on individual titling, which is what the Land Bill was proposing in Malawi, risks leading to the creation of land markets and privatisation of common resources that are particularly vital for the most vulnerable members of the communities.[118] Case law concerning the right to property in Malawi has in fact established that ownership of the beneficial interest in customary land is also protected – contrary to the misconception that tenure in customary land is insecure.[119]

In Malawi maize is the staple food in most districts. People use maize meal to make porridge (*nsima*) that is eaten every day in most households. For many people in the rural areas *nsima* is food. Relish from vegetables, fish or meat is a supplement to *nsima*.[120] Among educated Malawians and expatriates you often hear diminishing expressions such as "Malawians are spoiled, they want *nsima* three times a day and when the maize harvest is bad they complain that they don't have food even when rice would do the same job".[121] This and other similar statements hint at the fact that rural Malawians can blame themselves for their food insecurity problem because they simply do not value other staple foods such as rice, cassava, and sweet potatoes. This is naturally not the case. However, decades of skewed policies aimed at promoting white maize production have distorted production and consumption patterns, and this has made Malawians vulnerable to chronic food deficits.[122]

Increased maize production has, since the 1960s been the main strategy for achieving the objective of self-sufficiency in food production. As a consequence of this policy, maize cropping has been introduced throughout the country and has become the dominant food crop even in those areas that used to produce other crops. Agriculture extension workers have largely focussed on promoting hybrid maize production and the use of fertilizers to the neglect of other food crops and extension strategies. Small-holder land allocated to growing maize increased from 58 percent in 1980/81 to 70 percent in 1990/91.[123] Out of all agricultural households 97 percent cultivated maize in Malawi in 2005.[124] Over-reliance on maize is a problem that is today recognised both by the government as well as by donors and

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[117] The Customary Land Bill is amended to the Report of the Law Commission on the Review of Land-Related Laws, 9 April 2010.

[118] Olivier De Schutter, "The Emerging Human Right to Land", 12 *International Community Law Review* (2010) 303-334, at 323-324.

[119] See Danwood Mzikenge Chirwa, "A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi", 49 *Journal of African Law* (2005) 207-241, at 222.

[120] Civil Society Agriculture Network, "The People's Voice!" A Community Consultation Report on Malawi Food and Nutrition Security Policy Formulation Process, Lilongwe, Malawi, 2004, at 7. (The report is with the author.) From my own group interviews it was also clear that producing enough maize to fulfil the consumption needs of the family is what is considered important for food security.

[121] Field diary, Malawi, 2006. Similar statements in Interview No. 30 with donor; Interview No. 15 with Church and Society. FSD2727.

[122] Stephen Devereux, "State of Disaster: Causes, Consequences & Policy Lessons from Malawi", a report commissioned by Action Aid Malawi, June 2002, at 6. Available at http://www.actionaid.org.uk/_content/documents/malawifamine.pdf, visited 14 May 2012.

[123] Msukwa, *supra* note 101, at 4 and 12-14.

[124] Integrated Household Survey 2004-2005, *supra* note 92, at 96.

NGOs trying to improve food and nutrition security. Promoting alternative crops together with diversification is, however, challenging due to decades of public information on the importance of producing maize.[125]

Agricultural *liberalisation* measures have hit rural Malawi hard. Until the mid-1990s, smallholder farmers enjoyed subsidies on fertilizers and hybrid maize seeds, but farmers in the early 2000s worked in a very different policy environment. Before liberalisation farmers could also access cheap credit and sell their produce at supported prices to the Agricultural Development and Marketing Corporation (ADMARC). By 1996, fertilizer and hybrid maize seed had been removed and agricultural markets had been liberalised. Smallholders faced deteriorating terms of trade, volatile markets, and scarce credit.[126] In the liberalised, non-interventionist context, 'bad' maize production years became normal. Since the mid-1990s, the only good years have been those when there have been large-scale interventions to boost food production. Various such interventions have been implemented over the years by the government and with the support of donors, known as the Starter Pack and the Targeted Input Programme.[127]

The presidents that followed the one-party regime of President Kamuzu Banda (1966-1993),[128] Bakili Muluzi and Bingu wa Mutarika, implemented policies to remedy the previous biases against smallholder agriculture.[129] Following the election of Mutharika as President in 2004, the government decided to implement a radically different input programme, moving towards a general (not targeted) subsidy.[130] The President had publicly placed great importance on the FISP as a key strategy of the country's agricultural policy and is considered the most influential actor in this context.[131] In 2004/05 the government provided two million smallholder farmers with packs of 25 kg of fertilizers, 5 kg of maize seed and 1 kg of legumes, in addition to distributing vouchers for buying fertilizers to 500,000 smallholders.[132] The voucher programme targeted economically active farmers who could afford to buy subsidised fertilizers at 950 kwacha. During my stay in Malawi the FISP was a very topical issue, and almost every day news papers raised issues of alleged corruption and mismanagement. Due to these and other reasons donors have been reluctant to support subsidies. They have, however, accepted targeted subsidies for the poorest farmers and in 2006 the EU, DFID and NORAD supported a seed component of the subsidy programme.[133]

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[125] Interview No. 3 with donor, Malawi, 2006; Interview No. 35 with international NGO, Malawi 2006. FSD2727.

[126] Sarah Levy, "Introduction", in S. Levy (ed.), *Starter Packs: A Strategy to Fight Hunger in Developing Countries? Lessons from the Malawi Experience 1998-2003* (Cabi, 2005) 1-11, at 6.

[127] *Ibid.*, at 2 and 4.

[128] Dr. Hastings Kamuzu Banda led Malawi (formerly Nyasaland) to independence. In 1970 he became Life President. In 1993 he was forced to stand down, four years before his death. See chapter 3.1.

[129] Klaus Droppelmann et al., "All Eggs in One Basket: A Reflection on Malawi's Dependence on Agricultural Growth Strategy", International Food Policy Research Institute Discussion Paper, April 2012, at 16. Available at http://www.ifpri.org/publication/all-eggs-one-basket, visited 1 September 2012.

[130] Levy, "Introduction", *supra* note 126, at 6. The Farm Input Subsidy Programme can be seen as President Mutharika's flagship programme, a programme that was implemented against fierce donor resistance. See Blessings Chinsinga, "Can Subsidies Last in Malawi", *The Africa Report*, 17 July 2012. Available at http://www.theafricareport.com/index.php/soapbox/can-subsidies-last-in-malawi-501815522.html, visited 20 August 2012.

[131] Noora-Lisa Aberman et al, "Mapping the Contemporary Fertilizer Policy Landscape in Malawi", International Food Policy Research Institute Discussion Paper, August 2012, at 12. Available at http://www.ifpri.org/publication/mapping-contemporary-fertilizer-policy-landscape-malawi, visited 10 September 2012.

[132] Levy, "Introduction", *supra* note 126, at 6.

[133] Interview No. 23 with Ministry of Agriculture, Malawi 2006. FSD2727. All donors interviewed were careful to underline that their support to the subsidy program is designed in a manner to stimulate the private sector. E.g. Interview No. 3 with donor, Malawi 2006. Since 2006, the government used private sector agricultural dealers as

Needless to say, the subsidy programme is hugely popular in Malawi.[134] The country has experienced an increase in national maize production in the period of 2006-2010, moving from chronic food deficits to the point of exporting maize to neighbouring countries.[135]

In 2012, following the sudden death of President Mutharika, one of the key questions being asked is whether the change in government will also bring changes to the major policies such as the FISP. The new head of state, Joyce Banda, who was Mutharika's vice president, has already expressed commitment to the continuation of the programme. Analysts do not see this as surprising, considering that Malawi's agricultural production depends on some form of subsidy to smallholder farmers. Blessings Chinsinga writes that "subsidies have become more or less an integral part of the social contract between the government and citizens." Maize subsidies are at the core of Malawi's politics.[136]

The year 2012 is a challenging year in terms of food security in Malawi. The Malawi Vulnerability Assessment Committee (MVAC) reports that more than 1.6 million people will need food assistance. As many as 15 out of 28 districts are affected by dry spells and deteriorating food security. The recent devaluation of the national currency by 49 percent, together with a high inflation, has produced sharp increases in food prices and living costs.[137]

This is the context in which the three projects to be analysed operate: a country that suffers from chronic food insecurity and deep structural problems that create hunger.

1.6   Data and method

1.6.1   Research strategy: Analysis of three approaches

This study applies qualitative social science methodology. The goal is the same as in empirical social science in general: to explain and understand observed social phenomena. The aim is to understand the meanings, processes, and context[138] in which human rights and development are integrated; to explain the role of human rights and human rights principles within these contexts; and to identify what is characteristic of 'good development practice', human rights-based approaches as well as legal approaches to development.

In part III, the objects of enquiry are three food security projects in Malawi and the aim is to understand and explain the role of human rights and human rights principles within these projects, and to identify what are the characteristics of charity-based, rights-based and legal approaches. It is also important to understand the processes and contexts in which they operate. The analysis of the three food-related projects in Malawi takes place in a specific locality, context, and timeframe, and this cannot be disregarded. For instance it is of relevance to be familiar with the history of the human rights movement in Malawi, especially during the transition from an authoritarian regime to a multiparty form of government, in order to

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well as state-owned outlets for distribution of fertilizers and seeds. See DFID, "A Record Harvest in Malawi", 8 May 2007. Available at http://www.dfid.gov.uk/casestudies/files/africa%5Cmalawi-harvest.asp, visited 14 May 2012.

[134] The New York Times, "Ending Famine, Simply by Ignoring Experts", 2 December 2007, available at http://www.nytimes.com/2007/12/02/world/africa/02malawi.html?scp=1&sq=Ending+Famine&st=nyt., visited 8 May 2012. Similar statements in Interview No. 23 with Ministry of Agriculture, Malawi 2006. FSD2727.

[135] Droppelmann et al., "All Eggs in One Basket", *supra* note 129, at 16.

[136] Chinsinga, "Can Subsidies Last in Malawi", *supra* note 130.

[137] WFP News: "WFP Gears Up Food Relief for Thousands in Malawi", 13 July 2012. Available at http://www.wfp.org/news/news-release/wfp-gears-food-relief-thousands-malawi, visited 27 August 2012.

[138] Todd Landman, *Studying Human Rights* (London: Routledge, 2006), at 3 and 72.

understand the role human rights play in society today. Naturally, it is also important to know the food security challenges that Malawi is facing. The thesis tries to capture the rationale for choosing a specific approach to intervene in food insecurity and the role human rights play in this picture.[139] The study does not, however, attempt to give an over-arching analysis of the cause-and-effect processes of food insecurity in Malawi in general or to evaluate the effectiveness and effects of the programmes.[140]

The *strategy* for providing an answer to the main research questions about the role and added value of human rights in food security efforts is an *analysis* of three food-related projects. This strategy is *empirical* in the sense that *evidence* about what is taking place in these three projects is collected.[141] The analysis provides in-depth knowledge of the three cases studies and therefore I have no ambition to draw generalized conclusions based on the data acquired in the field. However, the data may provide *theoretical* insights, in this case related to the assumptions made before embarking on the field research, which help in understanding the role of human rights in development on a general level.[142] Data for the analysis has been collected through semi-structured individual interviews and group interviews conducted at the end of 2006. In addition to analysis of the interviews carried out during the field research, policy documents as well as other written material concerning the programmes are critically reviewed. Due to the difficulty of obtaining written material from Malawi after the end of the field research the study only gives a superficial follow-up of the projects.

The three food-related interventions in Malawi represent different approaches to development and food security: (1) supporting food security through food-for-asset (representing charity-based approaches); (2) supporting food security through demanding accountable services from duty-bearers as a matter of rights (representing rights-based approaches); (3) supporting legislation on the human right to food (representing legal human rights approaches). The assumption is that human rights play a role in all of these approaches, but what that role is differs and so do the interpretations of the so called human rights principles. The point in making such a comparison is not to play these approaches against each other ('charity/needs vs. rights') but instead highlighting that if and when needs are seen as a matter of fulfilling human rights ('needs as rights') this has certain implications. The *process* should look different if needs are dealt with as an human rights issue compared to cases where fulfilling needs is seen as 'charity' or a 'favour'.

The first object of inquiry is the food-for-asset component of the food assistance programme called the Joint Emergency Food Aid Programme (JEFAP) by the World Food Programme (WFP) and its NGO partners. What is characteristic of this approach is that service delivery (food commodities distributed in exchange of asset creation) is based on targeting needs, and the delivery of the assistance is based on charity rather than entitlements. The aim is to identify the rationale behind distributing food assistance, and the principles according to which programmes are managed, not to evaluate the effectiveness in reaching the intended beneficiaries.

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[139] Compare with "General Introduction: Context and Challenges for Combining Methods in Development Research", in Jeremy Holland with John Campbell (eds), *Methods in Development Research: Combining Qualitative and Quantitative Approaches* (United Kingdom: Centre for Development Studies, 2005) 1-18 at 3.
[140] Evaluation research typically intends to assess the effects and effectiveness of something, for example a policy or service, applying qualitative or quantitative methods. See Colin Robson, *Real World Research* (UK, Blackwell Publishing, second edition 2002) at 202.
[141] *Ibid.*, at 179.
[142] Robson, *Real World Research*, *supra* note 140, at 177 and 183. See also David Silverman, *Doing Qualitative Research* (London: Sage Publications, Second edition, 2005) at 126-127.

The second programme that is analysed is Shire Highlands Sustainable Livelihoods Programme (SHSLP) implemented by Oxfam and local government institutions. It is seen as representing 'rights-based approaches' because it makes more inspirational use of human rights than a normatively-based human rights approach. Integrating a rights-based approach, which started in 1999, has according to Oxfam, meant working at the institutional level to "stimulate the supply of rights and services" and at the community level to "generate awareness of and demand for these rights and services",[143] but without linking this language to international human rights instruments. My aim is to identify challenges in applying 'rights-talk', i.e. demanding accountable and transparent services as a matter of rights and obligations, not as a favour, in a very resource-constrained environment.

The third project chosen for the analysis is the Right to Food Project implemented by Church and Society together with a loose network of other civil society organisations. The project is seen to represent a 'legal human rights approach' since its main focus is on putting legislation in place that will guarantee duty-bearer responsibility and avenues for accountability. Through analysing the project, it is possible to study the possible added value, and the challenges facing this kind of a normative approach; an approach that is strongly rooted in the international human rights framework.

Malawi was chosen because of its prevalent food security problems and because I was familiar with the policy framework in the country from previous research on the human rights-based approach to development in the context of food security and HIV/AIDS.[144] There are many benefits in having all three case studies in the same country. In addition to logistical and practical benefits in carrying out field research, it also meant that all three projects functioned in the same political, social, economic, and legislative environment. However, the three projects chosen for the analysis are very different in terms of number of beneficiaries and staff members, budget, and not the least in terms of the assumed importance given to human rights. They also operate on different levels of society: while the Right to Food Project lobbies on behalf of national legislation, operating on the national level in a political environment, the two other projects operate on the district and local levels. There are different external factors inhibiting the projects and this is taken into account in the analysis.

It is clear that the projects cannot be *compared* with each other – and I analyse the three projects for different reasons. I deliberately choose projects that have a varied approach to food security, and it was a conscious choice that only one of the projects claims to apply a so called rights-based approach to development. I assumed that through analysing one food assistance project that represents a 'conventional' approach to hunger it would be possible to determine if there is any difference in how certain principles, common to 'good development practice' and human rights, are applied in this approach compared with the other two projects that both claim to apply these same principles. The purpose of the analysis of the food assistance project is to have a starting point, or baseline, of what is the role of human rights in a conventional charity-based approach. It is argued that it is impossible to know whether new ways of doing 'development' has any transformative effects before one is familiar with the situation that proceeded the rights-based and human rights-based approaches. Moreover, food assistance has traditionally played an important role in Malawi and it is still distributed every year. Since WFP is an important actor in Malawi the JEFAP programme was chosen. Naturally, it also played an important role that it was possible to reach WFP staff before the

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[143] Oxfam, "Integrating Rights into Livelihoods Programme: A Case Study of Shire Highlands Sustainable Livelihoods Programme", Malawi (project document that is with the author).
[144] Alessandra Lundström Sarelin, "Human Rights-Based Approaches to Development Cooperation, HIV/AIDS, and Food Security" 29 *Human Rights Quarterly* (2007) 460-488.

field research and that they agreed to meet me in Lilongwe during the first days of my stay in Malawi.

At first I thought that analysing a 'conventional' food aid project and a livelihoods project that identifies itself as rights-based would already provide me with some answers about the role of human rights and so called human rights principles in these two different approaches. However, when I saw a small article about the Right to Food Project in Malawi in a document published by FIAN[145] the idea to have a third project that is implemented by human rights NGOs instead of developmental organisations was conceived. In this way the analysis would also be able to see possible differences in the two discourses of development and human rights, which traditionally have been operating side by side with hardly any cooperation, at least in Malawi. Although I had little information about the Right to Food Project before going to Malawi I decided to take a risk and try to set up a sufficient number of interviews with project stakeholders. Church and Society, that heads the Right to Food Project, agreed to be part of the analysis.

1.6.2 Data collection: Semi-structured individual interviews and group interviews

A field research trip to Malawi was conducted in November-December 2006 to gather data for the analysis. During the field visit I was affiliated with the Centre for Social Research at the University of Malawi. The method for data collection was *semi-structured interviews*, combined with *group interviews*. Semi-structured interviews means that I used an *interview guide*[146] with some predetermined questions and areas to cover, but during the interview I also raised new questions while omitting others because of lack of time or because they seemed inappropriate with a particular informant.[147] In semi-structured interviews it is common to incorporate more highly structured sequences (e.g. to obtain factual biographical material) but since such personal data plays no role in my research there was no need for this.[148] Moreover, I wanted to underline the importance of dialogue and encourage the informants to elaborate on their views. In preparing for the interviews I benefited from Steinar Kvales extensive work on both the theoretical as well as practical aspects of qualitative interviews.[149] My interview guide included firstly some introductory comments, covering the purpose of my research in general and the interview in particular and secondly a list of topics and key questions to ask under each project.[150] Questions directed to people involved in all three projects focused on the rationale for the approach chosen in the particular project, and how human rights fit or do not fit into this rationale. The meaning of the concepts non-discrimination and focus on vulnerable groups, participation, accountability and empowerment was raised in the majority of the interviews. In addition to the common set of questions, project-specific questions were also raised. At the end of the interview I indicated that I had no further questions and gave the informant the opportunity to raise any issues he or she had been thinking about.

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[145] Carole Samdup, "Promoting the Human Right to Food in Malawi" in Voluntary Guidelines on the Right to Adequate Food: From Negotiation to Implementation, FIAN-Documents g47e/2006, at 15. Available at http://www.sarpn.org/documents/d0002164/FIAN_right_to_food_2006.pdf, visited 14 May 2012.

[146] Robson uses the concept "interview schedule" for the semi-structured interview but "guide" is more appropriate for my purposes as the aim of the predetermined questions was not to determine the timing or sequencing of the questions but rather to set the general framework of topics of be covered in the conversation.

[147] Robson, *Real World Research*, *supra* note 140, at 270. See also Britha Mikkelsen, *Methods for Development Work and Research* (New Delhi: Sage Publications, second edition, 2005) at 169 and 171.

[148] Robson, *Real World Research*, *supra* note 140, at 278.

[149] See Steinar Kvale, *InterViews: An Introduction to Qualitative Research Interviewing* (California: Sage, 1996).

[150] Compare with Robson, *Real World Research*, *supra* note 140, at 278.

I conducted 34 interviews with project personnel, government representatives, NGO staff, donors, and other relevant project stakeholders. Altogether 47 informants were interviewed. The majority of semi-structured interviews were on an individual basis but on a few occasions two or three people participated.[151] Individual interviews lasted about 45 minutes, while group interviews with two or three people took over one hour. The group interviews with rights-holders lasted one to two hours, depending on the number of people participating. The language spoken in the group interviews was Chichewa, and I used an interpreter. All other interviews were in English. Notes were taken during and after every interview and observations were written down in a field diary. This was also useful as sometimes informants shared useful information after the tape recorder had been turned off.

The majority of the informants were men – only 15 informants were women. This gender imbalance is due to the fact that most government officers and NGO staff members are men. The greatest gender imbalance was in interviews for the analysis of the Right to Food Project. All individual interviews were with men and it was only in one group interview that I had the chance to talk to (three) women.

Four *group interviews* with beneficiaries or rights-holders were organised. The discussion in these settings was not focused on only one particular topic and therefore it was not a *focus group*. Focus groups are group discussions with the purpose of addressing and exploring a specific topic in detail, e.g. people's views and experiences of contraception.[152] Moreover, focus groups are distinguished from the broader category of group interviews through explicitly using group interaction as research data.[153] It is also typical for focus groups that people participating are more or less homogenous, e.g. a group of widows, although opinions on this vary and heterogeneous groups are also used.[154] In my group interviews, the discussion covered a broad area and it was directed partly by my questions and partly by the interests of the participants. In the analysis of the data obtained from the participants. I do take group interaction and internal power relations into account but the study of these factors was not the main purpose of the interview.

In group interviews participants may be invited, i.e., sampled, or random in the way that participants are those who happen to be around at the time of the interview.[155] In my case I did not have any influence over the selection of participants in the group interviews. This can be seen as a challenge from the point of view of wanting to ensure an equal representation by all groupings in the village, including so called vulnerable groups such as widows, people living with HIV/AIDS and people with disabilities. On the other hand, random selection can have benefits in terms of excluding possible researcher bias. Two groups interviews were organised when visiting the SHSLP and the other two (separate for men and women) were held as part of the analysis of the Right to Food Project. The first two groups were mixed in the sense that people participating came from diverse backgrounds. The group interviews in which men and women were interviewed separately were more in the style of focus groups, as all participants were members of Church and Society in the Mulanje District. However, in this case the participants also came from diverse social backgrounds. Due to practical challenges it

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[151] The typical interview is one-to-one and face-to-face, but it can take place in a group setting. Robson, *Real World Research*, *supra* note 140, at 270.

[152] Mikkelsen, *Methods for Development*, *supra* note 147, at 173; Jenny Kitzinger, "The Methodology of Focus Groups: The Importance of Interaction Between Research Participants", in A. Bryman & R.G. Burgess (eds), *Qualitative Research*, Volume II (London: Sage Publications, 1999) at 138-155, at 138.

[153] Kitzinger, "The Methodology of Focus Groups", *supra* note 152, at 138.

[154] Robson discusses the benefits of homogenous and heterogeneous groups, see *Real World Research*, *supra* note 140, at 286.

[155] Mikkelsen, *Methods for Development*, *supra* note 147, at 172.

was not possible to organise an interview with beneficiaries of the food-for-asset component of JEFAP. Instead, questions concerning food assistance were raised with participants in the other groups.

The first group interview with rights-holders was held in a village in the Mulanje District. People in the villages usually work in their fields in the morning so I was advised by Oxfam to visit the village in the afternoon. Oxfam had informed the village about my visit. I arrived together with one officer from the Community Development office and one staff member of the human rights NGO Malawi CARER (Centre for Advice, Research, and Education on Rights), who also acted as my interpreter. As we arrived we were greeted by the village headman. He showed us into a brick house that is used for adult literacy classes and other common activities for the villagers. Inside the house I met a group of about ten men and women.[156] I shook hands with everyone. Then the village headman said a word of welcome in Chichewa, to thank everyone for attending. After this there was a short prayer. Then it was my turn to explain why I had arrived and what I wanted to talk about, i.e., express my interest in learning about the structures in the village, the outside support from government institutions and NGOs, the on-going development activities and the challenges villagers are facing. I also raised some questions about rights as I knew that the Malawi CARER had been educating villagers on rights issues. The village headman was the first to talk and answer my questions. While he was talking the others did not participate in the discussion. When I raised a question about the Village Development Committee a male member of the committee replied. From this point the others in the room also participated in the discussion. A young woman from the Village Rights Committee was active in giving replies and she also explained about the activities of this committee.

The set-up for this discussion with the rights-holders had a number of weaknesses. First of all it is clear that it was mostly the village headman and people with a position within an elected body who were talking. This is a typical problem in group interviews and focus groups. The benefit, on the other hand, is that participants tend to provide checks and balances on each other, i.e. there is a kind of natural quality control.[157] However, I cannot claim to have the view of, for instance, vulnerable groups. Secondly, the presence of the officer from Community Development and Malawi Carer, both of which are partners in the Shire Highlands programme, might have made people prone to speak only favourably of the programme activities. It is naturally impossible to make sure people were being honest and not only saying what they thought I wanted to hear. This is a general human tendency and anyone, no matter how powerful or powerless, has been in a situation where he or she is trying to assess what the person asking questions really wants to hear. Statements such as "gender balance is important", and the use of development buzz words such as "capacity building" made me careful when drawing conclusions based on this group interview. Thirdly, it is difficult to assess the accuracy of the translation from Chichewa to English and from English to Chichewa. These concepts might be the choice of the interpreter rather than the informant. The ideal situation is to have a professional outside interpreter but due to practical challenges such as time constraints, long distances and a limited local network (as this was in the beginning of my field trip) this was not possible.

The second group interview was the following afternoon in a village in the Thyolo District. When I arrived together with two staff members from Development Broadcasting Unit (DBU) that coordinates the Radio Listening Club in the village, a crowd of 10-15 villagers greeted us

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[156] Opinions on the optimum size of the group vary but figures of eight to twelve are usually held suitable. Robson, *Real World Research*, *supra* note 140, at 285.

[157] Robson, *Real World Research*, *supra* note 140, at 284.

with singing and dancing. They wanted to share the song that they use in the radio programmes they make. The atmosphere was full of pride for the village and the common activities, especially the Radio Listening Club that currently was making a programme about the misuse of fertilizer coupons. The villagers were very well prepared for my visit and my impression was that this was not the first time they received visitors from foreign countries. The man from the DBU interpreted. Again a strict protocol was followed during the opening of the discussion. The difference here was that while the headman of the previous village played an active role in the opening ceremony, this time all three village heads (two men and one woman) were sitting at the other side of the room and not taking active part in the discussion until later. After the praying and all the opening statements and introductions there was a short play about farming and the challenges faced by farmers performed by a small group of women and men. Then elected members from the Village Development Committee, the Village Rights Committee and the Radio Listening Club explained about the work these committees carry out in the village. After these general introductions I had the opportunity to direct specific questions to individuals from the committees and the village headmen. At one point I also indicated I would like to have an answer from everyone in the room. Towards the end of the session I encouraged the villagers to ask question of me and we concluded by comparing farming in Finland and Malawi.

The weaknesses in this second group interview are the same as in the first: not having an outside interpreter, not being sure that the presence of village headmen is not intimidating others and the difficulty to get all the people to participate in the discussion. My impression was, however, that the statements made were honest and frank and people were not trying to give a too rosy picture of the Shire Highlands Programme or the Radio Listening Club. Many women were also active in the discussion but the problems raised were not as gender specific as was the case in the forth group interview that was for women only. A common challenge in all four group interviews was to clearly communicate to the participants that I was not representing a donor or any development agency and that I was not in a position to decide about funds or the future of the programme. Being a white, European, academic woman visiting a village for a short while naturally effects the information shared with me. It would be naïve not to see that people were hoping to obtain some benefits from my visit and therefore also trying to please me as much as possible. The research interview was in this case not a conversation between two equal partners.[158]

The third and forth group interviews took place at Mulanje Mission with members of a local branch of Church and Society. It transpired to be a good decision to have separate interviews with men and women. Although this was a much smaller group interview than the previous two and the people interviewed were not direct 'beneficiaries' of the Right to Food Project it can still be argued that they, as local members of Church and Society, represent 'rights-holders'. It should also be noted that the Right to Food Project does not have any direct beneficiaries and this was as close as I could come to talking to people who were not staff members from NGOs involved in the project. The discussion was useful as it revealed the limited role of local activists in the Right to Food Project. At the same time, I had the chance to take up food security issues such as fertilizer coupons, land policy, food assistance, the role of local duty-bearers and power structures in villages with people who were in a considerably less privileged position than NGO staff. The fact that these people all lived in Mulanje, where Oxfam's Shire Highlands programme was implemented made the discussions even more relevant as this gave me additional information about the specific challenges in the programme area.

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[158] Kvale, *InterViews*, *supra* note 149, at 6.

When the interview started it was only me with two men from the Church and Society Board. Ten minutes later a third person, who happened to be part of the local elite, joined us. It was noticeable how the other two men became silent as the third man started talking in English instead of Chichewa. My driver was interpreting when the discussion switched back to Chichewa again. It soon became clear that none of the men had much information about the Right to Food Project and the atmosphere was a bit tense as it seemed it was embarrassing for them to admit they had no idea what I was asking about. The atmosphere improved again as I started asking about other Church and Society activities in Mulanje and general food security problems. For example, they showed me civic education material about human rights that Church and Society had used when conducting rights training with members of the Church. This was useful as I could see rights issues were taken up also outside Church and Society's main office in Blantyre.

During the discussion with three female members of Church and Society I was given an insight into these women's lives. The atmosphere was intimate and open. The presence of my male driver, who interpreted, did not seem to prevent these women from sharing stories with me. I heard about everything from violence against women in the families to how young orphan girls working on the tea plantations sell sex to male employees. The women told me how they work in the fields, how they get advice from extension workers and struggle to get coupons to buy subsidized fertilizer, knowing that most of the coupons go into 'deeper pockets'. The loud laughter following my question if there is anything they can do about corruption revealed what they thought of this a naïve question. Some of the women had also received goats and seed from NGOs and their opinion was that assistance coming from NGOs works better than from village chiefs. At the same time the women tried their best to help orphans in the area, taking care of them with food, soap, and blankets, even taking them to school. The trusting and intimate atmosphere in which all three women felt comfortable to express their views made it the most useful group interview in providing information about the overall context and challenges concerning food security and human rights in Mulanje.

When studying multiple cases it is crucial to set the boundaries of the study, i.e., to define aspects of the cases that are feasible to study within the time and means at hand. The question of who to interview (*sampling*) can have a considerable impact on later analysis. Qualitative researchers usually focus on a small sample of people compared to quantitative researchers who aim for larger numbers and seek statistical significance. Qualitative samples also often have more purpose than being merely random.[159] I set the boundaries of the case studies early on as I decided not to study every aspect of the programme but instead focus on the particular area that related to human rights issues. The boundaries for each project were a little different because the assumed role of human rights was different. For example, in the SHSLP I was not interested in learning about the seed component of the programme but instead I focussed on how rights issues have been integrated into the programme through rights training, radio listening clubs, and cooperation with the Labour Office and the trade union. This also helped to narrow down the people to interview.

In JEFAP my focus was broader and more general as I was not sure what the role of human rights would be but after my initial interviews I made the choice to narrow my focus down to the food-for-asset aspect of the overall programme. This choice was based on the perception that principles non-discrimination, participation, empowerment and accountability play a larger role in this context compared to schemes in which food given as direct assistance.

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[159] Matthew B. Miles and A. Micheal Huberman, *Qualitative Data Analysis* (London: Sage Publications, 1994, second edition), at 27.

With regard to the Right to Food Project, which is much smaller in scope, and focuses purely on the right to food, the question of setting boundaries was not a significant issue. The ambition was to interview as many relevant stakeholders of the project as possible, but being aware that it is not possible to cover everyone and some kind of selection had to be made. This selection was more or less random in that it was the circumstances (e.g. who picked up the phone that moment I called to set up the interview) that dictated the final selection rather than a detailed list of people to be interviewed that had been prepared well in advance. (This also holds true for the other projects as well.) Time constraint and conditions in Malawi did not permit the following of any detailed plan but instead the situation was lived each day. After each interview I considered who else should be interviewed in order to cover different aspects of the programme and to avoid bias.

The Right to Food Project had a rather 'elite approach', with limited input from 'the grassroots', and this is reflected in those individuals I interviewed (mostly male leaders of NGOs). The aim was to obtain an overview of the characteristics of settings and processes within the programme. This means the people themselves were secondary.[160] In fact, I did not know anything about the people to be interviewed in advance of the interview and he or she was selected based on his/her role in the programme, not their personal capacity. In addition to interviewing representatives of stakeholders to the projects, I also decided to speak to people who were familiar with either the projects or had insight into the substantial issues that I was trying to learn about, i.e. food security challenges, land policy, the human rights movement in Malawi, NGOs trying to work with a rights-based approach, etc. This proved to be a good opportunity not only to learn about the context in which the projects operate in Malawi but also to get contrasting and comparative information about the phenomenon of rights-based approaches in Malawi. For example, I have learned to be much more critical of NGO, donor and government reports. Moreover, talking "with people who are not central to the phenomenon but who are neighbors to it" can help in 'de-centring' oneself from a particular way of viewing the cases.[161]

1.6.3 Ethical issues

During any research process ethical issues will arise. In field research, the issue of how to approach the informants and what kind of information about the overall research project to supply is constantly on the researcher's mind. In order to be certain about having the *informed consent* and voluntary participation of the informants it is first of all necessary to inform the research subjects about the overall purpose of the research. Secondly, any possible risks and benefits from participating in the interview should be raised.[162] Depending somewhat on the interview setting I devoted more or less time to explaining the purpose of my research in general and why I had chosen to study the three programmes in Malawi in particular. I did this already when approaching the informant for the first time by phone and then in more detail before the start of the actual interview. When approaching the three implementing organisations WFP, Oxfam and Church and Society through e-mail before going to Malawi I also sent my research plan so that the overall aim of the research would be clear from the beginning. In the case of the present research, I failed to see any risks with participation from the perspective of the individual informant and therefore the issue was not raised when approaching them. For the three implementing organisations WFP, Oxfam, and Church and Society there is naturally the risk of being criticised. A potential benefit is, on the other hand,

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[160] See Miles and Huberman, *Qualitative Data Analysis*, *supra* note 159, at 33.
[161] *Ibid*., at 34.
[162] Kvale, *InterViews*, *supra* note 149, at 112.

to obtain an outsider's analysis of the programme that can be used in internal policy development.

A second ethical issue is that of *confidentiality*, which implies that private data identifying the informants will not be reported.[163] With permission, interviews were recorded on tape after handing over a statement guaranteeing the anonymity of the informant. I explained that I would use interview numbers instead of names when referring to interview data. On two occasions consent to use a tape recorder was not given and then I relied on writing notes. When reporting on the results I have chosen to indicate if the informant represents civil society, the government or a donor. With regard to interviews with the three implementing organisations I use their names in my reporting. I also indicate which government department has been interviewed. In some cases I only refer to the anonymous 'NGO' or 'donor'. The nature of the information given in the interviews is not as such sensitive or personal but as the number of NGOs and donors is so limited in Malawi it would in theory be possible to identify the name behind a specific statement, therefore, this was the only way to guarantee confidentiality. When interviewing donors some information concerning the relationship between the donor and Malawi Government arose that can be regarded as sensitive and in this case the informant specifically asked that I would not report this piece of information. During group interviews with rights-holders sensitive issues such as power relationships and corruption often occurred , and I have also reported on that, but in this case there is no way to find out the identity of the informants.

1.6.4 Analysis of interview data

All tape recorded interviews have been transcribed. The quality of the recording varies; sometimes there is heavy rain on a tin roof, sometimes the informant's speech is unclear and this has made the full transcription difficult. Altogether I have more than 200 pages of interview data, which is still a manageable quantity for the purpose of analysis. Analysis of the interview data started already in the field as I had the habit of listening to every interview the same evening as the interview took place, and writing a short summary in my field research diary. Below is an example of what a summary could look like.

> 1993-94: Malawi went through a transition but not transformation
> Dualist legal system, but duties not taken all the way: legal challenges for implementing the right to food
> Other challenges on the community level, still fear to talk of rights and demand accountability
> Duty-bearers blank in terms of seeing their work in a rights context
> Influx of human rights NGOs around 1994, but a lot of missed opportunities. Preaching the language of rights but no integration them into people's livelihoods.
> Rights need to be integrated into the official documents of the service providers
> Reason for RBA: development agencies see that development projects are not sustainable
> Accountability not taken all the way up (CARE), work with health centres but do not go to the district or central level
> NICE project has changed its approach this year from education on rights to "walking all the way" with communities seeking for remedies, taking different issues all the way, to central government if necessary.[164]

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163 Kvale, *InterViews*, *supra* note 149, at 114.
164 Interview No. 29 with Malawi Resource Centre for Human Rights, Malawi 2006. FSD2727.

Through using this diary I was able to write down observations that were useful for the analysis and when developing questions to be raised in up-coming interviews.

I use the empirical data to understand how the actors in Malawi *give meaning* to concepts such as human rights, participation, discrimination, accountability, and other key concepts and principles used in development and human rights work. This is a constructivist view.[165] I also make some generalisations to show trends within the broad phenomenon of interaction between human rights and development in the field of food security. In this context, I use my own interpretations. As interpretation requires at least some key concepts to guide the selection of relevant information,[166] I have chosen to focus on concepts that are characteristic of human rights-based approaches (HRBAs).

When *analyzing* qualitative data, the researcher has to move, in the interpretative analysis, between theory and empirical social facts in a way that often reshapes the theoretical ideas as well as her view of the empirical data.[167] In my case I started with an assumption about the role and added value of human rights in food security, then I collected my data, and as I started to analyse and interpret the data I also started to formulate some theoretical ideas. There has been a constant interplay between theoretical ideas (explanations) and empirical data.

When I started the transcribing process I had the habit of highlighting interesting passages and sentences. I did the writing of the first draft analysis parallel with transcribing. Before writing the conclusions I read through all relevant interviews again and highlighted relevant words and sentences. In the interviews, I have been looking for statements that support and/or question my assumptions about the role and added value of human rights in food security efforts. I have also focussed on how the informants give substance and meaning to the five so called key principles of a human rights-based approach to development. When writing the analysis I let the data speak for itself through using quotations. The contact persons from the three organisations have been given the opportunity to comment on the draft analysis before it was presented at any academic seminar.

In social research method text books, a long list of different approaches to analysis of qualitative data are usually identified and described. What analytical approach is chosen by the researcher depends on the purpose of the analysis. A key issue is to be explicit about the chosen method of analysis when reporting on the results. It is also important that the researcher is conscious of how qualitative data can be interpreted differently and that interviews will always contain an element of interpretation.[168] As noted, the possible approaches to analysis are diverse but there are, however, recurring features such as coding the data; adding comments and reflections; going through the materials trying to identify similar phrases, patterns, themes, relationships, etc; gradually elaborating a small set of generalizations that cover the consistencies in the data; and linking these generalizations to a formalized body of knowledge in the form of theories.[169] The overall aim is to look for meanings and understanding. There are no strict formulas for analysing qualitative data as is the case with analysing quantitative data – but this does not mean that there are no guidelines

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[165] See Klotz and Lynch, *Strategies for Research*, *supra* note 1.

[166] Klotz and Lynch, *Strategies for Research*, *supra* note 1, at 21.

[167] Allaine Cerwonka, "Nervous Conditions", in Allaine Cerwonka & Liisa H. Malkki, *Improvising Theory: Process and Temporality in Ethnographic Fieldwork* (Chicago: The University of Chicago Press, 2007) 1-40, at 15.

[168] Mikkelsen, *Methods for Development*, *supra* note 147, at 180.

[169] Robson, *Real World Research*, *supra* note 140, at 459.

to assist in qualitative analysis.[170] Constructive advice can be found in e.g. Miles and Huberman, who advocate a systematic approach to qualitative analysis,[171] and in Kvale's writings on what methods can be used to organise the interview texts.[172]

For the purpose of the analysis of the interview data from Malawi I have found that coding is the most useful approach. Coding of qualitative data means organising the raw data into conceptual categories and creating themes or concepts, which are later used to analyse data.[173] The themes and concepts I use are based on my assumptions and research questions.[174] I categorised data under the following headings: express linkage to rights, non-discrimination and focus on vulnerable groups, participation, empowerment, accountability, self-reliance, charity/favour, politics, policy issues, service providers, duty-bearers, rights-holders, and power structures. These labels are then attached to phrases, sentences, or whole paragraphs in my interview data. Codes are used to retrieve and organise data so that I can quickly find, retrieve, and cluster the segments relating to a particular research question, assumption, or theme.[175]

In order to display the interview data in an organised fashion I placed sentences that have been coded into charts before drawing final conclusions.[176] This functioned as a verification process, testing the validity and reliability of my conclusions. When displaying data in a chart it was easier to confirm if an explanation is plausible and if I have sufficient evidence to support it.[177]

1.6.5 The question of validity in analysis of qualitative data

A common challenge in qualitative social research is how to assess whether the conclusions in a study that are based on qualitative evidence are *valid*, i.e., are the findings meaningful, relevant, 'true'?[178] This is an epistemological question: what can we know, and how do we know what we know? There are, of course, different epistemological positions.[179] Qualitative methods are sometimes dismissed as unscientific, subjective, unreliable, and invalid. This is especially the case when qualitative methods in general and qualitative data analysis in particular are judged against common criteria of validity, as developed for psychometric tests. In positivist social science, validity is based on whether a method *measures* what it is intended to measure.[180] According to Kvale, it is clear that "[i]f the concept of validity is confined to quantitative measurements, then research, aiming at qualitative descriptions and interpretations of meaning, is by definition not a valid scientific method."[181] However, qualitative methods may achieve a valid scientific practice when validity is seen as a broader concept, implying to what extent a method *investigates* what it is intended to investigate, i.e.,

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[170] Mikkelsen, *Methods for Development*, *supra* note 147, at 181.

[171] Miles and Huberman, *Qualitative Data Analysis*, *supra* note 159.

[172] Kvale, InterViews, *supra* note 149.

[173] Mikkelsen, *Methods for Development*, *supra* note 147, at 181.

[174] As recommended in Miles and Huberman, *Qualitative Data Analysis*, *supra* note 159, at 58.

[175] Miles and Huberman, *Qualitative Data Analysis*, *supra* note 159, at 56-57.

[176] *Ibid.*, at 91 and 93.

[177] See Robson, *Real World Research*, *supra* note 140, at 476.

[178] Klaus Bruhn Jensen, "Discourses of Interviewing: Validating Qualitative Research Findings Through Textual Analysis", in S. Kvale (ed.), *Issues of Validity in Qualitative Research* (Lund: Studentlitteratur, 1989) 93-108, at 93.

[179] Mats Hårsmar *Understanding Poverty in Africa? A Navigation through Disputed Concepts, Data and Terrains* (Uppsala: Nordiska Afrikainstitutet, 2010) at 9.

[180] Steiner Kvale, "To Validate is to Question" in S. Kvale (ed.), *Issues of Validity in Qualitative Research* (Lund: Studentlitteratur, 1989) 73-92, at 73-74.

[181] *Ibid.*, at 74.

to what extent our observations reflect the phenomena of interest to the researcher. Qualitative research has then the power to reflect and conceptualise the nature of the phenomena investigated and can capture the complexity of the social reality.[182]

When discussing what is valid, true knowledge in social science one inevitably runs into the philosophical question of what truth is.[183] Social science is concerned with social reality that is constructed through people's opinions, experiences and judgments. The interview data I analyse represent the subjective opinions, reflections, and views of the informants in question, and therefore it is not possible to find one objective truth behind the data. Instead of one 'absolute truth' there are multiple subjective *narratives* of what is taking place in the three food security projects in Malawi. The interview conversation is able to capture the multitude of views on a theme.[184]

Hermeneutics deal with interpretation of social meaning – as opposed to naturalistic research methods searching for casual laws through the gathering of data by observation and experiment.[185] An interpretative process of knowledge production has always existed in the social sciences and humanities, so this is not a new phenomenon.[186] However, hermeneutics does not always apply the same notion of 'truth' as the naturalistic position, that views truth as corresponding to reality. Moreover, hermeneutics claims that scientific inquiry is always interpretative.[187] This is the position in this research. In this interpretative mission, when reading a text or listening to someone, the researcher should forget all her preconceptions concerning the content. She should, in the words of Gadamer, "remain open to the meaning of the other person or text". This kind of openness and sensitivity involves neither "neutrality" nor the "extinction of one's self", but rather being aware of one's own bias, so that what is being interpreted can present itself in all "its otherness" and thereby present its own truth against the researcher's own preconceptions.[188]

It is clear that the interview as a research method directly violates a positivist conception of science as interview data consist of meaningful statements, which are based on interpretations so that data and their interpretations are not strictly separated. Here we must keep in mind that quantified knowledge is not a goal of interview research, instead the main research findings are expressed in language. Language is neither objective or universal, nor subjective or individual, but *intersubjective*. Additionally, the interview is intersubjective instead of a purely objective or subjective method.[189]

With regard to the language used in part of my interview data, especially where the informant had a similar educational and professional background as I have, it is clear that we share the same language of the 'human rights expert'. The informant uses the same jargon and semi-technical language of rights and duties, the same concepts of accountability and empowerment. These are concepts I wanted to understand in the particular context of a project in Malawi. This means that the 'analysis' is already taking place during the interview, as the informant is helping me to analyse what is happening in the project and what role human rights play in it as well as in Malawian society and politics overall.[190] I am interested in

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[182] Kvale, "To Validate is to Question", *supra* note 180, at 74 and 83.

[183] *Ibid*., at 75.

[184] Kvale, *InterViews*, *supra* note 149, at 7.

[185] Mats Hårsmar *Understanding Poverty in Africa? A Navigation through Disputed Concepts, Data and Terrains* (Uppsala: Nordiska Afrikainstitutet, 2010) at 9-10.

[186] Allaine Cerwonka, "Nervous Conditions", *supra* note 167, at 19.

[187] Hårsmar, *Understanding Poverty in Africa?*, *supra* note 179, at 10.

[188] Hans-Georg Gadamer, *Truth and Method* (London: Continuum, second, revised edition of 2004) at 271-272.

[189] Kvale, *InterViews*, *supra* note 149, at 62 and 66.

[190] Thank you Professor Jeremy Gould for pointing this out to me.

understanding how these concepts are used and interpreted within the different projects, by the different actors, and through listening to my informants giving meaning to these concepts I am learning precisely that. I acquire information about how *they want me to think they apply the concepts*; how they try to instil empowerment in the people they work with. They offer me their story about what empowerment should be – and that reveals to me how different actors in the human rights community, the development/relief community, and the organisations where these two communities have come together as a rights-based approach (RBA) have different interpretations of these concepts. I can relate this to theories, and help in understanding the ideological differences these stories display.

What can be done to *validate* the findings that are based on interview data is to check the credibility of knowledge claims. We do not need to 'check' or validate the story given to us in the interview against 'one truth' but instead ask why this story is relevant now, what does it reveal? As put by Kvale: "Validation becomes investigation, continually checking, questioning, and theoretically interpreting the findings."[191] Theory helps in understanding the reality that is reflected in the interviews.

1.6.6 Summary

In this chapter I have made an effort to describe and problematise the various steps I have taken in the research process of the empirical section. Secondly, I have described the research strategy I have chosen in order to find an answer to my main research questions. In this context I have also explained why and how I have chosen the three food security programmes that are the object of enquiry. Thirdly, I have described the steps in data collection and the main challenges in using interviews as a research method. Ethical issues are part of these challenges. Finally, I have described my approach to the analysis of the qualitative data. I conclude by problematising the issue of validity in the analysis of qualitative data.

1.7 Thesis outline

Before presenting the analysis of the empirical data it is necessary to outline what is meant by key concepts such as development, human rights, human rights-based approaches to development and food security as well as human rights principles in general. This helps us to understand the three case studies from Malawi. Therefore, the second part of this study is a critical conceptual analysis that reviews how these concepts relate to agency and change. It starts with a review of the meanings given to 'development', introducing the major development schools and exploring what kind of 'development' is striven for in human rights approaches. It moves on to critically reviewing the human rights concept itself. Thirdly, it explores the relationship between food rights, food security and livelihoods. It reviews what meaning has been given to the right to food by international legal experts, by activists and, as an example, by national legal actors in India. Finally, the role and meaning of five selected 'human rights principles' in development is critically analysed. This is necessary in order to understand what difference human rights make as they enter into development programmes and projects, what new elements are brought in, and what value is added. The overall purpose of part II is to give theoretical explanations as to how these concepts have been defined by various actors in various contexts as well as answers to the general questions concerning the transformative potential of human rights in development practice and food security posed in part I. In this way we can understand the role of these concepts in food security in Malawi.

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[191] Kvale, "To Validate is to Question", *supra* note 180, at 77 and 78.

Part III is a case study, based on empirical data, from Malawi. It starts with an overview of human rights discourse in Malawi. It then moves on to analysing the three projects, starting with a food assistance programme, that represents a classical charity-based response to food insecurity, then analyses a rights-based sustainable livelihoods programme and lastly a conventional human rights project that is working with a legal approach. Finally, the assumptions are reformulated as conclusions.

PART II   CONCEPTUAL ANALYSIS

2.1   Review of the meanings attached to 'development'

Gro Harlem Brundtland noted in her forward to the influential report *Our Common Future* of 1987 that "the word 'development' has been narrowed down by some into a very limited focus, along the lines of 'what poor nations should do to become richer', and thus again is automatically dismissed by many in the international arena as being a concern of specialist, of those involved in questions of 'development assistance'". Brundtland challenges this assumption and suggests a common sense definition of development as something we all do in attempting to improve our lot.[192] As much as I like this definition, for the purpose of this thesis, I need to first of all explain and elaborate on the usage of the term 'development' during the last half century in development discourse. Second, I need to make clear what kind of 'development' is in focus in human rights-based approaches to development. Development for whom? Development of what? What is the objective of development?

2.1.1   Why 'development'?

Looking back at the early days of the 'development era' that emerged after the Second World War, Gilbert Rist points out that there might well have been hesitation about the right term for the many different practices designed to increase human well-being. 'Civilisation' was a term widely used until the end of the First World War and it could have been taken up again.[193] (Rist also argues that colonisation was seen as philanthropic in that it held a worldwide promise of civilisation for all, and it was seen as an expression of solidarity, something which resembles the rhetoric of the modern development discourse.)[194] 'Westernisation' could have been chosen to highlight the origins of the implicit model; and 'modernisation' also had its supporters. In the end, however, it was 'development' that gained most support.[195]

The way in which the term development has been used in the era after World War II is related also to the term 'underdevelopment', which was introduced by President Truman in 1949. 'Underdevelopment/development' suggested that there is a final stage and the possibility of bringing about a change in order to achieve it. It was then perceived to be possible to 'develop' a region; as opposed to things just 'developing'. Rist writes: "This *'development' took on a transitive meaning* (an action performed by one agent upon another) which corresponded to a principle of social organisation, while 'underdevelopment' became a 'naturally' occurring (that is, seemingly causeless) state of things."[196]

According to Gasper, we see the following four major types of usage of 'development' in development studies literature: (1) development as fundamental or structural change; (2) development as intervention, action; (3) development as improvements, 'good change'; (4) development as the platform for improvement, that which enables or allows improvement.

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[192] The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at xi.
[193] Gilbert Rist, *The History of Development: from Western Origins to Global Faith* (London: Zed Books, English edition 2002) at 25.
[194] *Ibid*., at 51.
[195] *Ibid*., at 25.
[196] *Ibid*., at 73. Emphasis in original.

The two last categories are more 'evaluative' in the usage of the word.[197] A commonality among the many usages of 'development' is denoting enhancement, i.e., increasing value or desirability – which naturally is subjective. What is 'good change' for an agribusiness might not be good for a landless peasant, etc. Development as a concept is used by those who promote the interest of the affluent *and* by those who would serve those less affluent.[198]

When we speak of different ways of defining development, and what differentiates them and what they have in common, a word of caution is needed, according to Rist. These definitions are all based upon the way in which one or many individuals picture the ideal conditions of social existence. These pictures are often inviting and desirable, and nobody can say it is illegitimate to dream of a more just world where people are happy, live healthier and longer, are free of poverty, exploitation and violence. It is fairly easy to assemble a broad consensus around such unchallengeable values. However, says Rist, "if 'development' is only a useful word for the sum of virtuous human aspirations, *we can conclude at once that it exists nowhere and probably never will!*"[199] Nevertheless, 'development' does exist, through the actions that it legitimates, through institutions that are dealing with development efforts. It is very real that there are development projects, development cooperation, development ministers, UN agencies for development, development banks, NGOs furthering development, and many other institutions and activities with similar aims. In the name of development all sorts of activities are undertaken: schools and clinics are built, wells dug, roads laid, children vaccinated, oversight institutions established, reports drafted, experts hired, trade liberalized, and much more. Every modern human activity can be undertaken in the name of development.[200]

This thesis is concerned with the activities that are undertaken in the name of development cooperation, specifically those that are claimed to support human rights and food security. Therefore, it is essential to be aware of the ways in which the thinking of different institutions and schools of development defines the desirable outcome of the activities carried out for further 'development'.

2.1.2 The economic growth and human development schools

In the crudest usage, development is seen as the same as economic growth, or GDP per capita.[201] Over time economists have been largely preoccupied with GDP as a measurement of economic growth, along with other abstract concepts such as saving and investment and exports and imports. A lack of recognition has been given to *people* as an end result of development, and there has been a general confusion about ends and means.[202]

Under the leadership of Pakistani economist Mahbub ul Haq (1934-98), the annual *Human Development Reports* (published since 1990) made a breakthrough in the campaign to see development as more than economic growth. The evolution towards 'human development' had, of course, been gradual, and in addition to ul Haq, the Indian economist and philosopher

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[197] Des Gasper, *The Ethics of Development* (Edinburgh: Edinburgh University Press, 2004) at 28.
[198] Jan Knippers Black, *Development in Theory and Practice: Paradigms and Paradoxes* (USA: Westview Press, second edition 1999) at 15.
[199] Rist, *The History of Development, supra* note 193, at 10. Emphasis in original.
[200] *Ibid*., at 10-11.
[201] GDP stands for Gross Domestic Product and measures the value of goods and services produced by a national economy over a year. Gasper, *The Ethics of Development*, *supra* note 197, at 28.
[202] Mahbud ul Haq, *Reflections on Human Development* (New York: Oxford University Press, 1995), at 4-5.

Amartya Sen (1933-) also played a considerable role in the development of the concept. Sen integrates many of his insights under the label 'development as freedom'.[203]

Since the introduction of the concept of 'human development', it is generally accepted that the real purpose of development is to *enlarge people's choices in all fields*. Economic growth or income increase is one of many choices people make, but it is not the only one.[204] Paradoxically, human development thinking came to the fore around the same time as there was a switch from state to market in the name of neoliberalism, according to which the central objective – economic growth – is to be achieved through structural reform, deregulation, liberalisation, and privatisation.[205] These two dominant development schools with different objectives and also with different agendas concerning how to reach them have existed side by side ever since. By the end of the 1990s, the World Bank, known for promoting development as being understood and measured in economic and monetary terms, now underlined the human development aspect.[206]

However, economic development thinking remained, and still is, influential, and people are *not* at the centre of development policy and planning in many countries. As an example of the strong role that economic development still plays, it can be mentioned that official development assistance (ODA) is defined by the Organisation for Economic Co-operation and Development as "those flows to countries and territories on the DAC List of ODA Recipients and to multilateral development institutions which are […] administered with the promotion of *economic development* and welfare of *developing countries* as its main objective".[207] This means that in development cooperation, the main objective is economic development of nations.

It is important to understand the difference between the economic growth and human development schools. The defining difference is that the first focuses on the expansion of one choice only – income – while the second takes on board all human choices, be they economic, social, cultural or political. It can be argued that economic growth can enlarge all other choices as well. However, it is important to understand that this is not necessarily true. There is simply no automatic link between income and human lives. There are many reasons why income expansion may fail to enlarge human options. National priorities may lead to uneven income distribution; the use of income is just as important as the generation of income. Moreover, knowledge, health, a clean physical environment, political freedom and enjoyment of life are not exclusively, or largely, dependent on income. National wealth can increase people's choices in these areas – but they might not.[208] Wealth is a means, not an end. Ul Haq writes "unless societies recognize that their real wealth is their people, an excessive obsession with creating material wealth can obscure the goal of enriching human lives."[209]

However, this does not mean that growth is not important in the human development school. Rejecting an automatic link between growth and flourishing human lives is not rejecting growth itself. Economic growth is held important in poor societies for reducing or eliminating poverty. What is essential to keep in mind is that the quality of growth is just as important as

[203] Gasper, *The Ethics of Development*, *supra* note 197, at 164-165. See Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

[204] ul Haq, *Reflections on Human Development*, *supra* note 202, at xvii.

[205] Pieterse, *Development Theory*, *supra* note 2, at 6.

[206] The World Bank, "Beyond Economic Growth", 2000, at 8. Online book available at http://www.worldbank. org/ depweb/beyond/beyond.htm, visited 14 May 2012.

[207] Development Assistance Committee DAC, "Factsheet: Is it ODA?", November 2008. Emphasis added. Available at http://www.oecd.org/dataoecd/21/21/34086975.pdf, visited 14 May 2012.

[208] ul Haq, *Reflections on Human Development*, *supra* note 202, at 14-15.

[209] *Ibid*., at 15.

its quantity. This means conscious public policy is needed to translate economic growth into human growth. This may require restructuring of economic and political power, far-reaching land reform, progressive tax systems, new credit systems, a major expansion of basic social services to reach all the deprived population, etc. The human development paradigm claims to question the existing structure of power. In the human development model, the policy interventions naturally vary from country to country depending on the circumstances but what is common to all of them is that people are moved to the centre stage. Each development activity is analysed to see how much people participate in it and benefit from it.[210]

> There must be a search for models of development that enhance human life, not marginalize it; treat GNP growth as a means, not as an end; distribute income equitably, not concentrate it; replenish natural resources for future generations, not destroy them; and encourage the grass-roots participation of people in the events and processes that shape their lives.[211]

The human development 'definition' of development is normative in the sense that it represents the UNDP's vision of what it *hopes* development to be. The formula of 'enlarging people's choices' does not mean very much: the process is open (it leads to the 'expansion of possibilities) and is in principle unlimited. It also assumes the existence of 'stages of development', just like any economic theory.[212]

2.1.3 Defining development and poverty in human rights approaches

The meaning of development in human rights thinking

What kind of understanding of development is the basis for human rights-based approaches to development? It is clear that human rights-based development is concerned with *people* as rights-holders and claim-makers. Moreover, as Nowak points out, full realisation of human rights is replacing economic growth as the ultimate *goal* of the development process.[213] The human rights-based approaches to development and the right to development are two distinct but yet intertwined phenomena and it is useful to look at *the right to development discourse* in order to understand what a human rights perspective on development means. The right to development discourse has given this much more thought than what is standard in various human rights approaches to development, where development as a concept is often taken to be a given.

It might be interesting to note that already by 1977 the Commission on Human Rights requested that the Secretary General would undertake a study into the international aspects of the right to development, which was being debated in the UN at the time. In this report, published in 1979, the Secretary General set forward an analysis, based on major UN instruments and debates, on which elements needed to be part of the concept of

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[210] ul Haq, *Reflections on Human Development*, *supra* note 202, at 16.
[211] *Ibid*., at 117.
[212] Rist, *The History of Development, supra* note 193, at 208-209.
[213] Manfred Nowak, "A Human Rights Approach to Poverty", in M. Scheinin & M. Suksi (eds), *Human Rights in Development Yearbook 2002* (Leiden: Martinus Nijhoff Publishers, 2005) 17-35, at 18. Nowak claims this happens for "the first time" but this is an overstatement. Growth as a goal for development has been criticized since the 1970s and "replaced" by many alternative models ever since.

development.[214] This meaning of development has striking resemblance with human development and is also outlines what we today know as human rights-based principles:

    (i)   The realisation of the potentialities of the human person in harmony with the community should be the central purpose of development;

    (ii)   The human person should be the subject not the object of development;

    (iii)   Development requires the satisfaction of both material and non-material basic needs;

    (iv)   Respect for human rights is fundamental to the development process;

    (v)   The human person must be able to participate fully in shaping his own reality;

    (vi)   Respect for the principles of equality and non-discrimination is essential; and

    (vii)   The achievement of a degree of individual and collective self-reliance must be an integral part of the process.[215]

Once development is seen to contain these elements, it is obvious that it is not a concern only for 'developing countries' but for every nation. The relationship between economic growth and the well-being of the individual, problems of non-participation in decision making, and environmentally unsustainable policies[216] are only a few issues that were mentioned as examples of problems being relevant to all societies in 1979 and remain so still today. In the above list, there is *no talk of the realisation of human rights being the objective of development* and also in other ways the definition of development has more in common with the human development philosophy, underlining the importance of the realisation of the *potentialities of the human person*, than modern discourse on the right to development.

The Declaration on the Right to Development was finally adopted in 1986, and here human rights are seen as *instruments of change*,[217] implying that everybody has the right to a process of change which is compatible with the human rights norms listed in human rights treaties.[218] One can say that development is defined as 'good change', and 'good change' is defined as being compatible with human rights norms.

Many countries of the South hoped to link the development discourse with the human rights agenda through the adoption of the UN Declaration on the Right to Development in 1986. The Declaration was, however, adopted with a certain degree of hesitation among the so called developed countries.[219] Its legal and political status (a non-legally binding instrument as it is) has remained controversial.[220] However, the Declaration opened up for debate on issues of

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[214] Commission on Human Rights, report by the Secretary-General on the international dimensions of the right to development, in para 26. UN doc. E/CN.4/1334, 2 January 1979. See also Gready and Ensor, "Introduction", *supra* note 70, at 18.

[215] Report by the Secretary-General on the international dimensions of the right to development, *supra* note 214.

[216] *Ibid*., para 25.

[217] Theo van Boven, "The Right to Development and Human Rights", 28 *The Review* (1982) 49-56 at 50.

[218] Peris Jones and Kristian Stokke, "Introduction" in P. Jones & K. Stokke (eds), *Democratising Development: The Politics of Socio-Economic Rights* (The Netherlands: Koninklijke Brill NV, 2005) 1-38 at 5. See also Arjun Sengupta, The Right to Development, Report by the Independent Expert on the Right to Development, UN doc. E/CN.4/2000/WG.18/CRP.1, para. 4.

[219] The United States voted against the resolution and eight other OECD countries abstained. See Arjun Sengupta, "On the Theory and Practice of the Right to Development", 24 *Human Rights Quarterly* (2002) 837-889, at 844.

[220] Anja Lindroos, *The Right to Development* (Helsinki: The Erik Castrén Institute of International Law and Human Rights Research Reports 2/1999) at 8.

individual human rights in development work, and this is still an ongoing topic in the UN.[221] As a basis for human rights-based development work, the right to development has, however, not been very popular. Bilateral donors in fact very seldom refer to the right to development.[222] The Declaration places emphasis on global inequity among states and donor obligations, referring also to a new international economic order based on sovereign equality,[223] and this is probably too political for many international development actors.[224] Among (Western) development actors various human rights-based approaches to development have gained wider support – and maybe this is a deliberate effort to stay away from the controversies raised due to the reference to global inequalities in the Declaration on the Right to Development.[225]

Another reason for the hesitation among some Western states towards the Declaration has been the general reluctance to accept economic, social, and cultural rights as enforceable human rights. Although this has changed significantly over the past ten year or so, historically there has always been certain tension between the North, that has traditionally emphasised civil and political rights, and the South that has given primary importance to economic and social rights.[226] One of the reasons for the long separation of development and human rights could be found in this tension. Around the time of the adoption of the Declaration on the Right to Development, the human rights community, especially the NGOs of the North, but also academics and the UN, focused almost exclusively on civil and political rights.[227] Consequently, most economic and social rights have, until recently, had a marginal position in the human rights community during the last half century. It can, for example, be mentioned that Amnesty International changed its statute to include work on economic, social, and cultural rights in 2001[228] (and it can be added that this was a hard-fought for move and a controversial shift within Amnesty).[229] The development community has for its part neglected both economic and social rights – that could provide a legal and ethical basis for their work –

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[221] Sia Spiliopoulou Åkermark, "Human Rights, Globalization, Trade and Development" in C. Krause & M. Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku: Åbo Akademi University Institute for Human Rights, 2009) 343-362, at 360.

[222] See Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1423.

[223] Article 3(3): "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."

[224] Jones and Stokke, "Introduction", *supra* note 218, at 5. See also Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1424.

[225] See Celestine Nyamu-Musembi and Andrea Cornwall, *What is the 'Rights-Based Approach' all about? Perspectives from International Development Agencies* (Brighton: Institute of Development Studies, IDS Working Paper 234, 2004), at 9. Available at http://www.ids.ac.uk/files/Wp234.pdf, visited 10 May 2012.

[226] See Lindroos, *The Right to Development*, *supra* note 220, at 70.

[227] The HIV/AIDS work can serve as an example. In the 1990s, the major share of human rights attention regarding HIV/AIDS was paid to confidentiality, privacy and bodily autonomy that were being described in the language of civil and political rights. David P. Fidler, *International Law and Infectious Diseases* (Oxford: Oxford University Press, 1999) at 209. For an example of civil and political rights related issues raised in the HIV/AIDS context, see George J. Annas, "The Impact of Health Policies on Human Rights: AIDS and TB Control", in J. M. Mann & S. Gruskin, et al (eds), *Health and Human Rights: A Reader* (New York: Routledge, 1999) at 37-45. For criticism that the human rights approach e.g. in the International Guidelines on HIV/AIDS and Human Rights is reinforcing the separation between civil and political rights from economic, social and cultural rights, see Mark Heywood and Dennis Altman, "Confronting AIDS: Human Rights, Law, and Social Transformation", 5 *Health and Human Rights* (2000), 149-177, at 157 and 166.

[228] "The History of Amnesty International", see http://www.amnesty.org/en/who-we-are/history, visited 14 May 2012.

[229] Stephen Hopgood, ""Dignity and Ennui" A Review Essay of Amnesty International's Report 2009: The State of the World's Human Rights", 2 *Journal of Human Rights Practice* (2010) 151-165, at 157.

and civil and political rights that are equally important in the struggle for human dignity and against social exclusion.[230]

The Declaration on the Right to Development speaks about development as a particular process of economic, social, cultural, and political development, in which all human rights can be fully realised.[231] Furthermore, the preamble of the Declaration defines development as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from."[232]

Arjun Sengupta notes that the concept of well-being in this context extends beyond the conventional notions of economic growth to include the expansion of opportunities and capabilities.[233] This comes close to the human development understanding of development, and therefore Sengupta argues that the right to development can be described as the *right to human development*.[234] The 'right to human development' is defined as a development process that expands substantive freedoms and realises all human rights. In the right to development perspective, human development is claimed as a human right, and thus becomes a qualitatively different approach compared to the human development model. The way development objectives are achieved[235] becomes central: "The objective is fulfilling human rights and the process of achieving this is also a human right." This process must respect equality and participation, not be in violation of human rights, be including a clear specification of obligations and responsibilities and having a mechanism for monitoring.[236] Equality and participation are central principles also in human development, but perhaps the defining difference between the right to development approach and the human development approach is that the objectives of development are set up as entitlements of rights-holders, which duty-bearers are expected to fulfil, respect, protect, and promote while respecting international human rights standards.[237]

One could say that this view on development represents the human rights communities' picture of 'ideal conditions of social existence', borrowing Rist's wording; and that as of today, there is no society where these conditions exist. This is simply an observation – not an attempt to delegitimise efforts that are striving towards such conditions. Some argue that having this kind of vision is what is distinctive about a human rights approach to development – that it sets out a vision of what ought to be,[238] providing a normative framework to orient the practice of development cooperation. The human development discourse is not lacking a vision for development, but while human rights approaches can refer to internationally agreed

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[230] Uvin, *Human Rights and Development, supra* note 52, at 47-48.
[231] The Declaration on the Right to Development states: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."
[232] As cited in Sengupta, "On the Theory and Practice of the Right to Development", *supra* note 219, at 847
[233] *Ibid*., at 848.
[234] *Ibid*., at 851. The Office of the United Nations High Commissioner for Human Rights (OHCHR) holds that a human rights-based approach is a conceptual framework for the process of *human development*. See OHCHR, "Frequently Asked Questions", *supra* note 81, at 15-16.
[235] The importance of the development process was discussed already in the Report by the Secretary-General on the international dimensions of the right to development, *supra* note 214.
[236] Sengupta, "On the Theory and Practice of the Right to Development", *supra* note 219, at 851.
[237] *Ibid*., at 852.
[238] Julia Hausermann, *A Human Rights Approach to Development* (London: Rights and Humanity, 1998) at 31.

norms, backed by international law, human development uses more philosophical arguments to back up their vision.

The different *goals* between human development and human rights-based development should be noted: the latter has full realisation of all human rights as the ultimate goal of development while the former aims at enlargement of peoples' choices in all fields. Those choices can change over time.[239] Working with a pre-determined goal decreases the role of people as active agents formulating their own vision for development.

Among the organisations working with human rights-based approaches to development, in one way or the other, there are critical voices stating that the objective to realise human rights is too narrow and limited. In order to capture all the goals of development, such as ending inequality and poverty, it is necessary to extend the notion of rights beyond legal frameworks, and this again leads to difficulties in delimiting exactly what a right is.[240] Therefore, some organisations choose rights-based programming, where a human rights analysis is brought into all programming and guides the work, instead of allowing legal human rights to inform their overall aim.[241] Moreover, many organisations struggle with the fact that concepts of human rights are quite alien within many communities they work with.[242] In this thesis an actor-oriented perspective on human rights in development is proposed as an alternative to partly address these dilemmas.

'Poverty' in human rights approaches

Although in theory human development is about enlargement of peoples' choices and freedoms, in practice it is mostly about *poverty reduction or eradication* (and that is true for the economic development discourse as well, only the tools for development policy making are different). Poverty is seen as one of the greatest obstacles to human development. The human rights community for its part is starting to protest that poverty is the gravest human rights challenge facing the world today.[243] Therefore, here the human development community and the human rights community have common ground, although it is not part of human rights practice to monitor or measure poverty.[244] Nor is there a unified human rights definition of poverty. The Office of the UN High Commissioner on Human Rights has commissioned a number of studies on the subject and suggests that Amartya Sen's 'capability approach' to poverty[245] – that is central in the human development discourse – provides a conceptual bridge between the discourses on poverty and human rights.[246]

The concept of 'capability' refers to a person's freedom or opportunity to achieve well-being, e.g. to what extent s/he can be free from hunger or take part in the life of a community.

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[239] ul Haq, *Reflections on Human Development*, *supra* note 202, at 14.

[240] Emma Harris-Curtis et al., *The Implications for Northern NGOs of Adopting Rights-Based Approaches*, (England: International NGO Training and Research Centre, Occasional papers Series No: 41, 2005) at 41.

[241] ActionAid is an example of one big NGO that is using rights-based programming, but retains its central vision of addressing poverty. *Ibid*., 40-41.

[242] Harris-Curtis et al., *The Implications for Northern NGOs*, *supra* note 240, at 42.

[243] Office of the High Commissioner for Human Rights, "Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies", at iii. Available at http://www.ohchr.org/Documents/Publications/ PovertyStrategiesen.pdf, visited February 2012; Office of the High Commissioner for Human Rights, "Human Rights and Poverty Reduction: A Conceptual Framework", New York: 2004, at 5. Available at http://www2. ohchr.org/english/issues/poverty/docs/povertyE.pdf, visited 10 May 2012; Irene Khan writes in the Amnesty International publication *The Unheard Truth* (2009) "that poverty is the world's worst human rights crisis".

[244] See Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 76.

[245] The approach was developed in dialogue with Martha Nussbaum.

[246] OHCHR, "Human Rights and Poverty Reduction", *supra* note 243, at 3.

Human freedom is thus the common element, linking the two discourses.[247] The capability approach is also a normative framework, evaluating social situations according to the amount of freedom people have to peruse what they have reason to value.[248] Freedom is here understood in a broad sense, to encompass both positive and negative freedoms. The capability approach defines poverty as the absence of certain basic freedoms, such as the freedoms to avoid hunger, disease, illiteracy, and so on. Poverty is no longer defined as a lack of adequate income as has traditionally been done. Income is not a capability and therefore not an aspect of well-being in itself, it is seen only as a factor contributing to the achievement of capabilities.[249] However, when we discuss poverty as a social problem we cannot deny the link to deprivation caused by economic constraints. The OHCHR report argues that there is a need for a definition of poverty that refers to the non-fulfilment of human rights *and* at the same time linking it to the constraint of economic resources.[250] Not every case of low level of well-being can be regarded as poverty, and so the report suggests that non-fulfilment of human rights would count as poverty when: (1) the human rights involved are those that corresponds to the capabilities that are considered basic by a given society; (2) inadequate command over economic resources play a role in the causal chain leading to the non-fulfilment of human rights.[251] As has been noted this is not a definition of poverty from a human rights perspective, but more a conceptual clarification of when and where human rights and poverty meet.

In the follow-up publication by the OHCHR, it is repeated that poverty is a state of complex and interrelated, mutually reinforcing deprivations, which impact on people's ability to claim and access their civil, cultural, economic, political and social rights.[252]

2.1.4   Alternative development models and empowerment

Beside the human development paradigm in the early 1990s there are other development models that have influenced how development as a concept has evolved over time and what kind of activities have been carried out in its name. The United Nations Commission on Environment and Development was established in 1983 in an attempt to address increasing concern with environmental problems in developing countries and the failure to relate these problems to development issues.[253] The subsequent report *Our Common Future* (1987) and its basic concept 'sustainable development' had a considerable impact on the development discourse. The report, also known as the Brundtland Report, defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[254]

As opposed to the human development school, the sustainable development movement, that started long before the so called Bruntdland Commission, was to a large extent anti-growth.

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[247] OHCHR, "Human Rights and Poverty Reduction", *supra* note 243, at 6. In order to fully appreciate the capability approach as a way of understanding and measuring poverty, one should also be familiar with other major other philosophical traditions, which have resulted in two distinct approaches to the definition and measurement of poverty: the income/consumption approach and the participative approach. See Hårsmar, *Understanding Poverty in Africa?*, *supra* note 179, at 24. This is, however, outside of the scope of this chapter.
[248] Hårsmar, *Understanding Poverty in Africa?, supra* note 179, at 23.
[249] OHCHR, "Human Rights and Poverty Reduction", *supra* note 243, at 9 and 7.
[250] *Ibid*., at 6.
[251] *Ibid*., at 10.
[252] OHCHR, "Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies", *supra* note 243, at iii.
[253] Michael Redclift, *Sustainable Development: Exploring the Contradictions* (London: Routledge, 1987) at 12.
[254] The World Commission on Environment and Development, *Our Common Future*, *supra* note 192, at 43.

For instance, the Club of Rome had recommended an end to exponential growth. The objective was not to place the 'environment' above the living standards of the poor in the South, but the Club wanted to see a commitment to meet the basic needs of the poor as the prime objective of a much more limited growth trajectory.[255]

In the context of how human needs and the environmental needs can coexist it is interesting to highlight indigenous cultures' understanding of 'development' and sustainability. In Bolivia, indigenous president Evo Morales has introduced the concept 'Living Well' into the public discourse as the basis for a global movement against consumerism, depletion of natural resources for profit, and current models of 'development'. This indigenous concept 'Living Well' means, in short, having all basic needs met while existing in harmony with the natural world instead of seeking more and more material goods at the expense of the environment.[256] It is a concept, which in theory seems to be similar to attempts to replace GDP with quality of life (while in practice these attempts still result in prioritising consumption).[257] This view challenges development as a process of constant 'improvement'. It also challenges the very core of Western thinking. The idea that growth or progress should be able to continue indefinitely is an idea that radically distinguishes Western culture from all others.[258]

This brings us to the fact that dominating development models have always been criticised. The so called *alternative development* school that advocates the empowerment model is also relevant when exploring the meaning of the term development. Criticism of the dominating economic model of development has also been at the core of this movement.

Alternative development is often referred to as an alternative development model or paradigm,[259] and within this label there are many representatives. What is common to these voices is an emphasis on 'development from below' and an effort to redefine development itself as *social transformation*.[260] The role of the state is, moreover, not viewed in the same way as in conventional development: the role of the state is to be an enabler and facilitator of people's self-development.[261] While human development is state-centred, alternative development has its agency in local, grassroots, and social movement activism. However, more recent alternative approaches, represented by e.g. John Friedman, argue that strong civil society needs a strong state.[262] I have chosen one representative of alternative development thinking, Friedman, because he partly applies a rights language and not only the language of equity, participation, and environmental sustainability. In 1992 Friedman wrote:

> No matter how dynamic, an economic system that has little or no use for better than half of the world's population can and must be radically transformed. Broadly speaking, the objective of an alternative development is to humanize a system that has shut them out, and to accomplish this through forms of everyday resistance and political struggle that insist on the rights of the excluded population

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[255] Redclift, *Sustainable Development, supra* note 253, at 54.
[256] IPS Inter Press Service, "Bolivia: 'Living Well' in Harmony with the Environment" by Franz Chávez, 2010. Available at http://ipsnews.net/news.asp?idnews=51125, visited 8 May 2012.
[257] Alberto Chirif, "Happiness as a Quality of Life Indicator", 1-2 *Indigenous Affairs* (2010) 64-69, at 69.
[258] Rist, *The History of Development, supra* note 193, at 238.
[259] Pieterse, *Development Theory*, *supra* note 2, at 81.
[260] *Ibid*., at 82-83.
[261] *Ibid*., at 83.
[262] *Ibid*., at 96.

as human beings, as citizens, and as persons intent on realizing their loving and creative powers within.[263]

This model strives for inclusive democracy and appropriate economic growth, the overarching intent being to reintegrate the invisible poor with the larger community, and to assert their full rights as citizens in that community. Friedman claims that this kind of reintegration of as many as half the population with an existing political community in which they exercise few rights cannot be done unless the system of dominance, i.e., authoritarianism, peripheral capitalism, and patriarchy are themselves fundamentally changed. This battle for systemic change may last for generations.[264]

As we can see *rights talk* has played a role in alternative development thinking. Friedman argues that human rights are one out of three foundations for the claim that every person is entitled to both adequate material conditions of life and to be a politically active subject in his community. (The other two are citizens rights and "human flourishing".)[265]

The way human rights are understood and applied in a rhetoric argument is, however, different from the mainstream understanding, underlining from below action and critically examining dominant definitions. This is also the case with regard to democracy. Friedman writes that "contrary to the popularly held view that democracy is defined primarily by a set of individually held rights, such as the vote or free speech, it is here understood to rest on the legitimate powers of an actualized citizenship or of responsible membership in a politically constituted community."[266] This means strengthening the meaning and reality of political community, and seeing political practice as a form of collective self-empowerment.[267] This again is linked to the struggle for accountability: a strong political community requires an open political space in which to mobilise and be able to hold the state accountable for its actions.[268] As we will see in the following chapters, the way the concepts empowerment and accountability are used, and how they are linked to human rights, differs from one development actor to another.

The term 'community development' can be seen as being part of the alternative development paradigm, although there are community development projects that are top-down in practice. Ife points out that most development projects are a mixture of top-down and bottom-up approaches. 'Empowerment' and 'participation' are principles valued in most top-down projects and many bottom-up projects make use of external expertise, to mention one example of how the mixture occurs in practice. This mix of top-down and bottom-up approaches also contributes to giving 'development' a bad name; the criticism is usually directed towards top-down approaches that seek to impose on a community someone else's view of what is 'good development'.[269] In bottom-up community-driven development it is accepted that 'development' can, and will, mean very different things in different contexts and communities.[270]

According to Ellerman there are two ways the 'helpers' (i.e., development professionals or others working with 'development') can thwart autonomy or self-help: (1) "the helper, by

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[263] John Friedman, *Empowerment: The Politics of Alternative Development* (Oxford: Blackwell Publishers, 1992) at 13.
[264] *Ibid.*, at 72-73.
[265] *Ibid.*, at 10.
[266] *Ibid.*, at 74.
[267] *Ibid.*, at 76.
[268] *Ibid.*, at 81.
[269] Ife, *Human Rights from Below, supra* note 8, at 18.
[270] *Ibid.*, at 20.

professionally guided programs of social engineering, deliberately tries to impose his will on the doer; (2) the helper, by benevolent aid, replaces the doer's will with her will, perhaps inadvertently."[271] Ellerman gives a number of examples of this kind of "unhelpful help". All kinds of conditioned aid, human rights related or not, can be placed in the first category while examples of the latter can be found in the area of funding given based on externally supplied motivation of carrots and sticks.

Ellerman suggests an indirect approach, which is based on the respect for the autonomy of the doers. *Autonomous action* is based on inside-out, internal, or intrinsic motivation and this does not go well hand in hand with attempts to engineer action with external carrots and sticks.[272] Similarly, bottom-up community development is based on the premise that local knowledge, wisdom, skills and understandings need to be valued above top-down wisdom and experience. In the context of our modern industrial society this is a radical position because we are used to bureaucratic models that assume superior wisdom to reside at the top of the hierarchy, and that the task of political, administrative and community processes is the implementation of this superior wisdom.[273] Ellerman makes a distinction between the 'direct path' and the 'indirect path'. In the first approach, the helpers help the doers by supplying motivation to get the doers to do what the helpers value "the right thing". In contrast, on the indirect path, which respects autonomy, the helper helps the doers to help themselves by reducing obstacles and by supplying e.g. resources to enable the doers to do what the doers were already motivated to do themselves.[274]

Uvin compares this to 'a radical capacity building approach'. The success of such an approach can be measured according to the degree to which local actors, whether public or private, are allowed to *fail and learn from failure*. Local action is never substituted, and the helper only brings in complements on demand. Uvin is convinced of the need for such a radical approach to institution building but is not sure it conforms with human rights standards. He sees compatibility between the approach and human rights values such as freedom of choice and autonomy. Civil and political rights might be strengthened through this approach, depending on the nature of the institutions. Concerning ESC rights, he believes this approach takes longer to yield results in their realisation than direct delivery- or service-based approaches. The approach of "do not substitute or impose" might be difficult or impossible to use applying a human rights-based approach to development cooperation, in which the build-in assumption is that capacity is created and used for human rights-conforming aims. Allowing local organisations and people to struggle for their own change and learn from their own mistakes becomes limited in a strong human rights approach that has clear objectives where the change should be going.[275] The contradiction between free choice and conditionality is only one example of tensions that are present in *all* aid.[276] At first sight it seems that human rights, when conventionally defined, add to the contradictions and paradoxes rather than offering solutions. I will show in the next chapter that an actor-oriented, or bottom-up approach, as suggested by Jim Ife is more compatible with alternative development thinking and from below community development.

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[271] David Ellerman, "Helping Self-help: The Fundamental Conundrum of Development Assistance" 36 *The Journal of Socio-Economics* (2007) 561-577, at 564.
[272] *Ibid*., at 566.
[273] Ife, *Human Rights from Below*, *supra* note 8, at 30.
[274] Ellerman, "Helping Self-help", *supra* note 271, at 575-576.
[275] Uvin, *Human Rights and Development*, *supra* note 52, at 114-115.
[276] *Ibid*., at 118.

2.1.6 Concluding remarks

It is quite sensible for development to change meaning over time in relation to changing circumstances. 'Development' then serves as a mirror of changing economic and political priorities and choices, and changing relations of power and hegemony.[277]

It is inevitable that there is substantial ambivalence and contradiction when we try to find a definition for development. 'Development' can be seen as the broad movement which has been carrying the market system along for the past two centuries – or it can be seen as the entire set of measures through which the world should be made a fairer place.[278] Hugo Slim actually suggests we do away with the word development, and talk a political language of equality, fairness, social justice, rights and responsibility.[279] This suggestion shows how contested the concept development is.

As we can see human rights have played a role in both mainstream development[280] and in the so called alternative development, and the two are not mutually exclusive. Mainstream development may currently be dominating, but at its side an alternative development discourse also exists, and it often brings in new ideas (gender equality and sustainability are two examples) into the mainstream. Broadly speaking one can see a divide between human and alternative development, on the one hand, and positivism of growth on the other.[281]

In the right to development and human rights-based approaches to development there are elements of people-centred human development, with a strong role to be played by the state. Since human rights discourse tends to avoid political questions, there is no clear position on economic systems and the question of growth. There is no fundamental critique or questioning of the very foundational (Western) idea of 'development' as constant growth or improvement; the human rights-based model simply puts some limitations on what actions can be legitimised in the name of development as well as offering 'new' principles, based on human rights norms, for the development process.

The *objective* of the right to development and human rights-based approaches to development is the realisation of human rights for individuals, as rights-holders, by states, as duty-bearers, under international human rights instruments. Development is defined as a process of economic, social, cultural, and political development, in which all human rights can be fully realised. This view on development reflects how the mainstream human rights community views 'ideal conditions of human existence'. It is a society where there are no violations of the rights and freedoms guaranteed in human rights instruments. It is a society where there is "constant improvement of well-being of the entire population and of all individuals", as declared in the preamble of the Declaration on the Right to Development. It is a society where all children are vaccinated, go to school and have access to nutritiously safe food and potable drinking water,[282] and so on. The ambition is high and the intension is good, but the outcome might be a rather *uniform* society far from the vision that development is about "realization of the potentialities of the human person in harmony with the community", as stated in the UN report on the international dimensions of the right to development in 1979.

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[277] Pieterse, *Development Theory*, *supra* note 2, at 7.
[278] Rist, *The History of Development, supra* note 193, at 214.
[279] Slim, "A Response to Peter Uvin", *supra* note 57, at 5.
[280] Mainstream development can be defined as everyday development talk in developing countries, international institutions and international development cooperation. Pieterse, *Development Theory*, *supra* note 2, at 94.
[281] Pieterse, *Development Theory*, *supra* note 2, at 96.
[282] Compare with General Comment No. 14 (2000) on the highest attainable standard of health, para 36, by the Committee on Economic, Social and Cultural Rights. UN doc. E/C.12/2000/4.

We can compare the human rights development objective with the objective of the human development school, which is an enlargement of people's choices in all fields. People may value vaccinations as a way of preventive health care, or they may not value it, they might value public schooling or not. Although the human rights system naturally provides for individual choice, the human development model has a stronger philosophical basis underlining the freedom and agency of individuals and groups. When the objective is *given* (from above as stipulated in human rights instruments and by expert-led institutions) there is less room for formulating people's own visions of what kind of development they might value.

However, when looking at the policies proposed in the human development school, they too are rather uniform and offer less room for freedom and autonomy. Moreover, although in theory people are at the centre of human development policies, in practice development progress continues to focus on nations or economies, rather than people.

The strongest emphasis given to agency, autonomy, and from below action is in the alternative development models. 'Development' is accepted to mean very different things in different contexts and communities, and the diversity that springs out of this is valued. Rights talk has been popular within the alternative development paradigm but the definition of what 'rights' mean is left open and the objective of development efforts is not linked to international human rights treaties.

2.2   Giving meaning to 'human rights', agency, and change in human rights discourse

In this chapter, I raise questions about the nature of human rights. What kind of understanding of the human rights concept can be respectful and relevant to the lived realities of the actors striving to improve the condition of their lives, i.e., doing 'development'? Who gives meaning to human rights? One of the central arguments set out here is that it is doubtful that human rights can be drivers of change that contest the status quo in favour of oppressed people if these very same people do not have a say in how they understand the concept of human rights. In order to be relevant, the people, who are to claim and implement international standards of human rights must perceive the concept of human rights and its content as their own. Human rights cannot be imposed on people from above as specialised expert knowledge, instead people must regard these standards as emanating from their own worldview and values.[283] Legitimacy of human rights is key for their practical relevance.

2.2.1   Introduction

My questions are related to the question raised by Balakrishnan Rajagopal as to whether the current trends in international law "will end up formalising and reinforcing a 'hegemonic' international law, or whether there is still some potential for making international law into a counter-hegemonic tool." Rajagopal argues that if it is going to be possible for a co-existence of counter-hegemonic international law alongside hegemonic[284] international law, then the Third World's reliance on discourses such as human rights or development need to be

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[283] Abdullahi Ahmed An-Na'im, "Conclusion" in A.A. An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) at 431.
[284] Hegemony refers to "power that maintains certain structures of domination" that is ordinarily invisible. Susan F. Hirsch and Mindie Lazarus-Black, "Performance and Paradox: Exploring Law's Role in Hegemony and Resistance", in Hirsch & Lazarus-Black (eds), *Contested States: Law, Hegemony and Resistance* (New York: Routledge, 1994) 1-31, at 6.

seriously rethought. Human rights discourse has been, in the past, used by the Third World against colonialism, apartheid, and in numerous self-determination movements. Today it is still used as a limited shield in the hands of social movements, NGOs and victims of human rights violations but the discourse of human rights has also "turned out to be a core part of hegemonic international law".[285] Human rights discourse of today has a choice, in Rajagopal's opinion, to either insinuate itself with hegemonic international law or it can be part of a struggle to strengthen counter-hegemonic international law.[286] This thesis argues that an actor-oriented approach to human rights from below, in which the voice of the actors themselves is strengthened in the processes of giving meaning to human rights, may be useful if the human rights idea is to be relevant as a counter-hegemonic strategy.

One fundamental dilemma for human rights practitioners, especially working in the South, is that there is often a gap between global visions of justice and specific, local community-based visions of justice.[287] In her research on the localisation of human rights, Merry has seen that human rights ideas still have difficulty in crossing the divide between their global sites of production and their local sites of appropriation.[288]

I agree with Merry that:

> [T]he paradox of making human rights in the vernacular [is]: in order to be accepted, they have to be tailored to the local context and resonate with the local cultural framework. However, in order to be part of the human rights system, they must emphasize individualism, autonomy, choice, bodily integrity, and equality, ideas embedded in the legal documents that constitute human rights law. These core values of the human rights system endure even as the ideas are translated. Whether this is the most effective approach to […] promoting global social justice is still an open question. It certainly is an important part of the expansion of a modernist view of the individual and society embedded in the West.[289]

In this chapter, I look at the debates related to the human rights concept: questions are raised on human rights and agency; 'politics' and human rights; legalization of human rights; human rights law and change; universalism, relativism, context and particularism; individual and group rights; and indivisibility and hierarchy between different sets of rights. These issues are relevant when exploring the potential transformative power of human rights as they enter into the development sphere.

2.2.2   Historic overview of the human rights movement

Since this study views human rights as social constructions that are discursively constructed, and therefore by definition change over time, it is essential to have some understanding of the history of human rights.[290] There is no general agreement on this history, and this debate is outside the scope of this chapter. For the purpose of understanding the role of human rights in modern development discourse and practice, it is sufficient to know that it is strikingly recently that the human rights phenomenon became *widespread*. Although ideals of dignity and justice have deep roots that can be located in all societies, human rights are a new concept

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[285] Rajagopal, "Counter-hegemonic International Law", *supra* note 40, at 64.

[286] *Ibid.*, at 71.

[287] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: The University of Chicago press, 2006) at 103.

[288] *Ibid.*, at 224.

[289] Merry, *Human Rights and Gender Violence*, *supra* note 287, at 221.

[290] See Ife, *Human Rights and Social Work, supra* note 3, at 144.

in human history.[291] Human rights, as they have been defined in legal documents and legal practice in the past decades, are a distinct and in many ways a new way of seeking values such as justice, fairness and humanity. Donnely argues that the claim that most societies and cultures have practiced human rights throughout history[292] confuses these values with modern legal human rights. Human rights, as equal and inalienable entitlements of all individuals, are a different way of seeking to realise values such as justice.[293] This position can be criticised for accepting a narrow and formalistic definition of the human rights concept, something this thesis argues should not be accepted, but it is essential to understand that the dominant human rights definition departs from other ways of addressing injustice.

Human rights law represents a modern project, first spelled out *theoretically* by some Enlightenment philosophers in the seventeenth and eighteenth centuries,[294] but the history of the *practical implementation* of international human rights extends only a few decades back.[295] According to Mutua human rights law is "an internationalization of the obligations of the liberal state" – the normative regime of international human rights law originated in liberal theory and philosophy, taking form in constitutional and other domestic legal regimes and only after World War II taking form as a binding system of international human right law.[296] (The western Enlightenment tradition within which the dominant human rights discourse was framed is naturally only one part of the history of struggle for human rights and can and should be deconstructed as it has lead to a narrow understanding of the human rights concept,[297] but it nevertheless has had great impact on how the human rights movement looks today.)

Since the 1980s, a variety of groups around the world, and all governments have learned to speak the language of human rights.[298] Beitz highlights that it is since the end of the Cold War that the scope of human rights doctrine has expanded and the resources devoted to their advancement and protection have multiplied.[299] It remains a debated issue whether the process of 'vernacularization' of human rights has granted ordinary people the use of human rights

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[291] Rhoda E. Howard, "Dignity, Community, and Human Rights", in Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 81-102, at 82.

[292] Penna and Campbell for example use so called 'human rights symbols' from Africa to show that 'traditional' Africa did have a human rights culture and the study and understanding of this culture would have theoretical and political relevance for both modern Africa and the West. David R. Penna and Patricia J. Campbell, "Human Rights and Culture: Beyond Universality and Relativism", in 19 *Third World Quarterly* (1998) 7-27.

[293] Jack Donnelly, "International Human Rights: Universal, Relative or Relatively Universal" in Mashood A. Baderin & Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Surrey: Ashgate, 2010) 31-48, at 39.

[294] The Enlightenment philosophers gave centrality to the human person; instead of 'man' being considered a part of nature and as interconnected with all living beings, 'he' was considered to be above nature and having special value. Valuing of 'his' or 'her' (usually 'his') rights became central in philosophical and ethical argument. Ife, *Human Rights from Below*, *supra* note 8, at 7.

[295] Heiner Bielefeldt, "Philosophical and Historical foundations of Human Rights" in C. Krause & M. Scheinin (eds) *International Protection of human Rights: A textbook* (Turku/Åbo: Åbo Akademi University, Institute for Human Rights, 2009) 3-18, at 16-17. Donnelly writes that "no society, civilization, or culture prior to the seventeenth century, however, had a widely endorsed vision, let alone practice, of equal and inalienable individual human rights." Donnelly, "International Human Rights", *supra* note 293, at 39.

[296] Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis", 29 *Human Rights Quarterly* (2007) 547-630, at 551.

[297] See Ife, *Human Rights and Social Work*, *supra* note 3, at 146; Paul Tiyambe Zeleza, "Introduction: The Struggle for Human Rights in Africa", in P. T. Zeleza & P. J. McConnaughay (eds), *Human Rights, the Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) 1-18.

[298] Moyn, *The Last Utopia*, *supra* note 38, at 218.

[299] Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009) at 1-2.

from below in transformative ways – and this is also one of the questions that this thesis wants to elucidate. What is clear is that international lawyers assumed a central prominence. Moreover, in the 1980s, human rights were no longer a minimalist utopia of anti-politics, and human rights organizations were forced to move from morality to politics and from charisma to bureaucracy.[300] Human rights were conceived through a desire to transcend politics,[301] but in the thirty years since their explosion in the 1970s, human rights have followed a path from morality to politics – although all their advocates are not willing to acknowledge this development,[302] and this is an issue we will return to later in this chapter. Human rights continued to claim that their source of authority transcended politics. However, their transformation into the dominant framework of the government and improvement of human life all over the planet changed them profoundly. The human rights movements' engagement with 'governance' concerns in postcolonial states is one example of embracing politics.[303]

Returning to the question of human rights as hegemonic and counter-hegemonic; Rajagopal claims that the expansion of the political use of human rights in the 1980s – he refers to struggles for democracy in Eastern Europe as well as in Latin America – meant that human rights discourse was in a counter-hegemonic mode during this time.[304] Latin American policymakers, legal scholars, and activists have historically been strong supporters of the development of international human rights law, as they have perceived such laws as a way of protecting weaker states from more powerful states, particularly the United States. Within these countries there have been vocal domestic human rights organizations demanding respect for human rights and change.[305] Moreover, social movements, e.g. by indigenous peoples, used a language of human rights to challenge violations and repression during this time. There were examples of how human rights were used for hegemonic agendas also during the 1980s but it was the end of the Cold War that made the shift possible, so that a new hegemonic role for human rights was born. The UN and human rights groups started to more aggressively pursue humanitarian interventions in the name of human rights in Somalia, the Balkans, Kosovo, Haiti, and elsewhere. Furthermore, a market-friendly understanding of human rights was being embraced by the World Bank and several bilateral donors. A new "totalising discourse", applying the language of military intervention, economic reconstruction and social transformation, gave a new hegemonic role to human rights.[306] However, this market-friendly understanding of human rights has not occurred without resistance and during the 1990s human rights played a role in local struggles against large-scale 'development' interventions such as dam constructions.[307]

As mentioned earlier, Jim Ife points out that human rights were created at the time of *modernity* and the specific ways of viewing the individual that characterise this time. One

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[300] Moyn, *The Last Utopia*, *supra* note 38, at 218-219.
[301] Koskenniemi holds that the standard view of international law is that of a ""'common language" transcending political and cultural differences". Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with new Epilogue* (Cambridge: Cambridge University Press, 2005) at 567.
[302] Moyn, *The Last Utopia*, *supra* note 38, at 227.
[303] *Ibid*., 223.
[304] Rajagopal, "Counter-hegemonic International Law", *supra* note 40, at 66.
[305] Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America", in Judith L. Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter (eds), *Legalization and World Politics* (Cambridge: The MIT Press, 2001) 249-275, at 255-256.
[306] Rajagopal, "Counter-hegemonic International Law", *supra* note 40, at 66.
[307] For human rights arguments against the building of dams on the river of Narmada see Philippe Cullet, "Narmada Dams and Human Rights" 17 *Frontline* (2000). Available at http://www.frontlineonnet. com/fl1714/17140950.htm, last visited 11 February 2012. The campaign resulted in internal changes of control and review mechanisms at the World Bank, as well as contributing to setting up of the Inspection Panel at the Bank.

defining feature of modernity has been an effort to seek sameness, a consequence of the view that there is or should be one 'right' way of doing things (sometimes called 'best practice').[308] The West is in this context seen as modern, urban, and dynamic while especially Africa and Asia are seen as traditional, rural, and static. These cultures are allegedly characterised by tradition, despotism, communalism, and irrationality – values that are seen as inherently opposed to human rights. The world is thereby divided "into the creators and recipients of human rights, the monitors and monitored, the viewers and the viewed, the globalists and provincialists, the universalists and relativists."[309]

In the following pages I will seek an alternative way of approaching and understanding the human rights concept. I argue that there is no one-size-fits-all definition of human rights. This is an approach to human rights that, in a postmodern way, celebrates diversity.[310] This approach does not go back to the 'roots' in relation to justice and dignity – it acknowledges those roots as well as what has been achieved during modernity and moves beyond these discourses into something new. A historic perspective on human rights and struggle against oppression shows that circumstances can and do change,[311] the current social order is not given.

2.2.3 A review of the meanings attached to the human rights concept: Moving beyond human rights as defined by the 'powerful for the powerless'

The human rights concept: four schools of thought

In this section, I first present four schools of thought on human rights, each of which has its own way of approaching and understanding the human rights concept. Thereafter, I present a so called actor-oriented approach to human rights, inspired by Nyamu-Musembi and complemented by Jim Ife's 'human rights from below'. Here I try to put forward an alternative way of giving meaning and content to the human rights concept where we can move beyond human rights being defined by the "powerful for the powerless",[312] which goes against the idea of participation and inclusion – central principles in human rights-based approaches to development.

An-Na'im claims that the idea of human rights is one of the most characteristic phenomena of our time. This concept has quickly gained global significance, penetrating into the consciousness of millions of people in every corner of the world.[313] In most research, including attitudinal research, the human rights concept is taken as a given. Stenner highlights that it is striking how comparatively little scholarship there is on how ordinary people actually understand the human rights concept.[314] This is the case despite there being serious disagreement about the human rights concept, rationale, and content, which is not necessarily

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[308] Ife, *Human Rights from Below, supra* note 8, at 36.
[309] Zeleza, "Introduction: The Struggle for Human Rights in Africa", *supra* note 297, at 10.
[310] Ife, *Human Rights from Below*, *supra* note 8, at 47. In the postmodern worldview different elements do not need to fit together, show consistency, or work in harmony, and this allows for communities where difference is valued rather than eradicated. *Ibid*. at 47. Pluralism is the 'ism' of our time. Kumar, *From Post-Industrial*, *supra* note 16, at 104-105.
[311] See Ife, *Human Rights and Social Work*, *supra* note 3, at 147.
[312] This phrase is used by Ife, *Human Rights from Below*, *supra* note 8, at 126.
[313] An-Na'im, "Conclusion", *supra* note 283, at 430-431.
[314] Paul Stenner, "Subjective Dimensions of Human Rights: What do Ordinary People Understand by 'Human Rights'?" 15 *The International Journal of Human Rights* (2011) 1215-1233, at 1216.

a terrible thing,[315] and that different people within academia, organisations, and state agencies embrace different concepts of and attach different meanings to human rights.[316]

Dembour has analysed academic human rights literature and based on the analysis she has identified four schools of thought on human rights.[317] I find her model helpful in clarifying the different meanings attached to the human rights concept and will therefore use the four schools as a starting point for a discussion on some pertinent issues related to human rights.

The first school presented by Dembour is the *natural school*,[318] which uses perhaps the most well-known and common definition of human rights. It is a definition that identifies human rights as those rights one posses simply by being a human being. Human rights are viewed as given. Human rights are absolute and universal entitlements based on 'nature'.[319] Martti Koskenniemi calls this "political theology", as natural rights suggest that "human communities are bound by values that precede them."[320] The natural scholars hold that human rights exist *independently* of social recognition, even though recognition is preferable.[321] To quote Jack Donnelly: "Although we *have* human rights universally, simply as human beings, we *enjoy* them as a result of contingent political and legal practices."[322]

Within the natural school, there is a tendency to celebrate human rights law. The development of international human rights law in the last half-century is regarded as undeniable progress. Natural scholars *believe* in human rights, and historically they have set up the parameters within which human rights came to be conceived and debated. Traditionally, they have represented the human rights orthodoxy.[323]

The orthodoxy is increasingly moving towards what Dembour calls the *deliberative school*. These scholars tend to reject the natural element on which natural scholars base human rights. They claim human rights come into existence through social agreement.[324] All rights are extrinsic to individuals and groups in that they are created and attached to legal persons by external forces, through legislative acts and/or judicial decisions. This kind of legal positivism leaves space for a social dimension as regards the development of rights and their attachment to their bearers, whilst natural law theory refers to divinations of one kind or the other.[325] Ife calls this tradition 'state obligations tradition' according to which human rights exist only when there are mechanisms in place to provide for their protection.[326] Rights depend for their

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[315] An-Na'im, "Conclusion", *supra* note 283, at 430-431. See also Paul Gready, "Introduction" in Gready (ed.), *Fighting for Human Rights* (London: Routledge, 2004) 1-32, at 3.

[316] Marie-Bénédicte Dembour, "What Are Human Rights? Four Schools of Thought", 32 *Human Rights Quarterly* (2010) 1-20, at 2.

[317] *Ibid*. Surprisingly, Stenner finds an overlap between how experts define human rights (as described by Dembour) and the views expressed by non-experts. See Stenner, "Subjective Dimensions of Human Rights", *supra* note 314, at 1227.

[318] The concept of natural law, which is based on a tradition stretching from antiquity to modernity, claims an absolute authority for some basic normative principles that are said to have priority over all 'human' legislation. The natural law tradition generally appears as one of the most important sources of human rights in Western tradition. Bielefeldt, "Philosophical and Historical Foundations", *supra* note 295, at 10.

[319] Dembour, "What Are Human Rights?", *supra* note 316, at 2-3.

[320] Martti Koskenniemi, "Human Rights Mainstreaming as a Strategy for Institutional Power", 1 *Humanity*, (2011) 47-57, at 48.

[321] Dembour, "What Are Human Rights?", *supra* note 316, at 3.

[322] Donnelly, "International Human Rights", *supra* note 293, at 42. Emphasis added.

[323] Dembour, "What Are Human Rights?", *supra* note 316, at 5 and 9.

[324] *Ibid*., at 3.

[325] Anthony Woodiwiss, "The Law cannot be enough: Human Rights and Limits of Legalism", in Meckled-García & Cali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human rights Law* (London: Routledge, 2006) 32-48, at 36.

[326] Ife, *Human Rights from Below*, *supra* note 8, at 74.

protective effectiveness on the nature of wider sets of social relations and developments within them.[327] This school stresses the limits of human rights and although they would like human rights to become universal they recognise that this will require time and will happen only through the global adoption of the liberal values they express. Whether this will happen or not remains to be seen.[328]

Similar to the natural scholars, the deliberative scholars tend to have great faith in the potential of human rights law. They, however, underline that the human rights normative system is in the making. Merry writes: "human rights law is far from being a consistent and coercive system of law. Rather, it is a fragmentary and largely persuasive mechanism very much in the making."[329]

The most common definition of human rights is probably a *mixture* of natural and deliberative schools. An-Na'im operates with this kind of definition according to which human rights are "claims to which all people are entitled as of right by virtue of their humanity", without distinctions on such grounds as sex, race, colour, religion, language, national origin or social group. He locates these rights and their implementation in the social and political realm of human affairs, and as such require the allocation of resources. The basic concept of rights can only be realised through some form of wide-scale political organisation, i.e. the state, which is capable and willing to undertake such functions.[330]

The third school mentioned by Dembour is the so called *protest school*. Protest scholars are concerned first and foremost with redressing injustice. They hold that human rights are realised through a *fight* for their realisation.[331] Zeleza reminds the reader that apartheid was not ended by a book or a court case, and neither were colonialism nor slavery, implying that human rights are not the outcome of concepts but of conflicts, of politics rather than philosophy, and instigations rather than insights.[332] Similarly, Stammers writes that the emergence and development of human rights needs to be understood as part of social movement struggles against structures of power.[333]

In the protest school, human rights are seen as rightful claims made by or on behalf of the poor, the unprivileged, and the oppressed. Human rights claims allow for the status quo to be contested in favour of the oppressed.[334] These scholars maintain that, in the words of Upendra Baxi, "suffering and repressed people remain the primary *authors* of human rights values and visions".[335] Baxi continues to point out that human rights norms and standards, however, also "entail 'participation' by national, regional, and global political, bureaucratic, and institutional actors". These actors tend to use human rights for the ends of governance, thereby transforming human rights into a means to the end for practices, processes and institutions of governance.[336]

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[327] Woodiwiss, "The Law cannot be enough", *supra* note 325, at 37.
[328] Dembour, "What Are Human Rights?", *supra* note 316, at 9.
[329] Merry, *Human Rights and Gender Violence, supra* note 287, at 227.
[330] Abdullahi A. An-Na'im, "Possibilities and Constraints of Legal Protection of Human Rights under the Constitutions of African Countries" in Abdullahi A. An-Na'im (ed.), *Universal Rights, Local Remedies* (London: Interrights, 1999) 5-24 at 7-8.
[331] Dembour, "What Are Human Rights?", *supra* note 316, at 8.
[332] Zeleza, "Introduction: The Struggle for Human Rights in Africa", *supra* note 297, at 7.
[333] Stammers, *Human Rights and Social Movements*, *supra* note 4, at 2.
[334] Dembour, "What Are Human Rights?", *supra* note 316, at 3.
[335] Baxi, "Politics of Reading", *supra* note 7, at 184. Emphasis added.
[336] Baxi, "Politics of Reading", *supra* note 7, at 191. See also Stammers, *Human Rights and Social Movements*, *supra* note 4, at 3.

Protest scholars often distrust human rights *law* and thereby attract mostly human rights activists and activist-scholars.[337] There exists a very diverse field of activists and researcher activists, and not all of them distrust human rights law. The contributors, most of whom are activist scholars, to the book *Fighting for human rights*, do not, for example, express any wide scale distrust towards human rights law.[338]

The last school in Dembour's model is the *discourse school* that is, according to Dembour, characterised by its lack of relevance towards human rights (I believe Dembour misinterprets discursive scholars in this regard as I will explain below). These scholars recognise that the language surrounding human rights has become a powerful language with which to express political claims, but they do not view human rights as given nor that they constitute the definitive answer to the ills of the world.[339] Therefore, they believe that human rights law is as good or as bad as any other law. It must always be judged in each situation anew.[340] However, these scholars tend to allude to the shortcomings of human rights discourse: it does not deliver what it promises, namely, equality between human beings. They often observe and describe the contradictory features of human rights discourse and they call for a re-evaluation of the human rights language.[341] Discursively oriented scholars tend to view 'rights as culture', proposing that "the rights discourse embodies certain features that anthropologists recognize as constituting culture." Rights are understood as rights talk, rights thinking, rights practices.[342]

Dembour refers to Makau Mutua as a representative of the discursive school. Mutua claims that the human rights movement needs to realise that it is young and therefore has an "experimental status, not a final truth."[343] In his work, Mutua "presents a view of human rights that questions the assumption of the major actors in the human rights movement." It questions "the mythical elevation of the human rights corpus beyond politics and political ideology."[344] Mutua moreover points at the paradox of human rights discourse: it seeks to foster diversity and difference, but only so long as it is exercised within certain limits, that according to Mutua is the 'liberal paradigm'. He calls for an urgent revision of human rights so that the ideals of difference and diversity can have a true meaning. Seeing human rights norms as frozen and fixed is not in the long-term interest of the human rights movement.[345] In other words, Mutua raises a number of critical questions but he does so because he believes human rights are hugely important – not because he sees them as lacking relevance, a feature that Dembour claims belongs to discursive scholars.

Recent anthropology of human rights has shown that, when the idea of human rights is rendered discursively, human rights discourse does not always homogenise legal or normative practice. Instead, Mark Goodale, who writes about human rights discourse in Bolivia, finds that it "transforms the terms of reference through which the legal mediates social, political, and economic relations" and "creates new conditions in which individuals or groups can

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[337] Dembour, "What Are Human Rights?", *supra* note 316, at 6 and 19.
[338] Gready, "Introduction", *supra* note 315, at 8.
[339] Dembour, "What Are Human Rights?", *supra* note 316, at 4.
[340] *Ibid*., at 6.
[341] *Ibid*., at 8 and 10.
[342] Cowan, Dembour and Wilson, "Introduction", *supra* note 13, at 11.
[343] Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) at 4.
[344] *Ibid*., at 2.
[345] *Ibid*., at 3-4.

organize social resistance."[346] Rather than suppressing (or homogenising) normative diversity, the arrival of human rights discourse has introduced the idea that individuals and groups have the right to organise in ways that respect their dignity and diversity.[347] This shows that when human rights ideas enter the local level, not as abstract universal ideals, but as rights talk, rights thinking, and rights practice they can find new limits. The way local groups use human rights also has an impact on the global human rights discourse, an issue I will return to when discussing who gives meaning to human rights.

Many critical authors want to acknowledge the importance of the international legal human rights framework, but at the same time point out that the global social movements for social justice has challenged aspects of this system, thereby contributing to its evolution and reformulation. They refer to indigenous movements that have called for a multicultural reconstruction of human rights (respecting diversity), to balance the liberal and individualist bias of the existing human rights system; to grassroots movements that have contested the traditional status of the state as the sole actor in the human rights regime; and to the feminist movement that has questioned the patriarchal character of the human rights tradition and worked for new instruments and conceptions.[348] The human rights practices of these movements are important as a research field in the discursive tradition.

That human rights do not represent a final truth is the same view as is held in the *constructed rights tradition*. Within this tradition the starting point is that human rights are constantly being negotiated, defined and redefined at all levels of society.[349] Klotz and Lynch write that "dominant actors can agree on what constitutes human rights at a particular point in time, but these meanings are contested (often by marginalized actors) and are inherently unstable."[350] To many this view is threatening because stability, or at least a stable core, is seen as a virtue and necessity in the human rights system. At the same time, diversity is also seen as a virtue and the human rights movement is struggling with trying to achieve stability and 'core content' of rights while at the same time upholding the image of being a diverse and inclusive movement.

In the constructed rights tradition, human rights are seen as contextual and dynamic, rather than universal and stable. The constructed rights tradition is a postmodern critique of traditional constructions of human rights, rejecting the idea of universal human rights as static, natural or somehow god-given. Human rights as discursively constructed sees human rights as a discourse that is changing and evolving but with universal elements,[351] as we will see. Human rights are grounded in lived experience; everyday life is seen as a process of negotiating and renegotiating regarding shared assumption about human rights and responsibilities that come with them. This perspective raises challenging questions about universality and context, which I will come back to later in this chapter. This tradition underlines people's agency in human rights protection and realisation,[352] something it has in common with an actor-oriented approach to human rights that will be presented below.

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[346] Mark Goodale, "The Power of Right(s): Tracking Empires of Law and New Modes of Social Resistance in Bolivia (and Elsewhere)", in M. Goodale & S. E. Merry (eds), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007) 130-162, at 158.
[347] *Ibid.*, at 159.
[348] See Boaventura de Sousa Santos and César A. Rodríguez-Garavito, "Law, Politics, and the Subaltern in Counter-Hegemonic Globalization", in de Sousa Santos & Rodríguez-Garavito (eds) *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005). 1-26, at 20.
[349] Ife, *Human Rights from Below, supra* note 8, at 76.
[350] Klotz and Lynch, *Strategies for Research, supra* note 1, at 13.
[351] Ife, *Human Rights and Social Work, supra* note 3, at 200.
[352] Ife, *Human Rights from Below, supra* note 8, at 76-77.

The present author finds that the discursive understanding of human right as social constructions is the best attempt to capture current reality of the social world we live in. However, as Dembour points out, the four schools are not fixed categories that neatly and perfectly describe single track thought processes,[353] and this study has been inspired by academic literature representing all four traditions presented above. For the purpose of understanding the role of human rights in development practice the discursive understanding of human rights is, however, most helpful.

An actor-oriented approach to human rights from below

This study has been inspired by what Celestine Nyamu-Musembi calls an 'actor-oriented approach to human rights'. Jim Ife writes about what a from below perspective on human rights and community development means and his account is a good complement to the actor-oriented perspective on human rights. In the actor-oriented model, there are no fixed definitions of the human rights concept. Scholars such as Mahmood Mamdani argue for moving towards a conception of rights that is produced in a concrete conceptualising of the wrongs in each situation and context. Such an analysis leads to an understanding of rights organic to the specific realities, and not a mechanical idea "as if out of a textbook", from the Western historical experiences.[354] Theoretically, this perspective is close to the 'constructed rights tradition', in which it is suggested that human rights are constantly being negotiated, defined, and redefined while firmly grounded in the lived experience of the actors themselves. The constructed rights tradition can be placed within the discourse school. However, an actor-oriented approach also has features similar to the ideas presented in the protest school.

In these approaches it is accepted that "rights are shaped through actual struggles informed by people's own understandings of to what they are justly entitled."[355] In the actor-oriented perspective rights are understood as "claims (of one person or group on another person, group or institution) that have been legitimised by social structures and norms."[356]

Nyamu-Musembi observes that "looking for the meaning of rights from the perspective of those claiming them transforms defined normative parameters of human rights debates, questions established conceptual categories and expands the range of claims that are validated as rights."[357] This is a defining feature of the protest school and is in opposition to what Baxi calls "human rights as ethical imperatives", a view according to which 'human rights' are not thought of in terms of political practices but rather an ethic of human rights that insists on what communities and individuals *ought* to desire.[358]

From an actor perspective, it is important to "start from where the doers are and see the world through their eyes." Participation as consultation is not enough: 'doers'[359] need to be in the drivers' seat in order to make their actions and experiences their own.[360] Ellerman warns against professionally guided programmes of social engineering that deliberately try to

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[353] Dembour, "What Are Human Rights?", *supra* note 316, at 4.
[354] Mahmood Mamdani, "Social Movements and Constitutionalism in the African Context", Working Paper, Centre for Basic Research, Kampala, Uganda, 1989, at 7.
[355] Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", *supra* note 18, at 41.
[356] Moser and Norton, *To Claim Our Rights, supra* note 46, at 4.
[357] Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", *supra* note 18, at 41.
[358] Upendra Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2002) at 7.
[359] Ellerman uses the concept 'doers' but 'actors' can also be used.
[360] Ellerman, "Helping Self-help", *supra* note 271, at 572, 575-576.

impose someone else's will on the doer.[361] In human rights and development practices there are many examples of such programmes. Researchers Turnbull, Hernández and Reyes exemplify this fundamental dilemma through using an actor-oriented approach in analysing assistance programmes for street children. Their data show that the interventions and services analysed by the researches were utilised by the street children in their *own way* and later modified by the helpers trying to make the children 'use them correctly' – only to discover new adaptations on the part of the children. Professional helpers, with their services, try to impose upon the children, the outsiders' idea of 'help' and 'rehabilitation'. However, the children have their own ideas. The result is a continuous battle that keeps the children on the streets.[362] Good intentions are not enough. The conclusion of the researchers is that programmes must construct relationships and strategies which do not force the child to renounce his or her identity in order to receive help.[363] This is a valid point in any programme that seeks to give assistance to a person or group of persons living under challenging circumstances. Often it comes down to the difference between a top-down model of working and a 'from below' perspective.

The conventional 'from above' approach to professional assisting usually means privileging of professional expertise over the experience of others. The idea of dialogical praxis, building on the work by Paulo Freire[364] requires that *both* the professional human rights/development/social worker and those with whom he or she works are seen as having equivalent wisdom and expertise. Naturally, professional workers will have specialised knowledge and skills but the person/s they work with have a range of knowledge, skills, and experience that the workers lack: expertise that comes from lived experience and survival skills. Dialogical praxis requires shared knowledge and mutual learning, and acting together toward achieving human rights.[365]

In human rights from the below approach, human rights are defined, negotiated, and enacted within different contexts. Human rights work becomes primarily about *culture* and *relationships* within communities, families, households, workplaces, and public spaces.[366] In a human rights-based approach to local development it is usually natural to view human rights work in this way ('rights as culture'). In this context, it is necessary to have an open mindset, to listen rather than propose solutions. Having a ridged and fixed definition of the human rights concept ('expert knowledge') usually prevents a meaningful dialogue and therefore an actor-oriented perspective may be helpful.

However, trusting a process directed by the actors alone can lead to exclusion and discrimination and there is a need for a human rights-based approach in which a human rights framework can place some limits on self-direction. A fundamental requirement is that the human rights of all people, whether part of the particular group of actors or not, are respected in the process.[367] In addition, the claimed right should be seen as either aspiring to apply to all of humanity or as applying to people from specific disadvantaged groups.[368] Moreover, since no local context is devoid of unequal power relationships, it is important to be aware who is defining the issues in a rights language. Merry points out that often activists translate rights

[361] Ellerman, "Helping Self-help", *supra* note 271, at 564.
[362] Bernardo Turnbull, Raquel Hernández and Miquel Reyes, "Street Children and Their Helpers: An Actor-Oriented Approach" 31 *Children and Youth Services Review* (2009) 1283-1288, at 1283.
[363] *Ibid.*, at 1287.
[364] Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 1993, first edition in 1970).
[365] Ife, *Human Rights and Social Work*, *supra* note 3, at 151-152.
[366] Ife, *Human Rights from Below, supra* note 8, at 139.
[367] *Ibid.*, at 124.
[368] Ife, *Human Rights and Social Work*, *supra* note 3, at 10.

claims in a way that is relevant to the life situations of the people involved. Often, international perspectives are translated 'down' more than grassroots perspectives are translated 'up' – and there is a real risk that e.g. women's own experiences are not heard in the process.[369]

Who gives meaning to human rights?

When I write about 'giving meaning to human rights', I do not mean norm creation, i.e., the drafting of new internationally recognised human rights norms. I am primarily referring to individuals and groups *giving meaning* and content to the human rights concept as they set out to achieve rights that are meaningful to them. This is not only about actors pushing for new legal interpretation of existing norms, although this is part of the meaning-giving process. The process does not take place in a vacuum: the legal documents defining human rights and the structures surrounding the international human rights system naturally influence how actors ultimately give meaning to human rights, and the kind of locally manifested interpretation of the human rights concept we will observe. Human rights are always interpreted and understood in a local context and these local human rights discourses are relevant when understanding the role human rights play within various contexts.

'Human rights from below' operates from a starting point where human rights are constructions defined by human beings in social, political, and cultural contexts – and it is what Jim Ife calls the *act of definition* that is the primary concern.[370] I prefer to call this process a 'meaning-giving-process' instead of a 'defining-process'. As Koskenniemi points out: "The interpretative techniques lawyers use to proceed from a text or behaviour to its "meaning" *create* (and do not "reflect") those meanings."[371] My starting point is that the meaning of human rights is *created* in social, political, and cultural processes, not only by lawyers and human rights experts but also by rights-holders claiming human rights. However, actors have unequal power to shape and reshape meanings in these fields. Moreover, words may be interpreted differently by different actors such as by activists and their targets, implying that there are limits to the capacity of the 'producers' of discourses to control the meaning given to words and signs.[372] 'Meaning' is constantly created and constantly challenged – at all levels. The local/national and transnational levels interact. Consensus is the result of a hegemonic process in which some actors have made their position seem the universal position.[373]

Because of these tensions, I agree with Ife that the questions of who defines the human rights concept, and who is excluded, are important. In what context does this process take place?[374]

In the deliberative school, that is dominating human rights discourse at the moment, human rights are accepted as being defined in legal documents and agreements. These are drafted and agreed upon by small groups of people: politicians, diplomats, academics, opinion leaders and some human rights activists. For a long time, they were predominantly privileged white men,[375] and particularly during the formulation of UDHR representatives of only a few states dominated the scene (the cluster of Western and European states around the United States,

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[369] Merry, *Human Rights and Gender Violence, supra* note 287, at 216.

[370] Ife, *Human Rights from Below, supra* note 8, at 134.

[371] Koskenniemi, *From Apology to Utopia*, *supra* note 301, at 597. Emphasis in original.

[372] See Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle", 108 *American Anthropologist* (2006) 38-51, at 41-41.

[373] Koskenniemi, *From Apology to Utopia*, *supra* note 301, at 597.

[374] Ife, *Human Rights from Below*, *supra* note 8, at 134.

[375] *Ibid*., at 126.

that dominated the UN). Since 1945, and the adoption of the UDHR, the circle of actors involved in the human rights movement, and also in standard setting, has expanded rapidly.[376] Recently, the voices of women and people from non-Western backgrounds have also gained influence in human rights discourse and have impact on how human rights are defined in documents. However, human rights still remain largely *a discourse of the powerful about the powerless*,[377] thereby contributing to a discourse of domination and disempowerment. Human rights discourse is dominated by the voices of the privileged,[378] speaking a specialised, often technical, language associated with a group of professionals that are part of global elites.[379] This inevitably has an impact on how human rights are perceived and applied by less powerful groups. At the same time, another kind of meaning-giving process is taking place, largely outside of institutions and agents of international law. Actors such as Oxfam, together with local groups, also contribute to giving meaning, or perhaps more accurately, they challenge the dominant meaning given to human rights when they generate completely new rights and reformulate existing rights in a way that makes sense to the people they work with.[380]

The international movement for women's human rights is another example of how activists, 'from below', influence the norm creating processes as well as the interpretative processes of international human rights law.[381] When reading about grassroots women's groups one receives the impression that the way human rights have been defined in international legal agreements has always been resisted by these groups. They have always pushed for new interpretations and also new legal norms.

Some even claim that this is the main value added: so far legal strategies to secure women's human rights have not brought about radical social change, but they have *challenged dominant social meanings* and understandings of gender, difference, culture, sexuality as well as *the very meaning of human rights*.[382] This is of central importance as grassroots women's groups are not satisfied with a narrow, legalistic and formalistic understanding of the human rights concept. I agree with Temma Kaplan that "we need a new language to explain what grassroots women's groups mean by human rights."[383] This is true not only for women's human rights, but also for other groups who have been marginalised in international and domestic processes of norm creation and interpretation. An actor-oriented approach to human rights questions the position of 'experts' as sole agents in the process of meaning-giving; it

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[376] Mutua, "Standard Setting in Human Rights: Critique and Prognosis", *supra* note 296, at 575.

[377] Ife, *Human Rights from Below*, *supra* note 8, at 126. Emphasis in original. Merry also reminds us of the urgency to include women in the making of the human rights framework so that we can move toward disrupting the patriarchal shape of that framework. Merry, *Human Rights and Gender Violence*, *supra* note 287, at 231.

[378] Ife, *Human Rights and Social Work*, *supra* note 3, at 117-118.

[379] See Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (Berkeley: University of California Press, 2005) at xviii; Robert Archer, "The Strengths or Different Traditions: What Can Be Gained and What Might Be Lost by Combining Rights and Development?", 4 *Sur International Journal on Human Rights Law* (2006) 81-89, at 86.

[380] In the Strategic Plan of 2001 Oxfam committed itself to working for five rights: the right to a sustainable livelihood, the right to basic social services, the right to life and security, the right to be heard, and the right to an identity.

[381] See Brooke Ackerly, *Political Theory and Feminist Social Criticism* (New York: Cambridge University Press, 2000) 143.

[382] Ratna Kapur, "Revisioning the Role of Law in Women's Human Rights Struggles", in Meckled-García & Cali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human rights Law* (London: Routledge, 2006) 101-116, at 110-111. Emphasis added.

[383] Temma Kaplan, "Women's Rights as Human Rights: Women as Agents of Change", in Marjorie Agosín (ed.), *Women, Gender, and Human Rights: A Global Perspective* (New Brunswick: Rutgers University Press, 2001) 191-204, at 195.

contributes to rethinking and reframing human rights, and thereby also gives human rights discourse a new language.

Concluding remarks

Writing from an actor-oriented perspective is the only way I, as an outsider, can write about human rights in development work in Malawi, because it is a completely new social setting for me. My argument is that human rights can play a meaningful role in development practice if the understanding of the human rights concept is rooted in the lived realities of the actors claiming them. At the community level there should be a public dialogue about the meaning, source, and authority of human rights as well as forms and strategies for claiming them and making them real in the everyday lives of the people. Having said this, the actor-oriented approach does pose certain challenges. When actors living in a resource constrained environment come together to the discuss development agendas and priorities they tend to prioritise short-term needs instead of striving for long-term changes in structure and policy.

It is also important that some core values and ideas embedded in the legal documents that constitute human rights law, such as autonomy, choice, bodily integrity, and equality,[384] are maintained and respected in the process. There should also be an *aspiration of universality*:[385] that what constitutes 'our' human rights also constitutes 'your' human rights. However, before going into the universality question we will examine some other debates that are important for our understanding of why a conventional definition of human rights is too limited for the purpose of contesting the status quo in favour of less powerful groups.

2.2.4 Human rights and agency

Norman Long, the founder of the actor perspective, defines *agency*, as "the knowledgability, capability and social embeddedness associated with acts of doing (and reflecting) that impact upon or shape one's own and other's actions and interpretations."[386] In general terms, agency assumes that the individual actor has the capacity to process social experience and to find ways of coping with life, even under the most extreme forms of coercion.[387] Individuals or networks of people have agency, and they may also attribute agency to objects and ideas, which can shape their perceptions of what is possible.[388] Human rights can potentially be an idea that expands perceptions of what is possible.

The theoretical foundations for studies on agency come from Giddens, who linked agency to power, saying that "an agent ceases to be such if he or she loses the capacity to 'make a difference', that is, to exercise some sort of power."[389] Action is crucial for agency; and action involves power in the sense of *transformative capacity*. According to Giddens, action depends on the capability to make a difference. What is important is that when circumstances are such that an individual (or group) has 'no choice' this is not to be equated with dissolution of action as such.[390] Having the power to make a difference can, under circumstances of social constraint, be used to regulate one's own inner state of being, rather than outer circumstances

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[384] Sally Engle Merry refers to *inter alia* these values in *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: The University of Chicago press, 2006) at 221.
[385] This concept is used by Ife, *Human Rights from Below*, *supra* note 8, at 213.
[386] Norman Long, *Development Sociology: Actor Perspectives* (London: Routledge, 2001) at 240.
[387] *Ibid*., at 16.
[388] *Ibid*., at 240-241.
[389] Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Cambridge: Polity Press, 1984) at 14.
[390] *Ibid*., at 15.

or events. Hirsch and Lazarus-Black have a dual meaning for 'state' as "institutionalized political order" and "condition of being".[391]

Agency scholars tend to put emphasis on the positive possibilities of purposive human action and the transformative potential that comes with this. For example Hickey and Mohan's concept of radical political citizenship builds on the tradition of seeing agency as a range of "sociopolitical practices, or expressions of agency, through which people extend their status and rights as members of particular political communities, thereby increasing their control over socioeconomic resources".[392] Cleaver warns that believing too much in active exercise of agency through purposive human action and its transformative potential may, however, lead to that we romanticise procrastination as resistance. He points out that decision-making processes and the exercise of agency in these contexts may be contradictory in their social effects; there are complex constraints on the exercise of agency, especially for poor and marginalised individuals and groups.[393] I agree with Cleaver that in all social processes that potentially lead to transformation there are transformation and tyranny, solidarity and conflict, articulation and mutedness, enablement of agency and constraint of structure.[394]

My position is that of constructivist research which assumes that people, who have agency, are both socialised into their situations *and* capable of transformative actions.[395] As human beings they have purposes and goals, or 'intentions'. These intentions affect whether and when people choose to take transformative actions that delegitimise, destroy or rebuild structures.[396] Therefore, agency is not seen as being in opposition to *structure*, as is often the case.[397] Actions taken by actors can support or oppose dominant discourse. New discourses may shift people's worldviews.[398] This is not, however, always a result of conscious action. "People consciously *and* unintentionally replicate *and* challenge institutionalized routines and prevailing assumptions".[399]

Human rights are sometimes celebrated as giving agency to ordinary people and groups – but I claim that it is doubtful that agency is possible if human rights are seen as a system that has already decided what people 'ought to desire'. Speaking one's desires and naming the direction of change one would like to see is crucial for agency. Baxi relates agency to the questions: "Who speaks through us when we speak about human rights? And on whose behalf may we speak?"[400] These are important questions especially in the development context when human rights are translated into locally relevant terms.

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[391] See Hirsch and Lazarus-Black, "Performance and Paradox", *supra* note 284, at 1 and 13.

[392] Gils Mohan and Sam Hickey, "Relocating Participation within a Radical Politics of Development: Critical Modernism and Citizenship", in Samuel Hickey & Giles Mohan (eds), *Participation: From Tyranny to Transformation* (London: Zed Books, 2004) 59-74, at 66. See also Frances Cleaver, "The Social Embeddedness of Agency and Decision-Making", in Samuel Hickey & Giles Mohan (eds), *Participation: From Tyranny to Transformation* (London: Zed Books, 2004) 271-277, at 271-272.

[393] Cleaver, "The Social Embeddedness of Agency", *supra* note 392, at 272-273.

[394] *Ibid.*, at 276.

[395] Klotz and Lynch, *Strategies for Research*, *supra* note 1, at 59.

[396] *Ibid.*, at 45.

[397] Stammers discusses the agency-structure problem in Stammers, *Human Rights and Social Movements*, *supra* note 4, at 25. Sztompka makes a distinction between 'sociology of systems' (i.e., structure) and 'sociology of action' (i.e., agency). See Piotr Sztompka, *Trust: A Sociological Theory* (Port Chester: Cambridge University Press, 1999) at 1. The discussion on agency-structure is also related to power (as 'power over' and 'power to') and empowerment, see chapter 2.4.7.

[398] Klotz and Lynch, *Strategies for Research*, *supra* note 1, at 44.

[399] *Ibid.*, at 7.

[400] Baxi, *The Future of Human Rights, supra* note 358, at xiii.

People living under difficult conditions have often, but not always, abandoned the idea that they 'can make a difference'. Therefore, if agency is the starting point for development, and it often is claimed that it is, it is important to put these people back in the drivers' seat when action is planned for and when claims are made. However, structural obstacles and social and political processes often prevent poor people's claims from being heard, seen, and reflected in the definition, interpretation, and implementation of rights at the national and local levels, as stated by Moser and Norton.[401] When political space is opened up, it allows different configurations for human agency and offers differing possibilities to challenge the status quo. By 'stretching' the political space in which individuals and groups are able to exercise their rights and participate in decisions that affect their lives,[402] opportunities for agency are created.

However, many people all over the world are unwilling to assume agency and prefer to be 'passive beneficiaries', maybe because they have been treated as such all their lives. Sometimes structures and discourses used by development and human rights institutions reinforce the victimisation instead of creating conditions for agency.

2.2.5 The political element of human rights

Academics and activists understand the role of 'politics' in human rights discourse in very different ways. The way the notion 'political' is used here is not to suggest that human rights commitments are nothing more than a reflection of a states' power and interests[403] (policy-oriented 'realism'). Instead this chapter operates from the starting point that human rights, especially through social movements, have become both the object of political struggle and a mode of political action.[404] There is, however, still some resistance against seeing the political character of human rights. Mutua argues for a need to become conscious of how the abstraction and apoliticisation of human rights "obscure the political character of the norms" human rights discourse seeks to universalise,[405] and he is not alone in raising these arguments.

In order to understand the debate about the political or apolitical character of human rights we need to look back in history. Costas Douzinas goes as far back as feudal society, claiming that political power, economic wealth, and social status coincided in the same individual during this era. One of the main innovations of natural rights was to remove politics from society, and depoliticise the economy, as a way of bringing to an end the automatic identification of political leadership with the economically dominant classes. As a result, politics became "confined into the separate domain of the state."[406] Over time, as human rights expanded to touch almost every part of daily life and politics, the main contemporary effect of human rights, Douzinas claims, "is to depoliticize politics itself."[407]

Here he refers to a distinction between 'politics' and 'the political', which builds on the insights of the Frankfurt School regarding the managerial and anti-ideological direction of

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[401] Moser and Norton, *To Claim Our Rights, supra* note 46.

[402] Holland, Brocklesby and Abugre, "Beyond the Technical Fix?", *supra* note 70, at 261 and 264.

[403] Compare with Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against the Human Rights Regimes", 102 *Colombia Law Review* (2002) 1832-1911, at 1842.

[404] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (UK: Routledge-Cavedish, 2007) at 101.

[405] Mutua, *Human Rights: A Political and Cultural Critique, supra* note 343, at 3.

[406] Douzinas, *Human Rights and Empire, supra* note 404, at 101.

[407] *Ibid.*, at 102.

parliamentary politics in the West.[408] The way I understand this is related to what Koskenniemi refers to when he writes that "under the liberal theory of politics […] the point of law is to lead society away from politics, understood as an effort to move from a state of contestation and conflict into one governed by rational rules, principles and institutions."[409] Koskenniemi's own view is that international law is always ingrained in "the system of distribution of material and spiritual values in the world." When this is accepted, the task of anyone wanting to use international law or human rights law as a counter-hegemonic strategy (Koskenniemi refers only to lawyers, but writing from an actors' perspective this is too narrow) "would no longer be to seek to expand the scope of law so as to grasp the dangers of politics but to widen the opportunity of *political contestation* of an already legalized world."[410]

Some argue that this is the main value added by human rights-based approaches to development; they can potentially repoliticise areas of development work, [411] i.e. create opportunities for political contestation. The question of power structures becomes very concrete when one starts to view marginalised individuals and power holders as rights-holders and duty-bearers. However, the trend of politicisation of humanitarianism and the fact that some NGOs have embraced human rights as politics has also been criticised. Here we should be clear that there are several trends taking place side by side and the depoliticisation/repoliticisation is a nuanced one, dividing NGOs and other actors internally and from one another.[412]

Other actors find the rhetoric of human rights appealing precisely *because* of its apolitical nature.[413] There can be no definitive conclusions drawn on this issue and there is a constant tension between the tendency to use human rights as a seemingly neutral way of improving governance, and using human rights to renegotiate political processes and challenge development policies contributing to continuous non-realisation of human rights for the poorest people.

Anthropologist Harri Englund has written extensively on the role of human rights talk in governance in postcolonial states. He observes that while the situation of human rights is invariably political, various participants in human rights discourse, deliberately or not, act in a way that contributes to its depoliticisation. For example, the human rights projects that Englund has studied avoided talking politics in a context where talk about politics was the nation's favourite pastime.[414] This reflects the resistance against admitting a shift to politics in the human rights movement. Human rights have become the core language of a new politics of humanity that is beyond old ideological contests of left and right.[415]

However, in various countries we start to see examples indicating that international and national NGOs involved in rights-based community development have been forced to shed their "apolitical" attitude and become involved in advocacy about policies to facilitate spaces

[408] Douzinas, *Human Rights and Empire*, *supra* note 404, at 102.

[409] Koskenniemi, *From Apology to Utopia*, *supra* note 301, at 599.

[410] *Ibid*., at 615. Emphasis added.

[411] Slim, "A Response to Peter Uvin", *supra* note 57, at 3; Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1415-1427; Gready and Ensor, "Introduction", *supra* note 70, at 23.

[412] Gready and Ensor, "Introduction", *supra* note 70, at 33.

[413] For example, Jungar and Oinas find that the Treatment Action Campaign in South Africa often uses a de-politicizing human rights rhetoric. Katarina Jungar and Elina Oinas, "A Feminist Struggle? South African HIV Activism as Feminist Policies", 11 *Journal of International Women's Studies* (2010) 177-191, at 187.

[414] Harri Englund, *Prisoners of Freedom: Human Rights and the African Poor* (Berkley: University of California Press, 2006) at 31-32.

[415] Moyn, *The Last Utopia*, *supra* note 38, at 227.

for disadvantaged and less powerful groups to be heard in governance structures at all levels.[416] What this thesis calls for is to be more conscious and honest about the political element of human rights.

If human rights are conceived of as only a formal legal project, their counter-hegemonic potential remains rather limited. It is when human rights are part of a political struggle for social change, in which law is seen as only one among many possible tools to be used against oppression, that human rights have empowering potential.

2.2.6 Human rights and legalization

Douzinas ends his chapter on the politics of human rights by stating that exclusion, domination, and exploitation are brought to the surface and awareness through human rights claims. Often such struggles, however, frame their resistance in terms of legal and individual remedies, which, in the case of success, lead to "small individual improvements and a marginal rearrangement of the social edifice."[417] The way I understand this is that through framing political claims as legal claims, human rights contribute to depoliticising politics. Further legalisation of human rights, consciously or unconsciously, hides the political element of human rights.

For obvious reasons, legal bodies have the authority to define and determine the limits and extent of *legal* human rights. Therefore, because the legal sphere and international human rights law have come to dominate human rights discourse, 'human rights' themselves are often understood in terms of legal provisions. This phenomenon can be called 'legalisation'.[418] There are also other ways of understanding the legalisation phenomena, e.g. "as a particular form of institutionalization characterized by obligation, precision, and delegation,"[419] but this is outside the scope of this chapter.

The predominant starting point for many studies by social scientists is to accept a legal definition of human rights.[420] This is also the case for studies on the relationship between human rights and development. Most development agencies operate with some sort of legal definition of human rights, which would fall between the natural school and the deliberative school. There are, however, a growing number of international and national NGOs and social movements that have adopted their own definition of human rights, which departs from international human rights law. Oxfam is one such organisation. Oxfam sees the potential and

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[416] For an example from Kenya, see Celestine Nyamu-Musembi and Samuel Musyoki, *Kenyan Civil Society Perspectives on Rights, Rights-Based Approaches to Development, and Participation* (Brighton: Institute of Development Studies, 2004) at 1. Available at http://www.ids.ac.uk/files/Wp236.pdf, visited 10 May 2012.

[417] Douzinas, *Human Rights and Empire*, *supra* note 404, at 109-110.

[418] Saladin Meckled-García and Basak Cali, "Lost in Translation: The Human Rights Ideal and International Human Rights Law", in S. Meckled-García & B. Cali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human rights Law* (London: Routledge, 2006) 11-31, at 12.

[419] Kenneth W. Abbott et al, "The Concept of Legalization" in Judith L. Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter (eds), *Legalization and World Politics* (Cambridge: The MIT Press, 2001) 17-35 at 17.

[420] Basak Cali and Saladin Meckled-García, "Introduction: Human Rights Legalized – Defining, Interpreting, and Implementing an Ideal", in S. Meckled-García & B. Cali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human rights Law* (London: Routledge, 2006) 1-8, at 2. Examples of political and social science studies that use a legal definition include Todd Landman, "Measuring Human Rights: Principles, Policy and Practice" 26 *Human Rights Quarterly* (2004) 906-31; Hans-Otto Sano and Lone Lindholt, *Human Rights Indicators: Country Data and Methodology* (Copenhagen: Danish Institute for Human Rights, 2000); Norwegian Agency for Development Cooperation, *Handbook in Human Rights Assessment: State Obligations Awareness and Empowerment* (Oslo: NORAD, 2001).

power in applying a rights language, but is wary of legalisation. It has formulated a list of rights which made sense to Oxfam's staff and counterparts around the world,[421] but has no direct reference to human rights law, although we can see parallels.[422] Since the empirical part of this thesis makes an analysis of an Oxfam programme in Malawi, I find it motivated me to question whether a legal definition of human rights is the only valid way of approaching the human rights concept and phenomenon. This study finds that a legal definition of human rights is too limiting in the context of human rights playing a meaningful role for people striving to improve their lives (doing 'development'). A legal definition of human rights is natural when approaching human rights as obligations of states, including Malawi, but is, for reasons that will be described below, not sufficient when doing human rights work at the local level with people and groups.

The starting point for this study is that human rights law is never an end in itself, only a means. Sometimes other approaches are more effective in reaching an end such as social justice. It remains an open question whether integrating human rights law into development efforts is the most effective approach of addressing issues such as inequality, food insecurity, and promoting social justice. We need empirical evidence showing the value of human rights-based approaches to development. We also need to know more about how the human rights concept is translated into local sites of struggles over justice, equality, and resources.

Nevertheless, at times the law in general and human rights law in particular does play an important role in challenging the status quo and is naturally not irrelevant from the perspective of this thesis.

2.2.7 Human rights law and change (contesting the status quo)

Hegemony and counter-hegemony

Law has been central to the neoliberal restructuring of the world and as such it is, in the words of Randeria "a prism through which to capture some of these transformations, and the resistance to it, in the South."[423] There is a rich scholarly work on power, hegemony, and resistance indicating that the law is simultaneously a maker of hegemony and a means of resistance.[424] *Resistance* is evidence that subordinate people are capable of questioning hegemony through diverse oppositional tactics. Through oppositional ideologies and behaviour, people confront dominant worldviews. Hegemony and resistance are not mutually exclusive; usually there are opportunities for resistance (and change) in the same process that can also transpire to be a factor contributing to structural reproduction.[425] Hegemonic

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[421] Marjolein Brouwer, Heather Grady et al, "The Experiences of Oxfam International and its Affiliates in Rights-Based Programming and Campaigning", in P. Gready and J. Ensor (eds), *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (London: Zed Books, 2005) 63-78, at 65.

[422] In the Strategic Plan of 2001 Oxfam committed itself to working for five rights: the right to a sustainable livelihood, the right to basic social services, the right to life and security, the right to be heard, and the right to an identity.

[423] Shalini Randeria, "Domesticating Neo-liberal Discipline: Transnationalisation of Law, Fractured States and Legal Plurality in the South", Wolf Lepenies (ed.), *Entangled Histories and Negotiated Universals: Centers and Peripheries in a Changing World* (Frankfurt a.M.: Campus Verlag) 146-182 at 175.

[424] See Hirsch and Lazarus-Black, "Performance and Paradox", *supra* note 284, at 9.

[425] Hirsch and Lazarus-Black, "Performance and Paradox", *supra* note 284, at 8-9.

processes and oppositional practices transform people and polities through producing "contested states";[426] and are therefore inextricably linked to law.[427]

Ratna Kapur writes that "law is a complex and contradictory discourse", suggesting that at times "the process of legalization of human rights has reinforced the subordination of the 'victim' of human rights violations", while at other times "human rights law has been an important source of resistance and change".[428] Moreover, Mamdani repeatedly highlights that the discourse on rights is a contradictory one, in both the 'Western' and contemporary African context (the context he writes about). "At certain historical moments, it has been a rallying cry for popular movements against arbitrary rule; at other moments, it has been the standard used by privileged minorities that sought a legal umbrella under which to preserve and reproduce these privileges."[429] Here we come back to the question of discourses of international law and human rights law as hegemonic and counter-hegemonic. If human rights are to play a counter-hegemonic function, that is questioning and contributing to reshaping the status quo, it is important to first be aware of how often they fail to have this function.

Rajagopal argues that counter-hegemonic power includes various types of *resistance*, and for human rights discourse it means being engaged in counter-hegemonic struggles ranging from anti-war protests to market access for agricultural products for poor countries. Human rights, being "the pre-eminent global moral discourse of our time", could potentially play an important role in counter-hegemonic international law – but "instead human rights – or to be accurate, a broad language of 'freedom'– has become the foundation for a hegemonic international law."[430] Furthermore, Koskenniemi claims that international law, and human rights law as one of its components, more often than not can be seen as maintaining the status quo. He gives the example of how "contingent and contestable" aspects of the world have begun to seem "natural and unavoidable" through legal rules that liberate powerful actors. He asks why concepts and structures of international law, which are in themselves indeterminate, nonetheless seem to emerge on the side of the status quo?[431]

One is free to disagree with Rajagopal and Koskenniemi on this issue, but it is hard to deny that human rights discourse, together with the discourses of good governance and development, maintain an image of knowing what to do and how to do it in a way that is superior to other ways. Be it in education, health, or the justice system, human rights, good governance and development all offer techniques, goals and methods for realising a vision for reshaping society following the liberal model.[432] The denial of what Obiora Chinedu Okafor calls "African agency in the governance of Africa's own societies" is widespread and characteristic of the current international structure in which human rights discourse tends to play a hegemonic role rather than a counter-hegemonic role. Advancing an actor-oriented approach to human rights and development would perhaps reveal new opportunities for human rights to be used as a strategy of resistance, questioning structures of domination and contributing to agency.

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[426] Hirsch and Lazarus-Black have a dual meaning for 'state' as 'institutionalized political order' and 'condition of being'. "Contestations over the 'state of being' of individuals also implicate social struggles involving political 'states'". See Hirsch and Lazarus-Black, "Performance and Paradox", *supra* note 284, at 1 and 13.
[427] *Ibid*., at 13.
[428] Kapur, "Revisioning the Role of Law", *supra* note 382, at 102-103.
[429] Mamdani, "Social Movements", *supra* note 354, at 17.
[430] Rajagopal, "Counter-hegemonic International Law", *supra* note 40, at 68.
[431] Koskenniemi, *From Apology to Utopia*, *supra* note 301, at 225.
[432] Rajagopal, "Counter-hegemonic International Law", *supra* note 40, at 69.

The 'spiral model' of human rights change

In legal human rights research there are, as far as I know, no *theories of change* concerning the role played by human rights law in processes leading to greater adherence to human rights standards. International legal scholars tend to focus on success stories of altered domestic practices to support the assumption that international law is an efficient way to engage in processes of change. In political science, by contrast, we can find some attempts to develop empirically testable hypotheses about whether, and under what conditions, legal rules are effective in changing government behaviour. International relations scholars have generated a number of theories about the relative importance of different explanatory variables (law is one of these variables) in changed government practices.[433]

This study is not concerned only with change defined as altered domestic practices, but sees social change as a broader process that is more difficult to define and test empirically. However, one theory of change, the so called 'spiral model' of human rights change is presented below in order to illustrate the need to develop new theories in human rights research.

The 'spiral model' is interesting and relevant for this study because it relies on insights of social constructivism, meaning that the model of human rights change by Risse, Ropp, Sikklink et al differs from e.g. rational choice theorists. The authors argue that the *social identities* of actors are important factors in the process of change. As actor's identities can be reshaped in discursive processes, transnational advocacy networks often engage in argumentative processes with norm-violating governments. However, this is in itself not enough for change to occur: sustained improvements of domestic human rights conditions require domestic institutionalisation of international norms.[434] The authors have developed what they call a "socialization model" to explain the conditions needed for "domestic actors to internalise the rules and norms emanating from international human rights regimes."[435] This model resonates with what Merry points to as the reasons why states choose to enter into human rights treaties. She believes these reasons are linked to "claims to civilized status in the present international order, much as ideals of civilization provided the standard for colonized countries during the imperial era."[436] Shaming of non-compliant governments is a cultural system "whose coin is admission into the international community of human-rights-compliant states."[437]

Risse, Ropp, Sikklink et al investigated eleven countries, each of which started in a phase of repression, even though the degree of human rights abuses varied.[438] In the beginning of the "socialization process" these governments did not perceive any pressure to comply with the norms, according the findings of the authors. (This is difficult to believe, but maybe domestic resistance was of a nature that is difficult to investigate after many years.) Risse and Ropp claim that "it was the task of transnational advocacy networks to create such adaptational pressure in the first place." Later in the stages of the 'spiral model', they claim that there began to be resonance between domestic audiences and international human rights norms.[439]

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[433] Helfer, "Overlegalizing Human Rights", *supra* note 403, at 1834-1835.

[434] Thomas Risse and Stephen C. Ropp, "International Human Rights Norms and Domestic Change: Conclusions", in Risse, Ropp & Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) 234-278, at 236-237.

[435] *Ibid*., at 271.

[436] Merry, "Constructing a Global Law", *supra* note 12, at 949.

[437] *Ibid*., at 943.

[438] Risse and Ropp, "International Human Rights Norms and Domestic Change", *supra* note 438, at 240.

[439] Risse and Ropp, "International Human Rights Norms and Domestic Change", *supra* note 438, at 272.

(Viewing these findings from an actor-oriented perspective on human rights, it may be the case that there was resistance already in the first place but this resistance was not framed in a language that at the time fitted international human rights norms. Relying on research by Merry, one can assume that there were "mediators" and "translators" who translated local/domestic concerns into a transnational agenda.[440] What was lost and what was gained in this process one can only speculate about.)

Nine of the eleven countries investigated by Risse, Ropp, Sikklink et al. went through a "denial" phase when the government rejected the very notion of international human rights jurisdiction. At the time of publishing their findings (1999), all the countries had moved towards "tactical concessions".[441] This is the third phase in the spiral, which is characterised by the fact that "the norm-violating government is forced to make *tactical concessions* to the international human rights community." According the Risse and Ropp, this gives the domestic opposition opportunity to start its own process of social mobilisation. If it links up with transnational networks, the government is under pressure 'from above' as well as 'from below'. If this pressure is sustained, a full implementation of human rights norms is likely to take place, and this marks the final stage of the spiral model, the so called "rule-consistent behavior".[442]

According to the authors, *transnational networks* have a dual task in the process of internalising rules and norms emanating from international human rights regimes into domestic practices. First, these networks remind "Western states of their own collective identities as liberal democracies and urge them to act upon these identities in the human rights arena." Second, they "teach human rights norms to norm-violating governments."[443] The in-built assumption is that change is inspired by transnational networks and domestic audiences follow later on as there starts to be resonance between them and international human rights norms.[444] This conclusion shows how much weight is given to transnational networks as 'teachers and preachers' of human rights. They also provide evidence to those who accuse human rights discourse of being 'foreign' or a continuation of imperialism.

The 'spiral theory' feels outdated and there is need for theories that suit our contemporary time when human rights norms are accepted by almost all regimes and human rights rhetoric is used on all levels by a multitude of actors. In Malawi, human rights (in practice 'freedoms') are talked of and referred to by government as well as non-governmental actors; they have become part of the official discourse. There have also been revisions of laws in order to live up to the international treaty provisions (this process is of course far from complete). However, there is no theory about whether all of this makes a difference to the population. The question arising from the 'spiral model' of human rights change is: what comes after the fifth and final stage of change ('norm-consistent behaviour')? Can human rights be effectively used as a tool (political and legal) by rights-holders to improve the conditions of their lives? A certain level of institutionalisation and acceptance of human rights norms is only a first step and cannot as such be equated with 'success' or social change. It might be that human rights are foremost used by domestic elites for hegemonic purposes.

Moreover, there is need for a theory of change concerning the role of human rights to be defined more broadly, not only as 'legal freedom rights', but as entitlements that groups of people feel justly entitled to. Studying grassroots women's groups, and the way they apply

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[440] See Merry, *Human Rights and Gender Violence*, *supra* note 287.
[441] Risse and Ropp, "International Human Rights Norms and Domestic Change", *supra* note 438, at 235.
[442] *Ibid*., at 238.
[443] *Ibid*., at 271.
[444] *Ibid*., at 272.

human rights discourse to achieve change in their lives, would be a good case study to develop and test a hypotheses concerning the role of human rights as a counter-hegemonic tool in struggles for social change. I will not develop such a theory here, but I want to highlight that lack of theories in studying human rights forces researchers to be humble about the possible role of human rights in domestic processes of change. We cannot assume that official human rights advancement automatically leads to progress and success.

2.2.8   The question of universality, relativism, particularity and context

Dilemmas and debates

The human rights concept can be meaningful and respectful of the agency of the actors when working with an actor-oriented perspective on human rights from below, but it is open to many difficult questions about context and universality.

In the Vienna Declaration and Programme of Action of 1993 human rights were presented as universal, indivisible and interdependent, and interrelated. It was stated that "[t]he universal nature of these rights and freedoms is beyond question."[445] However, when one takes part in scholarly debates as well as discussions at the grassroots level the universal nature of human rights is far from a settled matter. Behind the solemn statements in UN declarations there is considerable disagreements and contestations over the meanings attached to the human rights concept. Moreover, in the real world where people struggle to achieve human rights, things are messy, complex, and contradictory. In people's *lived experiences* human rights are not necessarily universal and indivisible, nor are they inalienable or inabrogable, two other principles which often are attributed to the human rights concept.[446]

The question of whether human rights standards provide a universal standard to be applied uniformly, or whether they are relevant to the social context has characterised the human rights movement ever since the adoption of the Universal Declaration.[447] In the 1990s the debate was rather black-and-white: universalists firmly believed that the power of human rights lies in their universality and human rights should be adopted in all cultural contexts despite differences in local normative systems. Relativists claimed that human rights ideas should not be imposed on societies with different value systems.[448] As I will show, the debate has become somewhat more nuanced and the positions are no longer so entrenched. There are ways around these dichotomous views leading to a more sophisticated way of dealing with universalism and relativism as well as human rights and culture. I have already called for a more nuanced way of giving meaning to the human rights concept. Furthermore, I will, in the following, refer to research that questions conventional ways of defining 'culture'. However, as these dichotomous and essentialised views are still strong in the more conventional human rights discourse I will devote some space to understanding this dilemma.

For many human rights scholars, universality is still beyond question. "Universality is at the core of the global human rights regime,"[449] is a commonly held conception. Yet, Jack

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[445] Adopted at World Conference on Human Rights in Vienna, 1993, UN doc. A/CONF.157/23, paras. 1 and 5.
[446] Ife, *Human Rights from Below*, *supra* note 8, at 86. Inalienability means that human rights cannot be taken away from an individual or group; inabrogability means that they cannot be given away, voluntarily or as trade-off for some other privilege. *Ibid.*, 84.
[447] Celestine Nyamu-Musembi, "Towards an Actor-Oriented Perspective on Human Rights", in Naila Kabeer (ed.), *Inclusive Citizenship* (London: Zed Books, 2005) 31-49, at 32.
[448] Merry, "Transnational Human Rights and Local Activism", *supra* note 372, at 40.
[449] Donnelly, "International Human Rights", *supra* note 293, at 31. Bielefeldt, "Philosophical and Historical foundations of Human Rights", *supra* note 295, at 3.

Donnelly argues that the question 'are human rights universal or relative?' is misformulated.[450] I agree with Donnelly and this is also supported by the evidence from the field work by Thoko Kaime that reveals the need for a new discursive framework that moves the debate *beyond* relativism and universalism. Universalism and relativism are simply inadequate as analytic tools for describing the role of human rights in social relationships.[451] However, before looking at possible solutions to the dichotomy between universalism and relativism it is necessary to have a better understanding of the dilemmas and why these debates have been so polarised in human rights discourse.

The 'natural rights' argument for universality is that since human rights are not given by a sovereign and therefore cannot be taken away by a sovereign, nor are they based on criteria such as age, gender, race or caste, human rights should provide a universal standard.[452] An argument against this view is that the 'natural rights tradition' is only one among many schools of thought behind human rights discourse. According to other views rights are not natural and eternal but always emergent and historically specific.[453]

The 'formalist argument' for universality is simply that since most states have ratified a number of binding international human rights treaties, human rights standards are universal.[454] For example, Donnelly argues that human rights enjoy 'international legal universality' because virtually all states accept the authority of the Universal Declaration and as of the end of 2009 the six core international human rights treaties had on average 170 parties. This means that in contemporary international society there is a 'hegemonic'/authoritative system of international legal principles that gives an element of universality to internationally recognised human rights.[455] Donnelly, however, admits that this universality can be relativised by stressing the incompleteness of the human rights system, in the sense that a number of states continue to resist these hegemonic international norms.[456]

Despite UDHR being cited today with near-universal approval, we have to keep in mind that it was a very narrow group of actors that launched the UDHR. Mutua points out that the few Southern states present in the formulation of UDHR, such as India, Lebanon, Burma, Pakistan, the Philippines, Ceylon, and Syria, had only recently gained independence. He reminds us that "the nations that drafted the UDHR directly colonized three quarters of the earth and enforced brutal, racist, and even genocidal policies in many places."[457] Only four African countries were members of the UN at the time. It is also relevant that the very concept of the nation state, with its constitutional order and bill of rights that African societies adopted after independence, was a colonial imposition – not a result of internal political, social and economic developments.[458] For these reasons human rights lack legitimacy in many African

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[450] Donnelly, "International Human Rights", *supra* note 293, at 32.

[451] Thoko Kaime, "'Vernacularising' the Convention on the Rights of the Child: Rights and Culture as Analytic Tools", 18 *International Journal of Children's Rights* (2010) 637-653, at 639 and 642.

[452] See Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 32. Bielefeldt calls this a quasi-biological interpretation or a tendency to see human rights deeply rooted in the Occidental tradition, according to which the human being has been 'created in the image of God', and endowed a special rank above all other creatures. This is a very apolitical interpretation (compare to the four schools of human rights thinking). Bielefeldt, "Philosophical and Historical foundations of Human Rights", *supra* note 295, at 10-11.

[453] "Setting Universal Rights" in Cowan, Dembour & Wilson (eds.), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) 27-30, at 27; Mutua, "Standard Setting in Human Rights: Critique and Prognosis", *supra* note 296, at 576.

[454] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 32-33.

[455] Donnelly, "International Human Rights", *supra* note 293, at 33.

[456] *Ibid*., at 34.

[457] Mutua, "Standard Setting in Human Rights: Critique and Prognosis", *supra* note 296, at 576.

[458] An-Na'im, "Possibilities and Constraints of Legal Protection", *supra* note 330, at 15.

societies,[459] although the African Charter on Human and Peoples' Rights adopted in 1981 has contributed to increasing legitimacy and a growing African human rights discourse. Another dimension of the legitimacy issue is the tension between elements of African cultural and religious traditions and certain human rights norms, e.g. in the area of women's rights, children's rights and rights of minority groups. Tensions naturally exist in all societies, including Western ones, but these tensions seem to be very pronounced in African societies.[460]

This is one reason why e.g. deliberative scholars refer to the *incompleteness* of the international human rights discourse and make the argument that human rights principles as currently constituted are not universal because they are shaped by distinctly Western experience.[461] All ideas, including human rights, emerge in a cultural context and cannot be divorced from it. These cultural contexts vary and change; what will be counted as 'human rights' will inevitably be different in different cultural contexts.[462] These scholars, who refer to the incompleteness of human rights, are using arguments labelled as 'multicultural universalism' or 'weak cultural relativism' and claim that human rights could become truly universal only if as many world cultures as possible contributed to shaping the discourse of rights. The human rights movement should build on these various contributions rather than work from a Western/Eurocentric conception of what human rights are.[463]

Typically there seems to be a contradiction between universalism, in the form of a "transnational but European-driven conception of rights, and relativism, in the form of respect for local cultural differences." Rights and culture are, in this view, seen as possibly mutually contradictory. However, seen in this way, the universalism/relativism debate essentialises *both culture and rights*. In this context, human rights are understood as a Western idea, based on Enlightenment traditions.[464] Culture is understood as a homogenous and integrated system of beliefs and values.[465] This weakens the human rights movement: in the South human rights advocates try to demonstrate that human rights are indigenous and relevant while "arrogant outsiders" insist on "imposing Northern models and procedures". The result is that dictatorial states dismiss them as imperialist impositions and the energy of the Southern human rights advocate is wasted.[466] This leads to situations of "law in practice" being very different from "law in the books", a familiar phenomenon in many countries of the South. This is the case especially when the latter are foreign legal transplants imported into a very different social and political context. Attempts to globalise "legal particularities" overlook the fact that laws reflect a long history of political contestation and compromises. When Western norms and

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[459] An-Na'im, "Possibilities and Constraints of Legal Protection", *supra* note 330, at 15. For an interesting account on how African states and their legal experts have contributed to the UN human rights system, see Mutoy Mubiala, "The Contribution of African Human Rights Traditions and Norms to United Nations Human Rights Law", 4 *Human Rights International Legal Discourse* (2010) 210-240.

[460] An-Na'im, "Possibilities and Constraints of Legal Protection", *supra* note 330, at 16.

[461] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 33-34.

[462] Ife, *Human Rights from Below*, *supra* note 8, at 98.

[463] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 33-34.

[464] Sally Engle Merry, "Changing Rights, Changing Culture", in Cowan, Dembour & Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) 31-55, at 32. Ife argues that universal human rights, as conventionally understood, reflect a certain Western Enlightenment view of the core concepts, 'humanity' and 'rights', that is inadequate for a more inclusive world where diversity is valued, not feared. Ife, *Human Rights from Below*, *supra* note 8.

[465] Merry, "Changing Rights, Changing Culture", *supra* note 464, at 32.

[466] Zeleza, "Introduction: The Struggle for Human Rights in Africa", *supra* note 297, at 8.

practices are diffused globally this does not happen without local translation and also resistance.[467]

In the postmodern world of relativism, multiple voices and fragmented realities, it is sometimes held that there is no room for a universalist discourse on human rights, especially since it has traditionally been a top-down discourse, and has difficulty dealing with difference and diversity. According to postmodern critique the idea of human rights is too tightly connected to the modernist project, and too western (or Eurocentric) to give a positive contribution to the future. I agree with Ife that this is a critique we cannot fully ignore.[468] I also agree with the relativists that Western hegemony is a concern.[469] However, a discourse of difference needs to be balanced with discourses of unity, underlining what unites and brings us together as human beings. A position that denies anything but the contextual, ignores the fact that despite cultural differences, human beings are connected.[470] It is from this perspective that a discourse of 'common humanity' can be appealing and powerful. Due to problems with the idea of the term 'common humanity', which brings us back to the natural rights tradition, seeking some essentialised, fundamental humanity, Ife suggests 'shared humanity' could be used when indicating commonalities between people. 'Shared humanity' can be explored through lived experience, but without identifying the single, 'common' form of human condition applying to everyone.[471] Through our 'shared humanity' human rights have a universal element. However, the context in which this is expressed can never be ignored.

Mahmood Mamdani challenges the debate on whether rights are of Western origin by arguing that rights are defined by *struggle*. He makes a simple yet profound and clear observation: "[w]here ever there was (and is) oppression – and Europe had no monopoly over oppression in history – there must come into being a conception of rights."[472] He claims that the notion of rights cannot have any fixed and immutable content; instead the content of rights must vary from one historical circumstance to another, and from one social context to another.[473] As Nyamu-Musembi points out, when human rights are viewed from this perspective, they are "both universal and particular: universal because the experience of resistance to oppression is shared among subjugated groups the world over, but also particular because resistance is shaped in response to the particularities of the relevant social context."[474] Human rights are relevant for people living in any cultural contexts, whenever they struggle for justice.[475] Africans have their own histories of the struggle for human rights, which are linked, but also distinct from similar struggles in other parts of the world.[476]

The authors referred to above have in common the message that it is necessary to stop thinking of universal/contextual as an *either/or* dichotomy. We need to explore a way of thinking about them as *both/and*.[477] This argument moves the debate on universality vs.

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[467] Randeria, "Domesticating Neo-liberal Discipline", *supra* 423, at 163.

[468] Ife, *Human Rights and Social Work*, *supra* note 3, 200 and 131.

[469] Zeleza, "Introduction: The Struggle for Human Rights in Africa", *supra* note 297, at 17.

[470] Ife, *Human Rights from Below*, *supra* note 8, at 98.

[471] *Ibid*., at 130.

[472] Mamdani, "Social Movements", *supra* note 354, at 1-2.

[473] *Ibid*., at 2. Bielefeldt notes that the European history of human rights provides only *one example* of various obstacles, achievements, and failures in the long-lasting political struggle for human rights. Repeating the European experience would naturally be impossible. See Bielefeldt, "Philosophical and Historical foundations of Human Rights", *supra* note 295, at 12 and 15.

[474] Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", *supra* note 18, at 43.

[475] Bielefeldt, "Philosophical and Historical foundations of Human Rights", *supra* note 295, at 15.

[476] Zeleza, "Introduction: The Struggle for Human Rights in Africa", *supra* note 297, at 7.

[477] Ife, *Human Rights from Below, supra* note 8, at 99.

particularism to a new level, an advancement on being trapped in the midst of trying to define 'culture' and arguing about into who's culture human rights ideals fit or who's culture they fail to fit. It questions assumptions about opposition between rights and culture that were fundamental during imperialism and to a large extent still remain part of the human rights rhetoric.[478] The starting point is then that both the concept of 'culture' and 'rights' are ever-changing; *change* rather than stagnation is characteristic of rights and culture.[479]

'Culture' and the universality question

In these debates in particular and in human rights discourse in general there is a need for conceptual clarification of 'culture' in the human rights praxis. Human rights tend to rely on an essentialised model of culture, and fail to take advantage of the potential of local cultural practices for change.[480] Often 'culture' is put into opposition to the universal human rights project and e.g. 'Third World women' are portrayed as victims of their culture in a way that reinforces stereotypes and cultural essentialism.[481] To give a concrete example from the area of women's rights: according to ethnographic field research by Merry, when government representatives, members of the expert committee under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), or the convention itself invoke 'culture' in proceedings related to CEDAW, it is mostly as an *obstacle* to change rather than as a resource or opportunity for change. According to this view 'culture' is fixed, static, bounded, and isolated.[482] The fact that transnational legal processes are engaged with cultural transformation remains unspoken.[483] At the same time, the human rights framework also includes rights to culture.[484] It is *rights versus culture* as well as *rights to culture* that have preoccupied scholars from various fields as well as lawyers, bureaucrats, NGOs and lay people, and engaged them in debates about the legal and political status which 'a culture' should or should not have.[485]

There are, however, more modern understandings of 'culture' as a continuous process of creating new meanings and practices.[486] Nyamu-Musembi argues that both cultural norms and formal rights regimes offer opportunities as well as challenges in dealing with specific situations of oppression. In reality, there are no clear cut lines; we cannot place the blame for human rights violations on culture and pose universal human rights principles embodied in formal laws as the solution.[487] Culture consists of ideas and practices that are not homogenous but continually changing because of contestation, new ideas, and institutions: "Cultural discourses legitimate or challenge authority and justify relations of power."[488] Merry views human rights as a means of producing *new* cultural understandings and actions. She sees human rights monitoring processes as a gradual cultural transformation; in these legal settings what is being produced is 'culture'.[489] However, mainstream social science has often failed to

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[478] Merry, *Human Rights and Gender Violence*, *supra* note 287, at 226.

[479] See Kaime, "'Vernacularising' the Convention on the Rights of the Child", *supra* note 451, at 64.

[480] Merry, *Human Rights and Gender Violence*, *supra* note 287, at 11.

[481] Kapur, "Revisioning the Role of Law", *supra* note 382, at 107. See also Rikki Holtmaat and Jonneke Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Cambridge: Intersentia, 2011).

[482] Merry, "Constructing a Global Law", *supra* note 12, at 946.

[483] *Ibid*., at 974.

[484] Article 15 of the ICESCR protects the right of everyone to, *inter alia*, take part in cultural life.

[485] Cowan, Dembour and Wilson, "Introduction", *supra* note 13, at 4.

[486] Merry, "Constructing a Global Law", *supra* note 12, at 947.

[487] Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", *supra* note 18, at 44.

[488] Merry, *Human Rights and Gender Violence*, *supra* note 287, at 11.

[489] Merry, "Constructing a Global Law", *supra* note 12, at 974.

study culture as a *process* shaped by factors such as the interplay between individual agency and social structure.[490]

When focusing on multiple configurations and meanings representing "a network of perspectives", that emerge from a '*situated analyses of rights*' as proposed in the actor-oriented perspective on human rights,[491] it is possible to avoid the age old dichotomies between "human rights universals and cultural absolutes". For example, non-discrimination of children in an African context is not the perspective of human rights advocates alone but also that of "ordinary people who claim no special knowledge of children's rights."[492] It appears that the most fruitful approach to the culture and universal human rights debate is viewing 'rights as culture'[493] instead of 'rights versus culture' or 'rights to culture'.

Kaime draws the conclusion that human rights should be given a general enough meaning in order to address the multiple configurations of meanings and perspectives that are and inform individuals' rights and which emerge from the contexts in which people live.[494] Human rights should be interpreted and transformed into practice in a way that raises legitimacy and gives rise to pluralism that is neither universalist nor relativist but grounded in the reality of people's daily lives.[495] Merry highlights the need to develop a framework that recognises difference and specificity but at the same time enables a shared language of equity and justice.[496] Finding this kind of shared language is difficult as long as human rights discourse is seen as the exclusive terrain of specialised (legal) experts.

2.2.9 Individual rights *and* collective rights

Another important debate in the search for and exploration of a meaningful human rights concept that is relevant in a local context concerns individual rights and collective rights. There has been cultural relativist critique claiming that human rights discourse downplays the importance of the community and promotes an individualistic model of rights that does not fit into non-Western way of life.[497] The basis of the so called 'Asian critique' of human rights has been that the human rights thinking inscribed in the UDHR and various UN covenants has a strong focus on the human as an individual, rather than on humanity as a whole. Critics from Asia argue that because of their individual bias, human rights are a colonialist attempt by West to impose its view of humanity on others.[498] (Ironically, the elites in e.g. Indonesia and Singapore, two states that have been vocal in defence of 'Asian values', are highly westernised. It seems that the rhetoric of cultural relativism in this case is more about political opportunism than concern for cultural values.)[499]

It is true that in conventional human rights thinking there is a strong focus on the individual as holders of rights. Individual rights are not to be found only in the field of civil and political rights, but most ESC rights are addressed to individuals, and even 'third generation' rights

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[490] Allaine Cerwonka, "Nervous Conditions", *supra* note 167, at 12.

[491] Nyamu-Musembi, "Towards an Actor-Oriented Perspective", *supra* note 447, at 39.

[492] Thoko Kaime, "The Struggle for Context in the Protection of Children's Rights: Understanding the Core Concepts of the African Children's Charter", 58 *The Journal of Legal Pluralism and Unofficial Law* (2009) 33-68, at 34 and 43.

[493] This concept is used in Cowan, Dembour & Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001).

[494] See Kaime, "The Struggle for Context", *supra* note 492, at 33.

[495] *Ibid*., at 66.

[496] Merry, *Human Rights and Gender Violence, supra* note 287, at 231.

[497] Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", *supra* note 18, at 44.

[498] See Ife, *Human Rights from Below*, *supra* note 8, 93.

[499] Cowan, Dembour and Wilson, "Introduction", *supra* note 13, at 7.

such as the right to development contains an individual dimension.[500] Human rights are *private* in that they are claimed to adhere in the human person him- or herself (the argument being that everyone has human rights by virtue of being human), unmediated by social relations. They are consequently also *individual*: an isolated human being can in principle exercise them. A human being holds rights not only against the state, but also against 'society', i.e., against his or her community or even family.[501] (We can find examples of such cases in Merry's book on violence against women.)[502] This is a radical departure from what has been the norm in most human societies, in which *collective* and *communal* rights would be preferred to individual rights.[503]

In different societies there are different ways of placing emphasis on individual rights/duties and collective rights/duties. A liberal, conventional understanding of rights implies both individual rights and individual responsibilities; a more social democratic tradition would underline individual rights and collective responsibilities; in Asia, by contrast, the lines between the individual, the society and the state are blurred by conceptions of duty, putting emphasis on individual duties to contribute well-being of the collective; and finally a communist ideal would subordinate the individual to the collective in terms of both duties and rights.[504] Human rights as defined in most international legal agreements reflect a certain way of putting emphasis on individual rights and responsibilities in relation to collective rights and responsibilities, although the normative preferences of many of the human rights instruments that have been adopted since the Southern states gained more influence over the standard setting process indicates that this is certainly not black-and-white. Many of the latter instruments move away from a focus on individualism and aim at tackling issues affecting groups or systemic social and economic problems that require radical solutions.[505]

Because of the Asian critique and as a response to advocacy on those parts of groups that are often systematically denied human rights (e.g. women, indigenous peoples, people with disabilities, and children) there has, in recent decades, been a growing interest in understanding human rights *collectively as well as individually*.[506] As we know there are some human rights documents that contain human rights whose holders are groups as well as individuals. The UN Declaration on the Rights of Indigenous Peoples[507] is an example of a document that incorporates rights regarded as belonging individually to members of indigenous communities as well as rights regarded as collective, such as the right to live freely as distinct peoples. The African Charter on Human and People's Rights, adopted in

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[500] Martin Scheinin, "Characteristics of Human Rights Norms", in C. Krause & M. Scheinin (eds), *International Protection of human Rights: A textbook* (Turku/Åbo: Åbo Akademi University, Institute for Human Rights, 2009) 19-37, at 24.

[501] Rhoda E. Howard, "Dignity, Community, and Human Rights", in Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 81-102, at 82-83.

[502] Merry, *Human Rights and Gender Violence, supra* note 287.

[503] Howard, "Dignity, Community, and Human Rights", *supra* note 501, at 83.

[504] Ife, *Human Rights from Below*, *supra* note 8, at 94; Mutua, "Standard Setting in Human Rights", *supra* note 296, at 576.

[505] Mutua, "Standard Setting in Human Rights", *supra* note 296, at 577. Examples would be the Declaration on the Right to Development (1986), Declaration on the Rights of Indigenous Peoples (2006), and Convention on the Rights of Persons with Disabilities (2006).

[506] Ife, *Human Rights from Below, supra* note 8, at 93.

[507] Adopted by the Human Rights Council on 29 June 2006 after more than twenty years of formal debates. See Robin Perry, "Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty" 24 *Harvard Human Rights Journal* (2011) 71-114.

1981, includes people's rights to existence and self-determination,[508] to economic, social and cultural development,[509] and to a general satisfactory environment.[510] Moreover, the International Covenant on Civil and Political Rights[511] contains a true collective right, the right of self-determination in Article 1.[512]

Developments of human rights law call into question rigid distinctions between individual and community in thinking about human rights and rights claims. As with universalism and context, it is essential to stop thinking about individual *or* collective rights, but instead emphasise that all human rights can have both individual and collective aspects.[513] Some claims are collective in nature, such as indigenous communities' claims for compensation for use of their knowledge in medicine. A '*situated analyses of rights*' as proposed in the actor-oriented perspective on human rights, point to people's own experiences of how individual and community concerns and interest overlap, sometimes in harmony and sometimes in tension. Sometimes it makes no sense to talk of individual rights unless the broader issue of the group's status as a rights-holding community is also addressed. This might be the case with individuals belonging to a low caste: your status as a member of a particular group is very central to how you are defined and treated in a particular social context.[514] The challenge is to not disregard the community context in which people are living, but at the same time not legitimising a narrow definition of personhood based on status in hierarchical social relationships.[515]

2.2.10 Indivisible *and* hierarchical human rights

A final debate that Nyamu-Musembi refers to when presenting the actor-oriented perspective on human rights is that which revolves around the relationship between different sets of rights. The issue that has been debated can in simplified terms be put like this: is the relationship a hierarchical one so that there are certain rights that take precedence over other rights? Or are all human rights indivisible and interdependent and interrelated,[516] as made clear in the Vienna Declaration and Programme for Action?[517] This would imply that human rights are non-hierarchical.

Internationally recognised human rights have traditionally been, especially before the Vienna Conference on Human Rights in 1993, divided into different categories. A well-known distinction that is often used is between three 'generations' of human rights: 1) civil and political; 2) economic, social and cultural rights; and 3) 'new' or 'third-generation' human rights, such as the right to peace, the right to development and environmental rights. This concept of generations may be used to suggest an order of priority between human rights.[518] Civil and political rights have been accorded stronger recognition in most legal frameworks and are often treated as if they take precedence over economic, social, and cultural rights.[519] In addition, the dominance of human rights discourse by the law and the legal profession has

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[508] Art. 20.

[509] Art. 22.

[510] Art. 24.

[511] Adopted in 1966, entered into force in 1976.

[512] These examples are raised in Nyamu-Musembi, "Towards an Actor-Oriented Perspective", *supra* note 447.

[513] Ife, *Human Rights from Below, supra* note 8, at103.

[514] Nyamu-Musembi, "Towards an Actor-Oriented Perspective", *supra* note 447, at 38-39.

[515] *Ibid*., at 41.

[516] *Ibid*., at 41.

[517] Adopted at World Conference on Human Rights in Vienna, 1993, UN doc. A/CONF.157/23, para. 5.

[518] Scheinin, "Characteristics of Human Rights Norms", *supra* note 500, at 22.

[519] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 41.

had consequences for the way in which human rights have been understood. Privileging civil and political rights over other human rights, as these tend to be more readily justiciable and thereby more easily dealt with through legal structures and processes, is one such consequence.[520] This is changing now that there are increasingly more efforts to deal with ESC rights as justiciable rights.[521]

In the UN rhetoric today, and in the rhetoric of most NGOs, it is, however, almost taken as a given that human rights are interdependent, interrelated, and indivisible (although it remains more of a statement of intent than a reality).[522] Indivisibility is also the starting point for human rights-based approaches to development: civil and political rights mean little without other categories of rights, and *vice-versa*. It is clear that in lived reality people do not experience rights, or their deprivations, in a way that would make it possible to distinguish between different sets of rights.[523] Concrete examples of how this functions in reality are raised in literature from within the development discourse.[524]

The *interrelated* nature of human rights seems to suggest that all human rights share common characteristics, for example that they imply obligations on the part of duty-bearers.[525] The idea that there would be a clear difference between the three 'generations' or categories of human rights, or even between the two first ones, is misconceived. While it is possible to make a distinction between negative and positive obligations, this distinction does not follow the three categories. Civil and political rights often require positive measures, including measures that require resources, e.g. holding of elections.[526] All human rights require resources in order for realisation to take place. Moreover, it is possible to understand all rights from the first two generations as having both individual and collective aspects, and also the third generation contains rights that have individual dimensions.

Daniel Whelan has reviewed the 'indivisibility and interdependence' literature from the 1980s and 1990s and writes that "the language of interrelatedness demonstrates *equality of importance or legitimacy* of economic, social, and cultural rights *in relation to* civil and political rights."[527] The rhetoric of *indivisibility* carries both conceptual and symbolic weight, and the claim that the two categories of human rights are indivisible carries considerable meaning. This rhetoric first emerged during the late 1940s and early 1950s, when the UN was the scene for serious debates about how to codify the rights in the UDHR into binding international law.[528] Moyn points out that in the 1940s when the idea of human rights was forged, there was some commitment to social equality, and social rights were comparatively uncontroversial. However, the context for the breakthrough of the human rights movement in the 1970s, that of totalitarianism and authoritarian rule, meant that social rights were not an issue that featured on the agenda.[529]

As we know, the Universal Declaration makes no distinction between civil and political rights and economic, social, and cultural rights. However, it was the intention of the UN

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[520] Ife, *Human Rights from Below, supra* note 8, 111.

[521] See Sisay Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System* (Åbo: Åbo Akademi University Press, 2011).

[522] See Gready and Ensor, "Introduction", *supra* note 70, at 14.

[523] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 42.

[524] Gready and Ensor, "Introduction", *supra* note 70, at 14.

[525] Daniel J. Whelan, *Indivisible Human Rights: A History* (Philadelphia: University of Pennsylvania Press, 2010) at 4.

[526] Scheinin, "Characteristics of Human Rights Norms", *supra* note 500, at 24.

[527] Whelan, *Indivisible Human Rights, supra* note 525, at 5. Emphasis in original.

[528] Whelan, *Indivisible Human Rights, supra* note 525, at 6.

[529] Moyn, *The Last Utopia*, *supra* note 38, at 222.

Commission on Human Rights to include only the first set of rights in a binding covenant. The plan on behalf of the Commission was to later on draft further conventions and additional instruments to cover other categories of rights. However, the General Assembly requested the covenant to include ESC rights. The Commission made a redraft in 1951 but the following year, after heated debate, the GA requested the Commission to draft two separate human rights covenants, separating again the two categories of rights. The countries that lobbied for a single legally binding covenant were concerned that ESC rights would never be embodied in a binding treaty if this was postponed. They also wanted the West to give as much attention to ESC right as to civil rights, a debate that also raised the issue of a guarantee for international development resources. Other postcolonial states, such as India, on the other hand, recognised that ESC rights would be primarily national responsibility – not a responsibility for the international community – individual rights as they are.[530]

The GA decision of 1952 to divide the then-single Covenant into two separate treaties is often referred to in literature on human rights. In the more recent literature, the focus for the reasons behind this change of events is placed on Cold War politics and the ideological differences between the United States and the Soviet Union. Mostly, these accounts overlook another critical political factor that led to the division: the importance of ESC rights to emerging anti-colonial and development agendas of newly independent states of the South. Among these states there was also strong support for self-determination as a human right,[531] an issue that is highly relevant for the debate on the collective/individual nature of human rights. The debates on the right to development sprung out of this rhetoric. Most industrialised states of the West were opposed to the fact that the Declaration on the Right to Development framed some of the rights as belonging to states instead of individuals.[532] All of this is crucial for our understanding of the role of human rights in development policy and practice. It seems that the recipient states of development assistance and the donor states throughout history have had quite a different emphasis in the discourse on human rights, and this has implications for the counter-hegemonic potential of human rights. If developing states and their citizens feel alien to the contemporary dominant human rights discourse, it is questionable that human rights provide tools for them to address injustices and development problems, unless they participate in reformulating the human rights concept.

The *contemporary* language of *indivisibility* reflects an acknowledgement of the fundamental unity of human rights as enumerated in the UDHR. Indivisibility is seen as a remedy for the breech caused by the forced separation that took place due to political disagreements, stemming *inter alia* from hesitation to the idea of justiciable economic and social rights.[533] Recent emphasis on human rights-based approaches to development suggests attempts to bridge the gap between freedom and sustenance. Moreover, viewing of participation as a right has politicised economic and social rights; the fulfilment of these rights are no longer seen as a 'welfarist' concern with provision of services to passive 'beneficiaries'.[534] The position that there is no 'hierarchy' of rights can, however, appear unhelpful for those seeking to identify priorities for action and change, e.g. in human rights-based development work. Therefore, it is important to understand how rights regimes operate as they relate to the capacity of poor people to access opportunities in order to identify and prioritise strategic entry points for action.[535]

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[530] Whelan, *Indivisible Human Rights, supra* note 525, at 6-7.
[531] *Ibid.*, at 62.
[532] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 42.
[533] Whelan, *Indivisible Human Rights, supra* note 525, at 208.
[534] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 43-44.
[535] Moser and Norton, *To Claim Our Rights, supra* note 46, at 14.

In an actor-oriented perspective on rights, there would be an open question about how people articulate rights claims in specific situations, instead of asking which types of rights are important and how they reinforce or weaken each other. An open question that does not assume anything about a hierarchy of rights "is more likely to bring the complex overlap between demands for rights as 'things' and demands for the power to make decisions concerning the 'things' (participation)."[536]

Another important issue is that the two traditional categories of rights, civil, political and economic, and social and cultural, are not enough to cover rights claims in a rapidly changing world. Demands from rights-holders reject the compartmentalisation of rights and continue to expand the rubric of rights into new areas such as knowledge rights. An actor-oriented perspective seeks to investigate struggles over rights in the everyday experiences as mediated by factors such as gender, ethnicity, caste and kinship structures,[537] while being open to issues and demands that do not easily fit into the current legal human rights structure.

Being aware of the tensions and shortcomings of the legal human rights structure is important in order to be able to use that framework when formulating human rights claims. An actor-oriented perspective allows for creative use of the human rights framework, not being too limited in instances where the human rights framework clearly contradicts lived reality. The artificial division of human rights is an obvious example.

2.2.11 Concluding remarks

In constructivist research there is an in-built assumption that people have agency and are therefore capable of transformative actions that delegitimise, destroy, and rebuild structures. Dominant definitions of human rights are not immune to such delegitimisation and reconstruction. There is no opposition between an actor perspective and a structural perspective of human rights. Structure puts limits on actions and agency but actions do change structure.

For many, human rights remain an excluding and elitist discourse with little relevance to the everyday lived reality. Yet, human rights represent a powerful idea. Human rights discourse needs to be expanded and made available so that a public political dialogue can take place at all levels of society rather than being protected and kept as expert knowledge. Human rights-based approaches to development can at best help in advancing this kind of localisation and politicisation process of human rights.

In this chapter I have argued for an inclusive and open way of approaching and understanding the human rights concept. Human rights are legal and political; universal and particular/contextual; have both individual and collective dimensions and include claims that can be situated in different categories of rights. Human rights discourse is a discourse of unity (putting emphasis on our shared humanity), however, this discourse should not replace a discourse of division but rather be placed alongside it, another example of both/and instead of either/or thinking. We need to understand what unites human beings as well as what divides them in order to build an adequate basis for social and political practice.[538]

Human rights discourse is a complex and contradictory discourse, especially in its legal forms. Legal human rights claims can both serve to maintain the status quo and to challenge and change it. Law as a discourse tends to have a "distinct ability to define and pronounce

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[536] Nyamu-Musembi, "Towards an Actor-Oriented Perspective" *supra* note 447, at 46.
[537] *Ibid.*, at 45-46.
[538] Ife, *Human Rights and Social Work*, *supra* note 3, at 201.

authoritatively on the world around it", as noted by Kapur.[539] The actor-oriented and from below perspectives on human rights are aware of this one-size-fits-all-best practice tendency that stifles from below visions. Political human rights claims are of course not free from contradictions and tensions either. When introduced from above, as expert knowledge, human rights are often introduced as somehow politically neutral legal solutions that will improve 'governance'.

Central to the argument in Ife's idea about human rights from below as well as in Nyamu-Musembi's actor-oriented perspective on human rights in development practice is the importance of the actors themselves being able to contribute to giving meaning to human rights. It is the process of 'meaning-giving' that is interesting in a human rights-based approach to development (and this does not, of course, take in a vacuum, the structures of the international human rights system are there to influence that process). If the actors are going to have a sense of ownership, so that a 'culture of human rights' can be embedded, they must have a say in the process. If participation is going to be meaningful, human rights cannot be seen as a 'professional' (mostly legal) practice. The human rights concept must be understood in a way that is organic to the specific realities of the actors claiming them. Additionally, the strategies applied must be born out of an understanding of the relationships and identities that shape this reality. In this way human rights can be relevant and meaningful to the lived realities of people striving to improve the conditions of their lives. If we take the idea about agency seriously, we must let actors themselves speak about human rights – we cannot have a ready list of 'things' 'they' ought to desire. There must be trust in the wisdom and change from below, seeing that there are opportunities and challenges for change in all cultures and all situations. The task of people doing human rights-based development work is about assisting the process so that poor people's claims are being heard, seen and reflected.[540] One of the most fundamental dilemmas in professional assisting is that outsiders try to impose their idea of 'help', or 'change'. Too often top-down management hide behind nice slogans of participation and empowerment, and often conflicts between these two principles are hidden and ignored. It remains an unresolved question how to deal with situations in which participants do not prioritise human rights realisation.

An actor-oriented approach does not imply that the UDHR, UN covenants of human rights and national bills of rights have no value or are unimportant or that human rights professionals' skills have no value. These documents have legal significance and they have symbolic power and can be tools to be used in advocacy, an important element of human rights-based practice. However, they are not the final and last word on human rights. Even though they enjoy some degree of universality, all the documents were made at particular times and specific contexts. People should be able to look at them critically and think about what human rights mean for them. Social movements have during all times challenged the human rights system and contributed to its evolution and reformulation. However, as there is a danger that actors 'defining rights' will make a list of local 'demands' explained in a rights language, it is essential that there is the aspiration of universality involved in such an exercise. People must think beyond narrow self-interest so that the human rights claims they have for themselves are also what they wish could be applied to all of humanity.[541] This is what distinguishes human rights from other rights regimes.

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[539] Kapur, "Revisioning the Role of Law", *supra* note 382, at 104. Kapur is referring to Carol Smart.
[540] Moser and Norton, *To Claim Our Rights, supra* note 46.
[541] Ife, *Human Rights from Below*, *supra* note 8, at 212-213.

2.3   Food rights, food security, and livelihoods

Having analysed the concepts 'development' and 'human rights' it is now time to turn to food rights, food security and livelihoods. In this chapter, I will deal with the integration between the right to adequate food and food security. In order to understand the context I will start by exploring who the poor and hungry are. Then I will firstly review the integration and disintegration between the right to food and food security historically, and secondly explore the relationship between the two concepts, including how they have come together as a human rights-based approach to food security. I will also review how the right to food has been given content and meaning by expert institutions and how civil society actors strive to change and redefine that content so that it would resonate with the lived reality of the poor and hungry.

2.3.1   Who are the poor and hungry?

Who is poor: A word on measuring poverty

Just as there are no universally accepted ways of defining development, there are no value-neutral means of measuring development or the lack of it. Since the understanding of development has been dominated by economic aspects, it has become common for countries to establish a poverty line based on income or consumption. The World Bank has set up the equivalent of US $1 in consumption per person per day as the line of absolute poverty, for purposes of international comparison.[542] According to this way of measuring, a poor person is someone who has less than one dollar per day to live on. Despite obvious shortcoming, the one dollar a day has been widely used as a proxy for poverty. For instance, the UN Millennium Declaration set out the goal that the proportion of the world's people whose income is less than one dollar a day should be halved by the year 2015.[543]

The *human development index* (HDI) is a measurement of socio-economic progress that reflects a broader understanding of development. The index uses a combination of criteria to measure the quality of people's lives. Three variables have been chosen: life expectancy, educational attainment (adult literacy and combined primary, secondary and tertiary enrolment), and real gross domestic product (GDP) per capita.[544]

The 1997 edition of the Human Development Report also introduced a *human poverty index* (HPI), using variables such as the percentage of people expected to die before the age of forty, the percentage of adults who are illiterate, the percentage who are lacking access to health services and safe water.[545]

The latest invention is called the *multidimensional poverty index* (MPI) and is said to reveal a different pattern of poverty than income poverty, as it reflects a different set of deprivations. The MPI has three dimensions: health, education, and standard of living. These are measured using ten indicators, inter alia child mortality, nutrition, years of schooling, child enrolment, drinking water, sanitation, and assets.[546] What is special about the MPI (compared to progress reports on the Millennium Development Goals, for instance) is that the MPI establishes the

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[542] Jan Knippers Black, *Development in Theory and Practice: Paradigms and Paradoxes* (USA: Westview Press, second edition 1999) 40-41. Today it is $1.25.
[543] UN General Assembly Resolution 55/2, 18 September 2000, Art. 19.
[544] Black, *Development in Theory and Practice, supra* note 542, at 42.
[545] *Ibid*., 42.
[546] Sabine Alkire and Maria Emma Santos, "Acute Multidimensional Poverty: A New Index for Developing Countries", UNDP Human Development Research Paper 2010/11, at 4. Available at http://hdr.undp.org/en/reports/global/hdr2010/papers/HDRP_2010_11.pdf, visited 10 May 2012.

'base' population as being the household. The argument is that as people live in households, the suffering of one member affects other members, and the abilities of one member to help other household members. The MPI analysis therefore focuses on people rather than nations. The MPI calculate the number of people whose lives are affected by multiple deprivations, not the number of countries as is the case in the Global Monitoring Reports. This commitment is argued to be part of a human rights-based approach and other ethical approaches, in which every human life is to be given equal weight.[547] People are in the centre, not economies. However, one might note that focussing on households rather than individuals is alien to conventional, individualistic human rights practice.

Who are the hungry?

The FAO calculates the number of hungry and undernourished people worldwide and publishes the results annually in The State of Food Insecurity in the World reports. The latest report tells us that, for the first time since 1970, more than one billion people and around one-sixth of all of humanity are hungry. The FAO claims that even before the food and economic crises, the number of undernourished people in the world had been increasing slowly and steadily for a decade.[548]

Numbers are numbers and they might be useful to give us a hint about how prevalent poverty and hunger are on a global scale. However, they do not tell us much about the question who the poor and hungry people are. The UN Millennium Development Project Taskforce on Hunger writes in the report *Halving Hunger: It can be done* that the hungry and the poor are the *vulnerable*. Many of the households living below the poverty line are unable to obtain enough food to feed the family members. Women and children are especially vulnerable to hunger. Women produce 60-80 percent of the food in most developing countries and more than 80 percent of the food in Africa – and yet they are disproportionately vulnerable to hunger, due to existing social inequalities. They own only 1 percent of the land and receive only 7 percent of agricultural extension time and resources.[549] In addition, when a women receives inadequate nutrition this has a tremendous effects on her children. Women may not be able to produce breast milk of sufficient quantity and quality when they are malnourished.[550]

Poor and hungry people do not live only in so called developing countries but also in rich industrialised nations. Janet Poppendieck has studied emergency food and their users in the USA. From her book *Sweet charity?* we learn that also in the wealthy USA the individuals most at risk of hunger are women, children, and the elderly, many of them members of minority groups. These groups asserted that the reasons they are hungry is because of unemployment or underemployment, high costs of housing and other basic needs, and inadequate welfare and food assistance benefits.[551]

Studies show that the majority of the world's hungry people live in *rural areas*. The task force on hunger estimate that about half of the hungry are smallholder farming households, as they

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[547] Alkire and Santos, "Acute Multidimensional Poverty", *supra* note 546, at 5-6.

[548] FAO, *The State of Food Insecurity in the World 2009* (Rome: Food and Agriculture Organization of the United Nations, 2009) at 4 and 8.

[549] UN Millennium Development Project, *Halving Hunger: It can be done* (Taskforce on Hunger report, 2005), at 5. Available at http://www.unmillenniumproject.org/documents/Hunger-lowres-complete.pdf, visited 4 December 2011.

[550] *Ibid*, at 2.

[551] Janet Poppendieck, *Sweet Charity? Emergency Food and the End of Entitlement* (USA: Penguin Books, 1998) at 50.

are unable to either grow or buy enough food to meet their daily needs. While accurate data is difficult to find, the taskforce estimates that roughly two-tenths of the hungry are landless rural people; one-tenth are pastoralists, fisher folk, and people who depend on forests for their livelihoods; and two-tenths live in urban areas.[552] Olivier De Schutter points out that in Africa, 90 percent of agricultural production is from smallholder famers with less than two hectares. They cultivate plots that are so small and of poor quality that they need to buy food.[553] Employment opportunities to obtain cash are, however, rare in poor rural areas.[554] Modern development schemes have promoted a movement to input-intensive, monocultural production for export, and small farmers often face fluctuating prices, increased costs, and decreased government support,[555] as we will see in the Malawi case-study in part II.

Most of the world's hungry, or 90 percent, are *chronically undernourished*. Only a small part of the hungry, or 10 percent, are those suffering from *acute hunger* that typically takes place during famines and disasters. Then as a third category there are those suffering from *hidden hunger*, caused by lack of essential micronutrients, even when they consume adequate amounts of calories and protein. Victims of acute hunger usually attract more attention and support than the chronic and hidden hunger.[556] This study addresses efforts that try to support those suffering from acute hunger through food assistance interventions as well and efforts that try to address chronic and hidden hunger through improved services e.g. in the area of agriculture.

2.3.2 The poor as experts on their own development

What is striking when reviewing the meaning behind the concept 'development' and 'poverty' is the absence of the voices of the poor themselves in defining development or the lack of it. Traditionally, it has been those who regard themselves as the 'social superiors' to the poor that have defined poverty and the poor. The nineteenth century called them the dangerous classes, and these negative perceptions have not completely disappeared. The poor are often viewed as equal to dirty, dumb, drugged, prone to violence and crime, and generally irresponsible. Social reformers have protested against this kind of stigmatisation. They have argued that the poor are themselves not to blame for their condition: the dangerous turned into the unfortunate, or disadvantaged classes. Poor people should at least have a roof over their head, clothes on their bodies, food on the table, and a job to go to. Moreover, in modern times, the *state* has become the guardian of the poor, running welfare programmes with specialised social workers in charge.[557] This is the thinking also in human rights discourse.

In the *Consultations with the Poor* study, that set out to listen to and understand the voices of approximately 20,000 people from 23 countries, the poor are seen as the experts on poverty. The large majority of the poor people included in the Consultations said they are worse off now, have fewer economic opportunities, and live in greater insecurity than in the past. They do not feel that they have benefited from massive political and economic changes and restructuring around the world. From a human rights perspective it is worrisome that poor people's experiences with government institutions are largely negative, even when government programmes are rated as important. The poor find their own institutions to be the

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[552] *Halving Hunger: It can be done*, *supra* note 549, at 3-4.
[553] Olivier De Schutter, "The Emerging Human Right to Land", 12 *International Community Law Review* (2010) 303-334, at 304.
[554] *Halving Hunger: It can be done*, *supra* note 549, at 4.
[555] De Schutter, "The Emerging Human Right to Land", *supra* note 553, at 304.
[556] *Halving Hunger: It can be done*, *supra* note 549, at 2.
[557] Friedman, *Empowerment: The Politics of Alternative Development*, *supra* note 263, at 55-56.

most dependable.[558] One of the significant conclusions was that overwhelmingly the poor want to be heard, and they want to participate in institutions, whether of government or civil society. They want institutions to play a major role: they want that institutions do more and do it well.[559]

Another issue that became clear was the importance of the psychological dimensions of wellbeing and ill-being. It became clear that the good and the bad in life are multidimensional, with the experiential and psychological dimensions at the centre.[560] The experiences are affected by a combination of material, physical, and social factors.[561]

What also emerged from the collective voices of the poor is their resilience and hard work. Despite the stress of their children going hungry, the humiliation and shame experienced in their interaction with government, traders, money lenders and landlords, the poor survive and persist. Additionally the poor take initiatives. They create groups to patrol the community to protect against theft; they establish saving groups; they create unions, cooperatives, temples, mosques, and church associations. They have labour exchange groups, chicken raising groups and burial groups.[562] This shows that the poor have agency and find ways of coping with the reality of their daily lives. We assume that because the majority of hungry farmers have not managed to take back power from corporate interests, landlords or bureaucrats, nobody can. Seldom do we seek to learn from the examples of peasant societies that *have* in fact overcome hunger.[563]

This is contrary to our view of poor people as passive and incapable of assuming responsibility for their own lives, and thereby needing to be cared for.[564] Researchers often operate with implicit or explicit assumptions that poor and oppressed people are 'marginals' or living 'outside' society. Paulo Freire claims they have always been 'inside' – inside the structures which made them who they are. The solution is not to 'integrate' into the same structures that oppress them but to *transform these structures*.[565] The question is if strategies based on human rights and the right to food can contribute to such social transformation.

2.3.3 Integration of food security and the right to food

From national food security to household food security

The concept of 'food security' became increasingly into focus in the 1970s as a response to the world food crisis taking place early in the decade. In 1974, the FAO organised the World Food Conference, which inter alia recommended the establishment of a Committee on World Food Security under the FAO.[566] The early 1970s saw the start of a new policy-oriented food and nutrition debate. This was clearly due to the fact that: firstly, increased food production did not guarantee a reduction in hunger; secondly, that many technological solutions proposed

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[558] Deepa Narayan et al. "Global Synthesis: Consultations with the Poor", Poverty Group of the World Bank, 1999, at. 2. Available at http://siteresources.worldbank.org/INTPOVERTY/Resources/335642-1124115102975/1555991124138742310/synthes.pdf, visited 3 March 2012.
[559] *Ibid.*, at 39.
[560] *Ibid.*, at 3-4.
[561] *Ibid.*, at 13.
[562] *Ibid.*, at 38-39.
[563] Frances Moore Lappé and Joseph Collins, *Food First: Beyond the Myth of Scarcity* (USA: Institute for Food and Development Policy, 1977) at 392.
[564] Poppendieck, *Sweet Charity?, supra* note 551, at 318.
[565] Freire, *Pedagogy of the Oppressed, supra* 364, at 55.
[566] Ida-Eline Engh, *Developing Capacity to Realise Socio-Economic Rights: The Right to Food in the Context of HIV/AIDS in South Africa and Uganda* (Antwerp: Intersentia, 2008) at 59.

had been based on insufficient analysis; and thirdly that a greater role and responsibility for the state was essential for the prevention of hunger and long term food security. Then in 1976 the Covenant on Economic, Social and Cultural Rights, which had been adopted a decade earlier, came into force. Some human rights experts and a few interested governments started to elaborate on the notion of the relationship of human rights with economic and social development.[567]

In the 1980s, there was increased focus on household food security as opposed to national food security defined in terms of national grain reserves for stable grains at national levels. Researchers tried to establish a concept taking into account the economics of the household, its social and ecological environment as well as the prevailing food culture as the broad framework to be used when determining food security conditions of households. Some of these elements were to become the basis also for the normative understanding of the right to adequate food. Today food security is generally examined at the household level in terms of *access* to food, rather than in terms of food supply.[568] However, Engh draws the conclusion that focus on access to food is still lacking in parts of the food security debates and policy discussions, so that there sometimes is a tendency to focus on availability of food at global, national or regional levels rather than vulnerable individuals' and groups' access to food. For the right to food, the starting point is always physical and economic access to food.[569]

The right to food as a concept has not been completely absent in debates on food security concerns. In 1981 human rights experts and food/nutrition developmentalists came together at a United Nations University seminar to think about how to bridge the gap between food and nutrition concerns, as well as goals and the system of human rights norms. As a result of this and other similar meetings development professionals working with food and nutrition gradually started using a new terminology that was inspired by human rights thinking: the hungry would no longer be seen as passive recipients of charity – they would become *rights-holders*. As rights-holders they can in principle claim their right to food to be fulfilled, while the state, as a signatory to the Covenant on Economic, Social and Cultural Rights, becomes the corresponding *duty-bearer* with obligations to help fulfil the right to food along with other rights.[570] This implies that the idea to divide people and institutions (mainly state authorities) into rights-holders and duty-bearers, when e.g. planning food security interventions, was already shaped in the 1980s. (The gap between theory and practice is however big and the actors involved in food related development interventions diverse. The language of rights and duties is still largely absent in the policies of the World Food Programme, for instance.) Moreover, a review of a textbook type of literature on human rights law reveals that the word 'beneficiary' is still applied also in human rights discourse,[571] and it is only more recently that the term right-holder is used by legal experts.[572] This is one example of the mutual changes and effects coming out of the process when two discourses meet.

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[567] Wenche Barth Eide, "The Promotion of a Human Rights Perspective on Food Security: Highlights of an Evolving Process", in Clay & Stokke (eds), *Food Aid and Human Security* (London: EADI, 2000) 326-350, at 330-331.

[568] Engh, *Developing Capacity to Realise Socio-Economic Rights*, *supra* note 566, at 60-62. This is inspired by the thinking of Amartya Sen.

[569] Engh, *Developing Capacity to Realise Socio-Economic Rights*, *supra* note 566, at 74.

[570] Eide, "The Promotion of a Human Rights Perspective on Food Security", *supra* note 567, at 332.

[571] See e.g. A. Eide, C. Krause & A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff Publishers, Second Revised Edition, 2001); Scheinin, "Characteristics of Human Rights Norms", *supra* note 500, at 35.

[572] See e.g. Declaration of Principles of Equality, The Equal Rights Trust, 2008. Available at http://www.equalrightstrust.org/about-ert/index.htm, visited 14 May 2012.

We should keep in mind that the meaning of the right to food was far from clear during this time. To many the idea of food as a right was unfamiliar and yet others had misconstrued the notion of a right to food as the unconditional duty of the state to provide food to all irrespective of its limited resources. There were various attempts to promote the right to food as a human right at intergovernmental conferences in the early 1990's. Although the World Conference on Human Rights in 1993 contributed to a conducive environment, it was only UNICEF among the UN agencies that by the mid 1990s had shown interest or a capacity to go beyond rhetorical statements about food as a human right. It was also UNICEF that chaired the Working Group on Nutrition, Ethics and Human Rights, that met for the first time in 1994, functioning under the UN system. Reports and recommendations of the Working Group made the UN agencies more familiar with the concept of a human rights approach to food and nutrition policies and programmes. In 1999, there was a session of the ACC/Sub-Committee for Nutrition in Geneva, hosted by the UN High Commissioner on Human Rights, and preceded by a thematic symposium, which provided an opportunity for a deeper consideration of the issues.[573]

At the first meeting between the human rights and development professionals in 1981 it was agreed that a more precise definition of the right to food, as well as further operationalisation of the corresponding duties or obligations for implementing this right was needed.[574] It was around the time of the World Food Summit in Rome in 1996 that the strong interest in food as a human right became apparent.[575] The World Food Summit and the subsequent Plan for Action included a specific call for a better definition of the right to food and the steps to realise it.[576] Considerable effort has been put into this task. In 1999, the Committee on Economic, Social and Cultural Rights clarified the normative content of the right to food in General Comment No. 12.[577] The next year the Human Rights Commission appointed a Special Rapporteur on the Right to Food.[578] In the Declaration adopted at the World Food Summit: *five years later* in 2002 the FAO Council was called to establish an Intergovernmental Working Group "*to elaborate, in a period of two years, a set of voluntary guidelines to support Member States' efforts to achieve the progressive realisation of the right to adequate food in the context of national food security;*"[579] These so called Right to Food Guidelines were adopted in 2004.[580] The Guidelines can be seen as a first attempt to 'marry' food security and the right to food,[581] and will be reviewed below.

This short historic overview reveals that the debates around food security and the right to food have had strong influence on each other. The cooperation between engaged professionals from both discourses existed, in the margins, long before human rights-based approaches became a trend. From the margins it was in the 1980s that the 'food security ship' and the

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[573] Eide, "The Promotion of a Human Rights Perspective on Food Security", *supra* note 567, at 334-336.

[574] *Ibid*., at 332.

[575] Kerstin Mechlem, "The Development of Voluntary Guidelines for the Right to Adequate Food", in Mahiou and Snyder (eds), *Food Security and Food Safety* (Leiden: Martinus Nijhoff Publishers, 2006) 351-390, at 359.

[576] Rome Declaration on World Food Security and World Food Summit Plan of Action, Commitment 7, Objective 4, adopted in Rome 13 November 1996. Available at http://www.fao.org/docrep/003/w3613e/ w3613e00.htm, visited 14 May 2012.

[577] General Comment No. 12, (1999) on the right to adequate food, Committee on Economic, Social and Cultural Rights, Report on the Twentieth session, UN doc. E/C.12/1999/5.

[578] Commission on Human Rights Resolution 2000/10 (17 April 2000).

[579] FAO, Report of the 123rd Session of the FAO Council, Rome, 28 October – 1 November 2002. Emphasis in original.

[580] Adopted by the 127th Session of the FAO Council, November 2004.

[581] See Mechlem, "The Development of Voluntary Guidelines", *supra* note 575, at 351-390.

'right to food ship' started approaching each other and the conceptual ground work for a human rights-based approach to food was laid.

The relationship between the right to food and food security

Human rights covenants and development policy share the same aim in relation to food, i.e., that all people have *access* to sufficient food. Both are concerned with fulfilling people's basic needs for food and nourishment.[582] In human rights language this aim is put in the following manner: "The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement."[583] Almost the same wording is used to define food security in the World Food Summit Plan of Action,[584] a document that was adopted three years before General Comment No. 12 appeared.

Kerstin Mechlem has covered the relationship between the right to food and food security quite exhaustively and I will therefore only highlight some basic facts. She firstly points out that the overall objective of food security policies is achieving food security while right-to-food aims at realising the right to food.[585] The way 'realization of the right to food' is defined by the Committee on Economic, Social and Cultural Rights is almost the same way as food security is defined. Moreover, food availability, accessibility, safety, cultural acceptability are issues of concern for both food security and the right to food. The justification of the objective to realise the right to food/achieve food security is however somewhat different, according to Mechlem. She states that there are a number of justifications as the ground for the aim of food security, ranging from moral grounds to more economic approaches. Human rights are, on the other hand, based on the idea of human dignity, and all other considerations must be secondary in nature. Mechlem also sees a difference in the nature of the objectives. Food security is a *policy concept*, and as such food security is subject to easy redefinition. The right to food, on the other hand is a well-recognised *element of international law*, with a binding normative content, so aiming for realisation of the right to food means implementing a *legal obligation*. The right to food can therefore also be violated and such violations can be subject of judicial or quasi-judicial remedies.[586] A rights-based approach to food security views governments' commitments in this area as an obligation, not a form of benevolence.[587]

I partly disagree that the right to food as part of international human rights law would have a more stable meaning than food security as a policy concept. When the right to food is seen to be discursively constructed its content and meaning too is subject to changes taking place over time.

I share Mechlem's view that the concepts of food security and the right to food relate closely to each other, although there can be situations when there is food security on the national level and the right to food of the individual can still be violated, because of discriminatory means.

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[582] Kerstin Mechlem, "Food Security and the Right to Food in the Discourse of the United Nations", 10 *European Law Journal* (2004) 631-648, at 643.
[583] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 6.
[584] "Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life." Rome Declaration on World Food Security and World Food Summit Plan of Action, para 1, adopted in Rome 13 November 1996. Available at http://www.fao.org/docrep/003/w3613e/w3613e00.htm, visited 14 May 2012.
[585] Mechlem, "Food Security and the Right to Food", *supra* note 582, at 643.
[586] *Ibid*., at 643-644.
[587] Food and Agriculture Organization of the United Nations, "The Right to Food in Practice: Implementation at the National Level", Rome: FAO, 2006, at 3. Available at http://www.fao.org/righttofood/KC/downloads/vl/docs/AH189_en.pdf, visited 10 May 2012.

This again implies that focus on *method* is crucial. "Progressively realizing the right to food should imply using a rights-based approach to food security that has distinct characteristics."[588] However, what a rights-based approach to food security means is open to interpretation, as will be shown in the following.

A human rights-based approach to food security as suggested in the Right to Food Guidelines

This section tries to answer the question what are the distinct characteristics of a human rights-based approach to food security? The answer to this question can be found in a comparison of the General Comment on the Right to Adequate Food and the Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security (the 'Right to Food Guidelines'), which are said to be a human rights-based practical tool.

One could imagine that the specific steps to be taken and the method to be applied are described in the Right to Food Guidelines to support the progressive realisation of the right to adequate food in the context of national food security. Furthermore, the Right to Food Guidelines are said to be "a human rights-based practical tool addressed to all States." *States* are encouraged to apply the Guidelines in developing their strategies, policies, programmes and activities.[589] (The fact that States are the target in the Guidelines does not make them irrelevant for agencies and organisations as they should support the capacity of the State as the main duty-bearer, and the capacity of the rights-holders, to realise the right to food.) A critical note is that the strong focus on national food security leaves the international level outside the scope of the Guidelines. When focus is on the actions which states can take to overcome hunger, the Right to Food Guidelines renders the effects of the international economic system largely invisible, which is a structural factor that can constrain the ability of states to guarantee food needs of their population.[590] This is, however, not the subject of this particular analysis. I will instead focus on what kind of a human rights-based strategy is proposed in the Right to Food Guidelines and compare this with the General Comment on the Right to Adequate Food.

According to General Comment 12, there should be a national *strategy* to ensure food and nutrition security for all, based on human rights principles,[591] (which are not defined). National strategies are also dealt with in the Right to Food Guidelines. The General Comment and Guidelines both point out that before formulating a national strategy, there needs to be careful *assessment* of existing national legislation, current programmes, and identification of constraints and availability of existing resources.[592] The strategy should identify policy measures and activities that are relevant to the situation and context.[593]

Impact assessment is an essential part of the Guidelines, and states are encouraged to conduct 'Right to Food Impact Assessments' in order to identify the impact of domestic policies,

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[588] Mechlem, "Food Security and the Right to Food", *supra* note 582, at 644-645. Engh, *Developing Capacity to Realise Socio-Economic Rights*, *supra* note 566, at 74. Engh says that "the right to food is not synonymous with food security, but they are closely related. If food security is realized, the conditions will be suitable for the right to food to be enjoyed."

[589] Voluntary Guidelines, Preface, at 2. Adopted by the 127th Session of the FAO Council November 2004.

[590] Jacqueline Mowbray, "The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the Problem of World Hunger", 20 *Leiden Journal of International Law* (2007) 545-569, at 559.

[591] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para 21.

[592] Voluntary Guidelines, *supra* note 589, Guideline 3.2.

[593] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 22.

programmes and projects on the progressive realisation of the right to adequate food.[594] With regard to assessing the food security situation in the country, the Guidelines highlights the importance of undertaking a "disaggregated analysis on the food insecurity, vulnerability and nutritional status of different groups in society".[595] Here the Guidelines go further in linking assessment of food insecurity with the principle of non-discrimination and the key role disaggregated data plays in an analysis of which groups in society suffer from possible discrimination in the area of the right to food. Otherwise, the Guidelines more or less repeat what the General Comment says in terms of that national strategies should address *all* aspects of the food system, including the production, processing, distribution, marketing, and consumption of safe food. The new dimension is that a national strategy for the progressive realisation of the right to food is linked to poverty reduction strategies, and in this context States should "give priority to providing basic services to the poorest, and investing in human resources by ensuring access to primary education for all, basic health care", etc.[596]

The Guidelines are clear in pointing out that they do not establish legally binding *obligations* for States or international organisations, and that the provisions in the Guidelines do not modify rights and obligations under international law.[597] However, because the claimed added value of a human rights approach to food security lies in the emphasis of addressing food insecurity as a matter of obligation, not benevolence, it is important to clarify what exactly is expected of states under the right to food as formulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). According to General Comment 12, the principal obligation under the right to adequate food is "to take steps to achieve progressively the full realization of the right to adequate food."[598] Similar to any other human right, this imposes three levels of obligations on States parties: the obligation to respect, to protect, and to fulfil.

> The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* (*facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.[599]

This language of respect, protect, and fulfil is not fully integrated into the Right to Food Guidelines. In the Introduction it is noted that States have an obligation to "respect, *promote* and protect and to take appropriate steps to achieve progressively the full realization of the right to adequate food."[600] When referring to the respect and protect dimension, the Guidelines repeat the General Comment. In explaining what the promote dimension means, the Guidelines use the same wording as the Committee on Economic, Social and Cultural

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[594] Voluntary Guidelines, *supra* note 589, Guideline 17.2.
[595] Voluntary Guidelines, *supra* note 589, Guideline 13.2.
[596] *Ibid*., Guideline 3.6.
[597] *Ibid*., para. 9.
[598] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 14.
[599] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 15. Emphasis in original.
[600] Voluntary Guidelines, *supra* note 589, para. 17. Emphasis added.

Rights use for the facilitation-dimension. (States are to promote policies intended to contribute to the progressive realisation of people's right to adequate food by strengthening access and utilization of resources and means to ensure a livelihood.) Finally, without using the word fulfil/provide, the Guidelines explains that states should maintain safety nets or other assistance for those who are unable to provide for themselves, to the extent resources permit.[601]

This is a little confusing as the Guidelines are designed to clarify and help states in developing strategies, policies, and programmes which are rights-based, i.e. *based on legal obligations*. A human rights approach to food security is supposed to facilitate the implementation of the right to adequate food,[602] but the Guidelines are perhaps not sufficiently clear in defining and giving concrete meaning to this approach. Failing to clarify the essential fulfil/provide dimension of the tripartite obligations can be confusing to states that want to establish and maintain safety nets or other assistance for individuals who are unable to provide for themselves as part of their right to food strategies. The rights-holders must be able to claim their right from a duty-bearer, otherwise it is unclear what value the human rights-based approach to food security adds to already existing food security policies. However the Guidelines seldom link the right to food to an obligation, and does not use concepts of 'rights-holders' and 'duty-bearers', concepts that were introduced into the food security debates already in the 1980s. Instead, the Guidelines are full of rather vague statements about striving for 'conducive policies', through a non-discriminatory and market-oriented trade system.[603] It remains unclear what exactly is the role of duty-bearer institutions, rights-holders, and different stakeholders such as donor states and international agencies.

The Guidelines are, furthermore, not helpful in clarifying the roles and responsibilities in times of *emergencies*. As we have seen in the General Comment, the State has the fulfil-obligation to provide the right to food directly to victims of natural or other disaster. This duty is dealt with in Guideline 14, under "Safety nets". To the extent that resources permit, the State "should consider" maintaining social safety and food safety nets to protect those who are unable to provide for themselves. Local procurement of items for food assistance is encouraged, and the food should be nutritionally adequate and safe, bearing in mind local circumstances and dietary traditions, and should target those most in need of assistance, respecting the principle of non-discrimination.[604]

General Comment 12 encourages similar approaches to food aid under the heading "international obligations".[605] *International* food aid is dealt with in Guideline 15, which is targeting donor states: "Donor States should ensure that their food aid policies support national efforts by recipient States to achieve food security." The stages of the food aid process should, "as far as possible be made in a participatory manner and, whenever possible, in close collaboration with recipient governments at the national and local level."[606]

The Guidelines deal with national safety nets and international food aid as two distinct domains, and the latter is accepted as being in the hands of donor states, whereas the General Comment gives the provide-responsibility to the national State, encouraging it to *seek*

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[601] Voluntary Guidelines, *supra* note 589, para. 17.
[602] Engh, *Developing Capacity to Realise Socio-Economic Rights, supra* note 566, at 74.
[603] Voluntary Guidelines, *supra* note 589, Guideline 5, para 4.7.
[604] Voluntary Guidelines, *supra* note 589, Guidelines 14.1, 14.2, 14.5.
[605] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, paras. 36-41.
[606] Voluntary Guidelines, *supra* note 589, Guidelines 15.1 and 15.5.

international assistance when resources are too few to fulfil its minimum obligations.[607] Donor policies are dealt with separately under "international obligations" where it is stated that "States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required."[608]

Donor accountability for actions and policies that hamper the right to food in developing countries is not an issue that is raised in the Right to Food Guidelines. This is an example that there are many aspects to food security and that the international level cannot be left outside a comprehensive human rights-based approach to food security. Inadequate food supply is often a result of complex, structural problems, outside the control of particular states and authorities on the national level.[609] However, the purpose of the above analysis was not to determine how effective a human rights-based approach is in tackling world hunger but instead to simply present the 'distinct characteristics' of such an approach as it has been laid out in the Right to Food Guidelines. As we have seen, it is far from clear what these 'distinct characteristics' mean and analysing the Guidelines side by side with General Common 12 indicates that neither document is helpful in giving clear answers.

The Right to Food Guidelines are supposed to be a resource when states want to make their own national rights-based food security policies at the national level, and therefore it is natural that it leaves room for a margin of discretion for states to choose their own approaches and ways of *implementing* the right to adequate food. Ironically, the Guidelines are quite detailed in the substantive parts, e.g. in highlighting what states should do to "improve the functioning of their markets",[610] indicating that there is not much room for discretion in the area of economic policies – the current market economical system is taken as a given – while being more vague when it comes to the obligation to respect, protect, and fulfil the right to food. It is especially the fulfil-dimension that differs from the interpretation given by the Committee on Economic, Social and Cultural Rights in General Comment 12. These obligations are mentioned only in the introduction and not in the actual Guidelines, indicating their marginal position.

In the area of impact assessment and monitoring of the right to food the Right to Food Guidelines, followed by FAO publications on the same subject, have clarified many issues that are only mentioned briefly in the General Comment on the Right to Adequate Food. In other areas it has been less helpful. The 'key principles' put forth in the Guidelines are vague slogans instead of useful guiding principles to inspire the process of development and human rights realisation. The fact that the Right to Food Guidelines do not claim to support the capacity of the duty-bearer to fulfil its obligations under the right to food and the capacity of the rights-holders to claim this same right, probably has many reasons, some of which have to do with political disagreements in the intergovernmental working group during the drafting process. The subject of rights and obligations under an economic and social right is still contested.

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[607] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 17: "A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food."

[608] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para, 36.

[609] Mowbray, "The Right to Food and the International Economic System", *supra* note 590, at 546.

[610] Voluntary Guidelines, *supra* note 589, Guideline 4.

2.3.4 The right to food defined internationally, regionally and nationally

Background

As we know, economic, social, and cultural rights were included in the Universal Declaration of Human Rights adopted in 1948. So called subsistence rights – adequate food and nutrition rights, clothing, housing and necessary conditions of care – are part of the right to an adequate standard of living in UDHR Article 25. Asbjørn Eide argues that in order to enjoy these *social* rights, there is a need to enjoy certain *economic* rights such as the right to property (UDHR, Art. 17), the right to work (UDHR, Art 23) and the right to social security (UDHR, Art. 22 and 25).[611]

UDHR was, according to Eide, initially an expression of ideals to be achieved, imposing above all a moral obligation on states. Gradually these ideas have been transformed into 'hard law' ('positive law'). At the international level this process started with the adoption of two Covenants in 1966, and later on we have seen numerous more specific conventions. This created international legal obligations for states, from which followed also the task to ensure that the rights were incorporated into national law and administrative practice.[612]

In the early stages of defining the right to food in international human rights law, there were debates about the nature of this right as an economic, social, and cultural right. Mutua points out that socialism and Latin American and Caribbean states influenced the ICESCR, and many other states, particularly in the West, interpreted its focus on socioeconomic justice as a threat to 'free market values'.[613] It was also argued that the right to food is not an individual right but rather a 'programme right' to be put into governmental policies in the economic and social fields. Deviations from the "cultural individualism in the West", can be traced back to states in the global South and can be attributed to the influence of the newly independent states in the UN standard setting from the 1950s onwards.[614] However, these arguments have been met by expert-led UN institutions based in New York and Geneva with counterarguments that underline the individual nature of all human rights. A UN publication "Right to adequate food as a human right", from 1989, argued that because Article 11 of ICESCR proclaims the right to food as "the right of everyone" this formulation implies that it is a human right belonging to *individuals*, not a "broad collective proposition".[615] This is an example of the kind of either/or thinking that has been characteristic of human rights discourse.

A related debate, that in part is still on-going, was related to the objection that socioeconomic rights are not *legally enforceable*. It was therefore argued that implementation of Article 11 is a political matter – not a matter of law.[616] Those in favour of ESCR as legally enforceable rights on an equal footing with civil and political rights have met this with counterarguments such as "the problem relating to the legal nature of social and economic rights does not relate to their validity but rather to their applicability."[617] A group of "authoritative experts" coming

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[611] Asbjørn Eide, "Human Rights Requirements to Social and Economic Development", 21 *Food Policy* (1996) 23-29, at 29.
[612] *Ibid*., at 30-31.
[613] Mutua, "Standard Setting in Human Rights", *supra* note 296, at 576.
[614] *Ibid*., at 576.
[615] Centre for Human Rights, *Study Series 1: Right to Adequate Food as a Human Right* (New York: United Nations, 1989), para. 42.
[616] *Ibid*., para. 43.
[617] Martin Scheinin, "Economic and Social Rights as Legal Rights", in A. Eide, C. Krause & A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook,* Second Revised Edition (Dordrecht: Martinus Nijhoff Publishers, 2001) 29-54, at 29.

together to formulate the Limburg Principles of 1987, concerning the interpretation and implementation of the ICESCR, held that "although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time."[618] In other words, experts have rejected the political element of the right to food and argued in favour of an individual, legally enforceable right. Again, tensions between the West and the rest in giving meaning to human rights are visible.

As we have seen, the right to adequate food has been defined in instruments of international human rights law, thereby setting a standard for national implementation of this right. Article 11 of the ICESCR protects in paragraph 1 "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing" and in paragraph 2 it continues by "recognizing the fundamental right of everyone to be free from hunger".[619]

In the process of giving more concrete content and meaning to Article 11, the Committee on Economic, Social and Cultural Rights (hereafter 'Committee') has played an important role. The Committee is a body of independent experts that monitors the implementation of the ICESCR.[620] In 2008 the UN General Assembly adopted an Optional Protocol to the ICESCR[621] and it was opened for signature in 2009. Through the Optional Protocol the Committee can begin to review individual complaints in a similar way to that of a court. Since this has procedure has not yet started to function, it is so far mainly through so called general comments and the reporting system that the Committee has given meaning and content to the right to food. According to Craven general comments have, so far, been the main tool for 'normative development'.[622] Before the adoption of General Comment on the Right to Adequate Food in 1999 the meaning of the right to food was not very clear.

The normative content

In General Comment No. 12, on the right to *adequate* food, the Committee on ESCR states that this right shall "not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients".[623] How "adequacy" is defined is determined by prevailing social, economic, cultural, climatic, ecological and other conditions in the society concerned.[624] The "core content" of this right implies, according to the Committee, "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture".[625] *Availability* has been defined as "possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution,

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[618] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural rights, 1987, Principle No. 8. UN doc. E/CN.4/187/17.
[619] Adopted on 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3. Regardless of the fact that Article 11 of ICESCR makes a distinction between the "right to adequate food" and the "fundamental right of everyone to be free from hunger", the concept of "the right to food" covers both of these aspects. See Philip Alston, "International Law and the Right to Food", in A. Eide, W.B. Eide, S. Goonatilake, J. Gussow & Omawale (eds), *Food as a Human Right* (Tokyo: The United Nations University, 1984) 162-174, at 167.
[620] On the Committee, see Matthew Craven, "The Committee on Economic, Social and Cultural Rights", in A. Eide, C. Krause & A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook,* Second Revised Edition (Dordrecht: Martinus Nijhoff Publishers, 2001) 455-472, at 460.
[621] GA resolution A/RES/63/117 (2008).
[622] Craven, "The Committee on Economic, Social and Cultural Rights", *supra* note 620, at 468.
[623] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 6.
[624] *Ibid*., para. 7.
[625] *Ibid*., para. 8.

processing and market systems that can move food from the site of production to where it is needed in accordance with demand."[626]

In order for the right to adequate food to be realised everybody should have physical and economic *access* at all times to adequate food or means for its procurement.[627] "Accessibility" has been divided into economic and physical accessibility. The first concept implies that "personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised." Physical accessibility refers to the importance of adequate food being accessible to *everyone*, "including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill." Certain groups, such as victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups, e.g. indigenous populations, "may need special attention and sometimes priority consideration with respect to accessibility of food."[628]

In Article 11(2), on the *right to be free from hunger*, three objectives are specially outlined, namely, to improve methods of production, conservation, and distribution of food. To achieve these objectives states should take necessary measures and programmes. In addition, reference is made to technical and scientific knowledge and the development or *reform of agrarian systems*. As the right to be free from hunger acts as a "sub-norm"[629] to the right to food, it can be assumed that the specific measures are intended to the right to food in general, not merely to the right to be free from hunger.[630]

According to Craven, the purpose of *agrarian reform*[631] in the context of the right to food is not always clear. Nevertheless, as Craven points out, indirectly inequities in land distribution contribute to poverty and thus also to inadequate access to food. However, it is clear that the inclusion of a reference to developing and reforming of the agrarian systems does not mean that states which do not initiate agrarian reforms would automatically be violating the Covenant.[632] The most effective way to implement the right to food varies depending on the situation and context.[633]

Even though the Committee has not clarified the necessity of an agrarian reform in the general comment on the right to food it has not disregarded this aspect of Article 11(2). Indirectly the Committee, on several occasions, makes reference to rural development, for example when it

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[626] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para 12.
[627] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 6.
[628] *Ibid*., para. 13.
[629] Amartya Sen has argued that the right to be free from hunger is a "metaright". Such a "metaright" can be defined as "the right to have *policies* p*(x)* that genuinely pursues the objective of making the right to *x* realisable." For example, in many countries where hunger is widespread, it might not be feasible to guarantee the right to be free from hunger for everybody in the near future, but policies that would rapidly realise freedom from hunger, do exist. See Amartya Sen, "The right not to be hungry", in P. Alston and K. Tomasevski (eds), *The Right to Food* (Netherlands Institute of Human Rights and Martinus Nijhoff Publishers, 1984) 69-81, at 70-71.
[630] Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Clarendon Press, 1995) at 316-317.
[631] The terms "land reform" and "agrarian reform" should not be used as synonyms even though they have much in common. The former term refers to a redistribution of land ownership to achieve a more equitable access to resources while an agrarian reform also includes supporting measures designed to make the reformed sector more productive. See Cristina Liamzon, "Agrarian reform: A continuing imperative or an anachronism?", in Deborah Eade (ed.), *Development and Rights* (Oxford: Oxfam GB, 1998) 101-113, at 103.
[632] Craven, *The International Covenant on Economic, Social and Cultural Rights, supra* note 630, at 322.
[633] See General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, paras. 21-22.

makes clear that the obligation to fulfil the right to food means that the state must take active measures to strengthen access to and utilisation of resources and means to ensure livelihoods.[634] In addition, in the guidelines regarding the form and content of reports to be submitted by States Parties under Articles 16 and 17 of the Covenant, it asks the State Party to describe legislative measures in the context of an agrarian reform taken to ensure an equitable distribution of food supplies.[635] In its concluding observations on State Party reports the Committee encourages agrarian reforms in cases where there is a high degree of concentration of land ownership.[636]

The UN Special Rapporteur on the right to food, has, in the capacity of an independent expert also played a significant role in giving meaning and content to the right to food. In 2002, Special Rapporteur Jean Ziegler made clear that access to land and agrarian reform must form a key part of the right to food. The rapporteur pointed out that hunger is predominately a rural problem and that rural poverty is often closely linked to extreme inequity in access to land. Moreover, as it is increasingly understood that small farms are more efficient than large ones,[637] the rapporteur stated that the notion of "developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources", used in Article 11(2)(a), can be understood as promoting agrarian reform to encourage small-scale farming.[638] The current Special Rapporteur, Olivier De Schutter, has continued along the same lines, stating that investments should be directed at promoting sustainable forms of agricultural production, benefiting small-holders who are most in need of support. He notes that the global food crisis with the surge in food prices in 2006-2008 was "the result of policies that have systematically undermined the agricultural sector in a number of developing countries over a period of 30 years."[639] In his report from 2008, he called for structural measures, leading to a profound reform of the global food system.[640] This shows that experts mandated by the UN have not defined the right to food in narrow terms solely as an individual, legally enforceable entitlement. They have not avoided putting the right to adequate food into a political and economic context, calling for structural reforms.

The right to food is not only guaranteed in the ICESCR. In the Convention on the Right of the Child, two articles address the issue of nutrition. In Article 24(1) "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health" and shall take appropriate measures "[t]o combat disease and malnutrition, including within the framework

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[634] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 15.

[635] Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Report of the Committee on Economic, Social and Cultural Rights, 88-100. UN doc. E/1991/23.

[636] Committee on Economic, Social and Cultural Rights, Concluding Observations on Paraguay (1996), UN doc. E/C.12/1/Add.1, para. 9; Concluding Observations on Guatemala (1996) UN doc. E/C.12/1/Add.3, paras. 10 and 24; Concluding Observations on Peru (1997), UN doc. E/C.12/1/Add.14, para. 12; Concluding Observations on Brazil (2003), UN doc. E/C.12/1/Add.87, paras. 31, 40 and 61. In these concluding observations the Committee makes reference to the situation of indigenous peoples, landless peasants or in general the rural population. In its concluding observations on the report of the Philippines, the Committee notes that the government has failed to meet its own targets in relation to the implementation of an agrarian reform. Also, the Committee states that: "The inadequacy of the agrarian reform programme appears to have had a negative impact upon the full realization of the right to food as enshrined in Article 11 of the Covenant". Concluding Observation on the Philippines (1995) UN doc. E/C.12/1995/7, para 19.

[637] Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World 2003*, (FAO: Rome, 2003) at 6.

[638] Jean Ziegler, "The right to food", report of Special Rapporteur of the Commission on Human Rights on the right to food to the General Assembly, Fifty-seventh session, 2002, paras. 22-24 and 30. UN doc. A/57/356.

[639] Report of the Special Rapporteur on the right to food, Olivier De Schutter, "Building Resilience: A Human Rights Framework for World Food and Nutrition Security", paras 7 and 8. UN doc. A/HRC/9/23 (2008)

[640] *Ibid*., para.6.

of primary health care, through […] the provision of adequate nutritious foods and clean drinking-water;"[641] In Article 27(3) it is stated that States Parties "shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." The Convention on the Elimination on All Forms of Discrimination against Women guarantees "adequate nutrition during pregnancy and lactation" in Article 12(2).[642] The way the committees monitoring these conventions have contributed to giving meaning to these nutrition-related rights is outside the scope of this chapter.

Both civil and political rights, economic, social and cultural rights, and collective rights are included in the African Charter on Human and Peoples' Rights. There is no categorisation of the three sets of rights; the Charter is, in other words, of an integrated nature.[643] Unlike the ICESCR, the African Charter does not use the concept of "progressive realisation" in relation to economic, social and cultural rights. Only in Article 16, which guarantees the *best attainable* state of physical and mental health, can the language of "progressive realisation" be found. In the other provisions the rights are set forth in a manner providing States Parties with obligations which are of immediate application.[644]

As all rights enshrined in the Africa Charter are placed on an equal footing, the African Commission on Human Rights has, in exercising its monitoring functions,[645] the ability to adopt a 'violations approach' in cases where a State Party has failed to fulfil its obligations with respect to economic, social and cultural rights.[646] This approach would have been impossible if the Charter had incorporated the same 'progressive realisation approach' that usually is the case regarding economic, social and cultural rights. In a violations case-based approach, determinations can be made with respect to real-life situations where the Commission makes a decision with respect to cases of specific allegations of a State Party's failure to fulfil its obligations.[647]

The African Charter does not guarantee the right to adequate food, the right to housing or the right to an adequate standard of living as such. According to some authors, this can be seen as

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[641] Convention on the Rights of the Child, GA Res. 44/25 of 20 November 1989, entered into force 2 September 1990. Article 24(1)c.

[642] Adopted 18 December 1979, entered into force 3 September 1981.

[643] In the Preamble of the African Charter on Human and Peoples' Rights the principle of interdependence is made clear: "*Convinced* that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be disconnected from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". African Charter on Human and Peoples' Rights, adopted on 27 July 1981 entered into force on 21 October 1986, 21 I.L.M. 59 (1982). See also Fons Coomans, "The *Ogoni* Case Before the African Commission on Human and Peoples' Rights", 52 *International and Comparative Law Quarterly* (2003) 749-760, at 750-751.

[644] Chidi Anselm Odinkalu, "Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights", in Malcom Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002) 178-218, at 196. See also Nana K.A. Busia Jr and Bibiane G. Mbaye, "Filing Communications on Economic and Social Rights under the African Charter on Human and Peoples' Rights (The Banjul Charter)", 3 *East African Journal of Peace & Human Rights* (1996) 188-199, at 192.

[645] The mandate of the African Commission is established in Article 45 of the African Charter on Human and Peoples' Rights.

[646] Odinkalu, "Implementing Economic, Social and Cultural Rights", *supra* note 644, at 196-198. See also Coomans, "The *Ogoni* Case", *supra* note 643, at 758-759.

[647] Chidi Anselm Odinkalu, "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights", 23 *Human Rights Quarterly* (2001) 327-369, at 351.

a significant disappointment from the promise of the Preamble.[648] However, these rights are covered by a combination of other provisions. Here, one central provision is Article 5, which recognises respect for human dignity. However, also those economic, social and cultural rights enlisted in Articles 14-17 of the Charter are of significance. In its case law the African Commission on Human Rights has given an extensive interpretation of the economic and social rights provisions which are included in the Charter so that also concerns in relation to food, clothing, forced evictions, safe drinking water, electricity, and basic medicine can be read into the Charter.[649] The concept of human dignity has thus been given substance and meaning and can be seen as an over-arching concept of the Charter.[650] According to Odinkalu, recognising "respect of the dignity inherent in the human person" as a distinct right and as a foundational value in the African Charter breaks down the artificial barriers imposed on economic, social and cultural rights and opens up vast possibilities for implementing these rights under the African Charter.[651]

In the inter-American system of human rights, the right to adequate food is foremost protected in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).[652] However, an analysis of the definition given to the right to adequate food under the inter-American system is outside the scope of this chapter.

Implementing the right to food through national strategies against food insecurity

In Article 2(1) of the ICESCR the State Party "undertakes to take steps, (…) to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant". The concept of "achieving progressively" has often been used as an argument for considering economic, social and cultural rights as mere "aspirations", not as enforceable individual rights.[653] However, the Committee on Economic, Social and Cultural Rights has made clear that the concept is used as a recognition of the fact that "full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time", and it should not be used in a way depriving Article 2 of any meaningful content. All States Parties are under an obligation to "move as expeditiously

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[648] See, *e.g.*, J. Oloka-Onyangio, "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa", 26 *California Western International Law Journal* (1995) 1-23, at 15.

[649] See Coomans, "The *Ogoni* Case", *supra* note 643, at 751; Odinkalu, "Analysis of Paralysis or Paralysis by Analysis?", *supra* note 647, at 341 and 364. In communications 54/91, 61/91, 98/93, 167/97 and 210/98 v. Mauritania, the African Commission found that lack of sufficient food, blankets and adequate hygiene in detention centres constitutes a violation of Art. 16 of the African Charter. See *Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights: Extracted from the Commission's Activity Report 1994-2001* (The Gambia: Institute for Human Rights and Development in Africa, 2002) at 186. See also communication 100/93 v. Zaire in which the Commission held that "The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine (…) constitutes a violation of Article 16." (*Ibid.*, at 366.) In communication 155/96 v. Nigeria the African Commission is of the view that right to adequate food is implicitly protected by other rights guaranteed in the Charter.

[650] Coomans, "The *Ogoni* Case", *supra* note 643, at 751.

[651] Odinkalu, "Analysis of Paralysis or Paralysis by Analysis?", *supra* note 647, at 366.

[652] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), adopted on 17 November 1988, entered into force on 16 November 1999, OAS Treaty Series No. 69.

[653] Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003) at 311; Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights", in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook,* Second Revised Edition (Dordrecht: Martinus Nijhoff Publishers, 2001) 9-28, at 10.

and effectively as possible towards" full realisation of the rights guaranteed in the Covenant.[654]

Furthermore, Article 2 imposes some immediate obligations on the States Parties. In General Comment No. 3, on the nature of States Parties obligations, the Committee underlines that the notion in Article 2(1) "undertakes to take steps" imposes obligations that are of immediate effect. This means that states must take steps "within a reasonably short time after the Covenant's entry into force for the States concerned" and also that the measures aimed at achieving full realisation should be "deliberate, concrete and targeted".[655] Moreover, the obligation to guarantee the rights without discrimination, put forward in Article 2(2), is also not subject to limitation.[656] Discrimination in access to food or means for its procurement on the grounds of "race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status" constitutes a violation of the Covenant.[657]

According to the General Comment the State enjoys a margin of discretion to choose its own approaches and ways of *implementing* the right to adequate food, as long as whatever steps are taken to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food.[658] Particular attention should be given to the need to prevent discrimination in access to food or resources for food. This should include guarantees of full and equal access to economic resources. Rights of women to inheritance and ownership of land and other property is particularly mentioned.[659] Moreover, even where a State faces severe resource constraints, "measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals".[660]

In order to take measures which are "deliberate, concrete and targeted", and indeed live up to the obligation to "take steps", states must engage in effective implementation and monitoring of the rights enshrined in the ICESCR. Designing and adopting programmes for implementation can be seen as steps in the process of realising the right to adequate food for all and have been regarded essential preconditions for compliance with the obligations set forth in the Covenant.[661]

States should first identify those who are food insecure and then formulate a *national strategy* for recreating access to food for these groups and the population as a whole.[662] Although every state has a margin of discretion in applying its own implementation process, the Committee on Economic, Social and Cultural Rights makes clear that as the ICESCR requires States Parties to take the necessary steps "to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food", this means that a national strategy to ensure food security must be adopted.[663]

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[654] General Comment No. 3 (1990) on the nature of States parties obligations (Article 2, para. 1 of the International Covenant on Economic, Social and Cultural Rights), Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/1991/23, at 83-87, at para. 9. See also General Comment No. 12, (1999), para. 14.

[655] General Comment No. 3, (1990), *supra* note 654, para. 2.

[656] *Ibid.*, para. 1.

[657] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 18.

[658] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 21.

[659] *Ibid*., para. 26.

[660] *Ibid*., para. 28.

[661] Sepúlveda, *The Nature of the Obligations, supra* note 653, at 360-361.

[662] Asbjørn Eide, "The Realization of Economic, Social and Cultural Rights. The Right to adequate food and to be free from hunger: Updated study on the right to food", submitted by Mr. Eide in accordance with Sub-Commission decision 1998/106, 1999, para. 62. UN doc. E/CN.4/Sub.2/1999/12.

[663] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 21.

National strategies that address the essential *issues causing hunger and malnutrition* are important tools when implementing the right to food. The Right to Food Guidelines reviewed give further guidance for states that are about to create rights-based national strategies for food security. Unfortunately, the guidelines are not very clear with regard to the important aspect of food as a human rights issue, i.e., obligations to respect, protect and fulfil the right to adequate food.

Actors calling for a Right to Livelihoods

The Committee on ESCR has raised issues of market access, land, and discrimination, i.e., broader issues of *livelihoods*. This has, however, not satisfied activists in the global South. At the World Social Forum 2009 a group of international NGOs, led by the Programme on Women's Economic, Social and Cultural Rights (PWESCR), came together to launch the Global Network on Women and the Right to Livelihoods. The Global Network aims to develop a common understanding of *the right to livelihoods* and is working towards having the right recognised in international human rights law.[664] The right to livelihoods, currently not recognised as a human right in any international instrument, is seen as connected to issues of land, water, forest, food security, food sovereignty, food production, and income security,[665] i.e. issues related to the right to food, natural resources and markets.[666] Conceptually, it is much more than the right to work – the right to livelihoods includes options that are outside of the workplace and yet crucial for many people's survival.[667]

The Global Network aims to work from the local to the global level, making women's right to livelihoods visible, to "restore a new language, a new imagination, a new politics and a new economy to the world." The actors highlight that this new polity and politics cannot come from those who use domination, extraction and power.[668] In these processes, the right to livelihoods is beginning to be defined from the ground up.[669]

This is an example of how actors strive to expand and reframe food related rights in the international human rights framework in a way that makes sense for them and the people they work with in the South.

PWESCR claims that a livelihoods perspective gives agency, especially to women, who are usually seen as a vulnerable group that are dependent on male breadwinners.[670] In most countries of the South women have invisible roles as workers in agriculture.[671] Yet rural women often play a vital role in providing for their families and communities, growing crops, gathering firewood or carrying water. However, lack of women's legal rights to land, lack of support for women after displacement (e.g. due to 'development' projects), and lack of credit

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[664] Emma Sydenham, "Women and the Right to Livelihoods: World Social Forum 2009", report published by Programme on Women's Economic, Social and Cultural Rights (PWESCR), at 26-27.

[665] Sydenham, "Women and the Right to Livelihoods", *supra* note 654, at 4.

[666] Programme on Women's Economic, Social and Cultural Rights, "Locating Women's Livelihoods in The Human Rights Framework", Discussion Paper No. 3, July 2011, at 1. Available at http://www.pwescr.org/PWESCR_Discussion%20Paper%20Final_30-7-2011.pdf, visited 18 December 2011.

[667] *Ibid*., at 2 and 11.

[668] Sydenham, "Women and the Right to Livelihoods", *supra* note 654, at 25.

[669] Programme on Women's Economic, Social and Cultural Rights, "Locating Women's Livelihoods", *supra* note 666, at 1.

[670] Notes from presentation by Priti Darooka, Executive Director of PWESCR, Turku, Finland, November 2010.

[671] 80 to 90% of food production in India is carried out by women. Mama cash, "Right to Food is a Women's Issue". Available at http://www.mamacash.org/page.php?id=2532, visited 18 December 2011.

all have negative impact on food security. Simultaneously, women are losing control over seeds, and livelihood-based farming is becoming more and more marginalised.[672]

The concept of livelihoods comes from the development discourse, and 'sustainable livelihood approaches' are popular among a diverse group of development agencies today, including Oxfam Malawi. These approaches were developed in the late 1990s and include focus on rights and power.[673] The campaign to develop a 'right to livelihoods' can thereby also be seen as a result of increasing interaction between development and human rights actors.

PWESCR notes that, at the grassroots level, one of the best ways to explain the right to food is by discussing livelihoods. Moreover, it points out that referring to the right to livelihood illustrates that the right to food is not, essentially, the right to be fed, which is a common misconception about the right to food. PWESCR and its partners situates the right to livelihood—to make a living and survive with dignity—at the core of the right to food, and they frame this right as the right to produce one's own food or earn sufficiently to purchase it.[674] PWESCR is based in India, and as we will see below, the right to food has nationally been defined in a very specific and narrow way as the right to be fed.

Giving meaning to food rights in India

In this chapter, I have so far reviewed how transnational expert institutions have given meaning to the right to food as a norm of international human rights law and how NGO actors strive for a new right – the right to livelihoods – as a complement to how existing rights have been defined. At the national level, different institutions play a role in defining food and livelihood related rights and the content usually reflects the specific historic, social, economic and political context of the country concerned. Although historically, *courts* have played a marginal role in the context of socioeconomic rights in most jurisdictions, their role has been strengthened over the space of the two past decades. In a significant number of jurisdictions, adjudicatory bodies have intervened to protect a range of social rights,[675] thereby contributing to giving meaning to these rights, including food rights. A careful analysis of the food-related cases, which tend to be litigated under social security, land and labour rights,[676] is outside the scope of this thesis, especially since Malawi does not belong to these jurisdictions.

I will, however, highlight India as one jurisdiction in which food litigation has lead to the right to food being defined in a particular way. Part IV of the Indian Constitution lists so called Directive Principles of State Policy (DPSP). Many of the provisions here correspond to those protected in ICESCR. Article 43 provides that the State shall secure work, a living wage, conditions of work that ensure a decent standard of living to all workers, agricultural or

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[672] Sydenham, "Women and the Right to Livelihoods", *supra* note 654, at 18.
[673] CARE, Oxfam and UNDP were among the first development organizations to develop sustainable livelihood approaches. See Diana Carney, *Sustainable Livelihood Approaches: Progress and Possibilities for Change*, (DFID, 2003) at 10. Available at http://www.eldis.org/vfile/upload/1/document/0812/SLA_Progress.pdf, visited 18 December 2011. See also Ian Scoones, "Sustainable Rural Livelihoods: A Framework for Analysis", IDS Working Paper No. 72, 1998. Available at http://www.ids.ac.uk/files/dmfile/Wp72.pdf, visited 10 May 2012.
[674] Programme on Women's Economic, Social and Cultural Rights, "Locating Women's Livelihoods", *supra* note 666, at 12.
[675] Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory", in M. Langford (ed.), *Social rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 3-45, at 3.
[676] Langford, "The Justiciability of Social Rights", supra note 675, at 4.

otherwise (compare to Article 11 and 15 of ICESCR).[677] In the 1970s and 1980s the Indian Supreme Court started to find creative interpretations of constitutional provisions in a way that transcended its earlier conservative phase and allowed room for a positive direction in its interventions in issues regarding the poor and disadvantaged.[678]

Although the issue of recurrent famines in some regions of India has received mixed reactions in courts, more recent engagements of the Indian Supreme Court, through Public Interest Litigation cases, forced the Court to confront the paradox of food scarcity while State silos overflowed with food grains. It was the People's Union for Civil Liberties that approached the Court in April 2001 demanding relief after several states in the country faced a second or third successive year of drought. Despite having 50 million tonnes of food stocks these states failed to make available minimum food requirements to the suffering population.[679] The Court ordered state governments to make sure that "food is provided to the aged, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them".[680] Later the same year the Court made a detailed order, converting eight nutrition-related schemes of free food distribution, subsidised grain for the poorest of the poor, midday meals, family benefit schemes etc into legal entitlement, making it obligatory for the government to implement them.[681] The Court even specified the minimum quantities of food and nutrition (counted in calories) that had to be made available according to age group.[682] This means that the Court has defined the right to be free from hunger in a very detailed and narrow way, as a right to be fed by benefit schemes, which is quite a long way away from the right to livelihoods as envisioned by PWESCR.

The directions issued recognise the State obligation to provide the minimum core of the right to food. However, decisions in the areas of the right to work and the right to shelter shows that the judiciary has, in parallel, deferred to a kind of executive policy that undermines these and other socioeconomic rights. Millions of people have been displaced as a result of the policy decision to continue with large dams and other projects that weaken the ability of already socially and economically disadvantaged people to find meaningful livelihood. Many of these policies are, according to Muralidhar, inconsistent with state obligations under constitutional and international law.[683] The Court's unwillingness to make orders contrary to these policies shows the limits of a legal approach to livelihood related policy issues.

It is in this context that civil society actors have come together under the Right to Food Campaign, formulating a set of common 'essential demands' relating to the forthcoming National Food Security Act. These 'essential demands' are claimed to set the Act in the context of the nutritional emergency in India and the need to address the structural roots of hunger. The campaign demands a comprehensive Food Entitlements Act (notice that the

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[677] S. Muralidhar, "India: The Expectations and Challenges of Judicial Enforcement of Social Rights", in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (Cambridge: Cambridge University Press, 2008) 102-123, at 103.

[678] *Ibid*., at 122.

[679] *Ibid*., at 116.

[680] Case of *People's Union for Civil Liberties v. Union of India* (2001), cited in Muralidhar, "India", *supra* note 677, at 116.

[681] Interim Orders of the Supreme Court, 28 November 2001, Available at http://www.righttofoodindia.org/orders/interimorders.html, visited 15 December 2011. See Basudeb Guha-Khasnobis and S. Vivek, "The Rights-Based Approach to Development: Lessons from the Right to Food Movement in India", in B. Guha-Khasnobis, S. S. Acharya & B. Davis (eds), *Food Insecurity, Vulnerability and Human Rights Failure* (Hampshire: Palgrave Macmillan, 2007) 308-327, at 310.

[682] Muralidhar, "India", *supra* note 677, at 117.

[683] *Ibid*., at 122.

concept 'entitlements' is used instead of 'food security', indicating the preference among civil society). The campaign continues along the lines of giving the right to food a specific definition, demanding "a universal Public Distribution System (providing at least 50 kgs of grain per family with 5.25 kgs of pulses and 2.8 kgs of edible oils); special food entitlements for destitute households (including an expanded Antyodaya programme); consolidation of all entitlements created by recent Supreme Court orders (e.g. cooked mid-day meals in primary schools; support for effective breastfeeding (including maternity entitlements and crèches); safeguards against the invasion of corporate interests in food policy; and elimination of all social discrimination in food–related matters."[684] In a similar manner as the Right to Food Project in Malawi, actors in India have drafted a Food Entitlements Act (draft 2009), but with a rather different content and meaning given to the right to food. The main difference is that while the Malawian draft focuses mainly on the negative state obligations, as will be shown in part III, the Indian draft includes far-reaching, specific positive obligations in the area of social security.

The Right to Food Campaign in India applies a legal approach, aiming at further legislation and legal recognition of food rights,[685] as a tool for social change. The campaigners call for protection of existing legal entitlements but also pushes to go beyond, calling for new entitlements and also fundamental changes in economic policy. The campaign has repeatedly called for a *comprehensive* food security bill that takes into consideration issues related to production, procurement and distribution together.[686] Such a comprehensive Right to Food Act "would require a fundamental realignment of the manner in which society and the state uses its resources today."[687] In a statement commenting on the National Advisory Council's proposed National Food Security Bill, a Right to Food Campaign accuses the Bill of being 'minimalist' and far from the comprehensive act they had pushed for: "The recommendations essentially deal only with a cereal-based targeted Public Distribution System and are a far cry from the comprehensive approach required to truly ensure food security for all."[688] The Right to Food Campaign in India is an example of struggles between different state and non-state actors over definitions of food rights. It shows how difficult it is to use rights-based arguments to push for structural change.

2.3.5 Concluding remarks

Food security programmes and food aid have been the development response to hunger while the human rights response has been establishing a legal entitlement that in theory can be claimed from duty-bearers. Despite this difference in emphasis, the two discourses are closely related to each other, both underlining physical and economic access to food. Food security has evolved from a focus on supply and availability of food on a national level, to access to food on a household and individual level. Physical and economic access to food is a key factor in how the right to adequate food has become to be defined.

In this chapter we have seen that the poor and the hungry, who are mostly women, live in rural areas and struggle for their daily livelihoods. We have seen that there are several

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[684] Right to Food Campaign, "Right to Food Act, Introduction". Available at http://www.righttofoodindia.org/right_to_food_act_intro.html, visited 15 December 2011.
[685] Compare to how 'legal approach' is used by Goodale, "Locating Rights", *supra* note 25, at 6.
[686] Right to Food Campaign's Response to NAC's decisions regarding the National Food Security Act, November 2010.
[687] Food Entitlements Act, Draft of 12th September 2009, at 4. Available at http://www.righttofoodindia.org/data/rtf_act_draft_charter_sept09.pdf, visited 15 December 2011.
[688] Right to Food Campaign's Response, *supra* note 686.

competing actors giving meaning to the right to food: UN-led expert institutions, national courts, NGOs and other civil society actors. The PWESCR's efforts to establish a right to livelihoods in the international human rights system and the Right to Food Campaign in India are examples of how civil society actors aim at giving meaning to food rights in a way that makes sense to them and the people they work with. They push for redefinition and expansion of current legal interpretations of the right to food, calling for what they feel are 'just entitlements'. For the PWESCR and its partners the right to livelihoods makes better sense in the lived reality of marginalised groups, especially women, whom they claim to represent.

We have seen certain tensions in what kind of meaning and content the right to food should have. The first tension is between the right to food as a broad, collective proposition that is to be implemented through political programmes and between an individual, justiciable entitlement to be claimed through courts or similar forums. The Committee on ESCR and the Special Rapportuer on the right to food have been in favour of the right to food being an individual, legal entitlement but at the same time not avoided broader, structural issues causing hunger and lack of livelihoods. The second tension is between the ambition to link the right to food to broader issues of livelihoods and a narrower welfare-ist approach to fulfil the right to be free from hunger through social protection measures, including food distribution. These tensions will appear again in the Malawi case-study in part III. We have, moreover, seen that the concrete content of a human rights-based approach to food security is not clear, despite the Right to Food Guidelines.

2.4 The role and meaning of 'human rights principles' in development practice

In this chapter I first highlight attempts to define human rights-based approaches to development and then I concentrate on exploring the meaning given to key principles in these approaches. The following concepts are analysed: express linkage to human rights, equality and non-discrimination, accountability, participation and empowerment. It is clear that an emphasis on principles such as participation, accountability, and empowerment is not unique to human rights-based approaches to development practice. Equality and a focus on vulnerable and marginalised groups suffering from discrimination has also been part of 'good development practice' for a long time. This chapter tries to resolve what exactly an emphasis on human rights adds to these principles. For each principle my ambition is to see how it has been interpreted and applied in the development discourse as an element of 'good development practice' and how it is understood in human rights discourse. Where it is possible, I also show what happens to the principle when the two discourses come together as a 'human rights-based approach to development cooperation'. Moreover, I try to identify what added or new value human rights thinking may bring to the principle in question.

2.4.1 Defining human rights-based approaches to development

From the start it is good to be aware of the distinction between rights-based approaches to public policy at the national level and human rights-based approaches to development cooperation. This section mainly deals with the latter, keeping in mind that there are "plural rights-based approaches, with different starting points and rather different implications for development practice."[689] Darrow and Tomas point out that among UN agencies alone there is significant differentiation between mandates, operational frameworks and circumstances. It may be possible to generalise certain principles, but with regard to programming frameworks it is understandable that one size does not fit all. Nonetheless, conceptual clarity is important

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[689] Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1415.

in order to highlight the distinct opportunities and challenges involved in human rights-based approaches.[690]

Sometimes the concept 'rights-based approach to development' is used instead of 'human rights-based approach to development'. Some development actors are consistent in their usage of the terms, making a difference between the two terms, while others are inconsistent in the usage of the terms. (And some others use 'rights-based approach' simply as shorthand for 'human rights-based approaches'.)[691] The difference is in emphasis: 'human rights-based' is seen as being linked more explicitly to the international human rights framework and is sometimes described as 'legalistic' (i.e., applying a definition of human rights as those standards agreed upon in international instruments). 'Rights-based approaches' are seen to be emphasising 'empowerment' of the poor and marginalised people and groups to claim their rights, and usually makes more inspirational use of human rights language,[692] (fitting better with the philosophy of an actor-oriented perspective). The Oxfam programme in Malawi, which is analysed in part III, applies a rights-based rather than a human rights-based approach. Plipat has made a distinction between three variants of rights-based approaches: popular, equity, and classical. The first one emphasises grassroots organising, the second global advocacy, and the third international human rights standards.[693] This again shows the large variations and differences in emphasis.

These approaches are not necessarily mutually exclusive,[694] but some commentators believe it to be problematic when there is a lot of emphasis that 'one-size of doing human rights-based approaches does not fit all', reflecting that there is no single, coherent way of doing this work, thereby assuming that by invoking *multiple* expressions of the approach, so called human rights-based approaches could cover most incorporations of human rights within the development sector.[695] It is feared that the notion of rights-based approaches can easily become a loose and ill-defined idea, which everyone can adopt and interpret to fit their own interests and agendas.[696]

In order to highlight the different approaches I devote a great deal of effort to reviewing the meanings attached to human rights-based approaches in this thesis. Moreover, human rights-based approaches do not account for all incorporations of human rights into the development sphere. Therefore it is good to be aware of these distinctions.

The Common Understanding is probably the most ambitious attempt to define a human rights-based approach to *development cooperation* and therefore it receives special attention in the following sections. The Common Understanding makes clear that:

1. All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide

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[690] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 483.
[691] Hannah Miller, "From 'Rights-Based to 'Rights-Framed- Approaches: A Social Constructionist View on Human Rights Practice", 14 *The International Journal of Human Rights* (2010) 915-931, at 917.
[692] Laure-Hélène Piron, "Learning from the UK Department for International Development's Rights-Based Approach to Development Assistance", Overseas Development Institute, July 2003, at 7. Available at http://www.odi.org.uk/resources/docs/2313.pdf, visited 10 May 2012.
[693] Plipat, "Developmentazing Human Rights", *supra* note 61, at 6.
[694] Piron, "Learning from the UK", *supra* 692, at 26.
[695] Miller, "From 'Rights-Based to 'Rights-Framed- Approaches", *supra* 691, at 918.
[696] Harris-Curtis et al., *The Implications for Northern NGOs, supra* note 240, at 40.

all development cooperation and programming in all sectors and in all phases of the programming process.

3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.

The first point means that the aim of all activities is to contribute directly to the realisation of one or several human rights. The second point means that human rights principles guide programming in all sectors, and in all phases of the programming process. The third point means that in a human rights-based approach to development cooperation "human rights determine the relationship between individuals and groups with valid claims (rights-holders) and State and non-state actors with correlative obligations (duty-bearers)".[697] The strong emphasis on international human rights instruments makes it into a classical/legal approach, which is natural for UN agencies bound by the UN Charter. However, UN agencies have been creative in applying the Common Understanding and not all agencies use a legal approach.

The Common Understanding is further elaborated on in the report Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, listing a number of essential attributes of the approach:

- "A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights."
- The main *objective* of development should be to fulfil human rights.
- In a human rights-based approach *rights-holders* and their entitlements are identified, and the corresponding *duty-bearers* and their obligations are also identified.
- *Principles and standards* derived from international human rights treaties guide all development programming in all sectors and in all phases of the programming process.[698] The principles most often evoked are non-discrimination, accountability and participation.

As we can see, these four points more or less repeat what is said in the Common Understanding, and I take this as a sign that there is general agreement on these basic attributes of the approach at the UN level. There seems to be agreement on the core elements defining human rights-based approaches to development cooperation: Human rights-based approaches work to strengthen the capacity of duty-bearers to respect, protect, and fulfil their human rights obligations. Simultaneously, the rights-holders' capacity to demand and claim that their human rights are respected, protected, and fulfilled is strengthened. The aim of human rights-based development is human rights realisation and the process of how this aim is reached is informed by human rights principles.

It is not only within the UN that human rights have entered into development programming. A wide range of development NGOs, such as Save the Children, Care International, Oxfam and

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[697] Common Understanding, *supra* note 50. The state carries legal obligations under international human rights law, but also non-state actors have responsibilities that are taken into account in situation analysis by agencies such as FAO and UNICEF. See Food and Agriculture Organization of the United Nations, *Methods to Monitor the Human Right to Adequate Food* (Rome: FAO, 2008) at 40. Duty-bearers include elected and appointed officials, civil servants, representatives of government and organisations (e.g. CSOs) retained by the government to deliver services. They can be acting on the community level or the national level. Rights-holders are individual citizens and non-citizens living within a state. The interests of rights-holders are sometimes represented by organisations such as NGOs, INGOs, unions and other civil society groups.

[698] OHCHR, "Frequently Asked Questions", *supra* note 81, at 15-16.

ActionAid, have been exploring rights-based approaches to their work. Pettit and Wheeler argue that the background to this trend is development practitioners began to recognise the limits of their approaches and experienced a need to address structural causes of inequality and exclusion and to confront these at all levels, i.e., legal, political, social, cultural, and economic levels. Legal reforms and enforcement along with public awareness and action became new methods of voicing demand and seeking accountability. There was general disillusionment with projects. At the same time human rights groups needed to engage with community-based organisations and membership associations instead of relying on professionals to advocate on behalf of the rights-holders. In order to do that the human rights professionals needed new skills such as community organising, participatory appraisals, etc. These factors all contributed to blurring the traditional lines between rights and development. And the need for change was mutual: development needed rights as much as rights needed development.[699]

Donor interest in human rights strategies for development has also been considerable, for instance in United Kingdom's Department for International Development (DFID), The Swedish International Development Agency (SIDA) and The Norwegian Agency for Development (NORAD),[700] and lately also Finland claims to apply a human rights-based approach to development, promoting the position and rights of people as rights-holders and the obligations of states as duty-bearers while emphasizing equality, non-discrimination and the right to self-determination.[701] With new aid modalities such as sector and budget support, donor governments see opportunities to influence recipient government's policies, but are at the same time concerned with lack of accountability on the part of the recipient government. In order to remedy the situation, there have been reforms of public institutions and support to civil society in holding the government and public sector accountable. Human rights have been arguments to back up this work, and have thereby also become part of outcome-driven and managerial approaches of top-down development.

The OECD DAC Network on Governance has published a synthesis report of *donor* approaches and experiences of integrating human rights into development. The authors have used a five-part typology for the integration of human rights into development: (1) Implicit human rights work; (2) human rights projects; (3) human rights dialogue (4) human rights mainstreaming; and (5) human rights-based approaches. The report found that most agencies were applying the three middle categories while a few were moving towards human rights-based approaches. In human rights-based approaches, "human rights [are] considered constitutive of the goal of development, leading to a new approach to aid and requiring institutional changes."[702]

The DAC report shows that still in 2005, when the report was published, the majority of development interventions in the area of human rights were separate from socioeconomic issues, such as water or health. The majority of direct interventions were civil and political rights projects. At policy level there was emphasis on the positive place of human rights, but human rights conditionality remained a feature of development programmes,[703] indicating that

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[699] Jethro Pettit and Joanna Wheeler, "Developing Rights? Relating Discourse to Context and Practice", 36 *IDS Bulletin* (2005) 1-8, at 2.

[700] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 480.

[701] "Suomen kehityspoliittinen toimepideohjelma", 16.2.2012. Available at http://www.formin.fi/public/default. aspx?nodeid=15319, visited 15 May 2012.

[702] Laure-Hélène Piron with Tammie O´Neil, "Integrating Human Rights into Development: A synthesis of donor approaches and experiences", prepared for the OECD DAC Network on Governance, September 2005, at iii-iv. Available at http://www.odi.org.uk/resources/docs/4404.pdf, visited 15 May 2012.

[703] *Ibid*., at iii-iv.

main attention is to create the conditions or infrastructure to promote and provide human rights, such as better laws, courts, stronger NGOs, democratic institutions, more transparent state apparatuses while at the same time linking aid to human rights criteria.[704] What these approaches have in common is that human rights enter into development programming as an element of outside quality control.

Celestine Nyamu-Musembi and Andrea Cornwall make an overview of what multilateral agencies, bilateral agencies and international development NGOs say about rights-based approaches to development. The authors conclude that there are certain common elements and principles, but with different emphasis. Most organisations see that the approach potentially can transform development practice from a focus on identifying and meeting needs to enabling people to claim their human rights. This entails (1) work with duty-bearers to strengthen their capacity in respecting, protecting and fulfilling human rights, (2) work with citizens and marginalised groups to claim their rights. The role the approach plays in the concrete work of the different organisations is, however, distinctively different. Some agencies tend to see human rights-based approaches as a broad set of *principles* defining an overarching approach to development that can serve as a new way of repackaging interventions. Participatory approaches as well as efforts to address issues of accountability alongside efforts to enable people to empower themselves are examples of principles that often are referred to in this context,[705] as is shown in the following sections.

2.4.2 Five principles as key elements of human rights approaches to development cooperation

As we have seen in the previous sections human rights-based approaches often come along with an emphasis on so called human rights principles. These principles are seen as giving guidance on the processes that should underpin legislation, policy, and implementation at all levels and between all actors.[706]

Before the adoption of the Common Understanding and the further explanations given to the approach in the report Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, five key principles were often used as a way to define human rights-based approaches to development cooperation. Sometimes you also see the same principles referred to as the acronym PANEL: participation, accountability, non-discrimination and attention to vulnerable groups, empowerment and linkage to rights.[707] The principles can be seen as the operational expression of the idea that human rights and development are interlinked, and they have implications for programming.

In the following I review these five interrelated key principles in another order: Express linkage to human rights norms and standards, equality and non-discrimination, accountability, participation, and empowerment.[708] In the beginning of my research I used these five

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[704] See Uvin, *Human Rights and Development, supra* note 52, at 168.

[705] Nyamu-Musembi and Cornwall, *What is the 'Rights-Based Approach' all about?, supra* note 225, at 45-46.

[706] Clare Ferguson, "Linking Human Rights and Aid Effectiveness for Better Development Results: Practical Experience from the Health Sector", Report for the Human Rights Task Team of the OECD-DAC Network on Governance, 2008, at 16. Available at http://www.oecd.org/dataoecd/41/53/43529192.pdf, visited 14 May 2012.

[707] Human Rights Education Associates (HREA), "Guide for Applying Indicators within UN Human Rights-Based Programming", prepared for UNDP, November 2007, at 6. Available at http://www.hrbatoolkit.org/wp-content/uploads/2011/02/HRBA_Indicators_Toolkit_HREA.pdf, visited 10 May 2012.

[708] Mary Robinson focused on these five principles in her lecture "Bridging the Gap between Human Rights and Development: From Normative Principles to Operational Relevance", World Bank Presidential Lecture, Washington, 3 December 2001. See also OHCHR, "Human Rights and Poverty Reduction", *supra* note 243; Jakob Kirkeman Hansen and Hans-Otto Sano, "The Implications and Value Added of a Rights-Based

principles as a starting point for describing what human rights-based approaches are all about and it influenced the questions raised in the empirical research. When I started to analyse my empirical data from Malawi, I was struck by how differently the actors involved in the three food security related projects interpreted and applied the principles of equality and non-discrimination, accountability, participation and empowerment. I therefore feel that it is essential to take a closer look at them and try to pinpoint which dimensions are related to human rights principle and which are those that rather belong to 'good development practice'.

As the principles are very interrelated, I have not seen anyone who has made a deliberate and conscious effort to put the principles in a hierarchical order. The order chosen in this review is conscious, yet not suggesting a strict hierarchy of importance. The reason 'express linkage to human rights norms and standards' is dealt with first is that this principle is the starting point for any action or strategy that wants to move into the direction of using human rights norms as a map for development policies and practices. It also has implications for situation or problem analysis and therefore naturally comes first. Non-discrimination and equality is the one principle that has the strongest legal justification in human rights law and is perhaps the clearest and least contested of the principles, and therefore it is dealt with second. As many agree that accountability under the human rights framework adds value because it gives a clear link to *obligations* of duty-bearers to respect, protect and fulfil human rights of rights-holders, this principle is taken up as number three. Participation has strong roots in the development discourse and it is not always so clear what element human rights add, especially since the human rights community is known to be run by an elite group of specialised experts in many societies. Empowerment is the principle that has the weakest link to the legal human rights framework, and is therefore dealt with last.

Empowerment, which often is seen as a core element of human rights-based approaches to development, is not mentioned per se in the list of principles in the Common Understanding. Instead, empowerment is mentioned as part of "other elements of good programming practices that are also essential under a human rights-based approach". Point three out of 13 states that "strategies are empowering, not disempowering."[709] Perhaps this indicates that empowerment is not seen as a *legal human rights principle* but rather as 'good development practice'. This is quite natural when one understands the historic background of the concept and how it emerged in the 'grassroots development discourse' in the 1980s[710] – long before it became popular within human rights discourse. (After all, there is no 'right to empowerment'.)

The Common Understanding gives a short explanation of the principles it raises (that are not the same as the five I will review). The way human rights principles are explained in the Common Understanding is *strongly linked with the international human rights regime*. It is, for example, explained under 'accountability and rule of law' that states and other duty-bearers are answerable for the observance of human rights. They have to comply with legal norms and standards, and when they fail to do so, rights-holders can institute proceedings for redress before a competent court or other adjudicator.[711] This shows that the Common

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Approach", in Bård A. Andreassen & Stephen P. Marks (eds) *Development as a Human Right: Legal, Political, and Economic Dimensions* (Cambridge: Harvard University Press, 2006), 36-56, at 40-41; Amnesty International et al, "Human Rights-Based Approaches and European Union Development Aid Policies", 2008. Available at http://www.ihrnetwork.org/uploads/files/10.pdf, visited 14 May 2012; Equal in Rights, "What is the Human Rights-Based Approach to Development?". Available at http://www.equalinrights.org/human-rights-based-development-hrbd/, visited 14 May 2012. The order in which these references list the principles is not consistent.
[709] Common Understanding, *supra* note 50.
[710] Black, *Development in Theory and Practice, supra* note 542, at 48.
[711] Common Understanding, *supra* note 50.

Understanding focuses on the judicial aspect of accountability, which is only one aspect of the broad concept accountability, as we will see in the next sections. The problem that the human rights-based approaches are associated with loosely defined procedural principles, for example raised by Russell,[712] arises when different UN agencies produce their own interpretations of the Common Understanding. Among UN agencies there is a very varied practice concerning human rights-based programming, despite the Common Understanding.

The limits between what is 'good development practice' and what is human rights-based practice is often blurred, to say the least, and, moreover, we should keep in mind that human rights-based approaches seek to strengthen existing good development practice, rather than replacing them. Darrow and Tomas make a distinction between 'good development principles', using instrumental or utilitarian motivations, and *normatively-based approaches* driven by the conviction that human rights are ends in themselves and therefore they must be given explicit consideration in development work.[713] I will refer to this distinction and test whether it holds true under closer scrutiny.

2.4.3 Express linkage to human rights norms and standards: Using human rights law as a framework for analysis

The whole rationale behind the Common Understanding can be seen in light of this principle: Development cooperation should contribute to the realisation of human rights; human rights standards and principles guide all phases of programming; human rights determine the relationship between rights-holders and duty-bearers, i.e., there is express linkage to the normative human rights system. The questions that need to be answered include: who are the duty-bearers at different levels and what are their responsibilities in regard to a specific problem? Are these duty-bearers also rights-bearers, i.e., do they rely on others performing their duties in order to be able to deliver their own?[714]

According to Jonsson, programming is first and foremost assisted by recognising that human rights standards determine the development *outcomes* while human rights principles define the conditions for an acceptable development *process*.[715] This means that 'the end does not justify the means',[716] i.e., there must be respect for the do no harm principle. In the Common Understanding it is made clear that human rights-based programmes should monitor and evaluate both outcomes and processes guided by human rights standards and principles. It is also important that assessment and analysis is directed towards identifying a pattern of rights and obligations. These elements are said to be necessary, specific, and unique to a human rights-based approach.[717]

From a practical level, it can, however, be argued that human rights standards are not precise enough to concretely inform this aspect of development programming.[718] (The Common Understanding, however, does not only refer to standards and principles but also

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[712] Anna F. S. Russell, "International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?" 9 *Journal of Human Rights* (2010) 1-23.
[713] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 486.
[714] HREA, "Guide for Applying Indicators", *supra* note 707, at 19.
[715] Urban Jonsson, "A Human Rights-Based Approach to Programming", in P. Gready & J. Ensor (eds), *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (London: Zed Books, 2005) 47-62, at 52.
[716] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 496.
[717] Common Understanding, *supra* note 50.
[718] Jonsson, "A Human Rights-Based Approach to Programming", *supra* note 715, at 52.

recommendations by treaty bodies: "Programming is informed by the recommendations of international human rights bodies and mechanisms", and they can be very concrete.)

Before deciding what measures are needed in order to reach a certain development outcome there needs to be careful *assessment, analysis and planning*. There is still no clear answer among UN agencies how to integrate a human rights perspective when conducting assessment and analysis at a country level. Some preliminary attempts have been made and I will review some of them here. According to the "Guide for Applying Indicators within UN Human Rights-Based Programming" step one is to understand the human rights situation at the country level. This is carried out through a review of international human rights norms and standards, aiming at identifying areas of progress towards realization of human rights, as well as areas where rights may be violated. As part of step one, a preliminary assessment of exclusion and vulnerability is carried out. Here human rights-based indicators, which are disaggregated in order to identify excluded and vulnerable groups, as well as those facing discrimination, play a key role. Indicators for understanding the human rights situation in a specific country include country ratification of international human rights treaties; status of state reports submitted to UN bodies; other reports and experts' judgments data; surveys on human rights awareness; analysis of percentage of budget spent on human rights activities.[719] As we can see this kind of analysis is on a very general level and relies on secondary data from expert sources. A risk is that practitioners get 'stuck' analyzing legal and policy contexts without connecting this information and analysis to input from communities – or even the policy work carried out by the national government itself.[720] This is an example of the shortcomings of top-down approaches.

A human rights-based situation analysis may reveal "capacity gaps in *legislation*, *institutions*, *policies* and *voice*",[721] ('voice' equals the level of opportunity among actors to participate and articulate their opinions). To address the capacity gaps, national laws may need to be brought into compliance with treaty obligations. Institutions may need to be strengthened, inter alia, through improving governance and providing people with effective remedies when their rights are violated. In addition, discrimination may be combated through policy reforms.[722] These are some of the substantive implications of a human rights-based approach that have implications for both the process and the outcome.

The Office of the High Commissioner for Human Rights has set out a human rights approach for the Millennium Development Goals in a publication from 2008. The most concrete suggestions it makes is that *human rights are prioritised by making policy choices and resource-allocation decisions within a human rights framework*,[723] i.e., the human rights framework is used in situation analysis to assist in policy choices. This is based on the argument that international human rights law provides a framework for assessing the reasonableness of policy choices and also that international human rights law pre-dates the MDGs, which means recipient states as well as donor states have existing legal obligations under human rights treaties. The questions that need to be asked include: Is the policy (related to the realisation of a MDG target, in this case) resulting in human rights violations? Is the policy adequately directed towards realizing human rights and ensuring equality, including gender equality? Are there adequate resources available for implementation? Is there risk of

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[719] HREA, "Guide for Applying Indicators", *supra* note 707, at 16-17.
[720] *Ibid*., at 18.
[721] OHCHR, "Frequently Asked Questions", *supra* note 81, at 27.
[722] *Ibid*., at 27.
[723] *Ibid*., at 7.

decline in the realisation of rights, contravening the principle of non-retrogression?[724] Policies and programmes intended to realise MDGs have the potential to violate human rights, and therefore human rights impact assessment is important in order to respect the 'do no harm' principle.[725]

UNICEF is perhaps the agency that has made the greatest effort to supply human rights-based tools for all phases of the programming cycle, but in these tools there is no express linkage to human rights law as such. The FAO uses a similar approach when conducting a right to food assessment, but with slightly stronger connections to human rights law. The FAO claims that only when the factors that hinder individuals to realise their right to food are known can a targeted right to food strategy be implemented. So called causality analysis will reveal to what extent, and why, the right to food is either being violated or at risk of being violated, as well as the major causes of these violations and the key actors involved. The aim is that the legal, policy and institutional framework must respond to the *causes* of malnutrition.[726] Role analysis not only identifies duty-bearers in relation to the realisation of a certain human right, but also their specific corresponding obligations and responsibilities. When there is a list of obligations and responsibilities for different groups of duty-bearers, it is necessary to investigate whether or not the obligations are being met.[727]

The FAO points out that in a human rights approach the primary concern is with 'what ought to be'. Only analysing 'what is' and 'why' is by itself not sufficient. It is important to focus on the aim, rather than the problem and subsequently the conditions that need to be present at different levels to achieve good nutrition. Basic conditions should be equitable access to resources, transparent leadership, participatory policy formulation, and discrimination-free control of resources.[728]

There is limited information available about the role of human rights law in programming in general and in situation analysis in particular. There are many technicalities surrounding situation analysis and the purpose here is not to give a full overview of all details. The main point I want to make is that the questions asked in human rights-based situation analysis are different since there is, or should be, express linkage to human rights norms and standards. The focus should be on the *accountability* aspect of human rights/development failures: Who has a duty? Who has a right? Why is this duty not executed? Why is the right not claimed/realised? What conditions need to be present in order for the duty-bearer to execute his obligations and responsibilities and the rights-holder to claim and enjoy his rights? When these questions are raised in situation analysis they do add a new perspective to 'good development programming'.

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[724] Norms already adopted should not be removed at a later date, i.e., states should not go backwards in the standards of protection of human rights ensured to individuals.

[725] Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach* (United Nations: New York and Geneva, 2008) at 12-13. Interestingly, none of the national MDG reports reviewed for a study by the Highlevel taskforce on the Right to Development made any reference to individual countries' commitments under international human rights treaties or conventions, despite the fact that the national reports considered were of countries that were all signatories and parties to the several international covenants. This indicates that there is no human rights approach to the MDGs outside of the OHCHR report. See High-level task force on implementation of the right to development, "The Right to Development and practical strategies for the implementation of the Millennium Development Goals, particularly Goal 8", adopted 2 November 2005, UN doc. E/CN.4/2005/WG.18/TF/CRP.1, para. 20.

[726] Food and Agriculture Organization of the United Nations, *Guide to Conducting a Right to Food Assessment* (Rome: FAO, 2009) at 20-21.

[727] FAO, *Methods to Monitor, supra* note 697, at 40-41.

[728] *Ibid.*, at 61.

2.4.4 Equality and non-discrimination

The equality and non-discrimination discourse

Before examining human rights discourse related to equality and non-discrimination, it is interesting to raise another related term, 'equity', mainly used in development discourse.

In the *World Development Report 2006: Equity and Development* the World Bank highlights inequality of opportunity as a "waste of human potential" and "missed development opportunities". The report observes that all over the world there is a persistent pattern of individuals and groups facing highly unequal opportunities to better their situation economically and socially. There are *systematic* differences in opportunities for individuals and groups who differ in skin colour, caste, gender, or place of residence. Such inequalities are often reproduced over time and affect welfare, human development, and also economic growth.[729] In human rights discourse, this would be called indirect discrimination if it could be shown that a provision, criterion or practice puts "persons having a status or a characteristic associated with one or more prohibited grounds" for discrimination "at a particular disadvantage compared with other persons".[730]

The World Development report does not offer a definition of 'equity', nor does it explain how it relates to equality and direct or indirect discrimination, but it does make clear that equity relates to two basic principles: Equal opportunity and avoidance of absolute deprivation. The second principle reflects the idea that the road from opportunity to outcome may be anything but easy, even if the equal opportunity principle is upheld. Therefore, society may decide to intervene to protect its 'neediest members'.[731] These two principles are part of human rights thinking as well. Equity and equality may be part of different discourses but they have considerable substantive overlap.[732]

The rights to equality and non-discrimination have a strong foundation in international human rights law,[733] and have been reaffirmed in declarations and codes of conduct developed by humanitarian agencies.[734] In 2008, a group of human rights and equality experts adopted 27 principles of equality[735] to give guidance on complex and controversial issues. This declaration is not legally binding in any way, but reflects international trends in the area of equality law and human rights law[736] and is therefore referred to here when trying to pinpoint what is characteristic of equality thinking in human rights discourse.

The right to equality is defined as "the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law." The Declaration on

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[729] The World Bank, *World Development Report 2006: Equity and Development* (Washington: The World Bank, 2006) at 27.

[730] Declaration of Principles on Equality, Principle 5, 2008. Available at http://www.equalrightstrust.org/endorse/index.htm, last visited 5 January 2012.

[731] The World Bank, *World Development Report 2006*, *supra* note 729, at 18-19.

[732] Presentation by Dr Dimitrina Petrova, "International Trends in the Area of Equality", Helsinki, 6 October 2011.

[733] For instance in the International Covenant on Economic, Social and Cultural Rights of 1966, arts. 2(2) and 3, and the International Covenant on Civil and Political Rights of 1966, arts. 2(1), 3, 4(1) and 26.

[734] See e.g. The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, 1995. Available at http://www.ifrc.org/Docs/idrl/I259EN.pdf, visited 14 May 2012.

[735] Declaration of Principles on Equality, 2008, *supra* note 730.

[736] Petrova, "International Trends in the Area of Equality", *supra* note 732.

Principles of Equality goes on to affirm that "Equal treatment, as an aspect of equality, is not equivalent to identical treatment." It is necessary to "treat people differently according to their different circumstances", and moreover, "to be effective, the right to equality requires positive action."[737] There is rich case law both on international and national levels to support the claim that positive action is required to fulfil the right to equality, but that is beyond the scope of this chapter. What can be noted is that already in 1989 the Human Rights Committee pointed out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate *discrimination* prohibited by the Covenant on Civil and Political Rights.[738]

Moreover, the Committee on ESCR has made clear that "in addition to refraining from discriminatory actions, States parties should take concrete, deliberate, and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated,"[739] i.e., the Committee calls for *positive action* on behalf of the duty-bearers. Legislation is one measure to address discrimination but governments also need to ensure that policies, plans, and strategies are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of the Covenant rights.[740] The heightened attention given to positive action reflects the thinking that equality of opportunity is not enough; in order to have equal capabilities or possibilities to participate in economic, social, political, cultural or civil life, certain outcomes such as education, health etc. of disadvantaged groups also need to improve.[741]

For development policy and practice, discrimination in the area of economic, social, and cultural rights is a huge challenge. The Committee on ESCR reiterates that Article 2(2) of the ICESCR requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant. Discrimination constitutes any "distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights."[742] The list of prohibited grounds of discrimination has been expanded over time and the one given in the Declaration of Principles on Equality includes, *inter alia*, pregnancy and economic status.[743] The Declaration also clarifies the notions of direct and indirect discrimination, both of which have been part of the equality discourse for a long time. It is direct discrimination when a person or group of persons is treated less favourably than a person or group of persons would be treated in a comparable situation, and this is related to one or more prohibited grounds.[744] Most non-discrimination law regimes also include a prohibition of indirect discrimination, a concept which is defined differently in different jurisdictions but usually says that discrimination on any of the discrimination grounds may take place when a practice or rule has a detrimental effect on persons meant to be protected

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[737] Declaration of Principles on Equality, 2008, *supra* note 730, principle 2 and 3.
[738] Human Rights Committee, General Comment No. 18 (1989), para. 10. Adopted at the thirty-seventh session. Emphasis added.
[739] General Comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, Committee on Economic, Social and Cultural Rights, Report of the Forty-second session, UN doc. E/C.12/GC/2, 10 June 2009, para. 36.
[740] *Ibid*., para. 38.
[741] Petrova, "International Trends in the Area of Equality", *supra* note 732.
[742] General Comment No. 20 (2009), *supra* note 739, para. 7.
[743] Declaration of Principles on Equality, 2008, *supra* note 730, principle 5.
[744] *Ibid*.

against discrimination.[745] Schiek finds that the arguments raised in indirect discrimination claims potentially expose structural disadvantage, which may lead to policy changes, but judicial procedures cannot necessarily repair disadvantage.[746] This is an area outside the scope of this chapter. What is interesting from a development perspective is whether human rights law on equality and non-discrimination can be used to improve efforts to alleviate poverty.

The Declaration of Principles on Equality calls for measures against poverty in Principle 14: "As poverty may be both a cause and a consequence of discrimination, measures to alleviate poverty should be coordinated with measures to combat discrimination, in the pursuit of full and effective equality." This is a controversial issue, and poverty as a ground for discrimination has not yet been accepted in any statement within the human rights framework. The Principles and Guidelines for a Human Rights Approach to Poverty Reduction instead highlights that poor people are often victims of discrimination on grounds such as birth, property, national and social origin, race, colour, gender, and religion.[747]

It is clear that obligations in relation to the rights to equality and non-discrimination have implications for how development policies are implemented. For instance, as the poor are the most disadvantaged and marginalised groups in every society, it is crucial that a poverty reduction strategy starts by addressing their special needs as well as their right not to be discriminated against.[748]

When using equality and non-discrimination as an important 'lens' for development efforts, it is essential to be aware how laws, policies, or administrative practices may create or combat structural discrimination. In human rights-based approaches it is highlighted that a great deal of poverty originates from political, social, cultural, or institutional discriminatory practices, ranging from the international to the local levels.[749] In order to measure the impact of different policies, it is important that *disaggregated data* by prohibited grounds of discrimination such as sex, disability, ethnicity, religion, language, geographic location and so forth, is collected and analysed.[750] However, this much called for data often does not exist, thereby not capturing the situation of the poorest and most marginalised people, including indigenous and minority groups, in official statistics and household and demographic surveys. The Office of the High Commissioner for Human Rights points out in a report that "available

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[745] Dagmar Schiek, "Indirect Discrimination", in D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart Publishing, 2007) 323-475, at 323.
[746] *Ibid*., at 475.
[747] OHCHR, "Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies", *supra* note 243, at 9.
[748] *Ibid*., at 10.
[749] Hansen and Sano, "The Implications and Value Added of a Rights-Based Approach", *supra* note 708, at 50.
[750] OHCHR, "Frequently Asked Questions", *supra* note 81, at 24. The importance of disaggregating data cannot be overemphasized, according to the High-level task force on implementation of the right to development, see the report "The Right to Development and practical strategies for the implementation of the Millennium Development Goals, particularly Goal 8", adopted 2 November 2005, UN doc. E/CN.4/2005/WG.18/TF/CRP.1, para. 22. On the issue of indicators, see Claire Naval, Sylvie Walter & Raul Suarez Miguel (eds), "Measuring Human Rights and Democratic Governance", 9 *OECD Journal on Development* (2008), at 165. Available at http://www.paris21.org/sites/default/files/Metagora-final_EN.pdf, visited 20 September; Siobhán McInerney-Lankford and Hans-Otto Sano, *Human Rights Indicators in Development: An Introduction* (Washington, D.C.: The World Bank, 2010).

data mostly remain at too aggregated a level and indicators frequently measure only "average" progress and hence hide patterns of discrimination, inequality and disparities in outcomes."[751]

Although there are many legal details around equality and non-discrimination, both in international human rights law and national equality legislation, this particular human rights principle is quite straightforward, at least in theory. What kind of operational implications it has for development efforts can of course be debated, but there seems to be some consensus that the principle implies that priority should be directed towards those suffering discrimination and disadvantage in any given context, especially the poorest of the poor and groups suffering multiple discrimination, such as rural women of an ethnic minority.[752] The Nepal-Finland cooperation project called Rural Village Water Resources Management can be mentioned as an example. Non-discrimination is here seen as requiring a focus on the most marginalised and vulnerable *to exclusion and discrimination, inter alia*, women, children, inhabitants of (remote) rural and deprived urban areas, and indigenous groups. In order to address the discrimination that these groups face in the area of water management, "positive targeted measures may have to be adopted".[753]

Women as a group often suffer discrimination and are a popular 'target group' in development efforts. Some argue that a rights approach helps avoid the pitfalls that are attached to an abstract and often depoliticised notions of 'gender', which have made 'women' as a category visible but not helped in making equality real. Human rights approaches keep the end output – guaranteed rights for all – in constant focus.[754] It is here that human rights discourse may add value: in redirecting focus on non-discrimination as the basis on which to demand equality and justice for women as *rights-holders*.

Surprisingly, a review of an overview of five of the most commonly applied gender analysis frameworks and tools reveals that discrimination is not a common focus of gender analysis. Issues such as how the planned activity impacts on men's and women's control and access over resources, time, and other socio-cultural factors, including changes in social roles and status, are analysed. It is only in the Women's Empowerment Framework by Sara Hlupekile Longwe where equal access to the factors of production by removing discriminatory provisions in the laws is highlighted.[755]

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[751] Office of the High Commissioner of Human Rights, "Human Rights and the Millennium Development Goals: A review of Country Strategies and Reporting", New York: 2010, at 28. Available at http://www.ohchr.org/ Documents/ Publications/HRAndMDGsInPractice.pdf, visited 18 January 2012.

[752] OHCHR, "Frequently Asked Questions", *supra* note 81, at 24. See also Twomey, "Human Rights-Based Approaches to Development", *supra* note 41, at 54; Hansen and Sano, "The Implications and Value Added of a Rights-Based Approach", *supra* note 708, at 50. Note that the Common Understanding is not linking non-discrimination to focus on the most vulnerable.

[753] "Questionnaire by Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation", Contribution from the Rural Village Water Resources Management Project, Nepal – Finland, Geneva, 2010, at 7. Available at http://www2.ohchr.org/english/issues/water/iexpert/docs/ questionnaires2010/Nepal_Finland_Cooperation_Rural_village_water_resources_management.pdf, visited 14 May 2012.

[754] Joanna Kerr, "From 'Opposing' to 'Proposing': Finding Proactive Global Strategies for Feminist Futures", in Joanna Kerr et al (eds), *The Future of Women's Rights* (London: Zed Books, 2004) 14-37, at 25.

[755] Gender Analysis Framework, available at http://www.devtechsys.com/gender_integration_workshop/ resources/review_of_gender_analysis_frameworks.pdf, visited 20 October 2011.

Non-discrimination in 'good development' and human rights approaches: Vulnerable to what?

In development and humanitarian operations, the principle of non-discrimination is linked to the impartiality requirement whereby humanitarian operations cannot be biased in favour of a particular religious, political, social or other group.[756] Therefore, this principle is visible in identification and selection of 'beneficiaries', in aid targeting. Often equality and non-discrimination are equated with providing services for 'vulnerable groups' such as women and children.[757] In order to establish the needs among the target population, a needs-assessment is usually carried out. This exercise is usually carried out by experts. As an example of the instructions these experts follow the WFP's guidelines on Comprehensive Food Security & Vulnerability Analysis can be mentioned. This tool is "designed to understand and describe the profiles of food-insecure and vulnerable households". In this context, vulnerability is not linked to the possible discrimination experienced by the individual or group, but is instead linked to other criteria, such as income. "Looking at household expenditure and income, the analyst is able to determine which are the most vulnerable households and what risks (drought, flood, pest, insecurity) will affect them the most."[758] Naturally, other assets than income are also taken into account, and this information is collected separately for men and women.[759]

The FAO uses a vulnerability analysis that aims at identifying people at risk of becoming food insecure or malnourished. Vulnerability is here about exposure to one or more risk factors and the capacity to withstand the effects of a specific risk or risks. Vulnerable or highly vulnerable are those people or households that have little or no capacity to safeguard their access to food, even when confronted with a minimal risk factor.[760] *In the vulnerability assessment, discrimination experienced by people is not a factor that is analysed.* Nevertheless, the FAO claims that targeting of groups that are vulnerable to food insecurity is essential in rights-focused approaches: "these approaches involve establishing transparent and non-discriminatory eligibility criteria." The purpose of the vulnerability analysis is to ensure that "all those in need are included in actions to reduce food insecurity and vulnerability".[761] In this case, vulnerability assessment is about identifying needs and making sure there is *no discrimination in the targeting process – but less about using discrimination and marginalization as a lens for analysis.* Focus is not on those who are most marginalised or vulnerable to *discrimination and exclusion*, but on those who are vulnerable to food insecurity or malnourishment. These examples show how differently 'vulnerability' can be defined in development work.

The point here is that when the human rights principle of non-discrimination and equality is used as a lens for analysis this can potentially add something to the kind of analysis and assessment usually carried out in good development practice. The focus should be more on finding out who is *marginalised and vulnerable to exclusion and discrimination* than who is vulnerable to food shortages, worsened by circumstances such as droughts. The answer might be that the same individuals and groups are experiencing both discrimination *and* food

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[756] Lorenzo Cotula and Margaret Vidar, *The Right to Adequate Food in Emergencies* (Rome: FAO Legislative Study 77, 2003) at 49.
[757] See Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 17.
[758] World Food Programme, "Comprehensive Food Security & Vulnerability Analysis Guidelines", January 2009, at 31. Available at http://www.wfp.org/content/comprehensive-food-security-and-vulnerability-analysis-cfsva-guidelines-first-edition, visited 14 May 2012.
[759] *Ibid*., at 34.
[760] FAO, *Methods to Monitor, supra* note 697, at 63.
[761] *Ibid*., at 63.

insecurity, but the question is different. Therefore, when the question as to why is there discrimination and what can be done to address it is added to the analysis *and* the affected people are actively involved in the inquiry, this can potentially be the first step to change the situation (agency) in addition to mitigating hunger through providing for needs for a period of time.

Concluding remarks on non-discrimination

The usual way of working with the principle of non-discrimination in human rights approaches to development is to focus on the most vulnerable individuals and groups. However, a short analysis of how vulnerability is defined in work that identifies itself as human rights-based, reveals that vulnerability assessment is very much like that in 'good development practice', i.e., about identifying needs and making sure there is no discrimination in the targeting process. The possible added value that a 'human rights lens' can bring is to focus on identifying the individuals and groups who are vulnerable to discrimination and exclusion. Disaggregated data is therefore of high importance – but seldom exists in reality. For example, human rights discourse may in some cases add value through redirecting focus on non-discrimination as the basis on which to demand equality and justice for women as *rights-holders*. Focusing on women as rights-holders naturally also leads to an analysis of the lack of equality.

2.4.5 Accountability

Introduction and background to the accountability discourse

McInerney-Lankford points out that it is problematic that there are two parallel accountability frameworks, that of development cooperation, such as the Paris Declaration on Aid Effectiveness (2005), and that of the legal human rights framework. The same countries that are held *mutually accountable* as donors and partners by the Paris Declaration, are also accountable for human rights that are "directly relevant to, and potentially impacted by, [aid] harmonization efforts."[762] Another challenge is that the accountability propounded through development frameworks is not of equal value as the legal accountability under human rights law. Accountability through development frameworks is built on principles, political commitments, and policy frameworks rather than binding legal obligations under public international law.[763] It is the value of these binding legal obligations that makes the human rights framework so attractive from an accountability perspective. Lack of accountability for human rights obligations as well as for development policy and practice is a challenge in most countries of the world, and more accountability mechanisms and processes are seen as the solution.

Struggles by the poor to hold the powerful to account is a key issue behind many conflicts.[764] "In most countries around the world, citizens know little about how much money their government has at its disposal, where that money comes from, and how it is managed and accounted for." What further diminishes the sense of accountability to citizens in Sub-Saharan

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[762] McInerney-Lankford, "Human Rights and Development", *supra* note 68, at 74-75. Quote from page 75.
[763] *Ibid*., at 74-75.
[764] Peter Newell and Joanna Wheeler, "Rights, Resources and the Politics of Accountability: An Introduction", in Newell & Wheeler (eds), *Rights, Resources and the Politics of Accountability* (England: Institute of Development Studies, 2006) 1-36, at 1.

Africa for public revenues is that a relatively large proportion of government revenues come from international aid and the export of primary resources (rather than tax revenues).[765]

In order to address these kinds of accountability gaps, specific reforms are called for whereby officials must explain, i.e., 'account' for their actions (actions should be 'transparent'); so that officials 'take responsibility' for their actions; so that voters hold elected officials to account through elections; and so on.[766] We can say that accountability generally refers to holding actors responsible for their actions.[767] As we will see below, there are many ways to do this.

The concept 'accountability' has assumed a central place in contemporary development discourse, partly due to increasing attention to the idea of 'good governance'.[768] The logic to support an institutional environment for 'good governance' is that certain conditions underpin the ability of governments to *be* accountable (supply-side conditions) and the ability of citizens and civil society to *hold* governments accountable (demand-side conditions).[769] Therefore, traditionally both human rights and development discourse have called for accessible, transparent and effective accountability *mechanisms* at all levels.[770] With regard to operational aspects of support to good governance in aid, donors tend to emphasise good governance as primarily linked to institutional development and to reform of administrative procedures. This means that the executive branch of government should be accountable for its actions, the bureaucracy should be of high quality, the legal framework should be appropriate to the circumstances, policy-making should be open and transparent so that citizens can have input in the decision-making process, and civil society should be strong so that it can participate in public affairs.[771]

Newell and Wheeler are of the opinion that the association between accountability and good governance, in the technical way described above, has meant that "the politics of accountability has been reduced to questions of state reform." In their book, they show that accountability cannot be achieved through institutional reform alone, although it naturally is a crucial aspect of improved accountability.[772] They claim that when accountability is framed as a problem of institutional engineering, legal reform, and better accounting, what often follows is a denial of the political and historical context of accountabilities by which people *make sense of rights and obligations*.[773] The empirical research for this thesis supports the fact that matters of institutional reform are far from the day-to-day reality when demanding accountability from power holders in struggles over resources and services.

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[765] Mary McNeil and Carmen Malena, "Social Accountability in Africa: An Introduction", in McNeil & Malena (eds), *Demanding Good Governance* (Washington: The World Bank: 2010) 1-22, at 7.
[766] Rob Jenkins and Anne Marie Goetz, "Accounts and Accountability: Theoretical Implications of the Right-to-information Movement in India", 20 *Third World Quarterly* (1999) 603-622, at 607.
[767] Peter Newell, "Taking Accountability into Account: The Debate So Far", in Peter Newell and Joanna Wheeler (eds), *Rights, Resources and the Politics of Accountability* (England: Institute of Development Studies, 2006) 37-58, at 40.
[768] Newell and Wheeler, "Rights, Resources and the Politics of Accountability", *supra* note 764, at 1.
[769] McNeil and Malena, "Social Accountability in Africa", *supra* note 765, at 5.
[770] OHCHR, *Claiming the Millennium Development Goals, supra* note 725, at 24.
[771] Hans-Otto Sano, "Good Governance, Accountability and Human Rights" in H-O. Sano & G. Alfredsson (eds), *Human Rights and Good Governance* (The Hague: Martinus Nijhoff Publishers, 2002) 123-146, at 131-132.
[772] Newell and Wheeler, "Rights, Resources and the Politics of Accountability", *supra* note 764, at 1.
[773] *Ibid*., at 21.

Different forms of accountability

In recent years, aid and development agencies have funded a large number of anti-corruption commissions, auditors-general, human rights machineries, and legislative public accounts committees. These are state agencies that monitor the arms of the state, and are called institutions of 'horizontal accountability'. 'Vertical' forms of accountability include both the individual citizen's electoral choice and the collective forms of pressure by civil society organisations.[774] Both vertical and horizontal accountability are dimensions of *political accountability*. The fact that rulers explain and justify actions to the ruled traditionally distinguished a democratic society from a tyrannical one. Today, with the growth of bureaucracies, the lines of political accountability have become increasingly blurred and the mechanisms of political accountability have grown.[775] For example, the Paris Declaration on Aid Effectiveness underlines the importance of the role of parliaments in scrutinizing budget and policy proposals. Parliamentary committees provide a further channel for engagements with parliamentarians in the role of reviewing legislations, budgets and policies.[776]

Traditionally, *financial accountability* has been important in development cooperation. This is a less political form of accountability concerned with inputs, outputs and outcomes, monitoring expenditure and making sure that the processes are efficient.[777] According to the Paris Declaration, partner countries commit to strengthening public financial management capacity and taking leadership of the public financial management reform process.[778]

Another accountability framework that is often supported by donors is *legal and constitutional accountability* that is assured by the judiciary. The judiciary is entrusted with the task to ensure that politicians and officials do not exceed their legal authority.[779] From a human rights perspective, judicial accountability is key. In countries where, for example, the right to food or related rights such as the right to social security have been incorporated into the constitution or other national legislation, this gives citizens an opportunity to challenge legislation and policy through judicial systems.[780] In addition, quasi-judicial accountability mechanisms, including independent bodies established to advance and defend human rights, such as national human rights institutions and ombudspersons,[781] promote accountability for human rights failure. Moreover, international accountability processes, such as quasi-judicial processes for reviewing governments' implementation of ESC rights, including the Committee on Economic, Social and Cultural Rights and special rapporteurs,[782] are important components of human rights accountability mechanisms. Recently there has also been developments within private sector accountability that has international relevance, e.g. the so called Ruggie principles on business and human rights.[783]

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[774] Anne Marie Goetz and Rob Jenkins, "Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-Sector Oversight in India", 3 *Public Management Review* (2001) 363-383, at 364. See also, Larry Diamond et al, "Introduction", in Andreas Schedler et al. (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers, 1999) 1-9, at 3.

[775] Newell, "Taking Accountability into Account", *supra* note 767, at 45-46.

[776] The Paris Declaration on Aid Effectiveness, 2005. See Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 36.

[777] Newell, "Taking Accountability into Account", *supra* note 767, at 50.

[778] The Paris Declaration on Aid Effectiveness, 2005, at 15.

[779] Goetz and Jenkins, "Hybrid Forms of Accountability", *supra* note 774, at 366.

[780] Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 40.

[781] *Ibid.*, at 40-41.

[782] *Ibid.*, at 41.

[783] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN doc. A/HRC/17/31, 21 March 2011.

Rights-oriented development discourses, in which there can be distrust in the processes of institutional engineering and judicial processes often support *social accountability*. This form of accountability explores citizen action, aimed at over-seeing political authorities, as a way of redefining the relationship between citizens and their elected representatives.[784] Social accountability is the direct accountability relationships between citizens and the state. In practical terms, this form of accountability refers to a broad range of actions and mechanisms (beyond voting) that citizens can use, such as monitoring public budgets, participation in budget formation, citizen report cards on service delivery, and social audits, to mention a few examples. In order to enhance social accountability an array of approaches, strategies, and methods have been used by a wide range of actors including citizens, civil society organizations, communities, government agencies, parliamentarians, and the media.[785] Social accountability is most often used in service delivery, in efforts to inform citizens and create channels for them to use information to hold service providers accountable.[786] In order for social accountability to work it requires transparency and right to information, as well as opportunities to use the information, i.e. participation and redress mechanisms. These can be formal or informal channels to express dissatisfaction as well as complaint channels within government agencies, independent redress institutions, redress mechanisms within development programmes, and courts.[787] (I will return to the role of courts in the next section.)

Social accountability tries to capture voices at the local level. One challenge is the low level of resources usually available at the local level. This is related to the fact that if the central government is not meeting its obligations in channelling resources for socioeconomic rights to the local level (as part of decentralisation) social accountability efforts remain ineffectual unless they also target the central government. An unexpected benefit of social accountability mechanisms might be that they create opportunities for actors to have a dialogue regarding the content and meaning of human rights, and obligations, in their lived realities. This requires that the agenda is open enough and that there is some awareness of the idea of rights and duties.

Social accountability as well as other accountability mechanisms in development can be high jacked by patrimonial systems and local elites to serve their agendas, or they can serve the agendas of development agencies. When unmasking the agenda behind different approaches to accountability one can ask questions such as: *what* is accountability for? (i.e., what broader political ends does it serve?); *who* is it for (i.e., who benefits, who formulates those claims?); *how* is it practiced? (i.e., through what means and processes?); *where* is it practiced? (i.e., at what levels of political decision making?)[788] Empirical assessment of which accountability strategies work, when and for whom[789] can contribute to making context-specific accountability models, promoting stronger position for rights-holders.

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[784] Newell, "Taking Accountability into Account", *supra* note 767, at 47-48.
[785] McNeil and Malena, "Social Accountability in Africa", *supra* note 765, at 6.
[786] World Bank, *World Development Report 2004: Making Services Work for Poor People* (Washington: The World Bank, 2004); Presentation by Dena Ringold, "Citizens and Service Delivery: Assessing the Use of Social Accountability in Human Development", Helsinki, 5 October 2011.
[787] Dena Ringold, Alaka Holla et al, *Citizens and Service Delivery: Assessing the Use of Social Accountability Approaches in the Human Development Sector* (Washington, D.C.: The World Bank, 2012).
[788] Newell, "Taking Accountability into Account", *supra* note 767, at 37-38.
[789] Newell and Wheeler, "Rights, Resources and the Politics of Accountability", *supra* note 764, at 3.

Accountability in human rights approaches to development

In 'good development programming' accountability flows from the implementing agency to the funding agency,[790] despite the fact that the Paris Declaration on Aid Effectiveness talks of 'mutual accountability'.[791] The strongest accountability relationship in aid processes is still that of recipient governments to donors. 'Mutuality' tends to be interpreted as meaning that partner countries prove, to the satisfaction of donors, that they have fulfilled their commitments.[792] (This is not changed by human rights approaches, as we will discuss later in this chapter.)

What does change through human rights-based approaches is that new lines of accountability emerge, such as government to target group, through the mobilisation of rights-holders.[793] Human rights-based approaches establish the accountability-requirement within a framework of specific human rights entitlements and corresponding obligations.[794] This approach implies the accountability of those with duties and obligations.[795]

Accountability is therefore often seen as the 'lynchpin' of the human rights framework: it aims at enabling citizens to claim their rights and ensuring governments and other actors to implement their responsibilities. Transparency is argued to be essential because without it people and organisations cannot access information needed to hold power-holders to account.[796] Thereby, we return once again to good governance. On the relationship between human rights and accountability, Sano observes that human rights can be seen as principles against which good governance programmes are checked or human rights can enter as specific measures and laws promoted for enhancing popular participation to promote accountability.[797] From both perspectives, the aim of accountability can be seen as enhancing a process of reviewing the performance of the government and other duty-bearers against their human rights obligations.[798] (New lines of accountability explored in human rights-based approaches often take the form of institutionalized local monitoring groups.[799])

Human rights discourse has traditionally focussed on the legal and judicial aspects of reviewing the performance of duty-bearers. Darrow and Tomas point out that mechanisms of redress need not be limited to, but should include, judicial mechanisms.[800] The argument has been that for accountability to be effective, it needs to be demanded[801] and have some kind of recourse or remedy mechanism, including rehabilitation, compensation, punitive sanctions, as

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[790] For examples of NGOs being accountable to their donors rather to their members, see Hans-Otto Sano, "Making Rights Work for the Benefit of the Poor and Marginalized: Assessing the Impact of CARE's Rights-Based Work in South-Western Uganda", Danish Institute for Human Rights, 2010, at 6-7; see also J.P. de Campos Guimarães, "Participatory Approaches to Rural Development and Rural Poverty Alleviation", Working Paper, UN Economic and Social Commission for Asia and the Pacific, 2009, at 21. Available at http://www.unescap.org/pdd/publications/poverty_and_development/participatory_rural.pdf, visited 10 May 2012.
[791] "Donors and partners are accountable for development results", see Paris Declaration on Aid Effectiveness, 2005, paras. 47-50.
[792] Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 35.
[793] See Sano, "Making Rights Work for the Benefit of the Poor", *supra* note 790, at 6-7.
[794] OHCHR, *Claiming the Millennium Development Goals, supra* note 725, at 24.
[795] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 495.
[796] Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 18.
[797] Sano, "Good Governance, Accountability and Human Rights", *supra* note 771, at 133.
[798] Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 18.
[799] For example in the work of CARE Uganda, see Sano, "Making Rights Work for the Benefit of the Poor", *supra* note 790, at 9.
[800] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 512.
[801] OHCHR, *Claiming the Millennium Development Goals, supra* note 725, at 24.

well as prevention of harm through changes in policies and practices or guarantees of non-repetition.[802] It is often underlined that effective enforcement mechanisms and the capacity to punish is an integral part of accountability. Illegal behaviour calls for legal sanctions; demonstrated abuses such as corruption or human rights violations, must be punished, otherwise there is no rule of law and no accountability.[803]

The human rights framework itself incorporates national, regional, and international judicial and other accountability mechanisms for reviewing the human rights obligations of governments. These include UN treaty monitoring bodies and special rapporteurs at the international level; human rights courts and commissions at the regional level. At the national level, judiciary and national courts, national human rights commissions and ombudspersons, administrative monitoring and review processes[804] have roles in monitoring of adherence to human rights.

Broadly speaking, 'legal human rights-based approaches'[805] typically focus on developing laws, policies, institutions, administrative procedures and practices that can deliver entitlements, respond to denial and violations and ensure accountability.[806] This kind of work is largely carried out with the support of donors and international agencies. UN agencies seem to focus on the legal aspects of accountability, as the Common Understanding promotes judicial mechanisms as a solution when states and other duty-bearers fail to comply with legal norms in human rights instruments: "aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law."[807] This is a basic principle in human rights law, and taking non-compliance with human rights norms seriously in development programming is naturally welcome (especially if this concerns also accountability for human rights impact by actions involving donor states). We should, however, keep in mind that accountability in the context of human rights-based development approaches has diverse meanings and many approaches by civil society and marginalised groups apply other methodologies for holding duty-bearers to account, e.g. social accountability in its various forms. Advocacy and mobilisation campaigns are important features of rights-based strategies to achieve greater accountability, and sometimes legal strategies are part of the 'tool box', sometimes not. Often social and political mobilisation is critical for ensuring that court judgments are enforced.[808]

Authors in favour of legal approaches often point out the value of human rights law offering a normative baseline mandating non-regression and a principle of 'do no harm'.[809] ('Do no harm' is not mentioned in the Common Understanding, despite its legal approach to accountability.) The OECD DAC argues that the "international human rights framework can provide a standard against which to assess aid effectiveness and ensure that changes instituted in the delivery and management of aid will support, or at least not undermine, the realisation

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[802] See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN doc. A/HRC/17/31, 21 March 2011, para. 25.

[803] Anderas Schedler, "Conceptualizing Accountability", in A. Schedler et al. (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers, 1999)13-28, at 16-17.

[804] Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 18-19; see also OHCHR, "Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies", *supra* note 243, at 17.

[805] This is my concept and not that of the authors Darrow and Tomas.

[806] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 512.

[807] See paragraph describing Accountability and Rule of Law in the Common Understanding, *supra* note 50.

[808] Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, at 19.

[809] McInerney-Lankford, "Human Rights and Development", *supra* note 68, at 71.

of human rights".[810] For this to work in practice, it would take strong accountability mechanisms so that development policy and practice of both donor states, multilateral agencies, and recipient states is monitored and assessed from a human rights perspective. Considering that the treaty monitoring mechanisms within the UN system seldom even refer to development policy and practice[811] this would require a considerable modification in current practices.

'Do no harm' should naturally be taken seriously in 'good development practice' as well as in human rights-based approaches. Respecting human rights and preventing harm that causes lower human rights enjoyment because of development activities can be seen as being part of duty-bearers' negative obligations. However, we should not forget accountability for positive obligations. The process of how rights can be realised is important in the accountability discussions that focus on the *enforceability* dimension of accountability. According to Newell and Wheeler, it is in this context that we encounter the limits of (over)-reliance on rights.[812]

At the level of development programming, promoting a stronger role for the human rights legal accountability framework is not necessarily the only or most relevant role that the human rights framework can play. Instead the act of *identifying* rights-holders[813] (and their entitlements) and corresponding duty-bearers (and their obligations) is what potentially raises levels of accountability in the development process. Both positive obligations to protect and fulfil a specific human right, and negative obligations to abstain from violations are to be considered.[814] But this does not mean that all development failures should be dealt with in human rights treaty monitoring bodies, for instance. Instead it requires that *human rights impact assessment* is applied to all development plans, policies, budgets, and programmes to determine progress/failures in human rights terms.[815] Explicit human rights reference in development programming is a doorway to increased human rights accountability.

Who is accountable for human rights impact in development?

The question *who* has duties and obligations is of course relevant. We know that states have a legal obligation to respect, protect and fulfil human rights and that they are accountable for human rights implementation of the conventions they have ratified.[816] We also know that the Paris Declaration advocates mutual accountability, i.e., that donors and partners are accountable for development results. (Paris Declaration also proposes commitments to donors that they e.g. refrain from requesting the "introduction of performance indicators that are not consistent with partners' national development strategies."[817]) However, despite the mutual accountability principle, it is commonly held that aid accountability is one-way,[818] and donor obligations are not often on the agenda.

What sort of accountability for human rights impact can be expected from international organisations and donor states? It is clear that the nature of political change in weak states in

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[810] OECD DAC Update, "Human Rights and Aid Effectiveness", April 2007, at 2. Available at http://www.oecd.org/dataoecd/15/12/38713028.pdf , last visited 18 January 2012.
[811] On the UN treaty monitoring and MDGs see Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals", 27 *Human Rights Quarterly* (2005) 755-829.
[812] Newell and Wheeler, "Rights, Resources and the Politics of Accountability", *supra* note 764, at 7.
[813] Called 'claim-holders' by Darrow and Tomas.
[814] See Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 511.
[815] Twomey, "Human Rights-Based Approaches to Development", *supra* note 41, at 54.
[816] Sano, "Good Governance, Accountability and Human Rights", *supra* note 771, at 137.
[817] Paris Declaration on Aid Effectiveness (2005), para. 45.
[818] Ferguson, "Linking Human Rights and Aid Effectiveness", *supra* note 706, 42.

the South is often heavily influenced by both bilateral donors and by UN development agencies. This is the case especially in transitional societies where civil society groups have received new influence, often thanks to support and resources from the international community. Donors and international agencies view these civil society groups as agents of democratisation, and they willingly take that role, but often they alone carry the risk of challenging authoritarian or transitional regimes and power-holders. It is not surprising that NGOs and local non-state actors raise demands concerning consistency of policy and human rights accountability of the very organisations and donors who are driving the agenda to reinforce participation and human rights through the operations of these local actors.[819] One can argue that Western donors and international organisations involved in democratisation, good governance, and human rights promotion certainly share a responsibility with national states both for respecting human rights themselves and for contributing positively to human rights fulfilment.[820] Among the development community there is, however, not much awareness or conscious effort to take such responsibility seriously.

In human rights law, the question of *extraterritorial obligations* has gained more attention recently. These obligations pertain to acts of a state which have human rights effects outside the territorial jurisdiction of that state. In this context it is important to make a distinction between an obligation to cooperate internationally for development and an obligation to provide development assistance.[821] Many donors have traditionally been cautious in the right to development debate, specifically for the reason that it has been interpreted by some as creating a right to receive international assistance.[822]

There is a general unwillingness among donors to take on international obligations, and Cornwall and Nyamu-Musembi suggest that international development agencies use the language of rights-based approaches to development without intending to bear the entirety of consequences that flow from it. They see that the lack of possibility of accountability mechanisms in the international development assistance structure is undermining the whole idea of aid recipients having been transformed from 'passive beneficiaries' to 'rights-holders'.[823] This is not only a legal question, but a practical problem that undermines the credibility of human rights-based approaches to development assistance.

Struggle for accountability

Authors who view struggles over rights and accountability in the context of wider social and political transformation (compared to those concerned with narrow 'legal human rights approaches') put accountability into a complex relationship between rights, resources and accountability, i.e., the relationship between the state and its citizens.[824] Newell and Wheeler remind us that accountability is not an end in itself. Instead, it is at best a means to achieving a wider set of goals that involves deeper social and political change. This point is often forgotten in technocratic and target-driven approaches to accountability.[825] For example, struggles over resources and efforts to realise rights such as housing or water concerns the relationship between rights and accountability. Rights become tools of accountability, where

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[819] Sano, "Good Governance, Accountability and Human Rights", *supra* note 771, at 140.

[820] *Ibid*., at 141.

[821] Wouter Vandenhole, "EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights", in Salomon, Tostensen and Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Antwerp: Intersentia, 2007) 85-106, at 85-86.

[822] See Piron, "Learning from the UK", supra note 692, at 15.

[823] Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1433.

[824] Newell and Wheeler, "Rights, Resources and the Politics of Accountability", *supra* note 764, at 4.

[825] *Ibid*., at 13.

marginalised groups use rights claims around key resources in a struggle for increased accountability from state, private, and civil society actors.[826]

Accountability is not just about answerability as to results, actions, and non-actions but also about delivering enforceability of rights. Rights, or rather the lack of their practical implementation, are at the heart of mobilisations for accountability.[827] The aim of social movements that struggle for basic rights is often to increase the level of *responsiveness and accountability* of public institutions.[828] Proposals for change can be made, but if they are met with a blank wall of unresponsiveness by duty-bearers the lives of rights-holders will not improve.[829] The responsiveness and accountability relationship is usually seen to function when bureaucracies involved in service delivery are responsive to citizen needs, and accountable to elected officials.[830] In these struggles, accountability is not apolitical and the judicial proceedings are not necessarily part of the process.

In addition to this, *judicial activism* is an interesting phenomenon. In India Public Interest Litigation (PIL) is one example that is very relevant when exploring the role of rights and accountability in development related claims. In a number of decisions by the Supreme Court of India, it was established that the judiciary is morally required and constitutionally mandated to increase its responsiveness to citizen requests for investigative action concerning specific government agencies, including service-delivery ministries. In the form of PIL, citizens enter the horizontal process of in-depth monitoring of government, and as such it represents an interesting case of hybrid accountability between the vertical and horizontal axes. Individual citizens and activists groups become part of an official fact-finding process. In India, PIL has legitimized the notion of direct citizen engagement with issues of executive oversight. PIL has also attracted a lot of interest by social movements in adopting legal processes, showing that it is possible for citizen-litigants to enter into legal-constitutional accountability institutions, becoming active demanders of answerability in a forum that carries the weight of enforceability. Most citizen-initiated approaches aim to achieve precisely this combination of answers and sanctions.[831]As constitutional regimes vary widely from one country to another, the Indian experience can naturally not be generalised. Moreover, the experiences from India are not only positive. Litigation has often times been time consuming, costly, relatively ineffective as compared to traditional mobilisation strategies,[832] and there is risk of depoliticising issues in the legal arena.

It is also important to be aware that, even in countries where there is judicial responsiveness to social claims and the courts are able to influence the formal political process, the successful

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[826] Newell and Wheeler, "Rights, Resources and the Politics of Accountability", *supra* note 764, at 5-6.
[827] *Ibid*., at 7.
[828] For a case study see Celestine Nyamu-Musembi, "From Protest to Proactive Action: Building Institutional Accountability through Struggles for the Right to Housing", in Peter Newell and Joanna Wheeler (eds), *Rights, Resources and the Politics of Accountability* (England: Institute of Development Studies, 2006) 122-143.
[829] Jo Rowlands, "The Right to be Heard: An Overview", in Rowlands (ed.), *Speaking Out: Case Studies on How Poor People Influence Decision-Making* (Oxfam GB, 2009) 1-10, at 6.
[830] Nyamu-Musembi, "From Protest to Proactive Action", *supra* note 828, at 136. On the other hand, bureaucrats, auditors and judges are kept at a distance from citizens and politicians precisely to guard against too much responsiveness to particular interests and influential social groups. However, in the name of 'neutrality' there are often policies and mechanisms in place that restrict public scrutiny and help to hide abuse of public office for private gain. See Goetz and Jenkins, "Hybrid Forms of Accountability", *supra* note 774, at 366-367.
[831] Goetz and Jenkins, "Hybrid Forms of Accountability", *supra* note 774, at 367-368.
[832] Shylashri Shankar and Pratap Bhanu Mehta, "Courts and Socioeconomic Rights in India", in Varun Gauri & Daniel M. Brinks (eds), *Courting Social Justice* (Cambridge: Cambridge University Press, 2008) 147-182, at 177.

contestation of legal meanings cannot be automatically associated with social change.[833] A review of social rights cases in Colombia shows that the Constitutional Court went from protecting individuals who were structurally marginalised from the market, to a protection of particularly vulnerable groups and then to a general protection of the middle class groups that were being affected by fiscal constraints. The Court started benefiting claimants who were not structurally excluded from the market but occasionally affected by 'market dysfunction' resulting from the economic crisis. The author behind the review however thinks more research is needed regarding the way in which law, legal language, and social movements interact to "understand the complex relation between courts and social change better".[834]

Concluding remarks on accountability

When human rights enter into development policies and practices, new accountability *relationships* and frameworks emerge. There is stronger focus on the state-citizen relationship compared to the donor-implementing agency accountability relationship that dominates in 'good development discourse'. Naturally there are overlaps, and strengthening the accountability of the executive in relation to citizens has been a goal in the good governance agenda for a long time (driven by donors and international agencies in the name of democracy, transparency and human rights).

In human rights-based approaches to development, the relationship between rights-holders and duty-bearers is at the heart of demanding accountability. The act of identifying rights-holders (and their entitlements) and corresponding duty-bearers (and their obligations) potentially raise levels of accountability in the development process – and this is something that can be done in development programming as well as in social activism. However, international agencies tend to focus on the strengthening of legal accountability mechanisms, through national legal and judicial reforms, leaving other forms of struggle aside. These 'legal human rights-based approaches' focus on developing institutions and administrative procedures that can deliver on entitlements and respond to violations, in the name of 'good governance', and less on the link between accountability and popular participation.

In non-legal rights-based approaches, e.g. by social movements, and partly also the by the World Bank in the area of social accountability,[835] advocacy and mobilisation around issues of the lack of practical implementation of services/rights are important aspects of the enforceability and responsiveness dimensions of accountability. In some countries, judicial activism also plays an important role in these broader struggles for accountability. When these struggles are truly inclusive they can have effects greater than 'winning the case'. However, one has to be careful not to generalise the role of rights and the legal framework in accountability struggles. The specific effects of a legal human rights discourse should be studied in context as they can have diverse effects.

At the same time as there is a tendency to emphasise the legal aspects of accountability as requiring national judicial and institutional reform, there is a tendency to neglect legal accountability flowing from human rights treaties and binding both donors and recipient countries. This is related to the question mark in the human rights accountability puzzle, i.e., the obligations and responsibilities assumed by international organisations and donor states.

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[833] Pablo Rueda, "Legal Language and Social Change during Colombia's Economic Crisis", in Javier A. Couso, Alexandra Huneeus and Rachel Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (New York: Cambridge University Press, 2010) 25-50, at 49.

[834] Rueda, "Legal Language and Social Change", *supra* note 833, at 31, 41 and 49.

[835] See Ringold and Holla et al, *Citizens and Service Delivery, supra* note 787.

The silence on this issue among the concerned actors undermines the credibility of their intent to strengthen human rights accountability in development.

Regardless of what form it takes, being able to hold institutions and other power holders that affects one's life to account is an important aspect and the subsequent principles are of participation and empowerment.

2.4.6 Participation

Different perspectives on participation

Participation has long been accepted as a means to improve relevance and effectiveness of programming, and also based on participation being an end in itself. However, 'participation' in development can mean different things depending on the context and the actors involved. Participatory processes range from people participating by providing information to outside 'experts' to participating in decision making as genuine protagonists.[836]

Andrea Cornwall has written an excellent review and analysis of participation in development policy and practice called *Beneficiary, Consumer, Citizen: Perspectives on Participation for Poverty Reduction*. She recalls three distinct arguments made for participation in the 1960s and 1970s. According to the first line of argument, development projects were seen to have a better chance of success if people were involved more directly in them. Participation was called for on the grounds of efficiency, effectiveness, and equity of access to benefits. The second set of arguments had a very different origin. They arose directly from the struggles of popular movement of the time for rights, recognition, and more equitable distribution of resources. The vision was social change for self-determination and self-governance, and less about institutions involving their users or clients in the design or delivery of programmes. The third argument is casting participation as a mutual learning experience.[837] In the first perspective on participation, people participate as 'beneficiaries'. They are invited to help make contributions to interventions that are designed to benefit them, and their participation is held to increase the effectiveness of these interventions. Participation is done *for* the people. The second perspective on participation can be associated with broader struggles for democracy and equity. Participation is *by* the people, and the aim is for them to gain rights over and entitlements to resources.[838] This perspective is close to issues of citizenship, which are linked to rights-based approaches that claim participation as a political right, thereby creating a political, legal and moral imperative for focussing on people's agency.[839] The third perspective on participation calls for a closer relationship between those who work in development practice and the people who are supposed to benefit from this practice. Participation means working *with* people.[840]

Cornwall reminds us of what she calls "the ethos of self-reliance" of the 1980s, a kind of 'do it for yourself' attitude in development that implied that beneficiaries became seen as

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[836] Lisa VeneKlasen, Valerie Miller et al., *Rights-Based Approaches and Beyond: Challenges of Linking Rights and Participation* (Brighton: Institute of Development Studies, 2004, IDS Working Paper 235) at 5. Available at http://www.ids.ac.uk/files/Wp235.pdf, visited 10 May 2012.

[837] Andrea Cornwall, *Beneficiary, Consumer, Citizen: Perspectives on Participation for Poverty Reduction* (Gothenburg: Sida Studies No. 2, 2000) 20-22.

[838] *Ibid.*, at 22.

[839] See Gils Mohan and Sam Hickey, "Relocating Participation within a Radical Politics of Development: Critical Modernism and Citizenship", in Samuel Hickey & Giles Mohan (eds), *Participation: From Tyranny to Transformation* (London: Zed Books, 2004) 59-74, at 70.

[840] Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 22.

consumers, or 'users and choosers'.[841] Seeing 'communities' as 'user and chooser' can imply that they are engaged in contributing labour, time, or cash to community development projects, or they are involved in user committees, or they obtain the control for design, delivery, and maintenance of projects. In the name of 'participation' communities are achieving an increasing role in co-production and in self-provisioning and are thus assuming many functions of the state. The state becomes "an enabling force by removing laws, liberalising the economy and opening up access to wider range of services through the encouragement of NGO involvement and private sector investment in basic service provision."[842] Cornwall cites Vengroff (1974) as proof that arguments such as these have been published. Vengroff made a case that self-help efforts can be used to delay the need for allocation of government funds and divert local demands for development from the central government to local initiative. This generates mass participation.[843] That this is contrary to human rights thinking is very clear. Human rights require a shift from beneficiary or consumer to citizen and rights-holder. We will come back to the implications of this.

It can naturally be argued that this is merely an example of 'bad participation', in which those with the power dictate the conditions of the 'participation'. However, it is important to be aware of the various understandings and meanings attached to 'participation' as defined in development discourse.

When we come down to the practical level the whole business of participation becomes even more complicated. Sometimes we can read in reports or policy statements that there has been, or should be, 'full participation' and 'participation by all stakeholders'. However, looking at the realities on the ground this can prove to be virtually impossible. Therefore, implicit choices about who participates are usually made also when the aim is 'full participation'. Methodology naturally plays a role here. A distinction can be made between approaches that place greater emphasis on participation of representatives, i.e., those who speak on behalf of a particular interest group, and those that aim at more direct democratic forms of participation. Nevertheless, these boundaries tend to be blurred and pragmatism often leads to the representation approach being included, in one form or the other.[844]

We need to be aware that development programmes can never function in a vacuum detached from local struggles for power and resources, i.e., from the political sphere. However, participatory approaches have been criticised for 'depoliticising' development by incorporating marginalised individuals in projects that they are unable to question.[845] It is often assumed that participatory approaches are apolitical and non-confrontational since they build upon an idea of finding consensus. Jenkins and Goetz point out that "in assuming consensus, different perspectives can be silenced, a problem which has been observed with regard to the subtle filtering-out of dissensus along gender and class lines."[846] This easily happens when participatory monitoring and evaluation exercises come from outside the community and the emphasis is on generation of information from the grassroots and less

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[841] Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 71.

[842] Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 76.

[843] *Ibid.*, at 19. See also de Campos Guimarães, "Participatory Approaches to Rural Development", *supra* note 790, at 4-5 for historical background of 'participation' as a form of self-help.

[844] Andrea Cornwall, "Unpacking 'Participation': Models, Meanings and Practices", 43 *Community Development Journal* (2008) 269-283, at 276-277.

[845] Glyn Williams, "Towards a Repoliticization of Participatory Development: Political Capabilities and Spaces of Empowerment", Samuel Hickey & Giles Mohan (eds), *Participation: From Tyranny to Transformation* (London: Zed Books, 2004) 92-107, at 93.

[846] Rob Jenkins and Anne Marie Goetz, "Accounts and Accountability: Theoretical Implications of the Right-to-information Movement in India", 20 *Third World Quarterly* (1999) 603-622, at 614.

emphasis on direct confrontation between people's knowledge and official accounts. Participatory techniques are therefore often apolitical in their implicit assumptions that information will flow 'from the bottom up'.[847] However, politics matter in development and understanding how participation relates to power structures and political systems is crucial for a more transformative approach.[848]

At the same time, we need to be realistic about the limitations of participation in development programming. People struggling to satisfy daily needs of food and water are not necessarily interested in attending workshops – or at least that is the assumption often made. Issues such as functional literacy, analytical, organisational, and advocacy capacities can be challenging and time-consuming. Under these circumstances it is tempting to involve civil society groups that do not necessarily represent the poor and disadvantaged instead of direct participation of the target groups.[849] We see elites (chiefs, headmen, landowners, higher castes, the urban educated) having prominent roles in new spaces created for participation; they represent and articulate the needs of the poor and marginalised.[850] Additionally, it is clear that perfect, transformative, empowering participation is unattainable most of the time,[851] especially in top-down approaches. However, if these modernist development approaches have caused a disjuncture between the 'elite' and the 'grassroots', participation could at least contribute to building a common language between "the architects and recipients of development programmes".[852]

Human rights: Participation is a right

The trend of emphasising new forms of democratic practice, which build on more direct and deliberative democratic traditions, broadening notions of political participation beyond the politics of the ballot box, and an increasing attention to human rights in development are factors that have contributed to a resurgence of interest in *popular participation*. Talk of participation as a democratic right is once again becoming popular.[853] In human rights-based programming the starting point is that *participation is a right*[854] enshrined in many human rights conventions. This right is often violated. It is argued that fostering participation in societal decision-making at different levels is an objective in itself. Greater participation is both a necessary outcome and a necessary aspect of the development process.[855] Participation should be viewed as a process of fostering critical consciousness and decision-making as the basis for active citizenship.[856] This means that participation is first and foremost seen a democratic principle that is relevant in all social, political, and economic decision-making – not limited to a development project or programme.

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[847] Jenkins and Goetz, "Accounts and Accountability", *supra* note 848, at 611, 613, 616.

[848] de Campos Guimarães, "Participatory Approaches to Rural Development", *supra* note 790, at 22.

[849] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 510.

[850] Cleaver, "The Social Embeddedness of Agency", *supra* note 392, at 274.

[851] de Campos Guimarães, "Participatory Approaches to Rural Development", *supra* note 790, at 24.

[852] Williams, "Towards a Repoliticization of Participatory Development", *supra* note 845, at 101.

[853] Andrea Cornwall, *Changing Ideals in a Donor Organisation: 'Participation' in Sida* (Sussex: IDS Working Paper 317, January 2009) 17-18. Available at http://www.ids.ac.uk/files/dmfile/Wp317.pdf, visited 9 May 2012.

[854] The relationship between participation and human rights was discussed already in the 1970s. See e.g. Commission on Human Rights report by the Secretary-General on the international dimensions of the right to development. UN doc. E/CN.4/1334, 2 January 1979.

[855] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 494.

[856] OHCHR, "Frequently Asked Questions", *supra* note 81, at 26.

There are some donors that have this view on participation, for example Sida.[857] The Swedish Government's White paper called *The Rights of the Poor – Our Common Responsibility* (1996/97) argues for strategies that enhance the possibilities for the poorest people to take a greater part in political life, especially at the local level of decision-making.[858] (We should, however, be aware that Sida is also struggling with translating their nice slogans into concrete practice.)[859] The driving force behind the arguments is, however, a belief that "democratization, establishment of the rule of law, good governance and popular participation in decision-making are declared to be the most important conditions for progress in the fight against poverty"[860] – rather than seeing participation as a value in itself.

This is not unique to Sida. In human rights discourse, participation is seen as a prerequisite and starting point for making other claims, and that means fostering greater participation also has utilitarian motives. The publication *Claiming the Millennium Development Goals: A Human Rights Approach* points out that, participation is a fundamental element in achieving economic, social, and cultural rights, as well as the right to development. Classic civil and political rights (rights to vote, freedom of expression and association) must, furthermore, be supported and it is essential to build strong democratic institutions and to consciously create space for participation in MDG-related activities. This means, *inter alia*, increasing transparency, and making information about policies and programmes accessible; creating channels for participation by the poorest and most marginalised groups; and making human rights awareness cross-cutting in all programmes.[861] This is in itself not new for the development agenda, the only new element is human rights awareness.

We can differentiate relationships that should be 'participatory', (or accountable or non-discriminatory for that matter): (1) the relationship between the 'beneficiary' and the 'project management'; (2) that between the people as citizens and rights-holders and the different power holders, i.e., government institutions, donors, corporations. Traditionally, human rights have played a role in the latter relationship but as human rights enter into 'programming' through human rights-based approaches they increasingly also become relevant in projects, although this process is certainly not always clear from the contradictions. When people are enabled to represent and choose for themselves through 'participatory development' they will not always support agendas of gender equality, democracy, and human rights. What facilitators should do in these situations remain, for the most part, unresolved either in the guidelines or operational practice.[862]

Kate Newman has observed in her research that there is in-built tension between participation and a human rights-based approach which embraces a universal, legislative approach to rights.[863] If participants are asked, it might be that they do not prioritise working on the right to education, which is the target of the organisation. There is a risk that the priorities and perspectives of the local groups become over-shadowed by an approach focusing on a specific

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[857] The Swedish term 'folkligt deltagande' made its way into Swedish aid in the 1970s. See Cornwall, *Changing Ideals in a Donor Organisation*, *supra* note 853, at 27.

[858] SIDA, *The Rights of the Poor – our Common Responsibility* (Stockholm: Ministry for Foreign Affairs, Government Report 1996/97: 169) at 36-37. Available at http://www.sweden.gov.se/content/1/c6/02/04/08/ab9600e5.pdf, visited 15 May 2012.

[859] See Cornwall, *Changing Ideals in a Donor Organisation*, *supra* note 853.

[860] SIDA, *The Rights of the Poor*, *supra* note 858, at 85.

[861] OHCHR, *Claiming the Millennium Development Goals*, *supra* note 725, 11-12.

[862] Cornwall, *Changing Ideals in a Donor Organisation*, *supra* note 853, at 54.

[863] Kate Newman, "Challenges and Dilemmas in Integrating Human Rights-Based Approaches and Participatory Approaches to Development: An Exploration of the Experiences of ActionAid International", 262-263. Doctoral thesis, University of London, submitted November 2011.

human rights-based target. Participation may clash with organisational interests.[864] It is difficult for transformative participation to have pre-defined goals,[865] as this goes against the very idea of allowing the 'beneficiaries' to be in the driver's seat. Moreover, transformatory participation cannot simply focus on methodologies, but must look at ways of challenging broader structures, and this requires political strategies.[866]

Cornwall points out that when 'participation' is used as a term to describe a 'method' or 'mechanism' that is limited to a project or programme, participation is something that is done to or for people by outsider agencies.[867] This is a very different view on participation compared to one where participation is seen as a right and democratic principle. However, the lines between the different participation practices in development have been blurred in recent years when concerns with the relationship between citizens and the state has increasingly become an issue on the development agenda, particularly in the move towards engaging citizen participation in policy processes,[868] such as Poverty Reduction Development Plans, and strategies for decentralisation.[869]

The question is what the human rights perspective adds to participatory approaches, in addition to giving legal legitimacy? As we have seen the development discourse has for decades worked on strategies to increase participation on different levels and by different groups, be it with limited success in practice. It is claimed that human rights-based approaches can add value to existing participatory approaches by calling for attention to the *quality* of the participation process.[870] I agree that rights-based development can provide a commitment to a qualitatively different form of participation so that citizens are facilitated to exercise their right to participation in challenging and changing institutions that are important for their lives.[871]

However, I am less certain that applicable human rights standards can provide a meaningful 'participation checklist' with key issues or preconditions that may need to be taken into account.[872] The problem with this argument is that human rights instruments and interpretations tend to have a rather limited view on popular participation, concentrating more on legal norms, judicial institutions and technicalities of elections and less on more direct forms of participation. (Donors and international financial institutions have been accused of operating with a narrow definition of democracy as multi-party elections which satisfy certain formal criteria.[873])

The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections,

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[864] De Campos Guimarães, "Participatory Approaches to Rural Development", *supra* note 790, at 21.

[865] Williams, "Towards a Repoliticization of Participatory Development", *supra* note 845, at 102.

[866] Mark Waddington and Giles Mohan, "Failing Forward: Going beyond PRA and Imposed Forms of Participation", in Samuel Hickey & Giles Mohan (eds), *Participation: From Tyranny to Transformation* (London: Zed Books, 2004) 219-234, at 220.

[867] Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 36.

[868] *Ibid*., at 60.

[869] Mikkelsen, *Methods for Development, supra* note 147, at 111.

[870] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 506.

[871] Holland, Brocklesby and Abugre, "Beyond the Technical Fix?", *supra* note 70, at 255-256.

[872] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 507-508. See also OHCHR, "Frequently Asked Questions", *supra* note 81, at 26.

[873] Randeria, "Domesticating Neo-liberal Discipline", *supra* note 423, at 158.

and to have access, on general terms of equality, to public service in his country.[874] The Human Rights Committee has issued authoritative interpretations that give further guidance to the question about participation. The Committee points out that 'conduct of public affairs' is a "broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers." All aspects of public administration, and the formulation and implementation of policy at international, national, regional, and local levels are covered.[875] What forms participation should take is an issue outside the scope of the General Comment. The General Comment mentions 'direct participation' once,[876] and then concentrates in detail on the different aspects of the rights related to elections. It does in fact not pay attention to the issue of the quality of participation outside of elections in any other way than noticing that "no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed."[877]

The 'quality criteria' for participation that is sometimes claimed to come from human rights discourse has its origins in the Declaration on the Right to Development, which includes the requirement that participation should be "active, free and meaningful".[878] This criteria is included in the Common Understanding that goes along the lines of the Declaration on the Right to Development, stating that active, free, and meaningful participation is an entitlement: "Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized."[879] This indicates that the UN agencies that are committed to using the Common Understanding as a starting point for their work have set the level of ambition high. Participation is an entitlement, and the participatory methods that are used should fulfil the 'active, free and meaningful' criteria. The process is as important as the outcome, which is human rights realisation. However, as we will see below, the narrow, legalistic approaches that are common in human rights work corresponds uneasily with this ambition.

The human rights community is not very 'participatory'

Lisa VeneKlasen et al. have identified differences between how development-focused organisations and human rights-based organisations understand participation and rights. In interviews with US based organisations the researchers found that there are diverse interpretations of these concepts and the approaches applied to advance them vary accordingly.[880] Development organisations and social movements have been pioneers in approaches to participation. In the early stage of this development, the organisations saw it as a means to improve programme design and implementation by using local people's experiences. Gradually, it was seen as a method to build capacity and, more recently, as a way to engage in policy change. Until recently, there had been little recognition of the role of participation in the work of most human rights organisations. Focus has been on the

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[874] Art. 25 of the International Covenant on Civil and Political Rights (adopted on 16 December 1966 and entered into force on 23 March 1976). The Convention on the Elimination of All Discrimination of Women and the Convention on the Rights of the Child are also relevant.

[875] Human Rights Committee, General Comment No. 25 (1996), UN doc. CCPR/C/21/Rev.1/Add.7, para. 5.

[876] "Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government." *Ibid*, para. 6.

[877] Human Rights Committee, General Comment No. 25 (1996), *supra* note 875, para. 6.

[878] Article 3 of the Declaration on the Right to Development, adopted on 4 December 1986, A/RES/41/128.

[879] Common Understanding, *supra* note 50.

[880] VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 12.

mechanics of legal and policy strategies. Another common strategy involved gathering information from victims of human rights violations. Participation was in this case about people providing data as informants. With the establishment of national organisations they gained a greater role as informants and partners. Methodologically, many of the international as well as local human rights groups have focussed on 'awareness raising' concerning laws and legal procedures rather than more participatory learning processes of helping people to analyse problems and identify solutions that promote rights in a local setting. Rights groups often use a discussion of rights as an entry point into communities, instead of starting with people's daily problems while 'good development practice' emphasises that it is essential to start where people are and build an explicit vision of social change. The narrow, legalistic approaches in human rights work have contributed to a 'crisis' in rights methodology evident in the interviews carried out for the research by VeneKlasen and her colleagues. While working with laws and legal systems is critical, it has become clear that the previous approaches usually failed to expand the scope of rights or strengthen accountability and capacity to deliver resources and justice.[881]

Harri Englund has analysed civic education on human rights and democracy carried out by the EU funded project National Initiative for Civic Education (NICE) in Malawi. His findings exemplify the challenges that human rights awareness raising has brought about in the area of participation. NICE was a substantial project in terms of coverage: its endeavour was to have an office in every district and its coverage extended to villages and townships through a network of volunteers. This meant that its coverage of the country was virtually equal to, if not greater than, the state. People in NICE's professional staff emphasised their association with the 'grassroots' but the fact is that NICE was a transnational project that, according to Englund "participated in governing Malawi with resources that in many cases exceeded those of government departments."[882] Despite the rhetoric of 'local ownership' the officers and volunteers of NICE created a sense of belonging to en *exclusive community of human rights experts*. Englund analyses the many subtle ways this was done in his book. I will not relate the details here but the main conclusion is that there was a distinction between NICE and the grassroots.[883] NICE was an organisation of quasi-professionals, mostly consisting of young people, who were taught to think of themselves as separate from the grassroots. They identified with the organisation rather than with the concerns of the grassroots. This was seen as imperative from the perspective of sponsors and managers, who could not allow NICE to appear to be challenging the prevailing political relationships in the country.[884] Despite emphasis on 'participation' 'the grassroots' did not choose what issues were important for them, and adjust the organisation's work accordingly, but it remained an abstract principle, serving top-down managerialism.

Another feature of NICE was its apolitical and nonpartisan nature, which corresponds uneasily with participation. NICE held public meetings on five thematic areas: local democracy, the environment, food security, gender development, and HIV/AIDS and health.[885] These themes are all deeply political but NICE managed to relegate politics to a sphere that posed no threat to wider power relations. The 'safe sphere' was 'the grassroots', often used as a synonym for 'the community'. Englund concludes that NICE's civic education defined political problems as if they were reducible to communities, and thereby they made the communities themselves the problem. The grassroots/community was asked to assume

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[881] VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, 9, 10, 12, 14, 15.
[882] Englund, *Prisoners of Freedom, supra* note 414, at 76.
[883] *Ibid*., at 77.
[884] *Ibid*., at 99-100.
[885] *Ibid*., at 99.

responsibility for its own development. In the name of 'participatory methods', greater input to the community's own development was called for.[886] This meant that the people in Malawi should learn to work for their development without waiting for the world around them to change first.[887] This was not unique to NICE's work in Malawi, but a wider trend in development practice. This is an example of 'either/or' kind of thinking – concentrating either on only the community as if the solution is to be found there OR on the wider policy environment as if the solution is in changed laws and policies. Few programmes have managed to engage both levels.

Concluding remarks on participation

When the starting point is that participation is a democratic right, participation is *by* the people – not something done *for* them.[888] This simple fact is often forgotten in human rights work as well as in development programming. When experts are involved, they tend to believe that they know what is best for 'the poor' and participation becomes consultation or superficial involvement in activities.

In human rights discourse participation is a legal right. Adding this as an argument to strengthen popular participation at all levels of decision-making adds to the legal legitimacy of participatory approaches in development. However, the argument that human rights-based approaches can add value to existing participatory approaches by paying attention to the *quality* of the participation process does not tolerate closer scrutiny. Many serious development NGOs that work in partnership with local people have probably given this question more thought than any human rights body at the international or national level. The 'active, free and meaningful' criteria, which is included in the Declaration on the Right to Development and the Common Understanding has not been given extensive consideration or interpretation by the human rights community.

Since participation is a right, advancing participation in decision-making is an objective in itself according to human rights thinking. It is a right to be an active participant in political processes, being able to speak up and be listened to by those in power – and that has its own value. However, it is also about enabling people to actively draw on their civil and political rights in order to achieve something else, often their economic, social and cultural rights.[889] In this way participation strives for a broader change agenda.

It is common both among human rights groups and development organisations, who define part of their work as participation, to view it as a way to link voice to accountability. The aim is thus to ensure that personal and community empowerment has a broader political change agenda and impact. The method is to start with identifying people's needs or problems and link them to advocacy strategies designed to influence and hold public power holders accountable.[890] In this case the aim is to increase participation in the relationship between people as citizens and rights-holders and the different power holders such as government institutions, donors and corporations that make policy decisions that have great impacts on poor peoples' lives.

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[886] Englund, *Prisoners of Freedom, supra* note 414, at 100.
[887] *Ibid.*, at 103.
[888] Compare to Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 22.
[889] See Rowlands, "The Right to be Heard", *supra* note 829, at 1. Oxfam GB has a global programme of work on the theme of 'the right to be heard'.
[890] VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 14.

2.4.7 Empowerment

Power and empowerment – the cause of confusion?

The concept of empowerment gained popularity in the 1980s in development discourse, particularly among village-level practitioners.[891] One can say that empowerment discourse is a contribution from the grassroots, and in the early days it came with the message from those working at the local level that, despite the rhetoric of participatory development, the power to define priorities is in the hands of a minority at the top.[892] Today, most development agencies claim to work on empowerment of the poor; work that no longer only occurs in close, face-to-face interactions between local organisations and their constituencies. References to empowerment are today found throughout development cooperation policies and programmes, and yet definitions are rare. Various attempts have been made, and most of these definitions focus on issues of gaining *power* and control over resources, expanding people's choices and opportunities, and investing them with the capacities and capabilities needed to affect change in their lives.[893] Most of these definitions, by the UN, the World Bank and bilateral donors, reflect the idea that 'empowerment' is a liberal concern, trying to enable people to make their own choices,[894] thereby reclaiming the power over one's own life.

VeneKlasen et al. point out that many human rights and development initiatives reflect a linear understanding of the notion of power. Effective strategies to address power need to take into account both *visible* forms of power (legislatures, laws and policies that can discriminate and undermine rights and participation of certain groups) and *hidden* forces of power that set the political agenda and benefit the privileged sectors of society. When working on participation and rights, actors need to acknowledge that the process that often is described as empowerment is ultimately about challenging and transforming these types of power relations and creating new relationships based on equality. In this process, conditions are created to help people expand their capacity and analyse problems and deal with power at all levels.[895] For these reasons this presentation starts with an investigation into the concept of power, and then moves on to dealing with the two concepts together.

Naila Kabeer observes in her work in the early 1990s that empowerment as a concept is clearly rooted in the notion of power and powerlessness, or absence of power. Analysis of powerlessness was, however, abandoned due to the static connotations and the focus shifted to the more processual aspects of power, i.e., empowerment and disempowerment. This is based on the insight that those who *appear* to have little power are still able to resist, to subvert, and sometimes to transform the conditions of their lives. However, the question remains what is meant by power, and therefore also by empowerment.[896] For all these reasons empowerment is a highly contested concept. Jo Rowlands points out that the reason for the confusion about empowerment is because the root-concept – power – is itself disputed. She argues that it is the differences in the way in which power is understood that can help explain the anomaly that

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[891] Black, *Development in Theory and Practice, supra* note 542, at 48.
[892] Naila Kabeer, *Reversed Realities: Gender Hierarchies in Development Thought* (London: Verso, 1994) at 223.
[893] Jeremy Holland and Simon Brook, "Measuring Empowerment: Country Indicators", in Ruth Alsop (ed.) *Power, Rights, and Poverty: Concepts and Connections* (New York: The World Bank, 2005) 93-110, at 94.
[894] See Holland, Brocklesby and Abugre, "Beyond the Technical Fix?", *supra* note, at 264-265.
[895] See VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 8-9.
[896] Kabeer, *Reversed Realities, supra* note 892, at 224.

people and organisations as far apart politically as feminists, Western politicians and the World Bank all have embraced the concept of empowerment.[897]

Although going deeply into power discourse and the discussions about the meaning of power and powerlessness is beyond the scope of this chapter, I will briefly highlight the main differentiations in how power is understood. Many important analyses of power in political science, sociology, and philosophy presuppose a definition of power as getting *someone else to do what you want them to do ('power over')*. Michal Foucault, Max Weber and Robert Dahl are examples of influential writers who have worked with this kind of definition, with their own nuances of course.[898] Steven Lukes' influential book *Power: A Radical View*, first published in 1974, also follows the power-as-domination path, although introducing a three dimensional view on power. Lukes claims that his writing about power is specific: it concerns power over others, i.e., power as domination. He defines this kind of power as "the ability to constrain the choices of others, coercing them or securing their compliance, by impeding them from living as their own nature and judgment dictate." The question how can we know when such power is at work, Lukes answers by encouraging penetration that goes behind appearances for the hidden, least visible forms of power. Power is the ability to bring about significant outcomes even without active intervention.[899]

This view on power as either 'power to', i.e., the capacity of an actor to affect the decision-making patterns and outcomes against the wishes of other actors, or as 'power over', i.e., implicitly accepted and undisputed procedures within institutions that systematically benefit certain individuals and groups at the expense of others,[900] has influenced the debates on power and empowerment. When power is understood as domination it can be described as 'zero-sum': the more power one person has, the less the other has.[901]

There seems to be some mismatch between how the notion 'power to' is used by different authors. Lukes uses this notion as one aspect of power as domination, while Jo Rowlands defines 'power to' as "generative power or productive power (sometimes incorporating or manifesting as forms of resistance or manipulation) which creates new possibilities and actions *without* domination." She mentions the example of leadership that comes from the wish to see a group achieve what it is capable of. This model of power is not a zero-sum as one person's power does not automatically diminish that of another.[902] Many feminists have argued for a reconceptualisation of power as capacity or ability, thereby understanding power not as 'power over' but as 'power to' (e.g. transform oneself or others). This is a kind of ability to foster transformative and empowering growth.[903]

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[897] Jo Rowlands, *Questioning Empowerment: Working with Women in Honduras* (United Kingdom: Oxfam, 1997) at 9.

[898] Amy Allen, "Feminist Perspectives on Power", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Spring 2011 edition. Available at http://plato.stanford.edu/entries/feminist-power/, visited 17 January 2012.

[899] Steven Lukes, *Power: A Radical View* (Palgrave Macmillan, 2005, second edition) at 12, 85-86. VeneKlasen et al. point out that many human rights and development initiatives reflect a linear understanding of the notion of power. Effective strategies to address power need to take into account both *visible* forms of power (legislatures, laws and policies that can discriminate and undermine rights and participation of certain groups) and *hidden* forces of power that set the political agenda and benefit the privileged sectors of society. See VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 8-9.

[900] Kabeer, *Reversed Realities, supra* note 892, at 224-225.

[901] Rowlands, *Questioning Empowerment, supra* note 897, at 9.

[902] *Ibid*., at 12.

[903] Allen, "Feminist Perspectives on Power", *supra* note 898.

Rowlands adds the categories 'power with' and 'power from within' as important for the understanding of the process of empowerment. She defines 'power with' as "a sense of the whole being greater than the sum of the individuals, especially when a group tackles problems together". [904] 'Power from within' is creative; it is an affecting and transforming power but not a controlling power. It is a positive, life-affirming, and empowering force that stands in stark contrast to power understood as domination, control, or imposing one's will on other people.[905] 'Power from within' has its basis in self-acceptance and self-respect, which implies respect for and acceptance of others as equals.[906] Empowerment must be understood as including both individual conscientisation[907] ('power within') as well as collective work, which lead to politicised 'power with' others, which again provides for 'power to' bring about change.[908]

Rowlands points out that when power is defined as the ability of one person or group to get another person or group to do something against their will, i.e., 'power over', then empowerment means bringing people who are outside the decision-making process into it. Understandably, this leads to a strong emphasis on participation in political structure and formal decision-making as well as on the ability to obtain an income that enables participation in the economic sphere.[909] The World Bank operates with such understandings of empowerment, although also taking into account participation in informal institutions.

According to the World Bank Sourcebook on empowerment and poverty reduction, "empowerment is the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives."[910] 'Institutions' include the state, markets, civil society, and international agencies but also informal institutions such as norms of social exclusion, exploitative relations, and corruption. Removal of formal and informal institutional barriers that prevent men and women from taking action to improve their lives is key to empowerment. People need a range of assets and capabilities at the individual level (e.g. health, education, housing) as well as at the collective level (such as the ability to organise and mobilise to take action).[911] Microenterprise credit programmes have been a widely used development intervention that has aimed at improving these assets and capabilities, especially for women.

Attempts to measure empowerment: An example of microenterprise credit for women

Various studies have been carried out to evaluate whether a development intervention is 'empowering', and for these purposes various indicators of empowerment have been set. For example Hashemi et al. used the following indicators to evaluate the empowerment potential of women's participation in credit programmes: mobility; economic security; ability to make small purchases; ability to make large purchases; involvement in major decisions; relative freedom from domination by the family; political and legal awareness; participation in public

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[904] Rowlands, *Questioning Empowerment*, *supra* note 897, at 13.

[905] Allen, "Feminist Perspectives on Power", *supra* note 898.

[906] Rowlands, *Questioning Empowerment*, *supra* note 897, at 13.

[907] Conscientization, or critical consciousness, is a popular education and social concept developed by Paolo Freire.

[908] Parpart, Rai & Staudt, "Rethinking Em(power)ment: An Introduction", in Jane L. Parpart, Shirin M. Rai & Kathleen Staudt (eds), *Rethinking Empowerment: Gender and Development in a Global/Local World* (London: Routledge, 2002) 3-21, at 4

[909] Rowlands, *Questioning Empowerment*, *supra* note 897, at 13.

[910] The World Bank, "Empowerment and Poverty Reduction: A Sourcebook", 2002, at vi. Available at http://siteresources.worldbank.org/INTEMPOWERMENT/Resources/486312-1095094954594/draft.pdf, visited 14 May 2012.

[911] The World Bank, "Empowerment and Poverty Reduction", *supra* note 910, at vi-vii.

protests and political campaigning; and a composite empowerment indicator, meaning that a woman was classified as 'empowered' if she had a positive score on at least five of the eight indicators.[912] The analysis found that involvement in credit programmes does empower women,[913] but that is not what is interesting about this study. What is interesting are the indicators used to capture what is meant by 'empowerment'. An 'empowered' woman is someone who goes to the market; owns her house or land; makes small purchases without asking permission of the husband; makes decisions on issues such as leasing land; is free to work outside the home; knows the law governing inheritance; and has protested with others on issues such as domestic violence. These are things that women received 'empowerment points' for in the study.[914]

The study seems to suggest that there is a clear line between empowerment and disempowerment, and that 'outside experts' can draw conclusions about who has reached the state of being 'empowered'. Naila Kabeer makes an important point when she notes that some of the indicators used may reflect organisational priorities rather than women's own, and cannot be taken as evidence of real change in power relationships unless they are also valued by women themselves as an aspect of their own goals.[915] Often empowerment is described as either an outcome, which can be measured, as in the case above, or as a process. Although in fact, empowerment is both a process and an outcome. Additionally it is a process that is often both fluid and unpredictable, making it challenging to measure, which of course does not mean researchers should not try.[916]

Kabeer has studied a number of evaluations of credit programmes' impact on empowerment of women loanees and she finds that what all these evaluations have in common is the *absence of the voices of the women themselves* telling the evaluators what kinds of impact they might value and what aspect of their own subordinated position in the family and society they might most want to change. The women had no opportunity to testify on their own behalf as to what credit has meant to them.[917] The central question is *whose perspective* should count when assessing meanings and significance. Impact has to be assessed in relation to the situation before the loan in order to understand what the kinds of changes were made possible as a result of the loan.[918] The women themselves are the best experts on their own situation before and after the loan, and they can give meaning and significance to the changes they experience.

In order to explore what the women's own vantage point can add to our understanding of the empowerment potential of the loans given, Kabeer made a participatory impact assessment of a credit programme in Bangladesh.[919] Many of the women interviewed gave witness of improvements in their lives as a result of greater economic and personal autonomy that access to credit has allowed them to achieve. Many of the changes reported in Kabeer's study are also reported in outsider evaluations of the impact of loans, such as reduction in domestic violence, increased decision-making and greater choice in household resource allocation.

[912] Syed M Hashemi, Ruth Schuler Sidney and Ann P Riley, "Rural Credit Programs and Women's Empowerment in Bangladesh", 24 *World Development* (1996) 635-653, at 638-639.
[913] *Ibid*., at 650.
[914] See explanation of indicators in Hashemi, Schuler Sidney and Riley, "Rural Credit Programs", *supra* note 912, at 638-639.
[915] Naila Kabeer, "'Can I buy me love'? Re-Evaluating the Empowerment Potential of Loans to Women in Rural Bangladesh", IDS Discussion Paper 363, 1998, at 16. Available at http://www.ids.ac.uk/files/Dp363.pdf, visited 10 May 2012.
[916] Parpart, Rai and Staudt, "Rethinking Em(power)ment", *supra* note 908, at 4.
[917] Kabeer, "'Can I buy me love'?", *supra* note 915, at 18.
[918] *Ibid*., 80.
[919] *Ibid*., 19 and 32.

What is stressed the most in Kabeer's study, was the women's own sense of enhanced self-worth as economic actors. Her study reveals that one of the most important impacts is related to women's enhanced sense of self-worth, of bringing something of value to their households.[920] This internal aspect of empowerment was not captured in the evaluations in which women's own experiences where not listened to.

Furthermore, women did not attach as much value to individualised forms of control over resources as some 'outside' evaluations of credit schemes claimed that they do, or 'should do'. The ability to participate in joint decision-making about how loans were used and how the income from loans were to be used mattered more to the women interviewed. Lending did contribute to a *greater voice* in household decision-making processes.[921] Naturally, the aim of any empowerment strategy should be to participate with greater strength in decision-making and actually influence such decisions,[922] but this does not have to be at the expense of other decision-makers. All of this indicates that empowerment is more nuanced when the starting point is 'power to' and 'power with' instead of 'power over'.

Rowlands points out that when power is given a generative meaning, 'power to' and 'power with', empowerment is concerned with the processes in which people become aware of their own interests and how those relate to the interest of others.[923] Power is not about domination and the power of others is not diminished once you get more power. It is a power that contributes, rather than takes away, a power that strengthens rather than weakens.[924]

Rowlands distinguishes between three dimensions of empowerment: personal, relational, and collective. Personal empowerment means "developing a sense of self and individual confidence and capacity, and undoing the effects of internalised oppression." (Compare to the Kabeer study in which one of the most important impacts was related to women's enhanced sense of self-worth, of bringing something of value to their households.) Relational empowerment is experienced when one develops the "ability to negotiate and influence the nature of a relationship and decisions made within it." (Compare to the fact that lending did contribute to a greater voice in household decision-making processes for women.) Collective empowerment is demonstrated where individuals work in a group to achieve a more extensive impact.[925] This is often very important in work where women work as a group on finding solutions to common problems. While collective aspects of empowerment are important, it should not be forgotten that women always act as individuals, and there is no reason to expect women, even from the same class or caste, to respond identically to new opportunities. It is not possible to plan an intervention which will be automatically empowering to all women. What a good intervention can do is to create an environment or provide resources which are most likely to enable as many women as possible to empower themselves.[926]

Kabeer raises the issue that empowerment is often conceptualised unidimensionally so that it is assumed that if women are not found to be empowered by one indicator, they must be disempowered. Instead empowerment can be seen as "an *expansion in the range of potential choices available to women* so that actual outcomes reflect the particular set of choices which the women in question value".[927] The important point is that it is an expansion of choices

[920] Kabeer, "'Can I buy me love'?", *supra* note 915, at 51 and 82.
[921] *Ibid*., at 82-83.
[922] Rowlands, *Questioning Empowerment*, *supra* note 897, at 14.
[923] *Ibid*., at 14.
[924] Kabeer, "'Can I buy me love'?", *supra* note 915, at 34 and 81.
[925] Rowlands, *Questioning Empowerment*, *supra* note 897, at 15.
[926] Kabeer, "'Can I buy me love'?", *supra* note 915, at 85-86.
[927] Kabeer, "'Can I buy me love'?", *supra* note 915, at 85. Emphasis in original.

which *the woman in question values*. This is the central thinking in Amartya Sen's capability approach, where individual advantages are judged by a person's *capability to do things he or she has reason to value*. The focus is on the freedom that a person has to do things that he or she may value doing or being. The capability approach should be judged in terms of individual opportunity rather than a specific 'design' as to how a society should be organised. Sen points out that as the capability perspective does point to the central relevance of inequality of capabilities in the assessment of social disparities, it does not, on its own, propose any specific formula for policy decisions.[928] Therefore, we should keep in mind that Sen's work on capabilities is only a source of inspiration for the empowerment discourse, and there are no clear answers how these notions should be operationalised into practice in development policies or otherwise.

Based on her study, Kabeer draws some broader lessons regarding empowerment and how to evaluate interventions that claim to empower people. Her first point is that 'empowerment' is a *multidimensional* process of change that cannot be reduced to any single aspect of process or outcome.[929] In her book from 1994 Kabeer also highlighted the multidimensional nature of power and suggested that empowerment strategies of women must build on 'the power within' as the basis for improving their ability to control resources, to set agendas and make decisions.[930] Strategies of 'empowerment from within' provide women with new perspectives as they are able to review their lives from other vantage points. Reflection, analysis and assessment of what has been taken for granted uncovers socially constructed and socially shared basis of apparently individual problems. Moreover, new forms of consciousness can arise out of women's new access to analytical skills, social networks, organisational strength, and a sense of not being alone.[931]

Empowerment is not something done to people, but rather it is a participatory process that engages people in reflection, inquiry, and action.[932] Development cooperation initiatives cannot 'empower women' but instead programmes can help to create the conditions whereby women can become "agents of their own development and empowerment".[933] Institutions, including international agencies, can support processes that increase women's self-reliance, building self-confidence, solving problems, gaining skills, and help them set their own agendas.[934]

Are human rights empowering?

The Common Understanding does not include empowerment in the list of human rights principles. Yet, empowerment is often included as an important element of human rights-based approaches to development. The question is what human rights add to the 'good development discourse' on empowerment? Are human rights empowering? This question is far too great to be answered here and it reappears throughout the thesis. First of all, I will not attempt to answer the question whether the practice of human rights has empowering outcomes, i.e., are the results from struggles over rights empowering? I will instead focus on

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[928] Amartya Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009) at 231-232.

[929] Kabeer, "'Can I buy me love'?", *supra* note 915, at 80.

[930] Kabeer, *Reversed Realities, supra* note 892, at 229.

[931] *Ibid*., at 245-246.

[932] See VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 9.

[933] Development Assistance Committee, "DAC Source Book on Concepts and Approaches Linked to Gender Equality", OECD, Paris 1998, at 9. Available at http://www.oecd.org/dataoecd/4/16/31572047.pdf, visited 14 May 2012.

[934] CIDA's Policy on Gender Equality. Available at http://w3.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/EMA-218123616-NN9, visited 14 May 2012.

the question of whether human rights discourse and language is empowering or disempowering from the perspective of marginalised rights-holders. My focus is thereby more on the processual aspects of empowerment.

It is a fact that human rights discourse has captured the attention of people around the world in a way that few other discourses have done. Likewise, it is a fact that an enormous global phenomenon has emerged on human rights.[935] Human rights thereby play a *political* role, empowering the individual and limiting the power of the sovereign, but we should keep in mind that they are foremost a rights discourse rooted in the *legal* tradition.[936] Whether this is a strength or a weakness can be debated and different actors have their own opinions about this. With regard to the empowerment potential of human rights, one can first of all note that the establishment of human rights as a legal structure is one aspect, and the possibilities to *use* this structure to expand possibilities is another. When there are legal norms to protect human rights of individuals in a society this is naturally a good starting point for empowerment defined by Kabeer as "an *expansion in the range of potential choices available*". However, we should not forget the other half of the definition "so that actual outcomes reflect the particular set of choices which the women [or men] in question value",[937] which indicates the importance of whose perspective counts in empowerment processes. Human rights must be valued as important and relevant in the daily lives of marginalised people in order for them to become relevant, as a language used against oppression, and as tools used to improve the quality of peoples' lives.

Concerning the human rights language associated with human rights discourse, Charles R. Beitz observes that "the language of human rights has become the common idiom of social criticism in global politics".[938] Human rights have called forth an advocacy revolution in the form of the emergence of a network of non-governmental organisations to pressure states to practice what they preach. Human rights have thus given witnesses and bystanders a stake in abuse and oppression both within and beyond the national borders.[939]

Hugo Slim sees empowering potential as the language of rights enters international development. The same people who used to be seen as 'needy' or 'beneficiaries' can now present themselves as rightful and dignified people who "can make just demands of power and spell out the duties of power in terms of moral and political goods." These people move from being objects to being subjects of their own free speech.[940] Indeed it is easy to agree that it is more empowering to be a claimant of rights than an object of a more or less arbitrary charity. At the same time, we should be aware that the language of human rights has many limitations. First of all, the language of human rights is not only spoken by the oppressed but also by the powerful, by the very same governments, inter-governmental organisations and government agencies that are criticised for oppressive policies. Human rights language has become 'mainstreamed' into policy frameworks of states, multilateral lending institutions and the UN.[941] Similarly, it can be observed that from one aspect codified human rights legitimate the power of states; and from another they are also the means to challenge this power.[942]

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[935] Miia Halme, *Human Rights in Action* (University of Helsinki, Research Series in Anthropology, 2008) at 211.
[936] Paulina Tambakaki, *Human Rights, or Citizenship?* (New York, Birbeck Law Press: 2010) at 13.
[937] Kabeer, "'Can I buy me love'?", *supra* note 915, at 85. Emphasis in original.
[938] In *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), preference.
[939] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001) at 8.
[940] Slim, "A Response to Peter Uvin", *supra* note 57, at 3.
[941] Ignatieff, *Human Rights as Politics and Idolatry, supra* note 939, at 22.
[942] See Tambakaki, *Human Rights, or Citizenship?, supra* note 936, at 74. Or as Mahmood Mamdani points out "Rights talk legitimises power because it develops an accountability of power." Mamdani, *Beyond Rights Talk and Culture Talk*, *supra* note 37, at 6.

Moreover, we must keep in mind that although there are analogies to human rights ideas in various cultural traditions, the particular form that they have taken in the human rights movement have post-Enlightenment, rationalist, secular, Western, modern and capitalist origins.[943] When combined with the unequal relationships between the West and everyone else, and the fact that human rights criticism has been an overwhelmingly one-way street,[944] it is clear that the language of human rights can be perceived as disempowering for many people and groups in the so called developing world.

Human rights education

The language of human rights has been preached to a great extent as part of 'awareness raising', in the belief that if people only know that they have human rights, they will start claiming them. Miia Halme observes in her doctoral dissertation that one characteristic of the human rights phenomenon is the radical and transformative potential of human rights discourse; "adherence to the human rights discourse has come to mark the abandoning of old ideologies and embracing of new ways of thinking." This discourse promises to challenge old structures of oppression and, in the name of the equal worth of all, to liberate the individual from them. One of the dominant tools used to realise these desires is commonly construed as *human rights education*, making the individuals conscious of oppression and empowering them.[945]

The objective of human rights education is said to include not only a learning process about human rights and mechanisms for their protection, but also skills to apply them. Developing values, attitudes, and behaviour which reinforce human rights is another element of human rights education, and so is taking action to defend and promote them.[946] According to Garth Meintjes human rights education should lead to a process of acquiring the knowledge and critical awareness needed to understand and question oppressive patterns of social, political, and economic organisation. Therefore, human rights education is often claimed to be empowering. The idea of human rights education as empowerment, however, demands pedagogical skills that differ in terms of objectives and methods from other areas of conventionally defined education. Meintjes claims that the danger is that while the rhetoric of empowerment is increasingly accepted, the ends and means remain those of conventional education.[947]

This is probably what happened in the NICE project in Malawi that we reviewed in the section on participation. NICE is, however, not the only example of educational activities on human rights failing to employ pedagogical methods that are empowering. In her analysis of certain educational activities of a Nordic and Scandinavian network of human rights experts, Halme asks "whether its educational mode provides students with increasing control or mastery over their own lives with which to challenge oppressive structures",[948] (central elements of empowerment) and she assesses how the education activities can be seen as

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[943] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Oxford University Press, 2004) at 18.

[944] *Ibid*., at 20

[945] Halme, *Human Rights in Action, supra* note 935, at 212.

[946] Elena Ippoliti, "Human Rights Education: Global Initiatives at the United Nations", in C. Mahler, A. Mihr & R. Toivanen (eds), *The United Nations Decade for Human Rights Education and the Inclusion of National Minorities* (Frankfurt am Main, Peter Lang, 2009) 11-18, at 12.

[947] Garth Meintjes, "Human Rights Education as Empowerment: Reflections on Pedagogy", in G. J. Andreopoulos & R. P. Claude (eds), *Human Rights Education for the Twenty-First Century* (Philadelphia, University of Pennsylvania Press: 1997) 64-70, at 65-66, 70.

[948] Halme, *Human Rights in Action, supra* note 935, at 106.

contributing to the goal of *empowering* participants.[949] Halme concludes that *learning* is construed as the adoption of necessary information 'dispensed' by authorities to those who are to receive it, and the outcome of the learning process is static – instead of empowering students to become conscious of their own participation in the creation of knowledge.[950] Her conclusion is that the learning process is static instead of empowering, and participants are held in predetermined positions. There is strict separation between faculty participants who hold 'knowledge' and students who benefit from this knowledge.[951]

As we have seen, Englund has made similar observations concerning 'civic education' activities on the subject of human rights and democratisation in Malawi. He views human rights discourse in Malawi as a disempowering discourse, characterised by elitism, and he calls it a "thinly veiled patronizing approach that enabled self-proclaimed experts to discount popular responses to their interventions."[952]

Halme and Englund both come to similar conclusions: human rights education, as it has been provided in their respective case studies, has missed opportunities to empower participants. Both see human rights education as hierarchical and non-participatory. Challenging oppressive structures is not taking place and instead the teachers or 'facilitators' are placed within exciting hierarchies.[953] Naturally, there are great differences between human rights education in a Nordic setting, at a university level, and civic education carried out in rural Malawi. However, it seems that the approaches used are not far apart, both seeing the process of enhancing knowledge as linear, flowing from the teacher to the student. According to Paulo Freire education should begin with resolving the teacher-student contradiction so that both are simultaneously teachers *and* students. This approach is not found in conventional, 'banking' education.[954]

One reason that human rights education has challenges in being empowering is perhaps the strong discourse of 'expert knowledge' prevalent in human rights discourse. The concept of human rights is seen as ready-defined, by experts. Empowerment is hard to reach if 'students' are seen as only the receivers of ready-defined concepts, instead of partners in a process where the human rights concept itself is critically analysed. It is necessary to contextualise and give meaning to human rights so that they are understood in the context of people's lived experience. People may have the experience of denial of the right to health care or freedom of expression. In a 'human rights from below' approach, the facilitators start from people's personal stories, hopes, disappointments, pain and experience of oppression – not from a remote 'universal declaration' or bill of rights. There can still be reference to such documents "but only in the sense that they represent specific attempts to articulate humanity in particular contexts and at particular times". They are not 'the holy writ'. Instead they can be examined from the perspective of the actors' reality.[955]

Perhaps it should not be surprising that human rights education has challenges to be empowering as the whole idea about empowerment is fairly new to human rights discourse

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[949] Halme, *Human Rights in Action, supra* note 935, at 107.
[950] *Ibid*., at 115.
[951] *Ibid*., at 213.
[952] Englund, *Prisoners of Freedom, supra* note 414, at 69.
[953] *Ibid*., at 104.
[954] Freire, *Pedagogy of the Oppressed, supra* note 364, at 53-54.
[955] Ife, *Human Rights from Below*, *supra* note 8, at 203.

and has been invented by other discourses, such as that of alternative development[956] and pedagogy.[957]

This short analysis highlights the tensions and paradoxes between the ambition of human rights and the actual practices that are trying to translate the principles into reality on the ground. In theory, human rights can be very empowering – in practice reality is more complicated and complex.

Human rights-based empowerment

Power has the ability to prevent people's participation and the fulfilment of their rights, and therefore questions of power and empowerment are central for human rights-based work.[958] Darrow and Tomas suggest that human rights do add value to good programming since they imply dignity and respect for the inherent worth of the individual, an argument which is based on the universal character of human rights. They use the same definition of empowerment as the World Bank in its Sourcebook, only adding that *empowerment means increasing the capacities of people to claim and exercise their rights effectively.* (This kind of rights language is not used by the World Bank.) In order to support empowerment, it is held that programme priorities should be in the area of education and access to information; strategies for inclusion and participation in decision-making; accountability of state officials; and building of local organisational capacity.[959]

Hans-Otto Sano has observed that the practice of rights-based empowerment include activities for rights-holder mobilisation, civil society participation, and advocacy strategies that include campaigns and litigation. This results in processes of knowledge enhancement and learning, in organisational development and capacity building, in the creation of new channels of interaction, and also in direct actions of rights-realisation.[960]

This highlights the formal and external aspects of creating an environment in which people can empower themselves. Emphasis in human rights-based empowerment is on enhancing people's ability to claim and exercise their rights effectively.[961] (This is an important feature of the Common Understanding despite the fact that the word 'empowerment' is not used in this context.) There is no questioning whether people *value* expanding their skills and choices when claiming and exercising their rights.

As in the discourse and practice around human rights-based approaches to development assistance in general, the discourse around empowerment is also diverse. While some agencies see rights as a means of addressing issues of accountability of duty-holders, others put rights into the context of enabling people to empower themselves to overcome obstacles to the realisation of social and economic rights. Cornwall and Nyamu-Musembi critically observe that CARE's work in Kenya is an example of the latter, where 'empowerment' has meant 'opting-out' of public services rather than making demands on the state as a duty-holder.[962] Just as 'participation' can be (mis)used to give communities an increasing role in

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[956] See e.g. Friedman, *Empowerment: The Politics of Alternative Development, supra* note 263.
[957] Although Paulo Freire did not use the concept 'empowerment' he is often considered a pioneer in this area with his classic book *The Pedagogy of Oppressed*, first edition of 1971.
[958] VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 8-9.
[959] Darrow and Tomas, "Power, Capture, and Conflict", *supra* note 65, at 494. Emphasis is that of the author.
[960] Sano, "Making Rights Work for the Benefit of the Poor", *supra* note 790, at 11.
[961] See e.g., Hansen and Sano, "The Implications and Value Added of a Rights-Based Approach", *supra* note 708, at 51.
[962] Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1431.

co-production and self-provisioning of many services,[963] and thereby giving rights-holders many functions that, according to human rights instruments, should belong to the state, so can 'empowerment' be used as a strategy to increase self-reliance *instead* of making demands on duty-holders.

Another strategy for empowerment is to work alongside poor people as advocates, and thereby increase the capacity of citizens to claim their rights.[964] Ideally, human rights work combines a local perspective with a national and global perspective. In development practice, empowerment is mostly associated with the local level. Jane Parpart et al. point out that empowerment cannot be understood only at the local level but requires attention to the "specific historical struggles of women and men within structures and discourses of power operating at micro-, meso- and macro-levels."[965]

There can be misunderstandings when the slogan 'people cannot be empowered, only empower themselves', which is an important insight, is translated into human rights-based work. People *can* empower themselves to *make demands* on duty-holders. Rights-based empowerment does not mean people start building the school on their own (or whatever demand it is they have). When mobilisation for human rights is on the agenda, empowerment does not automatically lead to increased self-reliance. Instead people start to make demands on the duty-holders to respect, protect, and fulfil their rights. If this process can be called 'empowerment' can and should be debated. The issues at stake are especially who sets the agenda, who decides what issue to mobilise around, and what happens in the process of translating people's daily challenges into human rights language.

VeneKlasen points out that when working on participation and rights, organisations need to acknowledge that the process that often is described as empowerment is ultimately about challenging and transforming these types of power relations and creating new relationships based on equality. In this process, conditions are created to help people expand their capacity and analyse problems and deal with power at all levels.[966] Considering that human rights discourse, and human rights education in particular, is often characterised by elitism and static learning models, this kind of work needs to start with the human rights organisations themselves.

Concluding remarks on empowerment

As pointed out by Kabeer, empowerment is a multidimensional process of change that cannot be reduced to one aspect, such as human rights. The human rights-based definition of empowerment, suggested by Darrow and Tomas, i.e., "increasing the capacities of people to claim and exercise their rights effectively", is too narrow. Human rights can play a role in empowerment processes but the willingness to use human rights as tools to expand possibilities must come from *within* the individual or group, especially considering that human rights discourse is associated with elite capture in many countries of the South. Following on from the thinking by Kabeer and Sen, individuals must have *reason to value* the actual outcome that can be achieved through asserting human rights.

As human rights traditionally have been seen as safeguards against power, and power in this case means 'power over', it is natural that human rights discourse has focussed on meanings of empowerment that use this kind of definition of power as the starting point. Human rights-

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[963] See Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 76.
[964] Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1430.
[965] Parpart, Rai and Staudt, "Rethinking Em(power)ment", *supra* note 908, at 12.
[966] VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 8-9.

based empowerment strategies then naturally focus on access to information, education, bringing people outside of decision-making into it, accountability of state-officials, advocacy strategies that include campaigns and litigation. There is less focus on 'empowerment from within' which would provide people with possibilities to analyse and review their lives from new perspectives. As far as I know there has not been any research on what role a human rights perspective could possibly add to this kind of analysis, reflection, and assessment. Both aspects of empowerment are important. If empowerment is to go beyond rhetoric to action, economic and political power to use legislation, having access to institutions and resources is a key issue, especially for women.

It is clear that the process of empowerment has both an internal and external aspect; it includes inner reflection about one's own inherent worth and ability as a human being as well as outer reflection and action challenging and transforming ridged relationships. For example, women's empowerment cannot come in the same language as has been infused by values of patriarchy. Empowerment has to come from a place within. The fact that someone learns that he or she has human rights just because he or she was born human, does not necessarily change this individual's sense of self-worth. In addition, inner reflection and transformation is needed. 'Power with' others through collective action and politics is often a force that has transformative capacity, leading to processes and outcomes that are valued as empowering by the participants themselves.

The purpose of reviewing some of the critical accounts made of human rights discourse, especially human rights education, as disempowering is to remind us that challenging old structures of oppression seldom occurs in a neatly organised fashion, from comfortable seats in a class room. Learning about human rights does not automatically lead to empowerment, or to taking actions to achieve change and address oppression. Change is a messy process, as most organisations involved in rights-based empowerment have learned. Moreover, it is clear that the role of human rights in processes of change can be static and disempowering or 'alive', claimed in the moment, and empowering. The context and the process matter and often there is a fine line between empowerment and disempowerment. We should also keep in mind that just because there are instances of human rights discourse failing to live up its own ambitions to achieve change, this does not mean that human rights should be abandoned as a source of inspiration that can inform struggles against oppression.

2.4.8   Concluding remarks on human rights principles

This chapter has tried to give an overview over diverging concepts and interpretations. It has also posed critical questions concerning the added value of human rights principles in development, and whether human rights discourse contributes to empowerment.

One of the overall questions in this thesis is what role human rights (as standards, as principles, as a language) play in development practice, and whether they have transformative potential. The answer to this question always depends on the context – and in order to understand the context it is important to understand how the actors involved in shaping this context define and apply so called human rights principles. Participation, accountability, and empowerment can be used as labels in a technocratic, 'from above' fashion that leaves little room for deeper structural change or these principles can give people opportunities to challenge structures that are hindering their human rights realisation, leading to personal and political transformation.

It is important to be aware of the different forms that the various so called human rights principles can take in development cooperation and otherwise. This is especially true

concerning accountability, participation, and empowerment which have strong foundations in other disciplines and discourses outside of the normative human rights tradition. Once we know something about how the principles in question have been interpreted and applied in 'good development practice' it is easier to be clear about the link they have to human rights.

It is not always possible to see a clear distinction between good development principles using instrumental or utilitarian motivations and normatively-based human rights approaches seeing human rights *as ends in themselves* (a distinction made by Darrow and Tomas). Development practice is far too complex to allow this kind of comparison, and the role human rights in general and human rights principles in particular play in this field is very diverse. Again, we must keep in mind that there is not one human rights-based approach to development but many approaches with different working methods and overall motivations for their work. A general distinction seems to be between an 'empowerment model' to human rights and development and a more legalistic approach concerning the role of human rights standards in development practice. The latter is driven by the conviction that human rights are ends in themselves while the former strives for broader and deeper social and political change, also questioning the human rights concept itself. Human rights and the principles of participation, accountability, and empowerment are means to achieving this wider agenda.

PART III   THE ROLE OF HUMAN RIGHTS IN FOOD SECURITY EFFORTS IN MALAWI: CHARITY-BASED, RIGHTS-BASED AND LEGAL APPROACHES

3.1   Human rights discourses in Malawi: Giving meaning to 'human rights'

In this chapter I discuss human rights discourse in Malawi and how the concept of 'human rights' has been used and interpreted by local actors. In Malawi there is a struggle between what Merry calls "the generalizing strategies for transnational actors and the particularistic techniques of activists working within local contexts".[967] There are no easy answers for solving these struggles, but I do think it is time to strengthen the local voices that are experts on the contexts within which they live and work.

However, during my field research I was shocked by the paternalistic attitudes the urban elite had towards rural Malawians. There was very little solidarity or commitment to making changes in social justice. Englund points out that *lack of commitment to social justice* is partly explained by the relative absence of radical ideologies among the intelligentsia.[968] Whether human rights have the potential to become a radical ideology that would challenge the status quo remains to be seen.

3.1.1   Second liberation: Commitment to a multiparty democracy, human rights, and a market economy

> "The issue of human rights is a new thing to Malawi. And sometimes it brings a lot of confusion, fears, it's natural."[969]

In the following I will give a brief overview of the historic developments behind a formal commitment to human rights and multiparty democracy. This overview of the Malawian human rights discourse focuses on a limited time period, starting from the 'second liberation' in the early 1990s to 2006 when I conducted my field research.

Malawi was ruled by one of the most repressive regimes in Africa after independence in 1964. Dr Hastings Kamuzu Banda had established an autocratic leadership system, making himself the undisputable leader. Despite brutal violations of human rights, Banda was generously supported with Western aid during the cold war because of his strict anti-communist stance. Around 1991, pressure groups against Banda were founded and in 1992 Banda saw no other way than to call for a referendum on the question of whether a multiparty system of government should be introduced or not.[970]

Neither of the two largest churches had been known for being critical of the Banda regime. However, through personal contact between opposition activists and the Catholic Bishops, the Catholic clergy was approached and a Pastoral Letter was read in Catholic churches throughout the country in 1992, publicly criticising the regime for its poor human rights

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[967] Merry, *Human Rights and Gender Violence*, *supra* note 287, at 103.
[968] Harri Englund, *Human Rights and African Airwaves: Mediating Equality on the Chichewa Radio* (Bloomington: Indiana University Press, 2011) at 5.
[969] Interview No. 6 with Oxfam, Malawi 2006. FSD2727.
[970] Heiko Meinhardt and Nandini Patel, *Malawi's Process of Democratic Transition: An Analysis of Political Developments Between 1990 and 2003* (Lilongwe: Konrad-Adenauer-Stiftung, 2003) at 3, 5, 9-10.

record, lack of democratic rights,[971] and Malawi's 'climate of mistrust and fear'.[972] This was mentioned often by my informants as an important mile stone in the Malawian human rights movement.

In a referendum held on 14 June 1993, two-thirds of Malawians voted for a multiparty democracy. The Banda regime did not concede defeat but the momentum behind the democratic movement was stronger than Banda had calculated. Two weeks later the Malawi Parliament, which had been restricted to the ruling Malawi Congress Party (MCP) for 29 years, repealed Section 4 of the Constitution to allow opposition parties. A National Consultative Council and a National Executive Council were set up to examine the Constitution and the electoral process. Opposition groups and the Malawi Law Society made requests for assistance from international legal experts on constitutional law, the electoral process and a Bill of Rights, and to advise on constitutional and legal reform.[973]

Amnesty International called for human rights guarantees in the Constitution to "provide the framework for the institutionalization of human rights safeguards", based on relevant international and regional human rights standards,[974] and consequently a democratic constitution was drafted within a few months, with considerable input from foreign experts.[975] The international community had become interested in human rights and good governance rather than simply anti-communism[976] and the democratisation process was encouraged by Western donors, but this only partly explains why Banda accepted the democratic transition, which was carried out in a reasonably peaceful way. Other factors such as age and illness of the president as well as the military's unwillingness to participate in repressive actions against the opposition movements were also important.[977]

The 1994 elections were won by the United Democratic Front (UDF) and Bakili Muluzu, a former servant of the old regime, was elected president.[978] There was no doubt that both in the 1993 referendum and in the General Elections of 1994 Malawians voted for change. However, it was far from clear what this change would involve other than the replacement of Banda and his loyalists. The fundamental socio-economic structures remained tightly in place, the politics of patronage continued and attempts to address massive poverty remained at the level of rhetoric.[979]

The 1999 elections were again won by the UDF,[980] led by President Muluzi. Five years later there was an outcry among civil society at Muluzi's attempt to stand for an unconstitutional third term,[981] and finally the 2004 Presidential election was won by Bingu wa Mutharika, as the candidate of the UDF. Mutharika was handpicked by Muluzi, who hoped he would follow his directives. In early 2005, Mutharika announced he was leaving the UDF and forming a

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[971] Meinhardt and Patel, *Malawi's Process of Democratic Transition, supra* note 970, at 8.

[972] Harri Englund, "The Dead Hand of Human Rights: Contrasting Christianities in Post-Transition Malawi", 38 *Journal of Modern African Studies* (2000) 579-603, at 584.

[973] Meinhardt and Patel, *Malawi's Process of Democratic Transition, supra* note 970, at 12.

[974] Amnesty International, "Amnesty International's Recommendations for Permanent Protection of Basic Human Rights Following the Pro-Democracy Vote", Document – Malawi, September 1993 (AI Index AFR 36/31/93). Available at www.amnesty.org, visited 14 May 2012.

[975] Meinhardt and Patel, *Malawi's Process of Democratic Transition, supra* note 970, at 12.

[976] Kings M. Phiri and Kenneth R. Ross, "From Totalitarianism to Democracy in Malawi", in K. M. Phiri & K. R. Ross (eds), *Democratization in Malawi: A Stocktaking* (Blantyre: Christian Literature Association in Malawi, 1998) 9-20. at 11.

[977] Meinhardt and Patel, *Malawi's Process of Democratic Transition, supra* note 970, at 11.

[978] *Ibid*.

[979] Phiri and Ross, "From Totalitarianism to Democracy in Malawi", *supra* note 976, at 12.

[980] African Elections Database. Available at http://africanelections.tripod.com/mw.html, visited 20 August 2012.

[981] See Englund, *Human Rights and African Airwaves, supra* note 968, at 6.

new party called the Democratic Progressive Party (DPP).[982] The formal commitment to human rights, made by the new government, seemed to soothe the donors' anxieties concerning the level of Malawi's democratic reform.[983] Food security became one of Mutharika's priorities, and policies in favour of smallholder famers, such as input subsidies, made him popular.[984]

At the time of my field research, at the end of 2006, human rights were very much part of an official discourse. Human rights were referred to in newspapers, on the radio, in public speeches by politicians and by government officials whom I interviewed. I share Englund's observation that the values of multiparty democracy, human rights, and a market economy are seemingly shared values. What all political parties in Malawi share since the transition to multiparty system of government, is commitment to liberalism in both politics and the economy. What distinguishes the parties is their regional base of popular support.[985]

3.1.2 'Freedom' discourse

There seems to be agreement that the major difference between the old and new eras is the greater extent of 'freedom' – *ufulu*.[986] *Ufulu* is Chichewa, which is the sole national language of Malawi and one of seven national languages of Zambia and has been offered as a translation of 'human rights'.[987] For local human rights discourse it is problematic that the entire human rights discourse has been embodied in the European linguistic idiom. Going deeply into the question of the role of imperial languages in the promotion of human rights awareness in Africa[988] in general and Malawi in particular is, however, beyond the scope of this chapter. It is sufficient to know that *ufulu* underlines freedoms rather than entitlements.

A longer version is *ufulu wachibadwidwe*, in which *ufulu* refers to 'freedom', 'liberty', and 'independence' while the adjectival *wachibadwidwe*, using the verb *kubadwa* which means 'to be born', and thereby hinges on the individual's birth right. Englund refers to a Malawian linguist, Pascal Kishindo, who has suggested that *ufulu wachibadwidwe* is actually a new coinage.[989] Nevertheless, *ufulu* was used by most human rights actors in Malawi and also by researchers describing human rights discourse in the country. I have, however, not found any research on the origin of the *ufulu* concept. Englund has, during extensive periods of field research in Malawi and Zambia, not been able to trace the authorship of *ufulu*.[990] Orally I have been informed by Malawians that *mfulu* actually is a more accurate description of the human rights idea, and is seen as something that has been part of Malawian culture long before the 'second liberation'.[991] The fact that the name of the Malawi Human Rights

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[982] Lisa Gilman, *The Dance of Politics: Gender, Performance, and Democratization in Malawi* (Philadelphia: Temple University Press, 2009) at 185-186.
[983] Englund, "The Dead Hand of Human Rights", *supra* note 972, at 582.
[984] Englund, *Human Rights and African Airwaves, supra* note 968, at 7.
[985] Harri Englund, "Introduction", in H. Englund (ed.), *A Democracy of Chameleons: Politics and Culture in the New Malawi* (Uppsala: Nordiska Afrikainstitutet, 2002) 11-24, at 11-12.
[986] Englund, "The Dead Hand of Human Rights", *supra* note 972, at 583.
[987] Englund, *Prisoners of Freedom, supra* note 414, at 49.
[988] Alamin M. Mazrui, "Globalism and Some Linguistic Dimensions of Human Rights in Africa", in P. T. Zeleza & P. J. McConnaughay (eds), *Human Rights, the Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) 52-70, at 56.
[989] Englund, *Prisoners of Freedom, supra* note 414, at 49. See also Pascal Kishindo, "Evolution of Political Terminology in Chichewa and the Changing political Culture in Malawi", 9 *Nordic Journal of African Studies*, (2000) 20-30.
[990] Englund, *Prisoners of Freedom, supra* note 414, at 50.
[991] These discussions took place in Copenhagen in November 2011 when I presented an earlier draft of this chapter in conjunction with a workshop that was part of the Future of the Nordic Development Research

Commission Bulletin is *Mfulu* shows that these terms are used in parallel, but with *ufulu* being more dominant.

Many Malawians also use *ufulu* to describe liberalism 'gone wild', characterised by disrespect by youths against elders, immoral dress code, disobedience and political disunity.[992] One of Thoko Kaime's informants relates this to the individual focus of, in this case, children's rights:

> These *freedoms* that children are said to have nowadays are good but sometimes they cause problems. The unity and peace that was in the family is now gone and parents have no freedom any more... According to our culture everyone should be similarly treated.[993]

Such accounts seem to indicate that there has been little discussion about the content of the human rights concept itself and how that fits into the lived reality of Malawian children, women, and men. Englund makes the argument that the notions of rights and freedoms have come to be defined in a particular way in Malawi, steered by foreign donors and creditors,[994] that is, 'from above'. One example of donor influence is the Malawi Human Rights Resource Centre (MHRRC), established in 1997 by the Danish Centre for Human Rights as a project with the "objective to strengthen the implementation of human rights standards in Malawi."[995] Although the MHRRC consisted exclusively of Malawian staff members, and seen as an obvious advantage by the funding Centre, concern was raised in an early evaluation report that "a 'Malawi way' of doing things is acceptable only when it is in line with international norms and standards. It becomes the 'wrong' way, however, when it is not."[996]

According to this line of reasoning, localised human rights discourses should be in line with how human rights are defined in international legal documents and there should be no room for too much vernaculisation. On this issue we should, however, be careful in drawing conclusions. It is clear that local activists, politicians, journalists and, religious leaders have eagerly participated in the process of giving meaning to the 'human rights talk' in Malawi, and it would be an oversimplification to say that human rights represent a Northern agenda.[997] Rather, human rights discourse has been dominated by elites that have close connections to donor representatives. (Regarding the role of donors, there is also the perspective that was presented in some of my interviews with local human rights activists that foreign donors have *avoided* rights talk and been more comfortable in 'welfare issues'.[998])

Conference. I am grateful to Dr. Desmond Kaunda for pointing out the parallel usage of *ufulu* and *mfulu* in the Malawian human rights discourse.

[992] Englund, "The Dead Hand of Human Rights", *supra* note 972, at 583.

[993] Referred to in Kaime, "The Struggle for Context", *supra* note 492, at 48. Emphasis added.

[994] Englund, *Prisoners of Freedom, supra* note 414, at 5.

[995] *Evaluation Report, The Malawi Human Rights Resource Centre,* prepared by South Consulting for The Danish Centre for Human Rights (Copenhagen: Danish Centre for Human Rights, 2000) at 3.

[996] *Ibid.*, at 36.

[997] See Englund, "The Dead Hand of Human Rights", *supra* note 972, at 580.

[998] Interview No. 19 with NGO, Malawi 2006. FSD2727. DFID had a programme called "Transform: Through Rights to Needs for Marginalised Malawians (2001-2003)" that was suspended in 2003 at the request of government. The main reason for closure was "an underestimation of the sensitivity of the project." See Chris Barnett et al., "Evaluation of DFID Country Programmes: Country Study Malawi 2000-2005", April 2006, at 32. Available at http://www.oecd.org/dataoecd/29/9/36721050.pdf, visited 15 May 2012.

However, looking at the legal framework and official discourse, human rights have been defined in a rather *narrow* way in Malawi, with the primary focus on so called civil and political rights. One of my informants explains:

> The reception of human rights here after democratization was clearly a transition first and foremost for political and civil rights. The excitement was on the freedoms rather, … freedom of speech, association, to participate in politics, to vote, to be voted into office, that was what the Malawians accepted that these are the rights. Economic, social and cultural rights have somehow been a bit hidden, they are there, we can talk about them but they are not as exposed as civil and political rights. So when we go to the people and we ask which rights are you concerned about they talk of those freedoms. Maybe because they were the rights that were more suppressed during the authoritarian regime because it was very strong on political participation, it tried its best to shot people out. Maybe that's why we are now in this stage, when we talk of economic, social and cultural rights, do people appreciate and understand them?[999]

There has been efforts by certain NGOs and the Malawi Human Rights Commission to include economic, social, and cultural rights in human rights discourse,[1000] but also in the context of these rights, focus has been on the 'freedom side' rather than the 'entitlement side'. To exemplify how a narrow understanding of rights as 'freedoms' has come to dominate human rights discourse, Englund has analysed translations of human rights instruments from English to Chichewa, the main local language in Malawi. That the Chichewa translation of human rights as 'birth freedoms' (*ufulu wachibadwidwe*)[1001] does not commit itself to the entitlement aspect of human rights is particularly revealing in the case of economic and social rights. The English translation of the Chichewa version of Article 22 of the Universal Declaration of Human Rights (1948) reads as follows:

> Everyone has the freedom to get assistance from the state when well-being is undermined in accordance with the extent to which the state can assist, as well as the freedom of economic activity and of what helps him/her to foster respect, development in life and his/her humanity.[1002]

When compared with the original version of Article 22,[1003] it is obvious that there is a mismatch. Englund goes further and says that the translation fails to convey any "empowering notion that could be deployed to challenge social and economic inequalities."[1004] Since few Malawians have the opportunity to compare the texts they are given by civic educators with the original, human rights discourse risks becoming an "alienating novelty and a disempowering discourse."[1005] Through civic education and other human rights and

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[999] Interview No. 19 with NGO, Malawi 2006. FSD2727.

[1000] See e.g. The Malawi Human Rights Commission Bulletin *Mfulu*, of July 2006, with focus on economic, social and cultural rights. Available at http://www.malawihumanrightscommission.org/docs/mfulu_july2006.pdf, visited 15 December 2011. The theme of the MHRC on International Human Rights Day in 2006 was "fighting poverty is an obligation, not charity". Interview No. 29 with Malawi Resource Centre for Human Rights, Malawi 2006. FSD2727.

[1001] Englund, *Prisoners of Freedom, supra* note 414, at 22.

[1002] *Ibid*., at 59.

[1003] "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Universal Declaration of Human Rights, UNGA res. 217 A (III) of 10 December 1948.

[1004] Englund, *Prisoners of Freedom, supra* note 414, at 59.

[1005] Englund, *Prisoners of Freedom, supra* note 414, at 60.

democratisation projects, well-meaning human rights groups used the notions of freedom, democracy and human rights to *confine the scope of what could be discussed*.[1006] This is characteristic of a human rights discourse that, in the words of Jim Ife, defines rights for 'the powerless by the powerful',[1007] and where there is little input 'from below' since the agenda has been set 'from above'.

Englund's critique of the human rights civil society in Malawi (as an elite movement upholding the status quo and current power relationships in a manner that is depoliticising human rights) has to be taken seriously, not the least because his findings are based on years of ethnographic fieldwork and command of Chichewa.[1008]

3.1.3   Local reactions to official human rights discourses

Ulrika Ribohn, another ethnographer, who has studied the changes that the 'freedom discourse' has brought about in Malawi, observes that during the Banda era relations between categories of men and women, and political institutions were defined in 'traditional' terms, stressing 'traditional' institutions. This has been redefined as the UDF government and official human rights discourses having defined traditional 'culture' as violating human rights.[1009] However, people react against attempts to portray their 'culture' in these terms (violator/violated). Ribohn has studied how ordinary Malawians continue to seek dignity and respect through "culturally salient notions of what it entails to be a "good man" or a "good woman"'. Her research shows how local values are excluded when human rights are positioned in opposition to 'traditions'.[1010] Official arguments are interpreted locally as attempts to change 'culture' in a top-down manner.[1011]

Ribohn's starting point is that Malawians' understanding of human rights is rather different from the universal intentions of the United Nations. She sees a clash between the local "manifestations of transnational agendas" and local reactions to these agendas. This clash is particularly strong in relation to cultural values and women's rights. The official human rights discourses used by government organisations and so called civil society argue that cultural values have to change in favour of human rights implementation.[1012] My argument is that this is what happens when human rights rhetoric is imposed from above, as ready-made concepts defined by transnational legal documents and actors, without a meaningful dialogue about the human rights concept itself.

Thoko Kaime, who has also done ethnographic research in Malawi, portrays a nuanced picture of human rights principles, such as non-discrimination, in action in the lives of children and adults in two villages in Thyolo district.[1013] He finds that the principles of the African Children's Charter are not only based on children's rights discourse but also on "an

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[1006] Englund, *Prisoner of Freedom*, *supra* note 414, at 10.

[1007] Ife, *Human Rights from Below, supra* note 8, at 126.

[1008] With regard to the criticism by Englund, Hans-Otto Sano asks whether the criticism can be generalised to the majority of Malawian NGOs. Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 67.

[1009] For examples of the official rhetoric see e.g. article in The Malawi Human Rights Commission Bulletin *Mfulu*, "Time is ripe to get rid of harmful cultural practices", March 2006. Available at http://www.malawihumanrightscommission.org/docs/mfulu_march2006.pdf, visited 15 December 2011.

[1010] Ulrika Ribohn, '"Human Rights and the Multiparty System Have Swallowed our Traditions": Conceiving Women and Culture in the New Malawi", in Harri Englund (ed.), *A Democracy of Chameleons: Politics and Culture in the New Malawi* (Uppsala: Nordiska Afrikainstitutet, 2002) 166-177, at 177.

[1011] *Ibid*., at 175.

[1012] *Ibid*., at 166.

[1013] Kaime, "The Struggle for Context", *supra* note 492, at 36.

eclectic mix of cultural, religious and spiritual agreements. Consequently, non-discrimination perspectives are not the preserve of '*ajenda*' or human rights advocates alone but also that of ordinary people who claim no special knowledge of children's rights."[1014] Kaime underlines the importance of "existing cultural logics and categories in the acceptance or rejection [...] of introducing 'new' principles". Kaime's research suggests that people seek ways of "combining their conceptions of family practice and children's rights norms", and in this process, "they not only redefine their cultural landscape but also *redefine the international children's rights corpus itself.*" He advises to not essentalise "culture or children's rights as constituting strict categories". Instead he calls for practices in which children's rights are not formulated as abstract forms but located in "specific, concrete experiences derived from the lives of children and their families."[1015] Ribohn's research suggests that 'culture' *has* been given a static and essentialised meaning by authorities and villagers in Malawi,[1016] and maybe that is why there seems to be such a sharp clash between 'culture' and official human rights discourses. Kaime's research suggests that there does not need to be a clash between these two worlds if only *mutual redefinition* is allowed and accepted.

3.1.4 Civic education

The main method of introducing international human rights into the consciousness of Malawians has been awareness raising and human rights education. The assumption has been that if people only knew their rights they would start claiming them.[1017] So called civic education has been seen as a way to "enlightening ordinary men and women about their rights, responsibilities and duties in relation to their government, with special emphasis on their rights and freedoms vis-à-vis government authority and power."[1018] In practice, it has been NGOs rather than government institutions that have carried out civic education activities.[1019]

In 1994, Amnesty International reported that "human rights activists are launching a human rights training program for Malawi with a symposium", organised by the Malawi Public Affairs Committee and funded by AI. Participants included religious leaders, human rights groups, and lawyers. The symposium was a first step towards a national training workshop for human rights educators.[1020] The strong focus on human rights education has later been criticised for having had limited impact also from within the civil society human rights movement itself: "All what the NGOs have done is to preach the language of rights and they have done that in the context of sensitization of the communities, rights education. It has been

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[1014] Kaime, "The Struggle for Context", *supra* note 492, at 43.

[1015] Kaime, "The Struggle for Context", *supra* note 492, at 65-66. Emphasis added.

[1016] Ribohn, "'Human Rights and the Multiparty System Have Swallowed our Traditions'", *supra* note 1010, at 170.

[1017] The following extract from an interview in *Mfulu*, the Malawi Human Rights Commission Bulletin, exemplifies this assumption: "The only way to stop human rights abuses against women is to have them empowered with knowledge of their rights and to enact legislation that can address loopholes that expose women to abuse." "Poverty and illiteracy block women empowerment" in *Mfulu*, of July 2006, at 2. Available at http://www.malawihumanrightscommission.org/docs/mfulu_july2006.pdf, visited 15 December 2011.

[1018] Ralph Kasambara, "Civic Education in Malawi Since 1992: An Appraisal", in K. M. Phiri & K. R. Ross (eds), *Democratization in Malawi: A Stocktaking* (Blantyre: Christian Literature Association in Malawi, 1998) 237-251, at 237.

[1019] *Ibid*., at 251.

[1020] Amnesty International, News service: "Malawi – Human Rights Symposium", 1 August 1994. AI Index AFR 36/WU 05/94. Available at www.amnesty.org, visited 14 May 2012.

in a context of preaching the word, like preachers standing on a podium."[1021] Having the role of passive listeners taking in knowledge from outside experts is not very empowering.

Englund has analysed civic education on human rights and democracy carried out by the EU funded project National Initiative for Civic Education (NICE) in Malawi. His findings exemplify the challenges experienced by human rights awareness raising. In the civic education meetings the officers explained about multiparty democracy and its 'cornerstones': tolerance, citizens' participation, free and fair elections, human rights, the rule of law, and transparent leadership. There was no attempt to find out to what extent these so called cornerstones resonated with the experiences of the people present at the meeting. The participants were expected to accept them as given definitions. The implied message was that the transition from the one-party regime of the MCP, that ended not many years before NICE entered into the country, had already taken place.[1022]

Englund's research questions the transformative role of so called civil society, a potential role that was celebrated in the early 1990s by numerous observers of African politics. The enthusiasm of the 1990s has faded and more critical accounts have emerged, highlighting the problems with overly romanticised notions of the role of civil society.[1023] Moreover, in Malawi there was an influx of NGOs in 1993-94, more particularly human rights NGOs.[1024] Malawi churches, that played a central role in the removal of the Banda regime, remained relatively active in Malawian politics also after the transition to a multiparty government.[1025] The Church and NGOs have worked so closely together on human rights issues that they, in some cases, have become virtually indistinguishable.[1026] Churches have been part of the 'civic education movement', but research shows that there were significant limits to their grassroots civil society activism.[1027] Peter VonPopp draws the conclusion that churches, at the grassroots, "may very well be agents of the status quo, rather than advocates for change in state-local power relations."[1028] This is a relevant conclusion when reviewing the Right to Food Project, which was initiated by a church-based human rights organisation.

It is not only civil society organisations that have conducted civic education on democracy and human rights. Institutions such as the Ombudsman and the Malawi Human Rights Commission also have 'public awareness' on their agendas. Again, the Danish Centre for Human Rights (DCHR) has been a major funding agency. With money from the DCHR the Ombudsman Office conducted workshops aimed at District Development Committees, and District Executive Committees (DEC); workshops with civil servants in ministries, military and the police; workshops for the media; a workshop with Principal Secretaries and Judges during the period of 1996-2000.[1029] In an evaluation report, lack of training in law and human rights among the staff of the Ombudsman Office itself was, however, noted as a major

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[1021] Interview No. 29 with Malawi Resource Centre for Human Rights, Malawi 2006. FSD2727.

[1022] Englund, *Prisoners of Freedom, supra* note 414, at 108.

[1023] Peter VonDoepp, "Are Malawi's Local Clergy Civil Society Activists? The Limiting Impact of Creed, Context and Class", in Harri Englund (ed.), *A Democracy of Chameleons: Politics and Culture in the New Malawi* (Uppsala: Nordiska Afrikainstitutet, 2002) 123-139, at 123.

[1024] Interview No. 29 with Malawi Resource Center for Human Rights, Malawi 2006. FSD2727.

[1025] See also Englund, "The Dead Hand of Human Rights", *supra* note 972.

[1026] *Ibid.*, at 586.

[1027] VonDoepp, "Are Malawi's Local Clergy Civil Society Activists?", *supra* note 1023, at 123-124.

[1028] *Ibid.*, at 137.

[1029] *Final Evaluation: Strengthening of the Ombudsman Institution in Malawi* (Copenhagen, Danish Centre for Human Rights, 2000) at 71.

problem. Of all staff members employed at the time of evaluation, only the Ombudsman himself and Chief Legal Officers had legal qualifications.[1030]

It seems that the agencies that have been funding most of the human rights related activities in Malawi since the transition to multiparty governance are eager to support the growing interest in freedoms, *ufulu*. There is, however, concern for the lack of capacity and knowledge in international human rights standards – and more training for the staff of the institutions and civil society organisations on the legal dimension of human rights as well as more 'civic education' for the general public has been seen as the solution. There has been less discussion on how feasible it is to adopt a legalistic understanding of the human rights concept in a country such as Malawi, with about 500 lawyers and a large, largely rural population with little official schooling. Initiatives that would investigate the intersection between everyday lived realities and human rights, calling for human rights as cultural practice located in specific local contexts, are rare.

3.1.5 The right to food in the legal framework of Malawi

Chirwa writes that "[e]conomic, social and cultural rights have suffered from lack of constitutional protection in Malawi since colonial times."[1031] The first written Constitution, adopted in 1964 at the time Malawi gained independence from Britain, included no socio-economic rights. The 1964 Constitution did guarantee civil and political rights and the right to property. Two years later, it was replaced by a second constitution, designed to transform Malawi into a republic. In the 1966 Constitution, human rights were only mentioned in passing in section 2(1)(iii) that included a reference to the UDHR. However, in 1968 there was already a constitutional amendment stating that "nothing in or done under the authority of law shall be held inconsistent with or in contravention of the Universal Declaration of Human Rights".[1032] This lasted until 1992 when the first litigation invoked the provision under the UDHR. In the *Chihana v. R case*[1033] the Supreme Court held that the UDHR forms part of Malawian law (referring to the 1966 Constitution). The case was about alleged interference with the freedom of speech as a violation of the African Charter of Human and People's Rights. The court held that the UDHR is part of the law of Malawi, while the African Charter is not (because Malawi has taken no legislative measures to adopt it).[1034] Since this Constitution of 1966 was repealed, and the 1994 Constitution does not make any reference to the UDHR; some writers argue that the UDHR is no longer part of Malawian law.[1035]

The 1994 Constitution includes a Bill of Rights, which recognises the right to family protection, the right to education, cultural and language rights, the right to property, the right to economic activity, labour rights, and the right to development.[1036] As we can see, the right to food is not on this list. The right to development does, however, provide a potential, but yet

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[1030] *Final Evaluation: Strengthening of the Ombudsman Institution in Malawi*, *supra* note 1029, at 52.
[1031] Danwood Mzikenge Chirwa, "A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi", 49 *Journal of African Law* (2005) 207-241, at 208.
[1032] Act No. 6 of 1966, introducing section 2(2) to the Constitution, as cited in Chirwa, "A Full Loaf is Better than Half", *supra* note 1031, at 209.
[1033] *Chakufwa Tom Chihana v. Republic*, MSCA Criminal Appeal no. 9 of 1993. Chihana was a famous political dissident. See Meinhardt and Patel, *Malawi's Process of Democratic Transition, supra* note 970, at 10.
[1034] Thomas Trier Hansen, "Implementation of International Human Rights Standards Through the National Courts in Malawi", 46 *Journal of African Law* (2002) 32-42, at 37.
[1035] Chirwa, "A Full Loaf is Better than Half", *supra* note 1031, at 209 and 234.
[1036] Constitution of the Republic of Malawi, 1994, adopted 17 May 1995.

unexplored, avenue for protecting many of the socio-economic rights, including the right to food, not expressly mentioned in the Bill of Rights.[1037]

Section 30 reads:

> 1. All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
>
> 2. The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
>
> 3. The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
>
> 4. The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

This section is interesting from many perspectives. First, it refers to "women, children and disabled" as groups to be given special consideration in the application of the right to development, indicating that their vulnerability calls for special measures. Second, there is no reference to 'progressive realisation' and 'available resources' as is the case of state obligations under the ICESCR, to which Malawi is a party.[1038] Instead it is stated that "the State shall take all necessary measures for the realization" of this right, which potentially implies far-reaching *positive obligations*. Third, an element of equality and non-discrimination (expressed as "equality of opportunity") enters in relation to access to basic resources, including food and employment. Forth, positive measures ('reforms') aiming at the "eradication of social injustices and inequalities" again gives the impression of extensive positive obligations on the part of the state. Lastly, the state has to justify its policies in accordance with the responsibility to respect the right to development.

All of the sub-paragraphs, and especially the last one that refers to *policy coherence*, are powerful statements. It is surprising that civil society groups have not made use of Section 30 in their advocacy or litigation efforts. ("Again in the past years the least attention has been on Section 30 of our Constitution which is the right to development in the broadest sense. I don't recall any grouping testing that provision of the Constitution out.")[1039] This is partly explained by a conservative Supreme Court: the majority of the judges do not view economic and social rights to be justiciable and the major focus of the judiciary since 1994 has been on civil and political rights.[1040]

Chirwa argues that section 30(2) can be regarded as guaranteeing access to basic resources such as food, and he refers to the Supreme Court's view in *Gwanda Chakuamba & Others* that "human rights provisions in the Constitution should be construed broadly and purposively."[1041] Section 30 shows that positive obligations and entitlements are not

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[1037] Chirwa, "A Full Loaf is Better than Half", *supra* note 1031, at 224-225.

[1038] Malawi ratified the ICESCR in 1994 but has not yet submitted its first periodic report.

[1039] Interview No. 29 with Malawi Resource Centre for Human Rights, Malawi 2006. FSD2727.

[1040] Dan Banik, "Human Rights for Human Development: The Rhetoric and the Reality", 30 *Nordic Journal of Human Rights* (2012) 4-35, at 30-31.

[1041] Chirwa, "A Full Loaf is Better than Half", *supra* note 1031, at 225. Referring to the case *Gwanda Chakuamba & Others v. The Attorney General & Others*, M.S.C.A. Civil Appeal no. 20 of 2000.

completely absent in Malawi, only marginalised both in the legal framework and in the popular human rights rhetoric that has focussed on 'freedoms'.

3.1.6 Concluding remarks

Civic education has been the main mode of 'sensitising' the Malawian public to issues such as human rights and democracy. In civic education, participants are expected to take 'human rights' as given concepts and therefore there has been very little dialogue about the meaning and value of human rights. Introducing human rights as expert knowledge imposed 'from above' (by the powerful for the powerless[1042]) in a country that recently has changed from an authoritarian regime to a multiparty form of government is not very respectful of the lived realities of the actors involved. In the best case, such practices are only isolated examples of bad pedagogy.

The role of donors as supporters of 'freedoms' is somewhat unclear, but it seems that they have been eager to support civic education as well as legal capacity building for the authorities.

Although ESC rights are marginalised in the discourse as well as in the legal framework, Section 30 of the Constitution, which guarantees the right to development, is surprisingly strong, underlining the entitlement dimension and positive obligations, i.e., issues that have been given less attention in the official 'freedom discourse'. Why civil society actors have not used Section 30 more in advocacy is unclear.[1043] This shows that a legal approach to food insecurity, in which claims would be based on legal rights, is not developed. There is no conscious effort to put legislation, policy, and practice in place that would support the realisation of the right to adequate food. Before analysing whether the Right to Food Project fills this gap I will explore the role of human rights in the development community's conventional approach, i.e., providing food assistance to needy beneficiaries.

3.2 Food assistance: A charity-based service

This section is an analysis of one particular food assistance programme in Malawi implemented by the World Food Programme (WFP)[1044] and its NGO partners. The purpose is to identify the *role* of human rights and to understand the principles according to which food assistance programmes are managed, not to evaluate the effectiveness in reaching the intended beneficiaries. What role, if any, is the right to food playing? Is food assistance seen as a service that is a matter of fulfilling the obligations under the right to food (i.e., providing a mandatory service to rights-holders who have been selected based on clearly defined criteria) or as *charity* (i.e., a favour that may or may not be provided to beneficiaries based on more or less arbitrary criteria)? Emphasis is also put on understanding the role and meaning of the 'good development practice' principles of non-discrimination, accountability, participation, and empowerment.

[1042] See Ife, *Human Rights from Below*, *supra* note 8, at 126. Ife claims: "Human rights remain largely *a discourse of the powerful about the powerless*, and this is itself a human rights abuse: a denial of the right to define one's rights."

[1043] In 2012 I was told that NGOs are working towards a test case concerning socioeconomic rights. E-mail interview with Church and Society, August 2012.

[1044] Food aid distributed by the WFP reaches about 100 million people worldwide annually. Food and Agriculture Organization of the United Nations, *The State of Food and Agriculture 2006: Food Aid for Food Security?* (Rome: FAO, 2006) at 4.

3.2.1 Introduction

> We occasionally feed people when they run out of stocks. And for some this is a
> yearly event. We make up the four months that people come short. Every year
> about 25 percent [of the Malawians] are chronically food insecure, so those are
> always there. There's always need, but that's controllable need.[1045]

Food aid has been an important part of international development cooperation and
humanitarian aid since the post-Second World War Marshall Plan.[1046] It is thereby one of the
oldest forms of foreign aid – and at the same time one of the most controversial. This is
mainly because food aid involves issues of trade and agricultural policy in donor as well as
recipient countries, but also because some development specialists have worried that food aid
can destabilise local markets, create disincentives for producers and traders, and undermine
the resilience of food economies. In a world that, in theory, produces more than enough food
to feed everyone, nothing seems more obvious than giving food to hungry people, but yet this
apparently benevolent response has attracted extensive criticism.[1047] The purpose of this
chapter is not to review evidence for or against any of these arguments, but it is important to
be aware that food aid is far from unproblematic.

The WFP is one of the few UN agencies that has not adopted a so called human rights-based
approach – despite former Secretary General Kofi Annan's request in 1997 to integrate human
rights into all activities of the organisation.[1048] One reason for this might be the general
tendency in food aid to adapt to immediate needs and 'practical problems' as they emerge.[1049]
Service delivery (food commodities), where *targeting is based on needs*, is characteristic of
this approach: "Food will be targeted at the right time to the neediest countries, to the neediest
populations in food-insecure areas (geographic targeting) and to intended beneficiaries."[1050]
This quote demonstrates the simple logic behind food aid in general and the existence of the
WFP in particular; in times of crisis, food will be distributed to those most in need of
assistance (the most vulnerable households) so that they can live through the crisis and
hopefully recover. The objective is to save lives.[1051] In Malawi, disasters have become annual
events and even in a year with an exceptionally good harvest, which was the case in 2006,
there were areas where people suffered from hunger.[1052]

In order to limit the scope of the analysis, focus is placed on the Joint Emergency Food Aid
Programme (JEFAP). This programme was initiated during the food crisis of 2002/2003 by
the Government of Malawi, donors, the WFP and NGOs.[1053] In late 2006, at the time that I
was conducting field research, there were three programmes under the JEFAP: (1) HIV/AIDS
programme where food was distributed to households with chronically sick patients or

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[1045] Interview No. 30 with donor, Malawi 2006. FSD2727.

[1046] Edward Clay and Olav Stoke, "The Changing Role of Food Aid and Finance for Food", in E. Clay and O.
Stokke (eds), *Food Aid and Human Security* (London: European Association of Development Research, 2000)
13-54, at 17.

[1047] FAO, *The State of Food and Agriculture 2006*, *supra* note 1044, at 3.

[1048] See "Renewing the United Nations: A Programme for Reform", 14 July 1997. UN doc. A/51/950.

[1049] Clay and Stoke, "The Changing Role of Food Aid and Finance for Food", *supra* note 1046, at 17.

[1050] World Food Programme, Executive Board Second Regular Session, Consolidated Framework of WFP
Policies, An Updated Version, Rome 22-27 October 2007, para. 11. Available at http://www.wfp.org/
sites/default/files/wfp137486~2.pdf, visited 14 May 2012.

[1051] Interview No. 21 with Department of Poverty and Disaster Management Affairs, Malawi 2006; Interview
No. 4 with WFP, Malawi 2006. FSD2727.

[1052] The maize production in 2006 was 113 percent higher than the previous season. See UN Malawi
Humanitarian Situation Report, July 2006. Available at http://www.unmalawi.org/reports/Sit_reports/
UN_SitRep01Aug2006.pdf, visited 10 May 2012.

[1053] WFP/NGO Partnership, Malawi, November 2006.

orphans; (2) food-for-asset (FFA) programmes where community members created assets in return for food; (3) targeted food distribution for asset creation to help those lacking food over the 'hunger months'.[1054] The emergency intervention in 2006 was small-scale (targeting about one million people) compared to the foregoing season of 2005/06 when five million Malawians where missing food entitlements.[1055] Moreover, the WFP in Malawi was also implementing a long-term school feeding programme and a therapeutic feeding programme for malnourished children.[1056] In the following, focus is placed on the food-for-asset programmes. During the field research in Malawi I met with WFP staff, NGOs, the major donors to the WFP and with government representatives.

3.2.2 Food aid as part of the right to food

In order to understand the role of human rights in food assistance programmes, we must first establish what human rights law says about food aid. Do people suffering from hunger have not only a moral but also a legal right to receive support? As we know the right to adequate food is guaranteed in Article 11 of the ICESCR,[1057] but this article is silent on food aid. The Committee on Economic, Social and Cultural Rights has, however, in General Comment No. 12 on the Right to Adequate Food made clear that the *obligation to fulfil (provide)* means that State Parties to the Covenant should provide directly for this right whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to food. The Committee then refers to victims of natural or other disasters.[1058] The Special Rapporteur on the right to food states that it may be necessary, as a last resort, for governments to provide direct assistance to those in need through safety nets such as food voucher schemes or social security provisions to ensure freedom from hunger.[1059] Food aid is, in other words, one way for a government to fulfil its minimum obligations under the right to food.

The State is in *violation* of the Covenant if it fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. Should the State's resources not be sufficient, it has to seek international support to ensure the availability and accessibility of the necessary food.[1060] The primary responsibility to prevent famine and hunger always rests with national governments, but all other governments should, according to the Special Rapporteur, *refrain* from taking action that cause food insecurity and to *respond* to requests for emergency assistance.[1061] There is, however, no agreement among states that there is a legal obligation to provide food aid and the matter remains controversial.[1062] It is important to keep in mind that food aid is also legally regulated in other instruments, which are unrelated to human rights law. For example, States Parties to the Food Aid Convention

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[1054] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1055] In December 2005 the Malawi Vulnerability Assessment Committee (MVAC) released its final figures, which indicated that there had been an increase in the population at risk from 4.2 to 5 million. See Malawi Humanitarian Situation Report by the UN Disaster Management Technical Working Group, December 2005. Available at http://www.unmalawi.org/reports/Sit_reports/UN_SitRep8dec2005.pdf, visited 10 May 2012.; See also UN Malawi Humanitarian Situation Report, *supra* note 1052. Interview No. 4 with WFP, Malawi 2006. FSD2727.

[1056] Interview Nos. 4 and 18 with WFP, Malawi 2006. FSD2727.

[1057] Malawi ratified the ICESCR in 1994.

[1058] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 15.

[1059] Report of the Special Rapporteur on the right to food, Jean Ziegler, 16 March 2006, para. 24. UN doc. E/CN.4/2006/44.

[1060] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para 17. See also Report of the Special Rapporteur on the right to food, *supra* note 1059, para. 37.

[1061] Report of the Special Rapporteur on the right to food, *supra* note 1059, para. 18.

[1062] See Lorenzo Cotula and Margaret Vidar, *The Right to Adequate Food in Emergencies* (Rome: FAO Legislative Study 77, 2003) at 22-23.

"agree to provide food aid to developing countries or the cash equivalent thereof" in annual amounts specified in the Convention.[1063]

The Committee on ESCR has expressed concern about the possible negative effects of food aid. According to General Comment 12, international emergency assistance in the form of food aid is to be provided in ways which do not adversely affect local producers and local markets, and should be organised in ways that facilitate the return to food self-reliance of the beneficiaries, and products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population. Moreover, food aid should be distributed based on the *needs* of the intended beneficiaries,[1064] indicating that focussing on needs is not alien to human rights thinking. The fact that the Committee, which has authority to interpret the Covenant, refers to these issues underlines that the *implementation of food aid* is a matter of human rights.

Clearly, guaranteeing that food is available also during crises situations is part of the human rights obligations of the Government of Malawi. The questions is whether the authorities in Malawi have accepted that food assistance activities (that are presently called 'humanitarian aid' or 'development', depending on the type of intervention) are part of a human rights agenda. Traditionally, there has been a clear distinction between humanitarian assistance work and human rights work. For instance George Kent draws this line in saying that "humanitarian assistance is mainly about service delivery, while human rights work is mainly about advocacy in relation to governmental actions."[1065] As an example Kent mentions that when a charitable organisation gives food to the poor this is humanitarian assistance, not human rights work. If the same organisation is pressing the government to act on the problem, it is doing human rights work. He adds that the task of human rights work is to ensure the fulfilment of the government's obligations in respect of support to the needy.[1066] In Malawi food assistance has been the government's way of supporting 'the needy' (although the motivation has been political and not related to human rights obligations). At least in theory, the WFP and NGOs are implementing this service on behalf of the government. Therefore, the strict line between humanitarian assistance and human rights work is difficult to maintain. Food assistance has a human rights dimension as it is one way of guaranteeing the right to food to those who are unable to realise this right through other means. Then of course it can be debated whether food assistance is the most appropriate way to fulfil the 'provide obligation' under the right to food.

A related question is whether the 'international relief industry' is designed in such a way that the role of the national government is sidestepped. It is difficult to deny that the fact that as donor governments often channel emergency funds through UN agencies and NGOs this has an effect on the possibilities for the national government to live up to its human rights obligations. This also has implications for the process of citizens holding the government accountable, through democratic processes, for failures to respond to food crises. Alex de Waal points out that the establishment of 'disaster institutions' at the UN (e.g. the WFP) has contributed to the internationalisation of responsibility for famines (implying the retreat from

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[1063] Food Aid Convention, 1999, Art. IIIa. See also Cotula and Vidar, *The Right to Adequate Food in Emergencies*, *supra* note 1062, at 31.
[1064] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 39.
[1065] Kent, *Freedom from Want*, *supra* note 83, at 124.
[1066] Kent, *Freedom from Want*, *supra* note 83, at 124-125.

domestic accountability). Another side effect of foreign-run relief programmes is that they often undermine the legitimacy of government efforts in the eyes of the public.[1067]

Food distribution in Malawi in 2006 was very much in the hands of donors, international agencies and NGOs, although there was an effort to strengthen the role of the government. A donor stated: "Last year we tried to make sure that it was the government that was owning the food distribution. Half of the distribution was done through WFP and half through the Department of Poverty and Disaster Management with NGOs. They were working the same way, it was just two different channels. It was to build capacity in the government, so that they can handle on their own the food security problems."[1068] Since donors and international development agencies have a leading role in the organisation of food assistance it also means they have to live up to the principles set out in General Comment 12.

3.2.3   The new food aid agenda: No free food

The methods used in food aid have changed over time in Malawi as well as elsewhere. Distributing free food is not 'trendy' any longer. What used to be food-for-work, mainly road construction, became FFA, i.e., construction of small-scale irrigation, fish-ponds etc in exchange of food items. Some donors were also increasingly interested in cash transfers instead of food (conditional cash transfers where people work).[1069] The ambition in the FFA programmes was to link the distribution of food commodities to asset creation and to livelihoods. The beneficiary worked 20 days in one month for four hours a day.[1070] The food basket that was received in FFA programmes after one month's work was 50 kg of maize, 5 kg of pulses and 2 litres of cooking oil.[1071] There is no question that the level of payment was low. The programmes were nevertheless very popular and people stood in line at registration. In rural Malawi the opportunities to make some money are limited or none existent. "They have an option to food-for-asset work and get a bag of maize or sorghum that can feed their family for one month. Or they have the option to work for 30 cents a day if they're lucky."[1072] It is true that the wage level in Malawi was and still is extremely low, and everyone who is 'better off' benefits from this in terms of cheap labour. Increase in the supply of casual labour (*ganyu*) has depressed rural wages.[1073] It is also true that through the FFA programme, people in urgent need of food obtained it in return for work on something that was supposed to contribute to agricultural production and therefore, in the long run, contribute to long-term

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[1067] Alex de Waal, *Famine Crimes: Politics & Disaster Relief Industry in Africa* (Bloomington: Indiana University Press, 1997) at 70, 79, 137.

[1068] Interview No. 3 with donor, Malawi 2006. FSD2727. An international evaluation report writes that "The decision to make use of an alternative food distribution channel through the Government Voucher Scheme, side by with the usual food aid distribution by WFP, and the subsequent decease of the WFP distribution charge, has given rise to major reduction in the total costs of the food aid distribution." The evaluation team further observes that "the Government is eager to increase its responsibility into the area of food aid distribution". See The European Union's Programme for Malawi, "Comprehensive Review of Stakeholders Response to the 2005/2006 Food Insecurity", Final Report, September 2006, at 6.

[1069] See Nita Pillai, "Food Aid for Development? A Review of the Evidence", in E. Clay and O. Stokke (eds), *Food Aid and Human Security* (London: European Association of Development Research, 2000) at 196-220.

[1070] One NGO that I interviewed expressed that four hours a day is too much considering that this person also needs to take care of his own fields. If a beneficiary is absent for two days he has to make for that. Interview No. 33 with NGO that is member of JEFAP, Malawi 2006. FSD2727.

[1071] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1072] Interview No. 18 with WFP, Malawi, 2006. FSD2727.

[1073] Eunice G. Kamwendo, "Knowledge Review and Gap Analysis: Hunger and Vulnerability in Malawi", a report by Regional Hunger and Vulnerability Programme, July 2006, at 6. Available at http://www.wahenga.org/news/news_item.php?news=88, visited 6 June 2008.

development.[1074] If it was not for food assistance programmes people would migrate to other areas looking for food.[1075] FFA programmes helped to alleviate the worst *symptoms* of chronic poverty. However, it is easy to criticise them for hindering the same *structures* that keeps the poor in poverty, that is, low wages.

The basic idea in FFA was that people should not just 'receive free food', because it was feared this would create 'dependency',[1076] and as we remember the General Comment on the Right to Adequate Food makes clear aid should be organised so that food self-reliance of the beneficiaries is ensured. One donor representative motivated this shift to food-for-asset programmes by saying: "To get the participation by the people, to get them understand why they are helped and not only receiving things. They have also to give something. That's why there are very few programmes where there is distribution for nothing."[1077]

In most of my interviews a 'hand-out mentality' was mentioned as a widespread problem in Malawi. Due to this 'hand-out mentality' it was perceived to be challenging to get a real understanding in the communities that the FFA is an asset creation programme as much as it is one addressing hunger. ("Everybody thinks they have a right to the food because the government gives food every year."[1078]) This brings us to the question whether the people receiving food assistance saw themselves as subjects of charity or as rights-holders who can demand accountable services from the duty-bearers. Food assistance is a *service* that, in theory but not in practice, is a matter of fulfilling obligations under the right to food. Therefore, people receiving assistance could potentially be in a position to make claims and hold people in authority to account for the way food distribution is handled. This was, however, seldom the case and it is doubtful that the ambition was to move into that direction. I come back to the issue of demanding accountable services in the analysis of the rights-based approach to food security.

In her investigation of the return of soup kitchens and food pantries in the early 1980s in the USA, Janet Poppendieck puts forward the argument that the kind of charity where free food is distributed to poor people is "a retreat from rights to gifts. Poor people might be, and often are, very well treated in charitable emergency food programs, but they have no rights, at least not legally enforceable rights, to the benefits that such programs provide."[1079] As long as Malawian authorities do not view food assistance as a rights-based service, regulating it as such, food distribution activities are part of a human rights agenda only in theory. For these reasons I label food assistance in Malawi a charity-based service.

[1074] The benefit of the assets created is sometimes contested. It is argued that, since unqualified labour is used, there is risk that the quality of the assets may be low and little provision is made for their maintenance and repair. In addition, simple technical solutions such as small-scale irrigation or water harvesting need maintenance, something that is often not available in rural Malawi. See Anna McCord, "Win-win or lose? An Examination of the Use of Public Works as a Social Protection Instrument in Situations of Chronic Poverty", paper presented at the Conference on Social protection and Chronic Poverty, University of Manchester, February 2005. Available at http://www.sed.manchester.ac.uk/research/events/conferences/documents/Social%20 Protection%20Papers/McCord.pdf, visited 10 May 2012.

[1075] Interview No. 33 with NGO that is member of JEFAP, Malawi 2006. FSD2727.

[1076] There is a big debate among scholars and organization whether food aid in fact creates 'dependency'. Some argue that the quantity of food aid is usually too small and the timing too unpredictable to encourage households to rely on it. FAO, *The State of Food and Agriculture 2006*, *supra* note 1044, at 35. See also Erin C. Lentz and Christopher B. Barret, "Food Aid and Dependency: Implications for Emergency Food Security Assessments", WFP, December 2005. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1142287, visited 10 May 2012.

[1077] Interview No. 3 with donor, Malawi, 2006. FSD2727.

[1078] Interview No. 18 with WFP, Malawi, 2006. FSD2727.

[1079] Poppendieck, *Sweet Charity?, supra* note 551, at 12.

3.2.4 Good development practice

Objective to target the most vulnerable through a participatory process

In addition to cultural acceptability and quality of the food commodities, principles of non-discrimination and a focus on the most vulnerable, participation, accountability and empowerment are very much on the agenda in food assistance. In this section I analyse the meaning of these 'good development principles', starting with non-discrimination and participation, that are highly interrelated.

Non-discrimination and impartiality do not imply that food assistance is to be distributed equally to all individuals, but rather that it has to be distributed only on the basis of need, regardless of any other consideration.[1080] Therefore, this principle is most visible in the selection of beneficiaries. Only the most food insecure households are being targeted in the JEFAP programmes. "A household has to indeed be vulnerable, that they don't have food, don't have livestock that they can sell and get food, that they don't have relations that can support them during this time."[1081] As we recall from previous sections, *in the vulnerability assessments carried out in the area of food security, discrimination experienced by people is not a factor that is analysed.* Vulnerability assessment is about identifying needs and making sure there is *no discrimination in the targeting process – but less about using discrimination and marginalisation as a lens for analysis.*

The identification of beneficiaries for FFA programmes and for targeted food distribution for assets started with the report from the Malawi Vulnerability Assessment Committee (MVAC) that indicated the deficit areas in terms of food.[1082] After the tonnages needed in each area that had been pointed out as food insecure had been established, the WFP and NGOs had a meeting with the District Executive Committee to evaluate whether the MVAC report was correct in its assessment of the food security situation in the particular district. As a second step there was another meeting at the Traditional Authority level (with local traditional chiefs as well as NGOs and CSOs active in that authority) where the WFP provided information about the amount of food available for distribution and asked about the development priorities set in the Traditional Authority so that the asset to be created by those participating in the programme would be useful and linked to livelihoods. The aim was to identify the particular villages that were more affected by hunger this year compared to normally.[1083] As a third step there was a meeting with the group village headmen and the village development committee to collect data on how many households that group headman had and how many households were vulnerable. (Note that there was no vulnerability assessment carried out, but instead the group village headmen and the village development committee made these decisions.) The village development committee then gave the NGO a list of names of vulnerable households and the role of the NGO was to do random verification to check that these households were indeed in need of food. It was the village development committee members that finally performed the registration of the beneficiaries.[1084] The role of the NGO was to sensitise the

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[1080] Cotula and Vidar, *The Right to Adequate Food in Emergencies, supra* note 1062, at 51.

[1081] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1082] The MVAC is regularly forecasting vulnerability to hunger. It is made up by relevant ministries (chaired by the Department of Poverty and Disaster Management Affairs), UN agencies and NGOs. Overall the trust in the accuracy of the MVAC report seems to be high among all stakeholders but one NGO was questioning its reliability.

[1083] Interview No. 18 with WFP, Malawi 2006. FSD2727.

[1084] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006; Interview No. 18 with WFP, Malawi 2006; Interview No. 33 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

committee on the criteria for targeting the beneficiaries.[1085] What should be noted was that the village development committee was common for a group of villages. With regard to one specific village, the structure was not explicit as to what happens.[1086] Some villages had organised sub-committees such as village relief committees or village food committees that would manage the process, but this was not the case in all villages.

In a situation where the majority of the people in rural areas are poor, targeting is a great challenge. Although humanitarian programmes usually cover 100 percent of the food requirements as identified in the report by the MVAC, the situation on the ground may be that households who are vulnerable were still left out. The difference between households being targeted and those left out was often very small.[1087] ("It is challenging for us to find ourselves targeting vulnerable people but at the same time leaving out as well vulnerable people."[1088]) It was unclear from my interviews how transparent and accessible the selection criteria were for the beneficiaries themselves. The risk is that the targeting process *feels* arbitrary in the eyes of the community members, if the criteria for becoming selected for the programme are not clearly defined beforehand. Another problem in terms of targeting was that the food security situation of the urban poor was not assessed by the MVAC. This meant that there might have been urban poor in need of assistance but the government could not provide this because of lack of information that could have helped in the targeting process.[1089] This was clearly a matter of failing to live up to the right of non-discrimination.

With regard to women as a potentially 'vulnerable group', I was told that the WFP aimed at high *participation* by women in food-for-asset activities. As put by one NGO: "Our requirement is that at least we should have 70 percent women".[1090] I was not, however, given any information on the kind of vulnerability analysis used to arrive at this decision.

As we know, 'participation' in development can mean different things depending on the context and the actors involved. In development policy, participation is often framed narrowly as a means to improve project performance, rather than a process of fostering critical consciousness and decision-making.[1091] 'Participatory processes' can mean fostering dialogue between different stakeholders, or that these are involved in the different phases of the programme. Sometimes the voluntary contribution by people in projects is seen as 'participation' (communities contributing time and effort to self-help projects with some outside assistance).[1092] This was not the case in JEFAP programmes in Malawi, or at least nobody I interviewed suggested that since people were working before getting food this meant it was a 'participatory process'. Rather, statements such as "there's good participation"[1093] suggest that participation was seen as something that is necessary for a successful programme, that is needed in order for the beneficiaries to 'own' the activities (and thereby sustain the

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[1085] Interview No. 33 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1086] Interview No. 32 with NGO that is not a member of JEFAP, Malawi 2006. During my interviews with NGOs I was given differing information as to what happens in *one* village. This shows that the processes vary from one village to another.

[1087] Interview No. 4 with WFP, Malawi 2006; Interview No. 21 with Department of Poverty and Disaster Management Affairs, Malawi 2006. FSD2727.

[1088] Interview No. 33 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1089] Interview No. 21 with Department of Poverty and Disaster Management Affairs, Malawi 2006. FSD2727.

[1090] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. WFP also indicated that they prefer that the woman in a household collects the food. Interview No. 4 with WFP, Malawi 2006. FSD2727.

[1091] VeneKlasen, Miller et al., *Rights-Based Approaches and Beyond, supra* note 836, at 5.

[1092] Mikkelsen, *Methods for Development*, *supra* note 147, at 53-54. According to Englund there is a general trend in Malawi to call for greater input in development projects by communities in the name of 'participatory methods'. See Englund, *Prisoners of Freedom, supra* note 414, at 100.

[1093] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

assets that are being created with the help of food assistance). The ambition in FFA programmes was that the selection of beneficiaries is a participatory process that is in the hands of the community itself instead of an outside NGO, *because* this is the most effective way to handle the process.[1094] In this case people participated as 'beneficiaries' in interventions designed to benefit them; participation was *for* the people.[1095] This interpretation of participation is far from that of 'public participation', which can be seen as a human rights principle.[1096]

The value of protecting the right to participation, together with guaranteeing rights such as freedom of the press and freedom of expression, is, according to Amartya Sen, a key issue with regard to *preventing famine*. Sen argues that adversarial democracy and an investigative press are political preconditions in famine prevention.[1097] Although Malawi is suffering from chronic hunger and poverty, a state which only occasionally develops into a large-scale famine,[1098] supporting new avenues for effective public participation in the young democratic Malawi could promote rights-holders to demand action from duty-bearers before there is another food crisis. This would mean fostering participation as a political process while also addressing lack of accountability of people in power, instead of maintaining participation as a technical process that aims at effectively managing a particular intervention.

A managerial approach to accountability

The WFP had a managerial and financial approach to accountability. The rationale was that the WFP has delegated authority and was therefore answerable for carrying out tasks according to agreed performance criteria.[1099] Accountability was the ensuring of the programme being run in the way it was supposed to according to the agreements. "We've set out in the project document to do certain things, we make certain commitments and with certain controls."[1100] This approach is understandable from the perspective of the WFP who were indeed carrying out a task on behalf of the government. Surprisingly, it seemed that also government representatives had the same approach to accountability (an apolitical process concerned with inputs, outputs, and outcomes). "Using the Sphere Handbook[1101] we are expected to give an adequate amount of food to those affected, at least 2100 kilocalories. And we are supposed to be accountable. Accountability is both to donors who are providing the relief items as well as to the recipients, the people who have been affected."[1102]

[1094] Interview No. 4 with WFP, Malawi 2006. FSD2727.

[1095] Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 22.

[1096] Article 25 of the ICCPR (1966) makes clear that "Every citizen shall have the right (…) to take part in the conduct of public affairs, directly or through freely chosen representatives."

[1097] Sen, *Development as Freedom, supra* note 203, at 178 and 181. See also Ben Crow, "Understanding Famine and Hunger", in T. Allen and A. Thomas (eds), *Poverty and Development into the 21st Century* (Oxford: Oxford University Press, 2000) 51-74, at 72.

[1098] In 2002 Malawi suffered from famine. See chapter 3.4.2 in this thesis. There is a difference between famine and chronic hunger. "Famine is a crisis in which starvation from insufficient intake of food, combined with high rates of disease, is associated with sharp increased death rates." Chronic hunger is defined as "sustained nutritional deprivation". Crow, "Understanding Famine and Hunger" *supra* note 1097, at 52.

[1099] Compare with Newell, "Taking Accountability into Account", *supra* note 767, at 50.

[1100] Interview Nos. 4 and 18 with WFP, Malawi 2006. FSD2727.

[1101] The informant is referring to the Minimum Standards of Humanitarian Response, which are providing technical guidelines for disaster response in the area of *inter alia* food aid. For detailed information see Alain Mourey, "Follow-up of the Code of Conduct of the International Red Cross and Red Crescent Movement", in E. Clay and O. Stokke (eds), *Food Aid and Human Security* (London: European Association of Development Research, 2000) 309-325.

[1102] Interview No. 21 with Department of Poverty and Disaster Management Affairs, Malawi 2006. FSD2727.

Donors and UN institutions play a considerable role not only as the providers of funding (in cash or in commodities) but also by advising on policy issues, and by expressing preferences on how food should be distributed etc. The issue of holding these institutions accountable for their actions and non-actions in the area of food assistance was never raised during my stay in Malawi. When asking about it I was often told that the relationship between the government and its donors was very unequal ("the donor has a superior stake and the recipient a lower stake"),[1103] and therefore donor accountability was not even on the agenda. As hunger response is internationalised, responsibility is given to a wide array of people and institutions (UN institutions, NGOs, donor governments and concerned citizens in any country on the globe) with vaguely defined accountability relationships.[1104]

Accountability during the process of channelling food assistance in Malawi was challenged by the fact that there were two governing structures side by side, one formal (created through a decentralisation process), and one traditional. According to the formal structure District Assemblies have the political power and District Commissioners have administrative power.[1105] Traditional Authorities consisting of traditional chiefs (inherited positions) have important roles in development activities. As we have seen in the above, the traditional structure was used in the food assistance targeting process. The problem was that it was not clear whether the traditional structure was accountable to the formal structure.[1106] These uncertainties made it difficult to achieve the aims of the decentralisation process, i.e., enhancing accountability and transparency by public participation in local development planning and by bringing decision-making closer to the public.[1107]

In a situation where needs are extremely high it is clear that those who have been given power and responsibility sometimes misuse their status. Since being a member of the Village Development Committee (VDC) was a voluntary commitment, it ensued that VDC members put themselves or their relatives on the list of beneficiaries. Another common problem was that there was a conflict between the chief and the committee, the chief wanting to decide who should get food assistance,[1108] and in that case the VDC was often a puppet of the chief. The result might then have been that the irrigation created as part of the FFA programme was built on the chief's land.[1109] There were also situations when the chief, and maybe also the rest of the community, felt it should be the active community members who voluntarily took part in development activities, such as building a school, who should get food assistance as a form of payment. "The community says these people who are not active should not get food, food should go to them actively involved."[1110] Therefore, addressing unequal power relations and ensuring that it is possible for all community members to participate is a key issue if the targeting process is to be accountable. There was, however, no equal participation in decision-making. I was told that in the local setting it is the people with knowledge who make

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[1103] Interview No. 1 with Malawi Human Rights Commission, Malawi 2006. Similar statements in interview No. 24, with Department of Poverty and Disaster Management Affairs, Malawi 2006. FSD2727.

[1104] de Waal, *Famine Crimes*, *supra* note 1067, at 70.

[1105] See Stephen N. Ndegwa and Brian Levy, "The Politics of Decentralization in Africa: A Comparative Analysis," The World Bank, August 2003. Available at http://www.kit.nl/portals/documents/query.ashx?RecordID=668296&Portal=RDLG, visited 3 March 2012.

[1106] Interview No. 32 with NGO that is not a member of JEFAP, Malawi 2006. FSD2727.

[1107] On the decentralization process see Mustafa K. Hussein, "The Role of Malawian Local Government in Community Development", 20 *Development Southern Africa* (2003) 271-282.

[1108] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1109] Interview No. 18 with WFP, Malawi 2006. FSD2727.

[1110] The interviewee is referring to safety net programmes such as the HIV/AIDS programme, not FFA programmes that are targeting people who are physically fit to work. Interview No. 33 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

decisions. "In most cases chiefs have knowledge because they are chiefs. They come from a royal family, they have privileges, it means they have been to school, they have been exposed more than an average villager."[1111] Open meetings where the names of the targeted people were shared with the community members, the aim being that in the end everyone is satisfied with the list, did occasionally take place in villages receiving food through the JEFAP.[1112] However, it seems that there were few accountability procedures that would have given the beneficiaries the opportunity to understand how service providers had discharged, or failed to discharge the aid.

During my field work in Malawi, I was repeatedly told that food (especially maize) in general and food assistance in particular is extremely political. Food is a useful political tool in a country facing one food crisis after the other. ("Food distribution is highly political, it's one of the tools for politicians to get votes."[1113]) The WFP and its partner NGOs naturally tried to avoid the involvement of politicians in the targeting process, but sometimes this still happened. "We also get a lot of pressure from politicians trying to manipulate our programme to suite their political agenda. Usually when they [the Members of Parliament] are involved the whole process is distorted. We have to try and make sure that this does not happen, but it takes time and effort."[1114]

In the Malawian context, where the distribution of food is highly politicised there is need for strong accountability mechanisms. However, it never transpires that politicians are held accountable for distorting food assistance programmes. What did happen was that the WFP took action against the transporter from whose truck some bags of maize were lost. Concerning attempts by politicians to highjack food assistance programmes, this was dealt with informally (by calling the Department of Poverty and Disaster Management Affairs, and asking them to talk to the politician).[1115] Although creating a legal, administrative, and political system to address these problems is first and foremost the responsibility of the Malawian Government, both the WFP and its partner NGOs dealing with the day to day implementation of food assistance programmes are in the position to voice these concerns as well as being creative when it comes to enhancing accountability under the current structures. Creating awareness of the right to demand accountable services from both Government institutions as well as from NGOs can contribute to an environment where citizens speak out, demanding accountability for how assistance is handled.

Taking accountability seriously implies that all the different actors who have responsibilities in the chain of food assistance can be held to account. At the bottom of the chain is the beneficiary, who might have concerns as to how the targeting was done. In cases of abuse or mismanagement beneficiaries are likely to turn to the actors present locally, i.e. the VDC or the chiefs (that most likely were involved in any possible abuse). "We tell the committees that when they have their own gatherings they should brief the communities. And we tell the beneficiaries that if you need further information consult the VDC."[1116] In other words, the

[1111] Interview No. 24, with Department of Poverty and Disaster Management Affairs, Malawi 2006. FSD2727.
[1112] Interview No. 4 with WFP, Malawi 2006; Interview No. 21 with Department of Poverty and Disaster Management Affairs, Malawi 2006. FSD2727.
[1113] Interview No. 3 with donor, Malawi 2006. FSD2727.
[1114] Interview No. 33 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.
[1115] Interviews Nos. 4 and 18 with WFP, Malawi 2006. FSD2727.
[1116] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

communities are on their own with these problems, without official mechanisms of accountability.[1117]

In the JEFAP programme accountability is an end in itself, a requirement that the government, the WFP and the NGOs have to meet. It is not linked to any broader agenda about what kind of political, social, and legal changes would be needed in order for beneficiaries to hold duty-bearers accountable for the food assistance service.

Empowerment as building capacity

Can food assistance be empowering? A donor representative did not see many possibilities for this: "Empowerment is hard to instil when you are giving somebody something. They don't have the ability to pay for it, and nobody wants to be in that situation. There's very little ways to empower them, they get a bag of maize and leave. There's not much dignity in that. At least you don't make them beg for it."[1118]

The WFP together with the NGOs implementing the programmes were however convinced that people were indeed empowered through the way FFA programmes are designed. I was told that the whole idea in FFA is empowering because you ask what the communities want ("we ask people what do you want, what are the priorities in your area? They decide if irrigation, forestry, roads.")[1119] Empowerment in this context is associated with being able to decide for yourself, to manage your own affairs in the community. "The communities are really being empowered because we just give them the guidelines and they are able to do the targeting on their own. That's part of empowerment."[1120]

It was claimed that the FFA format built local stakeholders' capacities and thereby empowered them.[1121] This meant that the *beneficiaries* receiving the food assistance were not necessarily empowered but *local actors* (often the local elite) managing the process gained more influence and power. The capacity of the actors being 'empowered' was supported through various kinds of trainings, for instance WFP organised trainings for their NGO partners on leadership of women, and the NGOs had then trained the VDCs on giving women a voice in the communities.[1122] The question of how effectively these kinds of trainings addressed power relationships within the communities in general and the VDC in particular, is impossible to assess.

I was told that 'sensitisation' is needed among the community members ("so that they understand why we are there, why is this important").[1123] This implies that the ideas came from outside (and clearly it was not always 'understood' in the communities why certain things were needed or 'good for development', so they needed to be 'sensitised'), but the community members had the right to choose between different options and also had the right to work (as volunteers, without payment) with various tasks in the development and relief

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[1117] The NGOs having responsibility for the implementation of food aid often has a large area to cover. As an example it can be mentioned that one NGO with a limited number of staff is responsible for 38 000 households. Interview No. 33 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1118] Interview No. 30 with donor, Malawi 2006. FSD2727.

[1119] Interview No. 3 with donor, Malawi 2006. FSD2727.

[1120] Interview No. 28 with NGO that is member of JEFAP consortium, Malawi 2006. FSD2727.

[1121] See International Food Policy Research Institute and World Food Programme, "Using Food Aid to Empower Communities: Concepts and Examples from Madagascar and Honduras", 2005. Available at http://www.wfp.org/ policies/Introduction/other/Documents/ifpri_briefs/Brief6Empower.pdf, last visited 26 January 2007.

[1122] Interview No. 18 with WFP, Malawi 2006. FSD2727.

[1123] Interview No. 3 with donor, Malawi 2006. FSD2727.

committees. This indicates that empowerment was seen as a process in which possibilities and options were broadened – but the 'beneficiaries' did not necessarily have a strong voice in setting priorities and agendas.[1124]

The way empowerment was understood in the FFA programme perhaps reveals more about how the mainstream development discourse has defined the notion 'empowerment' than about the food assistance programme itself. As so often happens when talking of empowerment, it was believed that empowerment is something done or given to people; and when empowerment is understood as being 'given' by one group to another (in this case the NGO contracted by WFP to the local structures) this hides an attempt to keep control. Real empowerment may take unanticipated directions, and the 'power over' the programme process that the outside agent has is likely to be challenged.[1125]

3.2.5 Concluding remarks

Food assistance programmes are large operations that demand a lot of resources in terms of administration and logistics, from the initial stage of procurement through international and national transport up to the delivery to the distribution authority. The WFP is known for being very capable of managing these affairs.[1126] The principles of 'good development practice' were taken seriously[1127] in the JEFAP but participation, empowerment, and accountability remained tools to increase effectiveness in reaching the intended beneficiaries; instead of viewing these principles as a something that should govern the relationship between the government and its citizens. When trying to avoid the political games of food aid, the development actors altered the programmes into a technical process, thereby also sidestepping accountability and participation as *democratic* principles. The food assistance service was being delivered by an international development agency in partnership with NGOs, on behalf of the government, and through the support of donors. There is no evidence that food assistance was dealt with as a rights-based service. Instead, the JEFAP food-for-asset programme was a well-managed charity-based service.

The WFP has not reformulated its mandate in human rights terminology and the agency does not refer to the right to food as a justification or legitimisation of its assistance programmes. There is, however, a *link* between JEFAP and the right to food through the fact that it is a human rights obligation of the Government of Malawi to provide food assistance in times of emergency to those unable to access adequate food by the means at their disposal. As we have seen, neither the government nor the WFP used this link as a starting point for the operations. The Government did not view food assistance activities as a human rights issue. The right to food, or human rights law in general, had few implications for the way JEFAP was implemented. The notable exception was that the right of non-discrimination and focus on the

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[1124] Compare with Naila Kabeer's definition of empowerment for women and with Amartya Sen's capability approach. Kabeer, "'Can I buy me love'?", *supra* note 915, at 85; Sen, *The Idea of Justice, supra* note 928, at 231-232.
[1125] Rowlands, *Questioning Empowerment*, *supra* note 897, at 16.
[1126] Jens H. Schulthes, "Is There s Future for the WFP as a Development Agency? Or Does Food Aid Still Have a Comparative Advantage?", in E. Clay and O. Stokke (eds), *Food Aid and Human Security* (London: European Association of Development Research, 2000) 256-273, at 256.
[1127] The conclusion, in a report on the right to food in Malawi, is that "WFP appeared to be the most advanced in using targeting for its programs". See Carole Samdup, "The Human Right to Food in Malawi", Report of an International Fact-Finding Mission, Rights & Democracy and FIAN International, 2006, at 49. Available at http://www.dd-rd.ca/site/_PDF/publications/globalization/food/food_malawi.pdf, visited 14 May 2012. Based on interviews with villagers in Mchinji the fact-finding mission found that accessing food-for-works programs was characterized by a number of obstacles such as variable criteria and reliability. *Ibid*., at 35.

most vulnerable people in theory had a strong role in the selection of beneficiaries, meaning that only the neediest people should get food and that there should be no discrimination in the targeting process. In practice the targeting process had its problems of course. This can partly be seen as the donors' way of trying to guarantee that food assistance was not misused for political purposes, that targeting was indeed based on needs. ("You cannot give the government the whole responsibility, because it's too political. You have to work with NGOs but making sure that the government is setting up a food security system."[1128]) One could even say that trying to make sure that food assistance reaches the most vulnerable was a sort of 'human rights conditionality'.

Avoiding the political games of food assistance meant that the influential development actors were also avoiding 'hunger as a political problem'. ('Politics' is in this context is not about partisan politics but can be defined as "the manner in which humans divide and distribute power and resources."[1129]) When food is distributed every year this must mean there is something wrong with the basic structure of the society[1130] – and this is a political problem. Distributing food was only dealing with the symptoms of how the basic structure of the society was failing to meet the needs of the most vulnerable part of the population. The question that we will look at in the next two chapters is whether a rights-based or a legal approach to food insecurity has any *transformative* potential in advancing societal change in favour of rights-holders.

3.3   A rights-based approach to food security: Demanding accountable services as a matter of rights and obligations

It is clear that within a large development NGO such as Oxfam[1131] there are several ways of working with a rights-based approach (RBA), and the purpose of this study is not to identify 'Oxfam's approach to RBA.' Instead the aim is to identify the *role* of human rights in this particular intervention and to analyse the meaning of non-discrimination, accountability, participation, and empowerment. What is *characteristic* of this particular RBA to food security, implemented in three districts in Southern Malawi? What is the *added value* of an RBA in the context of food security in terms of the potential *transformative* element of the approach?

3.3.1   Oxfam's rights-based approach

> Poverty is a state of powerlessness in which people are unable to exercise their basic human rights or control virtually any aspect of their lives. Poverty manifests itself in the inadequacy of material goods and lack of access to basic services and opportunities leading to a condition of insecurity.[1132]

Oxfam is one of many development organisations that link efforts to decrease poverty to issues of human rights. Oxfam took the formal decision to adopt a RBA to development in 2000. Embracing RBA was a response to the limited success of previous approaches; traditional ways of conducting 'development' were simply perceived as becoming less

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[1128] Interview No. 3 with donor, Malawi 2006. FSD2727.

[1129] Kent, *Freedom from Want*, *supra* note 83, at 121.

[1130] Compare with argument in Kent, *Freedom from Want*, *supra* note 83, at 123.

[1131] Oxfam is a confederation of 17 organisations working with more than 3,000 partners in more than 90 countries. See http://www.oxfam.org/en/about/, visited 20 August 2012.

[1132] Oxfam International, "Towards Global Equity: Strategic Plan 2001-2006". Available at http://www.oxfam.org/en/files/strat_plan.pdf, valid as of 8 March 2008.

effective.[1133] This places a lot of pressure on the new approach to deliver effective outcomes, but so far there are many question marks concerning the implications of applying RBA and its 'added value' is difficult to pinpoint. The exact meaning of RBA remained open to the organisation and its partners in 2007.[1134]

In the Strategic Plan of 2001, Oxfam committed itself to working for five rights: the right to a sustainable livelihood, the right to basic social services, the right to life and security, the right to be heard, and the right to an identity.[1135] Some of these rights are directly protected in international human rights standards, while others, such as the right to livelihoods, are not part of the human rights regime (although it could be argued that all of the five rights *reflect* many human rights treaties and declarations). The motivation behind Oxfam's choice is pragmatic: this formulation made sense to Oxfam's staff and their counterparts around the world.[1136] When we examine the five rights it is easy to see why these rights make sense to development professionals. The right to a sustainable livelihood stands for food security, the right to basic social services for basic health care, clean water, and education, the right to life and security for humanitarian action, the right to be heard for participation, and the right to an identity for vulnerable groups and gender. These issues have been part of the development agenda for a long time. What is new is the rights language.

In addition to promoting the five rights, Oxfam is committed to the principles of participation, accountability, the universality and interdependence of rights, non-discrimination and equality.[1137] Although empowerment is not on this particular list it is another important principle that underpins Oxfam's work. Oxfam claims that the *purpose* of the rights-based approach is to transform the vicious cycle of poverty, and disempowerment "into a virtuous cycle in which all people, as rights-holders, can demand accountability from duty-bearers, and where duty-bearers have both willingness and capacity to fulfil, protect and promote people's human rights."[1138] As we will see in the following analysis of the programme called Shire Highlands Sustainable Livelihoods Programme (SHSLP), the core of Oxfam's approach to RBA is about empowering rights-holders to demand accountable services as a matter of rights from duty-bearers, while at the same time supporting the capacity of these duty-bearers so that they can meet their human rights obligations.

3.3.2 Background to the Shire Highland Sustainable Livelihoods Programme

In order to understand what the introduction of RBA, that started around 1999, has meant for SHSLP in terms of working methods, it is necessary to first give a brief overview of how the programme has evolved. Oxfam has been working in the districts Mulanje, Thyolo and Phalombe in the Southern Region of Malawi since 1996.[1139] However, in 1987/88, Oxfam's interaction with Mulanje District had already begun through a commissioning of action research on poverty. This research showed the pervasive, acute, and endemic nature of poverty in rural Malawi – and the inadequacy of government structures to address the

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[1133] Marjolein Brouwer, Heather Grady et al, "The Experiences of Oxfam International and its Affiliates in Rights-Based Programming and Campaigning", in P. Gready and J. Ensor (eds), *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (London: Zed Books, 2005) 63-78, at 63.

[1134] Oxfam Novib, "How RBA Works in Practice: Exploring how Oxfam Novib and Its Counterparts Apply an RBA", 2007 (unpublished document).

[1135] Oxfam International, "Towards Global Equity", *supra* note 1132.

[1136] Brouwer and Grady et al, "The Experiences of Oxfam International", *supra* note 1133, at 65.

[1137] Oxfam Novib, "How RBA Works in Practice", *supra* note 1134.

[1138] Brouwer and Grady et al, "The Experiences of Oxfam International", *supra* note 1133, at 64.

[1139] Oxfam, "Integrating Rights into Livelihoods Programme: A Case Study of Shire Highlands Sustainable Livelihoods Programme, Malawi" (unpublished project document that is with the author).

problems – at a time when the one party regime of President Banda did not officially recognise the existence of poverty. Due to the authoritarian regime it was not possible for an international NGO such as Oxfam to work directly with communities. Instead, the action researchers recommended Oxfam to train district government staff in participatory problem-solving approaches, with the objective to generate attitudes and knowledge that would foster the participation of beneficiaries in development. This work was started in 1990, four years before the introduction of a democratic constitution.[1140] It was a major challenge to build government capacity at that time due to the intense and paranoid political environment.[1141]

The political environment was often mentioned by Oxfam staff during my interviews as a critical factor when introducing RBA. I was told that during the run-up to the second parliamentary and presidential elections (1999) in the country, Oxfam felt the need to increase awareness among citizens that whether they supported a one political party or not they still had the right to demand services from government as a right, not as a favour. Oxfam decided to 'sensitise' people on their rights, and at the same time also 'sensitise' the government structures, i.e. the service providers that Oxfam had been working with throughout the previous years. It was felt necessary to work on two sides: the supply side to 'stimulate the supply of rights and services' and on the demand side to 'generate awareness of and demand for these rights and services'.[1142] Firstly, the dual approach admitted that it was not constructive to only create demand when the government institutions may not have resources to meet those demands,[1143] and secondly, the non-conducive attitude among government officials needed to be addressed. "Now, we are coming from a background where service providers were seeing themselves as bosses. With the republican constitution it's more or less a demotion to servers. So we want them [the service providers] to accept that they have duties which they have to fulfil and for them to appreciate what there is to understand when we talk of human rights."[1144]

A third reason for the dual approach may have been that this is how Oxfam has been working from the beginning of the current programme in 1997 when a community based focus was introduced. Having identified the initial 10 target villages in Traditional Authority Mbuka a first participatory rural appraisal (PRA) with the whole community present was carried out. Ever since, PRAs have become yearly events during which communities are assisted in analysing their problems and discovering their root causes. The fact that since the year 2000 government extension workers have carried out the PRAs without Oxfam supervision shows that the programme has become 'their' programme instead of it being 'owned' by Oxfam.[1145] The link between Oxfam and the government institutions (the Ministry of Agriculture and Food Security and the Ministry of Community Development being the most important) was a so called desk officer. The link between Oxfam and a community was a VDC, which was elected under the supervision of an extension worker.[1146]

[1140] For a short overview of the political history of Malawi, see Englund, *Prisoners of Freedom, supra* note 414, at 13-18 and Englund, "Introduction", *supra* note 985, 11-24.
[1141] Max Lawson, "Oxfam Mulanje Livelihood Security Programme: Institutionalising Participation for Sustainable Livelihoods, Programme Model and Lessons Learnt 1987-2000", at 4 and 6-8 (unpublished project report).
[1142] Oxfam, "Integrating Rights into Livelihoods Programme", *supra* note 1193.
[1143] Interview No. 5 with Oxfam, Malawi 2006. FSD2727.
[1144] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.
[1145] Lawson, "Oxfam Mulanje Livelihood Security Programme", *supra* note 1141, at 9 and 17.
[1146] It should be noted that while the village development committees under the decentralisation structure are at group village level (on average about 10 villages), in the villages where Oxfam work, there is an elected village development committee in every village. See Lawson, "Oxfam Mulanje Livelihood Security Programme", *supra* note 1141, at 18.

3.3.3 Programme activities in 2005/2006

Throughout the existence of the programme, community members have in PRA exercises identified *food insecurity* as their primary problem. In Mulanje people live in rural areas farming tiny pieces of land,[1147] the fertility of which has been impoverished by continuous maize cropping. The majority of smallholder families have been found to be chronically food insecure, their own production lasting only for two-to-three months of the year.[1148] SHSLP promotes food security in a number of ways: by provision of improved seeds, provision of goats, organic manure making campaigns, training of extension workers and farmers on the management of kitchen gardens, etc.[1149]

Oxfam has found that in the programme area *income security* was an important component of food security. In order to obtain an income, people did casual agricultural labour ('ganyu'), which means working for food or cash in the fields of slightly better-off farmers or working for cash wages on commercial tea estates.[1150] Therefore, the programme aimed at improving labour relations. During the high season about 80 000 people were employed in the tea estates in Mulanje and Thyolo. The programme supported the Ministry of Labour Departments in both districts so that it could conduct inspections of workplaces, in order to enforce labour legislation.[1151] Moreover, the newly established Tea, Coffee and Macadamia Workers' Union was also supported by Oxfam.

The Tea, Coffee and Macadamia Workers' Union was formed in 2003. At that time unions were not recognised by tea estates. Therefore, Oxfam facilitated tripartite negotiations between the Labour Office (government), the Tea Association (employer) and Tea, Coffee and Macadamia Workers' Union (workers) and in August 2003 a recognition agreement was signed. Two months later an access agreement, which gave the union the right to enter into the estates and recruit members, was signed.[1152] In 2006, negotiations concerning a collective bargaining agreement were underway. This agreement was to mean that the union can bargain for better conditions of employment for their members.[1153] The level of payment in the tea industry was so low (1100 Malawi Kwacha per month) that tea estate workers fall below the national poverty line.[1154]

Support offered to the Labour Office meant that its staff members could go on regular inspection visits to tea estates and other workplaces. During these inspection visits staff checked whether labour conditions at the site were in line with labour regulations. Increased

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[1147] In the Mulanje District the average land holding size of households is 0.3-0.4 hectares, which is not sufficient to meet subsistence needs. Elke Kasmann and Wiseman Chirwa, "Mission Report & Recommendations, Integrated Food Security Programme, Mulanje", Malawi, GTZ, May 1997, at 10 (unpublished document that is with the author).

[1148] Lawson, "Oxfam Mulanje Livelihood Security Programme", *supra* note 1141, at 6; Interview Nos. 5, 6 and 7 with Oxfam, Malawi 2006. FSD2727.

[1149] Oxfam, "Shire Highlands Sustainable Livelihoods Programme (SHSLP) Annual Report", period of May 2005 to April 2006, at 1 (project document).

[1150] Lawson, "Oxfam Mulanje Livelihood Security Programme", *supra* note 1141, at 6; Interview Nos. 5, 6 and 7 with Oxfam, Malawi 2006. FSD2727.

[1151] Oxfam, "Integrating Rights into Livelihoods Programme", *supra* note 1193; Oxfam, "SHSLP Annual Report", *supra* note 1149, at 7.

[1152] In 2005, the union had 15,000 paying members but in 2006 membership dropped to 7,000 due to a drought that affected the tea industry. The membership fee was 10 Malawi Kwacha per month.

[1153] Interview No. 13 with Ministry of Labour, District Labor Office in Mulanje, Malawi 2006. Interview No. 14 with Tea, Coffee and Macadamia Workers Union, Malawi 2006. FSD2727.

[1154] 1100 Malawi Kwacha is about 6.5 Euros. The national poverty line is 16,165 MK per year (1347 MK per month). Republic of Malawi, "Integrated Household Survey 2004-2005", National Statistical Office, October 2005, at 138. Interview No. 14 with Tea, Coffee and Macadamia Workers Union, Malawi 2006. FSD2727.

inspections together with training concerning labour rights led to an increase in the complaints received by the Labour Office. In the year 2000, the Labour Office dealt with 201 complaints while in 2004 the number was 1,000. These complaints concerned issues such as non-payment of wages, unfair dismissals and injuries at the workplace.[1155] The Labour Office was in this regard equipped to support the members of the workers' union in their struggle for fair conditions of employment.

Droughts, disease outbreaks, crop disease and HIV/AIDS were factors that had a negative impact on the lives of the 120,000 farm families that the programme was targeting.[1156] Therefore, although SHSLP started as a development programme, Oxfam has also been involved in humanitarian responses in Mulanje, Thyolo and Phalombe. In 2006, there was a humanitarian programme reaching over 70,000 households with food assistance and another 6,000 households benefited from cash transfers (as an alternative to food assistance).[1157]

The programme, moreover, focused on various policy issues that had a bearing on food security. One such issue was the on-going land policy reform. One aim of the SHSLP was to increase awareness regarding the proposed land law (so that traditional leaders would know their new role), the new land tenure system, and the new structures that were to be established.[1158] The human rights aspect of land rights[1159] and the impact that the proposed new Land Act could have on food security was not raised. Another issue that had bearing on livelihoods, especially livestock production, was lack of security. During participatory rural appraisals community members raised warnings that cases of theft of livestock had a negative impact on food security. As a response, crime prevention committees were formed and trained with reference to community policing as well as crime victim rights.[1160]

The programme also worked with government institutions at the district level to address gender-based violence as an issue that prevented women from taking part in development-related activities in the community. A Victim Support Unit where victims of gender-based violence could seek assistance was established. Furthermore, there were meetings in communities to discuss the issue and informing people where they could report cases of domestic violence. According to Oxfam airing out these issues contributed to changes in attitude: "People, instead of saying these are family issues, ask can I seek redress from these institutions?"[1161]

3.3.4 Focus on rights *and* obligations

At the time of my field research, SHSLP had engaged the NGO Women and Law in Southern Africa (WLSA) to conduct training programmes with government extension workers, to stimulate an understanding of the rights and duties in their work, and another NGO called

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[1155] Interview No. 13 with Ministry of Labour, District Labor Office in Mulanje, Malawi 2006. FSD2727.

[1156] Interview No. 6 with Oxfam, Malawi 2006. FSD2727.

[1157] Oxfam, "SHSLP Annual Report", *supra* note 1149, at 1. Interview No. 6 with Oxfam, Malawi 2006. FSD2727.

[1158] Today customary land is administered by village headmen and chiefs according to local custom. See Asiyati Lorraine Chiweza, "The Challenges of Promoting Legal Empowerment in Developing Countries: Women's Land Ownership and Inheritance Rights in Malawi," in Dan Banik (ed.) *Rights and Legal Empowerment in Eradicating Poverty* (Surrey: Ashgate, 2008) 201-216.

[1159] See e.g. De Schutter, "The Emerging Human Right to Land", *supra* note 553, at 304.

[1160] Oxfam, "SHSLP Annual Report", *supra* note 1149, at 7.

[1161] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.

Malawi CARER[1162] to conduct sensitization meetings on human rights in the communities. In order to increase awareness on rights among communities, Malawi CARER had established village rights committees in all the villages that were part of the SHSLP. Together with volunteer community based educators, who had received training on rights issues from Malawi CARER, the village rights committees organised sessions where rights were discussed and they also assisted individual community members who wanted to seek redress for human rights violations.[1163]

Another component of RBA was the so called radio listening clubs. The Malawi Broadcasting Corporation's (MBC) Development Broadcasting Unit (DBU) had received support from Oxfam to establish radio listening clubs in 16 communities. The DBU provided communities with a microphone, a recording device, a radio, and training how to use the equipment. Then the local radio listening club made a recording on concerns that the village had, (a 'village voice') e.g. on problems with service delivery or non-existing services, labour issues, land issues or justice delivery, and took that recording to the responsible office at district level.[1164] It was claimed that the realisation of rights was triggered by increasing interaction between "claim holders (communities) and duty-bearers (people in authority – service deliverers)."[1165]

The service provider was supposed to listen to the tape and go to the village to respond, and together set up a plan for how they were going to address the situation. If no action was taken within the agreed time frame the villagers recorded another programme and that would go on air on national radio.[1166] This weekly radio program, partly consisting of material produced by radio listening clubs, was in Chichewa.

Radio listening clubs were not unique to the SHSLP. Community or rural radio had been a feature in participatory rural development initiatives in Malawi also before the SHSLP and outside of the programme area. In fact MBC radio has long traditions in being used for agricultural and rural development.[1167] Radio is the foremost mass medium in Malawi because it is far more widely accessed than newspapers and television, and also the internet.[1168]

Mchakulu, who has done research on radio listening clubs, based on field research from 2002-2003 claims that club members rarely discussed national issues that affected development at local level, the main reason being that most people were unwilling to discuss controversial or politically sensitive issues. This might be changing. Mchakulu's research shows that the younger generation wanted a more vigorous and open-minded agenda while the older generation still wanted a more cautious approach that would not alienate the local political elite.[1169] I was told that the radio listening club I visited did a programme on corruption in the

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[1162] CARER stands for Centre for Advice, Research, and Education on Rights. Director of Malawi CARER is Dr. Vera Chirwa, a lawyer and prominent person in Malawi's history. See Gilman, *The Dance of Politics, supra* note 982, at 163.

[1163] Interview No. 11 with community based educators in Mulanje District, Malawi 2006. FSD2727.

[1164] Oxfam, "SHSLP Annual Report", *supra* note 1149, at 7-8. Mchakulu lists HIV/AIDS, general community health, education and agriculture and farming as topics that were dominating most clubs in 2002-2003. See Japhet Ezra July Mchakulu, "Youth Participation in Radio Listening Clubs in Malawi", 33 *Journal of Southern African Studies* (2007) 251-265.

[1165] Development Broadcasting Unit, "Case Study: Makaula Community Reunion with Service Provider", at 3.

[1166] Interview No. 5 with Oxfam, Malawi 2006. FSD2727.

[1167] Linje Manyozo, "Rural radio and the promotion of people-centered development in Africa: Radio Listening Clubs and community development in Malawi", Paper presented in Maputo 6-10 December 2005, at 3. Available at http://www.codesria.org/IMG/pdf/manyozo.pdf, visited 10 May 2012.

[1168] Englund, *Human Rights and African Airwaves, supra* note 968, at 11.

[1169] Mchakulu, "Youth Participation in Radio Listening Clubs in Malawi", *supra* note 1164, at 257-258; 265.

distribution of government fertilizer coupons,[1170] which would suggest that at least this club did not avoid politically sensitive issues.

Mchakulu's research also shows that among youths the desire to "exercise their constitutionally guaranteed right to freely express themselves" was the second most common reason for joining a radio listening club, information seeking being the primary reason.[1171] This indicates a certain awareness of and willingness to use a language of rights.

Mchakulu claims that radio listening clubs present local citizenry with a public sphere for debate that is free of state interference.[1172] It is the club members themselves who have the power and responsibility to set the agenda for these debates. Any club member is free to raise a burning issue for discussion.[1173] According to Englund, this principle that made it possible for everyone, regardless of age, gender, and other similar markers of hierarchy, to submit stories was unprecedented,[1174] and it opened new space for public debate in rural Malawi. The forum was, however, not free from power struggles. Women spoke less than men, and the longest time slot was taken by service providers, who gave expert-like advice in a manner that is typical of top-down developmentalism and a common problem to many participatory approaches.[1175]

Women made up the majority of the clubs, and this can be partly explained by the fact that the Development Broadcasting Station's original aim with the clubs was to meet developmental information needs of women. In fact, the reluctance of some of the clubs to discuss political issues emerges partly from the traditional low status of women in Malawi. The women who founded the clubs emphasised issues that seemed development-oriented and useful for the improvement of their households and local communities as a way to legitimise the clubs in the face of a sceptical male-dominated society. Later on men were invited into the club, and this was seen as a way to get the men's 'stamp of approval'.[1176]

3.3.5   Sustainability and the role of the government

All extension workers had received training on rights-based approaches by the WLSA. This reflected the fact that the SHSLP was not Oxfam's programme but a programme implemented by government structures with the support of Oxfam. It was government service providers who were doing the job on the ground with communities. Oxfam filled in with resources, for instance, by providing motorbikes and fuel to extension workers so that they could reach the communities. In a highly aid-dependent country, such as Malawi,[1177] this approach is difficult to avoid. At the same time it is clear that Oxfam cannot continue with this form of direct budget support at district level forever. The question is whether central government is going to make it possible for government officials at the district level to continue with the work after Oxfam discontinues its financial and other support. (The democratically elected local government councils are responsible for local development plans to the central government

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[1170] Interview No. 10 with Development Broadcasting Unit, Malawi 2006. FSD2727.
[1171] Mchakulu, "Youth Participation in Radio Listening Clubs in Malawi", *supra* note 1164, at 260.
[1172] *Ibid.*, at 253.
[1173] *Ibid.*, at 255.
[1174] Englund, *Human Rights and African Airwaves, supra* note 968, at 223.
[1175] *Ibid.*, at 42.
[1176] Mchakulu, "Youth Participation in Radio Listening Clubs in Malawi", *supra* note 1164, at 258-260.
[1177] Between 1994-2004 aid disbursements have represented between 13 and 41 % of GNI. See "Evaluation of General Budget Support 1994-2004: Malawi Country Report", May 2006, at 10-11. Available at http://www.idd.bham.ac.uk/general-budget-support/PDFS-OECDDAC/mal.pdf, valid as of 8 March 2009.

but have no financial autonomy, and no right to collect taxes. They thereby depend on financing from central government.)[1178]

The service providers I met did not think central government is going to provide finances to continue the work that they had been doing with funds from Oxfam. On the one hand they felt confident that they had the skills and capacity to carry on with the new working methods also in the case where Oxfam had to leave Mulanje, but, on the other hand, they were concerned that the lack of resources will prevent them from using the newly required skills. "If they [Oxfam] are to pull out it's just as good to give a gun without the bullets. So how can we use the gun? How can we reach the community so that we can assist their problems?"[1179] Service providers were worried that if they do not have the resources to meet and assist the communities, this will create a lot of frustrations. "It's really a challenge… they [the communities] have been trained in rights, this time around they are able to demand various services! And at certain times Oxfam was able to come and rescue where government cannot manage. Now that Oxfam is pulling out it remains with government to respond to what communities will be demanding. That will be difficult and at the end of the day we are seeing some frustrations on the part of the communities."[1180]

This question of sustainability is always a challenge in development cooperation. If the trigger to use a rights-based approach to government service provision at district level comes from an international NGO instead of the central government, there is no guarantee that the changed practices that may take place actually last longer than the programme. Another challenge is to integrate what local duty-bearers learn in rights trainings into their everyday activities.[1181] Unless it is clearly spelled out that services in e.g. the area of agriculture are to be seen as obligations on the part of the local authorities and this approach is integrated into the official documents of these institutions, practices are not likely to change.[1182]

Oxfam had taken conscious steps to move away from being a service provider to being a facilitator. Instead of providing funding directly to small-scale interventions in communities it had started giving funding to the District Development Fund that is administrated by the District Assembly. Communities, through VDCs, were encouraged to apply for funds from this Fund. The idea was that people would understand that Oxfam is not going to be present in the district forever,[1183] and would learn to turn to the government structures as duty-bearers.

The process of how a duty-bearer was identified in the SHSLP is interesting from a human rights law perspective since traditionally only the state (government) and its agents are recognised as having duties under human rights instruments.[1184] When human rights enter into development efforts it is, however, increasingly acknowledged that rights are also relevant in horizontal relationships between persons.[1185] In the SHSLP, governmental, non-governmental

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[1178] Meinhardt and Patel, *Malawi's Process of Democratic Transition, supra* note 970, at 48.

[1179] Interview No. 8 with extension workers from Ministry of Agriculture and Ministry of Community Development, Malawi 2006. FSD2727.

[1180] Interview No. 8 with extension workers from Ministry of Agriculture and Ministry of Community Development, Malawi 2006. FSD2727.

[1181] Interview No. 17 with Women and Law in Southern Africa, Malawi 2006. FSD2727.

[1182] Interview No. 29 with Malawi Resource Centre for Human Rights, Malawi 2006. FSD2727.

[1183] Interview No. 5 with Oxfam, Malawi 2006. FSD2727.

[1184] Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization", in R. Hanski & M. Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (Finland: Institute for Human Rights, second revised edition, 1999) 25-47.

[1185] Ghalib Galant and Michelle Parlevliet, "Using Rights to Address Conflict – Valuable Synergy", in P. Gready and J. Ensor (eds.), *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (London: Zed Books, 2005) 108-128, at 115.

and private actors were all seen as relevant duty-bearers.[1186] What mattered was who the duty-bearer is in the eyes of the community members, not under some legal provision. The community simply wanted to know who can help them to solve their problems.[1187] More often the help came from NGOs, instead of government structures. This implied that in communities Oxfam was seen as a service provider, and sometimes even as the ultimate authority. This constellation was the result of Oxfam (and other NGOs) having more funds and resources than government structures.[1188] NGOs that wanted to *promote* and *facilitate* the government duty-bearers instead of themselves providing services directly to the communities, find that it was not easy to change roles,[1189] especially since community members often thought Oxfam was doing a better job than the government.[1190]

3.3.6 Giving meaning to human rights: An actor-oriented approach

In the SHSLP there was open use of 'rights language', especially by the radio listening clubs. In the programme documents there was, however, no analysis of the legal framework nor was there reference to specific rights in the Constitution of Malawi or international human rights instruments ratified by the country. Oxfam's own (international) list of five rights was not used either. There was simply no explicit link between the programme activities, focussing mainly on food security, and the legal framework.[1191]

Oxfam staff told me that the Bill of Rights in the Constitution of Malawi[1192] was the point of reference for the human rights awareness rising sessions. The challenge was that economic and social rights had a weak position in the Constitution in Malawi. For instance, the booklet "Human Rights in the Constitution of Malawi: The Bill of Rights"[1193] reflected the Constitution in the sense that the political and civil rights were given the majority of the attention while only the last page dealt with the right to development, which entails access to basic services such as education, health and food.[1194] Oxfam wanted to change attitudes towards socioeconomic rights: "Food security is a human rights issue. And people don't look at it as a human rights issue. Government has to look at food security as a human rights issue and make sure people are food secure."[1195] The strategy taken in the SHSLP was to work directly with the policy and practice by district level government institutions instead of influencing the legal framework.

I was perplexed by this lack of analysis of and reference to the legal human rights framework until I came across theoretical material on an actor-oriented perspective on human rights in

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[1186] Oxfam Novib, "How RBA Works in Practice: Exploring how Oxfam Novib and Its Counterparts Apply an RBA", 2007 (unpublished document) at 12.
[1187] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.
[1188] Interview No. 24 with Department of Poverty and Disaster Management Affairs, Malawi 2006. FSD2727.
[1189] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.
[1190] I discussed the role of Oxfam and other NGOs with a group of women at Mulanje Mission and they said people in general think it is better that aid is coming directly from NGOs than going through the traditional structure of chiefs. It is believed that government structures at all levels are corrupt. Group Interview No. 4 with female members of Church and Society in Mulanje District, Malawi 2006.
[1191] This is often seen as the first step when applying a rights-based (or a human rights-based) approach to development. See OHCHR, "Frequently Asked Questions", *supra* note 81, at 15.
[1192] Constitution of the Republic of Malawi, 1995, Chapter IV.
[1193] Malawi CARER, 2001. Malawi Carer has produced awareness raising materials on human rights in the form of booklets and posters (in English and Chichewa).
[1194] Article 30(2) of the Constitution reads: "The State shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure."
[1195] Interview No. 6 with Oxfam, Malawi 2006. FSD2727.

development, and I was able to put the SHSLP into that conceptual framework. In the SHSLP actors did not primarily rely on fixed definitions of the human rights concept in general, or the right to food concept in particular, instead the meaning of 'human rights' were shaped in the process of demanding services from local duty-bearers.

One could assume that lack of analysis of the legal framework would have an effect on situation analysis but some actors within the SHSLP had taken steps into the direction of using rights as a roadmap for development ('rights' defined very loosely). Before radio listening clubs decided to record a 'village voice' they identified a problem in *terms of rights*, and they also identified a *duty-bearer* (although the term 'service provider' was mostly used). For example the community agreed that one reason for food insecurity was lacking extension services needed to produce more food.[1196] A DBU officer explains:

> The way our right to food is being denied is that we are not getting the services, the extension services from Government extension officer. So he's not coming to the community to teach us on how we can make our ridges. As a result we are not producing food and we are hungry. So here we wanted to demand that now. So they [the RLC] invite that community and they make that recording. And in that recording they are going to explain how his absence or his inability to come to deliver services is violating their right to have food so they explain in that process that you see our right to food is being denied here because of your absence, you are not coming here to give us your services.[1197]

This human rights language is far from that in international human rights covenants and closer to the everyday lived reality of power struggles over resources. Members of the radio listening clubs were less specific (than the DBU officer quoted above) on how they had given meaning to the right to food to include extension services,[1198] but the general impression was that people were starting to demand services from duty-bearers as a matter of rights, not as charity as it used to be. There seemed to be general awareness that *I have a right*, without people being specific[1199] and in most cases without relating rights to obligations of duty-bearers. In some instances there was, however, also awareness that the fact that *I have a right* means somebody else has a *duty*. ("We know we have the right to food so government should reduce the maize price."[1200]) When asking what should be the role of the central government I was told: "The major role that the government should play is to ensure that we villagers here have all the social services present in our communities. In addition, the government has a responsibility to make sure that all our rights, including right to food, right to health, right to education are fulfilled. It's their responsibility."[1201] These quotations show that in the lived reality of villagers it made sense to equate rights with services.

The way actors in the SHSLP gave meaning to rights and obligations is an example of how "rights are shaped through actual struggles informed by *people's own understandings of to*

[1196] Group Interview No. 2 in Ngamwani Village in Thyolo District, Malawi 2006. FSD2727.

[1197] Interview No. 10 with Development Broadcasting Unit, Malawi 2006. FSD2727.

[1198] Group interview No. 2, Ngamwani Village in Thyolo District, Malawi 2006 (with members of RLC): "One program that I'd like to highlight since the RLC was established is how to make ridges and to protect soil. We identified that problem because it was also abusing or violating our right to have food or food security. So we decided to record a program to look at the issue of ridges that was also contributing to shortages of food in this area." FSD2727.

[1199] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.

[1200] Group Interview No. 1, Malawi 2006. FSD2727.

[1201] Group Interview No. 2, Malawi 2006. FSD2727.

what they are justly entitled."[1202] Actors do not necessarily use any 'legal' argumentation but instead insist on what they think "*they are justly entitled to*" – 'just entitlement' as opposed to 'an ethic of human rights' – and this is characteristic of an actor-oriented approach to human rights in development, as spelled out by Nyamu-Musembi.[1203] One can also draw parallels to the *constructed rights tradition*, according to which human rights are constantly being negotiated, defined and redefined at all levels of society.[1204] Human rights are seen as contextual and dynamic, grounded in lived experience. This tradition underlines people's agency in human rights protection and realisation.[1205]

According to Englund the Chichewa radio programme, partly produced through radio listening clubs, has generated a nationwide audience that "debates the abuse of power through idioms that are different from the vocabulary introduced by human rights activists".[1206] The kind of individualistic and assertive claim-making that has been promoted by human rights activists, who also tend to focus on civil and political rights rather the full range of rights claims, has been absent.[1207] The radio programme questioned the idea that human rights need to be introduced by experts. All of this contributed to an alternative debate on injustice,[1208] providing competing meanings to 'human rights' and questioning the official and NGO human rights discourses. This supports the suggestion by Gready and Ensor that a rights-based approach has potential to not only reinvent development but also reinvent human rights.[1209]

This kind of actor-oriented approach in which human rights are loosely defined without reference to international norms and standards is contrary to the 'express linkage' requirement of HRBAs, being the basis of *inter alia* the Common Understanding among UN Agencies. According to this thinking human rights standards and principles should guide all phases of programming, and human rights should determine the relationship between rights-holders and duty-bearers, i.e., *there should be express linkage to the normative human rights system*.[1210]

From a community development perspective it is, however, not acceptable that human rights are defined in a non-participatory manner by the powerful for the powerless. Participation has long been part of a community development discourse; we recall that participation has been on the agenda of Oxfam since 1990. A community development perspective on human rights strives to examine ways to make the process of giving meaning to human rights more democratic and participatory.[1211]

Working with a loose definition of human rights enabled Oxfam and its partners to create more dialogue about the meaning and content of the human rights concept than that which is normally the case in awareness raising projects. The voice of the actors was particularly strong in radio listening clubs as they are free to set their own agenda in terms of claiming needs as rights.

[1202] Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", *supra* note 18, at 41. See also Ife, *Human Rights from Below*, *supra* note 8.
[1203] Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development", *supra* note 18, at 41-51.
[1204] Ife, *Human Rights from Below*, *supra* note 8, at 76.
[1205] *Ibid*., at 76-77.
[1206] Englund, *Human Rights and African Airwaves, supra* note 968, at 3.
[1207] *Ibid*., at 5 and 9.
[1208] *Ibid*., at 221.
[1209] Gready and Ensor, "Introduction", *supra* note 70, at 14.
[1210] Common Understanding, *supra* note 50.
[1211] See Ife, *Human Rights from Below*, *supra* note 8, at 126-127.

However, when actors come together to give meaning and content to what they mean by human rights, when they decide what they are going to struggle for, there is an obvious risk for exclusion and discrimination. In a RBA, such as that used by Oxfam, the task of the facilitators is to make sure the voice of everyone is heard and reflected. Otherwise there is a risk that the agenda is set by the powerful for the powerless, only on the community level. The data I have from the SHSLP is not rich enough to analyse the process of how actors come together to give meaning to human rights and whose voice has been the strongest in radio listening clubs, and other forums. Certainly, the radio listening club process has not been free from challenges and power struggles, as has been shown by Mchakulu's research. Interference from local political elites, which in some cases can lead to violence, and sometimes fears of state intervention, were factors that weakened these forums.[1212]

In order to avoid exclusion and discrimination in the clubs, it would have been important to put more effort into the process of identifying and defining an issue as a human rights issue to be taken up by the club. Jim Ife reminds us that a human rights from below approach to community development is not an 'anything-goes-approach'. There should also be an *aspiration of universality*:[1213] what constitute 'our' human rights in this community should also constitute 'your' human rights in another community. It is, moreover, important that some core values and ideas embedded in the legal documents that constitute human rights law, such as autonomy, choice, bodily integrity, equality,[1214] and voice, are maintained and respected in an actor-oriented approach to human rights, which has no fixed definitions of the human rights concept.

3.3.7   Are rights confrontational?

In most of the interviews I was reminded of the historical context of Malawi; that the whole issue of human rights arose around 1994 with the transition from a one party regime to drafting a new constitution that provides for democratic governance and the introducing of a bill of rights. Introducing 'rights talk' in villages, promoting people to *demand* services as a right and thereby challenging power, and doing this in a very resource constrained environment, is indeed not an easy task.

Human rights are sometimes accused of being 'political', or overly focussed on the state and using adversarial techniques to hold violators accountable. It is claimed that this is unhelpful for the development process.[1215] (The debate about the de-politicisation/re-politicisation that human rights potentially bring as they enter into development is dealt with elsewhere. If human rights are to be bring about transformation, they have to be 'political' in that they have to deal with political questions about how to share resources.) The DBU's approach – making radio programmes where duty-bearers' lack of action are exposed on national radio – can indeed be defined as almost confrontational, but it is unclear if this approach has found its inspiration in human rights techniques or in empowerment techniques stemming from the development discourse. Moreover, Mchakulu's research shows that at least some clubs used

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[1212] Mchakulu, "Youth Participation in Radio Listening Clubs in Malawi", *supra* note 1164, at 265.

[1213] Ife, *Human Rights from Below, supra* note 8, at 213.

[1214] Sally Engle Merry refers to *inter alia* these values in *Human Rights and Gender Violence*, *supra* note 287, at 221.

[1215] Mary Robinson, "What Rights Can Add to Good Development Practice", in P. Alston and M. Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 25-41, at 32.

to avoid politically sensitive issues and debates, focusing on economic empowerment rather than political empowerment.[1216]

The difference between 'human rights techniques' and 'empowerment techniques' originating from development discourse could potentially be quite substantial as adversarial human rights techniques aim at duty-bearer action to remedy the situation while the development discourse often promotes increased self-help and self-reliance in the name of empowerment.[1217] In the case of the radio listening clubs the two approaches seem to come together. The responsible duty-bearer is invited to the community for a dialogue and it is underlined that both sides (the community as well as the service provider) should contribute to solving the problem. "After discussion we make an action oriented plan: what are we going to do as a community and how are you as a service provider going to assist us?"[1218] Mchakulu notes that members of radio listening clubs are not asking the authorities and service providers to solve problems on their own but instead the club members propose possible solutions.[1219]

Not all international NGOs applying what they call RBAs have gone as far as Oxfam and the DBU in Mulanje, Thyolo and Phalombe. For instance CARE Malawi had developed an approach to RBA where there was no explicit use of rights language due to the sensitivity of the issues: "When you start talking of accountability and transparency in your face like that the authorities don't always take it positively. We were aware of that. We said how can we engage ourselves in a rights based programme but at the same time not being confrontational?"[1220] CARE also underlined the 'responsibility' of the communities in an explicit way, thereby promoting self-reliance. For example, when a community becomes aware of the resource constraints that a health centre is struggling with, they start to invest in preventive mechanisms ("because they know that they cannot rely on this health centre, as it is highly limited in terms of the services it can actually provide."[1221]) If CARE had had a more confrontational approach it could have assisted the community in taking the issue from the district level to the central level, and to demanding additional resources.

Oxfam's strategy to support channels for rights-holders' demands was also visible in the area of labour relations. Again, Oxfam has a dual approach where it supported the Government Labour Office as well as the Te, Coffee and Macadamia Workers' Union. Again, training and sensitisation on labour regulations was a key entry point into cooperation with rights-holders and duty-bearers alike. The training sessions on labour rights that Oxfam facilitated targeted the general public, workers at tea estates, and other workplaces, as well as managers at tea estates.[1222]

The environment in Mulanje and Thyolo, where there is a long history of plantation agriculture and a sense of acute land scarcity (that is directed against the plantations), may facilitate political mobilisation of villagers.[1223] In this context, it has been possible for Oxfam

[1216] Mchakulu, "Youth Participation in Radio Listening Clubs in Malawi", *supra* note 1164, at 264.

[1217] See Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 1431.

[1218] Interview No. 10 with Development Broadcasting Unit, Malawi 2006. FSD2727.

[1219] Cornwall and Nyamu-Musembi, "Putting the 'Rights-Based Approach'", *supra* note 44, at 264.

[1220] Interview No. 32 with CARE, Malawi 2006. FSD2727. DFID had a programme called "Transform: Through Rights to Needs for Marginalised Malawians (2001-2003)" that was suspended in 2003 at the request of government. The main reason for the closure was "an underestimation of the sensitivity of the project." See Barnett et al., "Evaluation of DFID Country Programmes", *supra* note 998, at 32.

[1221] Interview No. 32 with CARE, Malawi 2006. FSD2727.

[1222] Interview No. 13 with Ministry of Labour, District Labor Office in Mulanje, Malawi 2006. FSD2727.

[1223] Daniel Alberman, Desmond Kaunda and Mick Moore, "Fashion, Passion and Ambiguity: A review of How DFID Malawi has Incorporated Rights-Based Approaches into its Work", 31 March 2005. (Report is with the author).

to develop a 'soft confrontational approach' in which demands are presented to duty-bearers, but at the same time underlining dialogue, mutual responsibility, and action by all sides.

3.3.8   Rights-based development principles

The following section analyses what non-discrimination, participation, empowerment and accountability meant in the SHSLP. I discuss the principles in this order because of the role non-discrimination plays in targeting; it cannot be separated from participation and empowerment.

Vulnerability, participation, and power: Increasing the voice of women

As stated earlier, targeting the most vulnerable has been interpreted as being part of an equality agenda. With regard to targeting, the same 'mantra' that was on the lips of all development agencies – lifting the poorest of the poor out of poverty – was also repeated by Oxfam: "We are looking at children, chronically sick, women. Those are the key targets, because we want to get them out of poverty."[1224]

In the SHSLP, the question of who is most vulnerable was critical during the PRA exercise that was the basis of all development interventions in the communities. The facilitators (from government institutions) used tools such as 'the resource walk' to identify those with fewer or no resources. They used simple questions such as 'who can afford to buy bread' or 'who owns a bicycle' when categorising people into vulnerable and less vulnerable. An in-depth discussion on the ethical aspects of 'categorising' people is outside the scope of this paper, but it is clear that this process has its own inherent problems (especially since the difference in terms of resources between the 'vulnerable' and 'less vulnerable' is very small). It should also be kept in mind that 'lack of resources' or 'poverty' can be defined in many ways.[1225]

The conclusion in previous sections regarding the possible difference between using non-discrimination as a principle in vulnerability assessment and targeting in 'good development practice' compared to using non-discrimination as a lens for analysis in human rights-based work, is that focus in the latter would be more on finding out who is *marginalised and vulnerable to exclusion and discrimination* than who is vulnerable to e.g. food shortages. The answer might be that the same individuals and groups are experiencing both discrimination *and* food insecurity, but the question is different. Furthermore, when the question of why there is discrimination and what can be done to address it, is added to the analysis *and* the affected population is actively involved in the inquiry, this can potentially be the first step to changing the situation (agency). This did not happen in the SHSLP at the time of my field research.

In RBA it is often claimed that engagement with rights, in a social and political process, can transform established, often hierarchical structures within society, and therefore rights can potentially be used as entry points to challenge *power relations*.[1226] In the SHSLP it was recognised that addressing unequal power relations is indeed important if the so called vulnerable groups are to be included in the development process, but it is unclear how

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[1224] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.
[1225] In local languages there are four different concepts to describe the state of poverty: *umphawi*, *kusauka*, *kusowa*, and *usiwa*. The first term means poor quality of life arising from lack of basic necessities, the second translates into poor quality of life arising from continuous struggle to live, the third term means lack of anything at a particular time, i.e. it refers to a temporary situation, and the forth is lack of clothing. Kasmann and Chirwa, "Mission Report & Recommendations", *supra* note 1147, at 18.
[1226] Gready and Ensor, "Introduction", *supra* note 70, at 23.

explicitly rights were used as justification for questioning hierarchical structures. "We can only get them out of poverty through inclusion. It's an issue of changing relations within communities, an issue of redefining roles and responsibilities and sharing power."[1227] In human rights terminology 'changing relations' means addressing *discrimination*. If the human rights framework had been used as a starting point for the problem analysis, that is basically what the participatory rural appraisal is concerned with, questions around vulnerability would focus on discrimination, non-inclusion, and equality in the opportunities to participate instead of lack of resources alone. Dividing the villagers into categories based on their economic status is as such not enough to establish patterns of exclusion and marginalisation.

The first priority seems to have been to ensure the *participation* of vulnerable groups in the community structures such as the VDCs and its sub-committees. The SHSLP had a policy that there should be equal representation of both sexes in the VDC, so that half of the 10 members were to be women. In addition, groups such as people living with HIV should be represented.[1228]

Ensuring equal participation is indeed important since the VDC and other committees play a key role in community development. After the PRA, where priority problems were identified, the villagers together with the service providers made a development plan for the village. The implementation of the plan was in the hands of the VDC. In practice this meant that the VDC applied for funding from the District Development Fund for small scale interventions (e.g. in the area of clean water).[1229]

In the programme area the kinship structure is matrilineal, meaning that heritage of property such as land passes through the female line. Female and male children alike inherit property from their maternal uncles and not their fathers.[1230] After marriage the husband settles in the village of his wife. In theory, this provides for a strong economic position for women,[1231] but it became clear during the interviews that in practice decisions about and control over land are taken by the man in the family.[1232] Studies have shown that women's rights to land in such matrilineal systems are more theoretical in nature.[1233] Additionally, it should be noted that leadership positions are usually held by men.[1234] Success or failure in promoting women's real influence over the politics of development through having a voice in elected village bodies is not easy to demonstrate. Ensuring formal participation by women is not enough if the female representatives sit quietly at the back. However, an outspoken effort to have equal representation by women in VDCs has made it *possible* for women to take part in decision-making.[1235]

When speaking of women and participation, it is necessary to elaborate on the concepts of power and empowerment. As mentioned previously, Rowlands points out that some definitions of power focus on the ability of one person or group to get another person or group

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[1227] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.

[1228] Interview No. 7 with Oxfam, Malawi 2006. This policy was mentioned also during the two group interviews.

[1229] Interview No. 8 with extension workers from Ministry of Agriculture and Ministry of Community Development, Malawi 2006. FSD2727.

[1230] Chiweza, "The Challenges of Promoting Legal Empowerment", *supra* 1158, at 210.

[1231] Kasmann and Chirwa, "Mission Report & Recommendations", *supra* note 1147, at 4.

[1232] Interview No. 7 with Oxfam, Malawi 2006; Interview No. 5 with Oxfam, Malawi 2006; Interview No. 25 with Ministry of Lands, Physical Planning and Surveys, Malawi 2006; Group Interview No. 4 with female members of Church and Society in Mulanje District, Malawi 2006. FSD2727.

[1233] Chiweza, "The Challenges of Promoting Legal Empowerment", *supra* note 1230, at 211.

[1234] Kasmann and Chirwa, "Mission Report & Recommendations", *supra* note 1147, at 4. See also Gilman, *The Dance of Politics, supra* note 982.

[1235] Interview No. 7 with Oxfam, Malawi 2006. FSD2727.

to do something against their will.[1236] When defining power as 'power over' (being able to control something, even having control over another group), then empowerment means bringing people who are outside the decision-making process into it.[1237] Oxfam and the SHSLP seem to have aimed at empowering women in this conventional meaning of the word. *There was strong emphasis on women's participation in political structures and formal or informal decision-making.* This indicates that participation had a broader meaning and agenda behind it than what was the case in the JEFAP. Women and men did not participate merely as 'beneficiaries' but also as citizens and rights-holders.[1238]

Using the conventional definition of power as 'power over', i.e. if one group gains power it will be at the expense of another group's power position,[1239] usually creates tensions. One such group was the village heads, who had given up part of their power to other community structures such as VDCs.[1240] Because the SHSLP underlined equal participation and the importance of fair representation in the VDC and its subcommittees, Oxfam staff believed people had been empowered to question the position of the village head men. "People used to see the village headman as God, they would not question him. But now they can say no."[1241] It seemed, however, that the position of the village heads varied from one village to another. It would be naïve to think that problems around the power position of traditional leaders have been solved. In many villages people were still afraid of the village head man and would not confront him with concerns about corruption, for example, during the distribution of government subsidised fertilizer coupons. "We are voiceless because it's our village headman who is doing that [corruption]. We have no power. We are afraid."[1242]

Participation has been an important theme since the beginning of the SHSLP, when one aim was to teach participatory methods to government extension workers. It seems that, in the SHSLP, participation has a broader meaning than functioning as a developmental tool (although PRA is such a tool). The aim was not only to involve and activate people around common development problems, and thereby increase a sense of 'ownership', but also to address issues of equality and power and thereby to increase the voice of the voiceless. Participation, nevertheless, remained at the district level instead of making efforts to increase the voice of community members at a central level, where policy decisions are actually made.

Empowerment as being aware that 'I have a right'

What we have seen in the chapter on food assistance is that empowerment is often linked to building capacity and 'handing over power' to local structures. There are, however, other ways of conceptualising power than 'power over', i.e., power as domination. When women (or other marginalised groups) gain 'power to', 'power with' and 'power from within' rather than 'power over' this entails a very different meaning of empowerment.[1243] Within these non-dominative interpretations of power, empowerment is concerned with the processes by which people become aware of their own interests – perhaps in this case defined as rights. As

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[1236] Rowlands, *Questioning Empowerment*, *supra* note 897, at 9.

[1237] *Ibid*., at 13.

[1238] Comapre with Cornwall, *Beneficiary, Consumer, Citizen, supra* note 837, at 22.

[1239] Rowlands, *Questioning Empowerment*, *supra* note 897, at 11.

[1240] As an example it can be mentioned that some chiefs also feel threatened by the village rights committees and community based educators. Group interview No. 11 with Community Based Educators, Malawi 2006. FSD2727.

[1241] Interview No. 6 with Oxfam, Malawi 2006. FSD2727.

[1242] Group Interview No. 4 with female members of Church and Society in Mulanje District, Malawi 2006. FSD2727.

[1243] Rowlands, *Questioning Empowerment*, *supra* note 897, at 12.

put by Rowlands: "Empowerment is thus more than participation in decision-making; *it must also include the processes that lead people to perceive themselves as able and entitled to make decisions*."[1244] In the SHSLP it seemed that as women became aware of 'I have a right' this process started, whether this is the intention of the programme or not.

This awareness means adopting a new sense of self that incorporates rights.[1245] Research by Merry shows that the rights framework does not displace other frameworks but adds a new dimension to the way individuals think about their problems.[1246] The same research also shows that the human rights framework is powerful because it shows that something, such as gender violence or hunger, is not natural and inevitable.[1247]

When engaging in a human rights-based approach to development, the aim is not just 'empowerment in general', or 'building capacity in general', but empowerment in relation to claiming and realising human rights. Rights-based empowerment is concerned with knowing your rights, acting on them and holding duty-bearers to account.[1248] *Rights language* is therefore a key factor in the empowerment process. 'A rights-holder' is per definition entitled to something (*what* he or she is entitled to, is often defined by the actors themselves, as we have seen).

As can be recalled, in the SHSLP, human rights language is far from that used in international human rights covenants, and in fact closer to the everyday reality of power struggles over resources. In the two communities that I visited, one in Mulanje and one in Thyolo, people referred to the right to services, the right to development, the right to food etc.

Human rights-based empowerment usually highlights the formal and external aspects of creating an environment in which people can empower themselves. Emphasis is on enhancing people's ability to claim and exercise their rights effectively.[1249] There is usually no questioning whether people *value* expanding their skills and choices into claiming and exercising their rights. (The aspect of empowerment emphasised by Naila Kabeer and Amartya Sen.) The data I have about the SHSLP is not rich enough to make a conclusion about how active the actors have been in setting the agenda, but it seems that within at least the radio listening clubs there was a genuine possibility to engage in any challenge the community faced. Whether the club members chose to apply a rights language to make their claim was something they did if it made sense in their lived reality. Beneficiaries also played a crucial role in PRA by e.g. choosing priority intervention for the own community. The absence of a clear link to any specific list of rights in Oxfam's work in the SHSLP gave room for an actor-oriented approach to rights-based development, creating space for participation *and* empowerment, rights *and* obligations. Otherwise there is always a risk that the priorities and perspectives of the local actors become over-shadowed by an approach focusing on a specific rights-based target such as a specific right.[1250]

Among Oxfam staff and extension workers there was a high level of optimism that human rights language has already by itself empowered the communities. "The trainings [on rights]

[1244] Rowlands, *Questioning Empowerment*, *supra* note 897, at 14 (emphasis in original).

[1245] See Merry, *Human Rights and Gender Violence*, *supra* note 287, at 181.

[1246] *Ibid.*, at 180.

[1247] *Ibid.*, at 180.

[1248] Danish Institute for Human Rights, "Malawi Baseline Data, Malawi HIV/AIDS programme 2005-09", Baseline research 2005-06, report of 2006, at 18. Available at http://www.humanrights.dk/files/pdf/ Publikationer/ Forskning/hos3.pdf, visited 2 February 2012.

[1249] See e.g., Hansen and Sano, "The Implications and Value Added of a Rights-Based Approach", *supra* note 708, at 51.

[1250] Newman, "Challenges and Dilemmas in Integrating", *supra* note 863.

are more or less like an eye opener. They never knew before and they say now they know. And it's like they know their rights and they know they have the right to demand services from each and every sector of government."[1251] The question is whether awareness of the fact that 'I have a right' is enough? The capacity to actually *take action* and claim rights from government institutions (to demand services), or to start a process to seek redress for a violation (this could mean visiting the labour office or the police) was still very low in the communities. The small office of Malawi CARER (with two staff members) did not have the resources to assist village rights committees and volunteer community based educators in the 220 villages in the programme area.

A baseline research carried out in Malawi by the Danish Institute for Human Rights the same year as my visit to Mulanje and Thyolo (2006) revealed that rural rights-holders (small-holder peasants, pieceworkers and fishermen) were barely confident to make claims that went beyond their community. This was mainly because of low expectations as regards the structures of local governance. They tended to see making claims as futile efforts for the reason that the capacity and willingness of district authorities to respond to such claims were deemed weak or non-existent by community members.[1252] The data was collected in completely different districts (Salima and Nkhotakota),[1253] and cannot be directly applied to the situation in the SHSLP districts, but I share the observation that in order for meaningful exchange to take place, duty-bearers have to feel and act responsible. Sano observers that this is more likely to happen when NGOs facilitate linkages between communities and district authorities.[1254]

In order for rights-based empowerment to take place, community members cannot be left alone in the struggle to make demands. Leaving things at the point of rights awareness is not enough. 'Preaching the language of rights' is not very effective if there is no link to interventions and to action-taking. If rights are to be empowering, people need to become involved, to mobilise in a struggle for social justice, not to just be passive listeners taking in knowledge from outside experts. The secret behind the popularity of the radio listening clubs is perhaps to be found in the active role of the participants. There was a conviction that through radio listening clubs communities can mobilise themselves and make a difference.[1255] The popularity of the weekly radio show meant that the DBU was under pressure to set up an increasing number clubs.[1256]

Mobilising rights-holders to claim rights from duty-bearers while at the same time building the capacity of the duty-bearers to respond to the demands, has been a creative and empowering way to engage in rights-based development. At the same time, it should not be forgotten that also duty-bearers need to be empowered. Duty-bearers should not only be aware that *'I have an obligation'* but also have the tools to fulfil this obligation. It will be a

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[1251] Interview No. 8 with extension workers from Ministry of Agriculture and Ministry of Community Development, Malawi 2006. FSD2727.
[1252] Hans-Otto Sano and Hatla Thelle, "The Need for Evidence-Based Human Rights Research", in F. Coomans, F. Grunfeld & M. T. Kamminga (eds), *Methods of Human Rights Research* (Antwerp: Intersentia, 2009) 91-109, at 102. Research carried out by Sally Engle Merry supports that "vulnerable individuals' willingness to adopt a rights framework depends in part on the way institutions respond to their rights claims." Merry concludes that poor women see themselves as rights-subjects only when powerful institutions treat them as if they are rights-subjects. Merry, *Human Rights and Gender Violence*, *supra* note 287, at 215.
[1253] Danish Institute for Human Rights, "Malawi Baseline Data", *supra* note 1248, at 4.
[1254] Sano and Thelle, "The Need for Evidence-Based Human Rights Research", *supra* note 1252, at 102.
[1255] The level of optimism about what the local Radio Listening Club can achieve was high in the village. Group Interview No. 2, Malawi 2006. FSD2727.
[1256] Interview No. 10 with Development Broadcasting Unit, Malawi 2006. FSD2727.

long journey before district level government service providers in Mulanje, Thyolo and Phalombe have those tools.

Accountability: putting pressure on the government

The traditional approach to accountability is concerned with providing checks and balances in the development process. In the SHSLP there was also the ambition that actors should account for their actions and for how they have spent resources. However, as we will see below, accountability was taken somewhat further, into the area of mobilising communities to putting pressure on duty-bearers, thereby linking accountability to obligations, and rights-based empowerment.

Accountability is often linked to 'good governance' and this is also the case in the SHSLP. Oxfam claimed it promoted good governance in the name of effective monitoring of how funds were being used. With regard to the funds used by communities for small scale projects it was the task of District Assemblies to do the monitoring. At the village level, the community structure that was responsible for the project organised public meetings during which they accounted for how the money was spent.[1257] Here it should be noted that the VDC acted as duty-bearer in this instance.

As we have seen, new accountability *relationships* and frameworks emerge when human rights enter into development policies and practices. There is stronger focus on the state-citizen relationship as compared with the donor-implementing agency accountability relationship. What is striking in my data is that local representatives of the government resisted when Oxfam tried to make changes in how accountability relationships worked, e.g. through giving the District Executive Committee the role of approving or rejecting the applications for funding of local development projects, a role that Oxfam used to have. This might indicate that local actors were unwilling to assume the role of active actors and would have preferred to be passive beneficiaries of interventions.

Oxfam made changes in accountability relationships and tried to take a more passive role. The new system of providing funding through the District Development Fund, instead of through Oxfam, however, caused concerns that it would actually lower the level of accountability. Since the members of the District Executive Committee approved or rejected the applications for funding, and the members were politicians, there was fear of politicisation of these interventions. "When they [the DEC members] are making these approvals there are so many biases. We find where there are strongholds, where they are more powerful within the government, we find most of the projects will go there to leave the other areas where there is little power. Government cannot do what Oxfam is doing because of issues of transparency and accountability."[1258]

One 'monitoring tool', that also aimed to increase the level of participation and accountability, was regular meetings called 'How is development progressing?' (*Chitukuko Chikuyenda Bwanji*). The VDC members met extension workers to discuss how the development plan for the village was progressing, and to take stock of successes and failures.[1259] This was an opportunity for community members to confront the extension workers with complaints about not fulfilling their obligations.[1260] The political culture in

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[1257] Oxfam, "SHSLP Annual Report", *supra* note 1149, at 6.
[1258] Interview No. 8 with extension workers from Ministry of Agriculture and Ministry of Community Development, Malawi 2006. FSD2727.
[1259] Oxfam, "SHSLP Annual Report", *supra* note 1149, at 9.
[1260] Oxfam, "Integrating Rights into Livelihoods Programme", *supra* note 1193.

Malawi was, however, still flavoured by almost 30 years of authoritarian regime, and questioning people in authority was something people were not yet comfortable with.[1261] Therefore, even if these monitoring meetings provided the space to confront government extension workers, it may have been difficult to uphold an atmosphere where it was actually possible to do so. "People still have the mindset that standing up and claiming rights might be an issue that might face them with certain consequences. They are still fearful about that."[1262]

The question is also whether it is effective to demand accountability from individual extension workers at the district level when they in reality have no power to decide about resource allocation for their department. As regard to demands about services as a matter of meeting obligations, radio listening clubs might be more effective since the programmes are aired on national radio. This means that the accountability element is taken all the way up to the central government – at least indirectly. If there is enough attention towards the district level government's inability to act, the central government will have to respond. "So you find Lilongwe, that is kind of the headquarters, calling the district offices, trying to find out what they [the district office] proposed they would do in the village, and asking why it has not been accomplished. They had promised to do something and they didn't do it."[1263] This could mean that it is feasible to use the radio as a tool to put pressure on the central government. "I've seen some improvements in service delivery in some of the areas mainly in government departments. I've seen some top officials taking action, even if they have not been to the area, they have heard that the government officers are not providing. So some top officials have reacted by taking positive actions."[1264]

In the SHSLP demanding accountability from duty-bearers in the area of services was at the heart of the programme. However, human rights were the *platform* for these demands on a political, or rhetoric, not legal level. There was no legal analysis of what the various rights, stemming from the Constitution of Malawi as well as international instruments, actually could mean in terms of services. The leading organisation, Oxfam, was not a human rights watch dog, naming and shaming duty-bearers, testing the legal provisions in courts, or other forums. The legal framework was not seen as an avenue for holding duty-bearers accountable. This is natural in an environment were most people, especially poor people, do not seek justice from formal courts but rather from traditional leaders, religious leaders, family counsellors, and other non-state actors.[1265] In the SHSLP it was *assumed* that outcomes from development interventions (roads, schools etc.) are, or should be, *de facto* rights for the people. It was the act of identifying rights-holders and duty-bearers (and their obligations) that was key. Accountability was in this context about a political process where citizens put pressure on the government to deliver certain services, and these services were understood to be part of a rights agenda. Accountability was linked to obligations, but without making explicit linkage to legal provisions.

It can be argued that rights-based approaches to development such as that used in the SHSLP contribute to taking human rights into new areas, in the search for, and struggle over, a new

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[1261] It should be noted that the Banda regime was known for brutally silencing all political opponents. Torture, political killings and disappearances were widespread. Analysts agree that, although there is now freedom of speech and assembly, violence, corruption, and nepotism are still part of Malawian political culture. See Harri Englund (ed.), *A Democracy of Chameleons: Politics and Culture in the New Malawi* (Uppsala: Nordiska Afrikainstitutet, 2002).
[1262] Interview No. 29 with Malawi Resource Centre for Human Rights, Malawi 2006. FSD2727.
[1263] Interview No. 5 with Oxfam, Malawi 2006. FSD2727.
[1264] Interview No. 6 with Oxfam, Malawi 2006. FSD2727.
[1265] Dan Banik, "Human Rights for Human Development: The Rhetoric and the Reality", 30 *Nordic Journal of Human Rights* (2012) 4-35, at 31.

rights regime.[1266] In this new rights regime there is not necessarily any strong link to the human rights instruments as these are being interpreted in present jurisprudence. For members of radio listening clubs it made sense to equate services and rights, to claim needs as rights. This is a defining feature of the protest school and is in opposition to what Baxi calls "human rights as ethical imperatives". An ethic of human rights insists on what communities and individuals *ought* to desire.[1267]

3.3.9 Concluding remarks

It is striking that the SHSLP included a wide variety of activities; it seems that flexible planning allowed for anything from provision to improved seeds to awareness rising from land policy. In some of the interventions it was difficult to find even an implicit link to human rights and also in the so called rights-based interventions explicit analysis of how the particular activities contributed to human rights was lacking. The programme had no rights-based goal, but had instead introduced rights as one component of the overall goal to strengthen food security and reduce poverty. In the report by Oxfam 'Rights Based Approaches' was, however, put as a separate heading,[1268] instead of allowing RBA to inform every aspect of the programme. This would suggest that the activities related to rights were seen as new 'add-ons' to old working methods, implying no fundamental shift in the rationale behind the development intervention.[1269]

This is one way of presenting how the programme fits into a broader context of what role human rights play in development interventions. Another way (and the one I prefer) is to say that everything that the programme did was informed by the aim of supporting the capacity of the district level duty-bearers to deliver rights/services and at the same time generating awareness of and demand for these rights among communities through training and through radio listening clubs. It can be argued that the programme viewed all services as rights, and enabling government extension workers to include e.g. improved seeds is therefore part of a rights agenda. Oxfam and its partners were working to create a culture of human rights where rights-holders would be able to claim needs as rights and where duty-bearers would be clear that they have an obligation to respond.

This is a considerable shift in human rights discourse in Malawi that has focused on rights as freedoms rather than rights as entitlements. Having such a strong focus on the responsibility of the duty-bearer is also a change from a discourse that has previously emphasised the responsibility of the rights-holder. Perhaps Oxfam, an actor outside of the human rights movement, has another way of working with human rights that is less focussed on the legal framework. In this approach, Oxfam and its partners were, moreover, not avoiding political issues – but the pressure on duty-bearers remained at a district level instead of taking them all the way up to the main duty holder, the Government.

In human rights terminology, 'positive obligations' could be used to describe government services, including services needed after a violation has taken place, e.g. in the area of delivery of justice, and 'negative obligations' to describe preventative action to hinder violations from taking place, e.g. community policing, or labour inspections. Oxfam has managed to make the district government extension workers to take the programme activities

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[1266] Gready and Ensor, "Introduction", *supra* note 70, at 6-7. E.g. Oxfam has introduced its own list of rights that it promotes. On this issue see Olivia Ball, "Conclusion", in *supra* note 70, 278-300, at 290.
[1267] Baxi, *The Future of Human Rights*, *supra* note 358, at 7.
[1268] Oxfam, "SHSLP Annual Report", *supra* note 1149, at 7.
[1269] See Uvin, "On High Moral Ground", *supra* note 51, at 2.

onboard in their work, instead of allowing them to merely cooperating with Oxfam, which is often the norm in development cooperation. This is a good achievement but the question mark is how well the role of the central government, as the ultimate duty-bearer of human rights obligations, has been taken into consideration. It is worrisome that service delivery, defined as rights by community members, was almost completely dependent on the support of an international NGO.

As we have seen there was no strong link to the legal framework to support the line of reasoning that services are rights. My impression is that everything that was seen as 'development' before was turned to 'rights', without any deeper analysis. The conscious choice to deal with rights issues at this level ("we have tried not to look at rights as documents but something that is part of everyday life")[1270] can be put into the conceptual framework of an actor-oriented approach to rights-based development. In this context at least the following factors should be taken into account. It is not sustainable to view all needs as rights; there needs to be debate about the content of concrete rights. There is a risk that rights language may, in the long run, loose its value and legitimacy if it is used without a clear basis in norms and standards. Without a link to the legal framework the normative nature of human rights could be weakened. However, rights language may lose its empowering effect if the approach becomes too legalistic and abstract. The impression from the group interviews with community members was that becoming aware that 'I have a right' was indeed empowering. Empowerment was in this case a process that led these people to perceive themselves as able and entitled to make claims and demand accountability.[1271] With continued efforts to support the mobilisation of rights-holders there is a chance that rights issues can become part of a struggle for social justice in Mulanje, Thyolo and Phalombe.

Looking back at my hypothesis about the possible added value of human rights-based approaches to development, i.e., has the introduction of 'rights talk' led to a shift in the attitudes among Oxfam staff and government extension workers so that provision of services is seen as a matter of *obligation*? It is difficult, if not impossible, to 'prove' that *human rights language* has changed the mindset of the actors in the SHSLP, to move from a charity-based to a rights-based approach to service delivery. However, it is clear that the ambition is to convince district level government to move in that direction, although the legal reasoning to back up this claim might be weak. However, the key issue is that there is a shift from viewing services as 'charity' to dealing with them as 'rights'. The challenge is that this shift is not sustainable if it takes place only among local level duty-bearers and not in central Government.

Neither Oxfam nor government partners had made any systematic effort to do a *human rights-based situation or problem analysis*, but it is interesting to note how community members themselves identified problems in terms of rights. Even though it is not clear how widespread this practice was among the radio listening clubs, the one example referred to earlier indicates that human rights can play a role when preparing to mobilise and demand accountability of duty-bearers. In addition, the participatory rural appraisals could move in this direction, by asking which rights remain unfulfilled, why this is the case, which duty-bearers should take action, what changes are needed in policy and practice.

Although policy issues are on the agenda of the SHSLP, a systematic human rights-based problem analysis would probably mean that there is more attention paid to addressing structural causes of hunger (lack of land, lack of services, lack of influence) at policy level

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[1270] Interview No. 10 with Development Broadcasting Unit, Malawi 2006. FSD2727.
[1271] Compare with Rowlands, *Questioning Empowerment*, *supra* note 897, at 14.

instead of addressing short-term needs (that can be seen as 'symptoms' of past policy decisions). The risk with moving in that direction is that problem analysis may become less participatory, carried out by 'experts' with a good knowledge of the overall policy environment instead of the beneficiaries themselves. Beneficiaries play a crucial role in current PRAs by e.g. choosing priority intervention for the own community. In a resource constrained environment community members tend to prioritise short term interventions such as provision of improved seeds – and giving them the liberty to do so is in line with the principle of participation and empowerment. It is not easy to strike a balance between a legalistic (elite) approach and a participatory (grassroots) approach.

The principle of *accountability* was in the SHSLP used as a basis to put pressure on government institutions to live up to promises that were made during meetings between service providers and community members. This line of reasoning is definitely a step away from the managerial approach to accountability that was characteristic of the JEFAP. A problem was that accountability demands stayed at the district level instead of targeting the central government with power to decide over resources and policy priorities. This was done in combination with efforts to increase transparency and participation by previously excluded groups (e.g. women) in decision-making. Rights language again played an important role, as it was argued that services are a matter of fulfilling human rights obligations.

Human rights indeed seemed to be a platform to demand that duty-bearers are held responsible for their actions and non-actions in the area of services in the programme area, at least on a rhetorical level. It is interesting to see how, in the process of formulating human rights claims, the actors reshape and broaden what is normally understood to be human rights, taking the human rights agenda into the area of services. There is no question that through rights-based approaches, the development discourse challenges the traditional understanding of 'human rights'.

3.4   A legal approach to food security: Legislation as a tool for transformation

What is characteristic of a 'legal' approach to food security? How is the role of human rights different compared to the other two projects? Through an analysis of the right to Food Project I also attempt to answer broader questions on human rights discourse in Malawi. Can the newborn interest in socioeconomic rights in Malawi contribute to a human rights discourse that underlines the political implications involved in taking human rights obligations seriously? Are the organisations involved in the Right to Food Project contributing to challenging the status quo, i.e., is the Right to Food Project contributing to societal and political *change* that strengthens the position/voice of rights-holders, and helps to increase the protection of their human rights and possibilities to demand *accountability* from duty-bearers? Is the right to food discourse, lobbying for national legislation on the right to food, *empowering* for rights-holders?

There is no written material about the project and therefore I have relied on my interviews with staff from key member organisations and two group interviews with members of a local branch of Church and Society in Mulanje as the basis for this analysis.

3.4.1 Introduction to the Right to Food Project

The so called Right to Food Project was started within Church and Society in 2003.[1272] Church and Society is the human rights department of the CCAP Blantyre Synod, established

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[1272] Interview No. 15 with Church and Society, Malawi 2006. FSD2727.

in 1993, around the transition to a multiparty democracy. As all other human rights groups in Malawi,[1273] Church and Society had originally focussed on civil and political rights but gradually it felt the need to move into the area of economic and social rights. As a consequence the Right to Food Project was setup with the support of faith-based donors in Canada.[1274]

In the first year of the Right to Food Project a lawyer was contracted to draft a bill on the right to food.[1275] This bill, called the Food and Nutrition Security Bill, was presented to the Parliamentary Committee on Agriculture and Natural Resources in order to gain their support for the initiative. Furthermore, the right to food bill was presented during "awareness meetings with the clergy".[1276] The Food and Nutrition Security Bill was therefore an initiative by civil society. The draft analysed in this chapter has later been updated with input from the Ministry of Agriculture, the Malawi Human Rights Commission and the Malawi Law Commission. It has, however, not been adopted and the National Right to Food Network continue to lobby for the enactment of the draft bill. The main obstacles are said to be the misunderstandings around the concept of progressive realisation and fear that the bill places obligations on government that are too heavy.[1277] Thus far, one act (The Prevention of Domestic Violence Act, April 2006) has been successfully passed in Malawi based on a bill from civil society organisations.[1278]

After the initial stage of the project Church and Society decided to contact other civil society organisations in order to establish a national Right to Food Joint Taskforce. This taskforce is a loose network of human rights organisations as well as developmental NGOs working in the area of food security. Although the project is an example of joint advocacy by human rights and development NGOs[1279] it would be an overstatement to say that these two set of organisations have truly joined forces under *one* project. The member organisations say their common aim is the adoption of an act on the right to food, but they work individually and focus on different ways to strengthen the right to food. While Church and Society has drafted a bill, Action Aid, for instance, has focused on lobbying for the inclusion of a reference to the right to food in the Malawi Food Security Policy.[1280] Advancing the status of the right to food as a legal norm is, however, a common objective for the organisations and therefore it is possible to analyse the activities of the taskforce as a legal approach to food security. The Taskforce later evolved into a registered NGO called the National Right to Food Network.[1281]

[1273] Before 1993, there were no human rights organisations in Malawi. It was especially in the late 1990s that human rights NGOs began "sprouting up" in Malawi. Interview No. 19 with NGO, Malawi 2006. Harri Englund points out that it was after 1999 that civic education on rights and democracy gained momentum in Malawi. See Englund, *Prisoners of Freedom, supra* note 414, at 96.

[1274] Interview No. 15 with Church and Society, Malawi 2006. FSD2727.

[1275] Interview No. 15 with Church and Society, Malawi 2006. The copy of the draft bill that the author has received from Church and Society is entitled Food and Nutrition Security Bill. According to the draftsperson the draft bill was presented in early 2005. Interview No. 16 with draftsperson of Food and Nutrition Security bill, Malawi 2006. FSD2727.

[1276] Interview No. 15 with Church and Society, Malawi 2006. FSD2727.

[1277] E-mail interview with Church and Society, August 2012.

[1278] Interview No. 19 with NGO, Malawi 2006. FSD2727.

[1279] On this general trend of closer cooperation between human rights and developmental NGOs, see Paul J. Nelson and Ellen Dorsey, "At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs", 31 *World Development* (2003) 2013-2026.

[1280] In the Food Security Policy, there is a statement that "[c]ognisant of the provisions for the protection of human rights and freedoms as enshrined in the Constitution of Malawi, the right to adequate food is fully accepted as a human right." Ministry of Agriculture and Food Security, Food Security Policy, August 2006, at 5.

[1281] E-mail interview with Church and Society, August 2012.

At the time I visited Malawi, there was a constitutional review process underway and a Special Law Commission had been set up for this purpose. Civil society organisations, including member organisations from the Right to Food Taskforce, were represented on the commission. Some efforts to include specific reference to the right to food were taking place. "We thought we could push for the express recognition of the right to food in the constitution. And the civil society did make its proposal to the [Special] Law Commission and since we are represented in the Special Law Commission that will review the Constitution, we hope those representations are going to be taken into account."[1282] In a similar vein: "The right to food is not clearly specified in the Constitution and we would like it to be properly recognized."[1283] It seems that different member organisations concentrated on advocating for stronger protection of the right to food through different avenues: some focused on stronger constitutional protection, others on stronger policy and yet others on a specific act on the right to food.

3.4.2 Background: The famine of 2001/2002

In order to understand the discussions about the right to food in Malawi it is necessary to look back at the 2001/2002 famine. Action Aid, which is a member organisation of the Right to Food Taskforce, facilitated research concerning the causes and consequences of the famine and in this context the right to food was briefly broached for the first time.[1284] It was especially the accusations of mismanagement on the part of the government that raised the issue of the right to food. "It happened that in 2001 we had a food crisis which was triggered by mismanagement."[1285] The informant is here referring to the fact that in 2001 the National Food Reserve Agency (NFRA) sold almost all of the Strategic Grain Reserve (SGR) at a critical point. The NFRA had a mandate to maintain buffer stocks of grain and in 1999 and 2000 the SGR held a near full storage capacity of 180,000 MT of maize. Part of the story is that this stock was bought with money borrowed at an annual interest rate of 56 per cent. This again is explained through the privatisation of the management of the reserves. Before 1999, SGR was managed by Admarc, which is the agricultural marketing parastatal agency. Donors, including the IMF and the EU, however, decided that national grain reserves should be "run independently and on a cost-recovery basis" (i.e. should be privatised) and therefore the NFRA was created in 1999.[1286] As no government funds were available, the newly established agency took loans from commercial and government banks to purchase maize from Admarc.[1287]

The chain of events and decisions that led to the deletion of the SGR is at the core of the argument that the famine had 'political' reasons – not 'technical'. (The 'technical' explanation is that the famine was a result of production failure, information constraints, a depleted food reserve, import bottlenecks, and high food prices.) According to the political explanation, it is

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[1282] Interview No. 16 with draftsperson of Food and Nutrition Security Bill, Malawi 2006. FSD2727.

[1283] Interview No. 19 with NGO, Malawi 2006. FSD2727.

[1284] Devereux, "State of Disaster", *supra* note 122.

[1285] Interview No. 20 with NGO, Malawi 2006. FSD2727.

[1286] In the 1980s, the proponents of structural adjustment found that ADMARC's market infrastructure was already inefficient, required heavy subsidies, drained the national treasury, and created disincentives for private sector entry into the maize market. Privatisation of ADMARC was recommended in the Malawi Poverty Reduction Strategy Plan but the government resisted implementing all the changes towards full privatisation to avoid risking popular support. See Caroline Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", USAID, September 2005, 46-47. Available at http://pdf.usaid.gov/pdf_docs/PNADE034.pdf, visited February 2012.

[1287] Devereux, "State of Disaster", *supra* note 122, at 9. See also Samdup, "The Human Right to Food in Malawi", *supra* 145, at 50; Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", *supra* note 1286, at 48.

claimed that the IMF instructed the Government of Malawi to sell the maize in the Strategic Grain Reserve in order to repay the debt incurred by the setup of the NFRA. The IMF for its part maintains that it only advised the government to sell *part* of the SGR to service its debt.[1288] The SGR sell-off was raised by one informant as a human rights violation: "It didn't make sense to just sell the SGR and then maize is scarce. That was more or less carelessness and a human rights violation because you can't play with such an important commodity just to make sure you want to make profit, it was supposed to serve the needs of the people. By then the signs of the food crisis were visible and people were dying and everything."[1289]

Moreover, private traders were accused of having profiteered from the sale of the SGR (buying maize when prices were low and holding it until prices rose; making large profit).[1290] In addition, this issue was linked to the right to food. "The allegation that private traders deliberately purchased SGR maize cheaply in order to hoard and resell it at excessively high prices during the food shortage is an extremely serious accusation. Profiteering from hunger violates the basic human right to food."[1291] There had even been speculation that local politicians were involved in these activities. A list of people who had purchased maize from the SGR was published, and this list included a number of prominent names.[1292] Moreover, the Anti-Corruption Bureau accused several Malawian politicians of benefiting from the sale of the reserves. A Presidential Commission of Inquiry was set up to investigate the sale of SGR maize.[1293] The report by the Presidential Commission blamed donors for the mishandling of the SGR (for putting forth the idea of forming the NFRA to take over responsibility of the SGR from Admarc when the government had no readily available resources for this purpose). The Anti-Corruption Bureau had a different view on the scandal and recommended in July 2002 that the Director of Public Prosecutions order investigations into charges of criminal recklessness and neglect acts against seven people. The list included the Director of Admarc, Friday Jumbe, who later became the Minister of Finance.[1294]

Despite these efforts, my informants were not satisfied with the level of accountability. "The crisis that happened in 2002 and politicians were found to have participated in mismanaging the food stocks, never have they been taken to court. I know from rights perspective some activists have said that by then if we did have a right to food law that would have made litigation possible."[1295]

Against this background, the drafter has made an effort to address profiteering issues in the Food and Nutrition Security bill. Draft Section 6 states:

> Any person who practices unfair trade practices which:
> b. takes advantage of vulnerable persons by exerting undue pressure or undue influence on such person to enter into a transaction related to food production, marketing, storage, supply, processing or consumption;
> Shall be guilty of an offence under this part.

[1288] Devereux, "State of Disaster", *supra* note 122, at 1. See also Roshni Menon, "Human Development Report 2007/2008: Famine in Malawi – Causes and Consequences", Human Development Report Occasional Paper, at 6. Available at http://hdr.undp.org/en/reports/global/hdr2007-8/papers/Menon_Roshni_2007a_Malawi.pdf, visited 10 May 2012.
[1289] Interview No. 22 with civil society network, Malawi 2006. FSD2727.
[1290] Devereux, "State of Disaster", *supra* note 122, at 2.
[1291] *Ibid*., at 3.
[1292] Devereux, "State of Disaster", *supra* note 122, at 11.
[1293] Samdup, "The Human Right to Food in Malawi", *supra* 145, at 50.
[1294] Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", *supra* note 1286, at 48.
[1295] Interview No. 20 with NGO, Malawi 2006. FSD2727.

Furthermore, other sections of the draft bill tried to address problems such as those encountered in 2001/2002. Section 4d included a reference to "rules regarding management of strategic grain reserves including draw down there from" and in 4e "prescribing minimum strategic food reserve levels." This can be seen as an attempt to make sure there is better regulation of the SGR, which is also a top priority for all donors. In 2004, the government and donors formed a joint oversight committee of the NFRA to monitor and authorise release of the SGR.[1296]

Going back to the events in 2001/2002, a State of Disaster was finally declared by President Muluzi on 27 February 2002, although information indicating famine was already available in late 2001, but the credibility of this information was questioned. Save the Children had published a report in October 2001 that indicated that maize prices had risen by 340 percent and maize production had fallen drastically.[1297] The organisation recommended an emergency response but this was rejected. The Malawi Economic Justice Network mobilised activist groups, campaigned in the media, and pressured the government to declare a famine. International media (BBC, CNN and others) broadcasted reports from Malawi in February and March 2002, which showed that in the case of Malawi the media was a late indicator of stress, not an early warning.[1298] Sen and Dréze have argued that informal systems of warning such as newspaper reports and public protests serve the dual function of bringing information the authorities can use and elements of pressure that "may make it politically compelling to respond to these danger signals and do something about them urgently."[1299] The argument contends that famines are therefore best prevented in pluralistic political systems with open channels of communication.[1300] The Malawi famine of 2001/2002 shows that famine is not always prevented despite available information and pressure from the public.

It is clear that the President was late in declaring a state of emergency; the disaster had already taken severe forms. There are no official estimates of excess mortality due to the famine and exact figures of the number of deaths are not available. Lists of names collected by civil society groups indicate that between 1,000-3,000 people died from famine related deaths. If one is to compare with previous sever famines in Malawi's modern history, the Nyasaland famine of 1949 resulted in an estimated 200 deaths.[1301]

It was not only the government that did not take the information about the serious food shortages seriously; also donors were slow in responding, although they eventually provided food aid. This can perhaps be explained through the fact that the relationship between the government and the donors was not the best: in November 2001 several major donors (including UK, EU, Denmark and the US) had suspended their aid programmes because of alleged corruption, economic mismanagement, and political violence by government supporters against the opposition.[1302] During the past years much has changed and Malawi's President Bingu Mutharika (2004-2012),[1303] enjoys a better relationship with donors; the general perception is that the Mutharika administration tried to 'check corruption'.[1304] It also

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[1296] Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", *supra* note 1286, at 34.
[1297] The report of 2001 is cited in Reliefweb, "Nutrition Survey Report, Salima and Mchinji Districts", September 2002, at 2. Available at http://reliefweb.int/node/409474, visited February 2012.
[1298] Devereux, "State of Disaster", *supra* note 122, at 7-8.
[1299] Sen and Dréze "Hunger and Public Action", *supra* note 32, at 263.
[1300] *Ibid*., at 264.
[1301] Devereux, "State of Disaster", *supra* note 122, at 18.
[1302] *Ibid*., at 14-15.
[1303] President Bingu Mutharika died of a heart attack in April 2012. Vice president Joyce Banda, know as a women's rights campaigner, acts as president until the following elections in 2014.
[1304] Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", *supra* note 1286, at 34.

seems lessons were learned from the awful experiences in 2001/2002. "The famine in 2001, that was a huge embarrassment, it was burnt in as failure in most politicians minds. And I think lessons learned after that, incorporated a lot of that into the 2004/5 famine."[1305]

According to the Action Aid report the famine in 2001/2002 had such devastating effects compared to the famine in 1991/1992 because economic liberalisation had removed the strong involvement of Admarc. Ten years earlier Admarc had depots in the remote rural communities and made food available at affordable prices. To move from a system where Admarc controlled input supply as well as food prices to full liberalisation where food supplies and prices were suddenly determined by the market proved difficult.[1306] "We have a liberalized market system and liberalizing a market in a country where market structures are not developed you are only promoting exploitation. The government is currently not very willing to intervene into the market. We strongly feel it should come in more strongly."[1307] This is, however, the view of one member organisation and there is no consensus on the way forward. Donors, who have a strong voice in policy decisions, government, and civil society disagree about the appropriate role of the state in addressing vulnerability and food insecurity. Admarc's social role, in particular, was subject to widespread debate at the time of my field research. Nevertheless, Admarc continued to be popular among the general public and no politician was willing to go too far with the privatisation, and thereby risk popular support.[1308] In addition to the changed role for Admarc came the fact that the so called Starter Pack programme, distributing packs of fertilizers and seed to nearly three million farmers, had been scaled down beneficiaries in 2000/01, and had not been replaced by any other large-scale food security programme.[1309] The above factors need to be taken into account when analysing the role of the right to food as a potential avenue for addressing food insecurity and famine.

3.4.3   Giving meaning to the right to food in Malawi: A word on process

In the following, I analyse the draft bill produced within the Right to Food Project, The Food and Nutrition Security Bill. Drafting a bill on the right to food is a process of giving meaning and content to a human rights norm and as such the process is interesting. Who is taking part in the process, and who is excluded? In what context does the 'definition' take place?[1310]

The bill analysed here is the draft of 2006. It has been updated later on but I have not had access to these versions. The first bill was drafted by a lawyer without consulting any 'stakeholders'. What was done in order to increase 'participation' was that member organisations took up the right to food and the draft bill during awareness raising meetings[1311] but there were no wider consultations.[1312] "Normally when we are drafting a law it will

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[1305] Interview No. 30 with donor, Malawi 2006. FSD2727.

[1306] Devereux, "State of Disaster", *supra* note 122, at 2. ADMARC has a history dating back to 1971. Before being partly privatised in the late 1980s, ADMARC was the sole trader of maize. Any farmer could sell beans, tobacco, and other produce to ADMARC if no one else would buy it at a set price. It also held a monopoly on inputs such as fertilizers, seeds, and farm implements. See Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", *supra* note 1286, at 46.

[1307] Interview No. 20 with NGO, Malawi 2006. FSD2727. The contradiction between the Government's human rights responsibilities and the impossibility of intervening in pricing because of the liberalised market system was also noted in Interview No. 1 with Malawi Human Rights Commission. FSD2727.

[1308] Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", *supra* note 1286, at 29 and 49. See also Meinhardt and Patel, *Malawi's Process of Democratic Transition, supra* note 970, at 59.

[1309] Levy, "Introduction", *supra* note 126, at 8.

[1310] See Ife, *Human Rights from Below*, *supra* note 8, at 134.

[1311] Interview No. 15 with Church and Society, Malawi 2006; Interview No. 19 with NGO, Malawi 2006. FSD2727.

[1312] This was confirmed in the two group interviews with members of Church and Society in Mulanje. FSD2727.

require this participation phase before we even begin to draft the law. That was not the case with this one."[1313] This meant only a very small group of people (all men) were included in the drafting and thereby also the meaning-giving process: the lawyer who drafted the bill and the leader of Church and Society who initiated and advised him. Because of this 'top-down' approach there were member organisations that felt the draft should be reviewed before the issue was be taken any further. "It was drafted by a lawyer. We feel it need to be reviewed, it need to have the mandate of the people."[1314]

Lack of participation and dialogue in the process of giving meaning to human rights is characteristic of a legal approach to human rights. Human rights are accepted as being defined in legal documents, which are, for obvious reasons, drafted by small groups of people, usually politicians, diplomats, academics, opinion leaders, and a few human rights activists.[1315] As can be recalled, in this way human rights is *a discourse of the powerful about the powerless*,[1316] thereby contributing to a discourse of domination and disempowerment.

A drafting process that would have included wide consultations could possibly have contributed to a public dialogue about the meaning, source, and authority of human rights and the right to food as well as forms and strategies for claiming them. However, this opportunity to discuss the relevance and meaning of the right to food for the lived reality of the people in Malawi was not taken by the organisations.

The drafting took place within the framework of Malawi's regional and international commitments to the right to food.[1317] From my analysis of the content of draft bill it seems that the ICESCR has been the main source of inspiration rather than the African Charter on Human and People's Rights. The draft bill uses the same kind of 'progressive realisation' language as the ICESCR and that it is not used in the African Charter and also not in Section 30 of the Malawi Constitution.

The *context* is which the drafting process in Malawi took place had transnational origins. Church and Society took part in the process of drafting the Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security (the 'Right to Food Guidelines'),[1318] led by the Food and Agriculture Organisation based in Rome (i.e., by a global elite). There is little resemblance between the 'Right to Food Guidelines' and the draft bill with regard to the content, other than that the definition of 'food security' is the same. The impulse to legislate on the right to food in Malawi originated from the discussions and negotiations on the international guidelines,[1319] and that in itself is relevant when trying to understand the process and what impact it has had on human rights discourse in Malawi. When a small group of people, associated with an international and national elite, speaking a specialised, often technical language[1320] come together to draft/give

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[1313] Interview No. 16 with Draftsperson of Food and Nutrition Security Bill, Malawi 2006. FSD2727.

[1314] Interview No. 20 with NGO, Malawi 2006. FSD2727.

[1315] Ife, *Human Rights from Below, supra* note 8, at 126.

[1316] Ife, *Human Rights from Below*, *supra* note 8, at 126. Emphasis in original. Merry also reminds us of the urgency to include women in the making of the human rights framework so that we can move toward disrupting the patriarchal shape of that framework. Merry, *Human Rights and Gender Violence*, *supra* note 287, at 231.

[1317] Malawi ratified the African Charter on Human and Peoples' Rights 17 Nov 1989 and the International Covenant on Economic, Social and Cultural Rights 22 Dec 1993.

[1318] Adopted by the 127th Session of the FAO Council, November 2004.

[1319] Interview No. 15 with Church and Society, Malawi 2006. FSD2727.

[1320] See Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (Berkeley: University of California Press, 2005) at xviii; Robert Archer, "The Strengths or Different Traditions: What Can Be Gained and What Might Be Lost by Combining Rights and Development?", 4 *Sur International Journal on Human Rights Law* (2006) 81-89, at 86.

meaning to the right to food this inevitably has an impact on how human rights are perceived and applied by less powerful groups.

This can be seen against the process of 'transnationalisation of law' that takes place as a consequence of the emergence of a set of new legal actors. International and local NGOs, social movements, and the UN system all play a role in law making processes, and the draft bill on the right to food in Malawi is an example of this. Randeria points out that this is as such not new for post-colonial states that never had absolute monopoly over law production.[1321] National legal landscapes have always been complex and shaped by diverse external influences, but the growing dominance of international law, the transnationalisation of state law and the direct involvement of multilateral institutions, donors and transnational NGOs have all contributed to a new "supra-national dimension of legal pluralism".[1322] The draft bill is certainly an example of national civil society, with transnational links, contributing to legal pluralism.

3.4.4 From freedoms to entitlements?

As previously mentioned, the human rights rhetoric and discourse in Malawi has emphasised *freedoms rather than entitlements*, civil and political rights rather than socioeconomic rights. The concept of entitlements is not used, as such, in e.g. the ICESCR. It was developed by Amartya Sen in the late 1970s, and became widely known after the publication of his book *Poverty and famines* (1981) and in his later book *Hunger and entitlements* (1988). The central message was that focussing on food supply is not enough – what matters is who has *command* over these supplies. Food and other goods and services over which a person has command, are his or her '*entitlements'*.[1323] The concept of entitlements is thereby, according to Kracht and Huq, closely related to that of legal ownership rights.[1324] Eide, who also bases his writing on entitlements on Sen's scholarship, writes that "entitlements exist when one party effectively controls productive resources or can insist that another delivers goods, services, or protections, and that parties will act to reinforce (or at least not hinder) their delivery."[1325] Kent views entitlements as "nationalized versions" of global human rights and the obligations that come with them.[1326]

I use the concept here because I think it describes the idea of positive state obligations and it helps in avoiding simplistic assumptions based on ideas that fulfilment of the right to food for all can be achieved by mere distribution of food resources. While the positive obligation to fulfil the right to food does occasionally (and in the case of Malawi, probably more often than not) involve food distribution, or other forms of social protection such as cash distribution, it

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[1321] Randeria, "Domesticating Neo-liberal Discipline", *supra* note 423, at 152.
[1322] Randeria, "Domesticating Neo-liberal Discipline", *supra* note 423, at 151. "By pointing to the coexistence of a plurality of legal orders within one single political unit, […] legal pluralism interrogates the centrality of state-made law and its exclusive claim to the normative ordering of social life." *Ibid*., at 151.
[1323] Amartya Sen, *Hunger and Entitlement* (Finland: World Institute for Development Economics Research, United Nations University, 1988) at 8.
[1324] Uwe Kracht and Muzammel Huq, "Realizing the Right to Food and Nutrition through Public and Private Action", 21 *Food Policy* (1996) 73-82, at 74.
[1325] Asbjørn Eide, "The Right to an Adequate Standard of Living Including the right to Food" in A. Eide, C. Krause & A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook,* Second Revised Edition (Dordrecht: Martinus Nijhoff Publishers, 2001) 133-148, at 139.
[1326] Kent, *Freedom from Want*, *supra* note 83, at 91.

is necessary also to improve the prevailing "legal, political and economic arrangements"[1327] with the aim of strengthening poor people's entitlements.[1328]

The Malawian human rights discourse has, in addition to a strong emphasis on 'freedoms', also focused on the responsibilities of the individual that are said to come with human rights. (This is in line with the African Charter on Human and People's Rights that departs from other human rights instruments and imposes duties on individuals. These duties are owed to other individuals, the family, society, and also the state.)[1329] Only recently has there been a shift to a stronger focus on obligations by duty-bearers. "At first it was everybody for themselves: you have rights, it's up to you. Now we are saying you have rights but certain people have obligations to ensure you enjoy your rights to the outmost."[1330] Within the Oxfam rights-based approach the actors used this kind of language of rights *and* obligations.

Obligations, especially of a legal nature, were also important in the Right to Food Project and the draft bill. Overall, the main purpose of the draft bill was to make the right to food justiciable,[1331] that is, enforceable through legal and para-legal institutions. Due to limited access to formal legal forums, the organisations behind the draft bill aimed at a system where the right to food could be claimed outside the court system: "We hope the right can be claimed not only in formal magistrate courts and the like. Once we have the law we are going to call on the government machinery to be more responsible and the claiming might be through group actions, advocacy and lobbying, more of that sort rather than maybe an individual going to court."[1332]

The draft bill established a the Malawi Food and Nutrition Authority. The Authority would be competent to receive complaints. According to the draft bill, individuals and groups, or organisations representing such groups, may bring complaints and petitions before the Authority and it may find a *violation* of the right to food and nutrition security.

Draft Section 50: "Any person guilty of an offence under this Act or regulations made hereunder for which no penalty has been prescribed shall be liable to a fine of K750,000 or to imprisonment of 5 years." The explanation behind this rather exceptional approach may be found in the fact that the Malawi Constitution allows its Bill of Rights to apply in the private sphere.[1333] Private actors are bound by human rights provisions and when courts are resolving private disputes, they have the duty to consider human rights, including socio-economic rights.[1334] This practice is reflected in the fact that the Malawi Office of the Ombudsman is competent to investigate complaints in both public and private spheres, which has led to a massive volume of cases received.[1335]

It seems that the draft bill would establish personal criminal responsibility for offences under the act, rather than ordering the government to remedy the situation through taking positive measures as has been the case when finding a violation of the right to food in India and South

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[1327] Used in Jean Drèze and Amartya Sen, *Hunger and Public Action* (Oxford: Clearndon Press, 1989) at 9.

[1328] Kracht and Huq, "Realizing the Right to Food and Nutrition through Public and Private Action", *supra* note 1324, at 75.

[1329] Articles 27-29 of the Charter define duties of individuals. See also Mutua, "Standard Setting in Human Rights", *supra* note 296, at 577.

[1330] Interview No. 19 with NGO, Malawi 2006. The challenge is that duty-bearers have not recognized that rights imply that they have certain obligations. Interview No. 29 with Malawi resource Centre on Human Rights. FSD2727.

[1331] Interview Nos. 15, 16, 19 and 20, Malawi 2006. FSD2727.

[1332] Interview No. 19 with NGO, Malawi 2006. FSD2727.

[1333] Chirwa, "A Full Loaf is Better than Half", *supra* note 1031, at 235.

[1334] *Ibid*., at 235.

[1335] *Final Evaluation: Strengthening of the Ombudsman Institution in Malawi*, *supra* note 1029, at 50-51.

Africa.[1336] As we have seen in part II, in India the right to food litigation has lead to the Supreme Court converting eight nutrition-related schemes of free food distribution, subsidised grain for the poorest of the poor, midday meals, family benefit schemes etc into legal entitlements, making it obligatory for the government to implement them.[1337]

The Authority was given a broad mandate in the draft bill. Draft Section 36 stated:

> The Authority shall be competent in every respect to protect and promote the right to food and nutrition security in Malawi in the broadest sense possible and to investigate *violations of such right* on its own motion or upon complaints received from any person, class of person or body.[1338] (Emphasis added.)

This kind of 'violations language' was not used throughout the draft bill. *Progressive realisation* of "the right to food and nutrition security" (draft Section 3(1)) was advocated. In this context, the right to food was linked to the Millennium Development Goals. The Draft Section 3(4) stated that "The Government shall progressively eliminate hunger by improving wages and incomes of people in order that by 2015 there shall be no person earning less than $1 a day." Also the notions of "taking steps" and "maximum available resources" (familiar from the ICESCR) were used in the draft bill. There was even a direct reference to "international covenants":

> The government shall take steps, legislative, economic, technical or otherwise to the maximum of its available resources with a view to achieving progressively the full realization of people's rights enshrined in the international covenants related to the right to food and nutrition security to which Malawi is a party. (Sec. 3(6))

Draft Section 3 took very little consideration of *specific national conditions* in Malawi, even to the extent that the international poverty line was used instead of the national poverty line. Furthermore, the wording of the draft bill seemed to lower the level of positive state

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[1336] The Indian Supreme Court ordered in the 1985 case of *Kishnan Pattnayak and Others v State of Orissa* that State government try to solve the problems of poverty rather than just focusing on immediate disaster relief. In a South African case of 2003 (*Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*) the North West provincial government was ordered to, *inter alia*, plan a programme to ensure the effective implementation of the Social Relief and Distress Grant. See Sibonile Khoza (ed.), *Socio-Economic Rights in South Africa* (South Africa: Community Law Centre, Second Edition, 2007) 328-329.

[1337] Interim Orders of the Supreme Court, 28 November 2001. Available at http://www.righttofoodindia.org/orders/interimorders.html, visited 15 December 2011. See Basudeb Guha-Khasnobis and S. Vivek, "The Rights-Based Approach to Development: Lessons from the Right to Food Movement in India", in B. Guha-Khasnobis, S. S. Acharya & B. Davis (eds), *Food Insecurity, Vulnerability and Human Rights Failure* (Hampshire: Palgrave Macmillan, 2007) 308-327, at 310. See also Muralidhar, "India", *supra* note 677, at 102-123.

[1338] This mandate is very similar to that of the Malawi Human Rights Commission, which was established under Chapter XI of the Constitution as a national human rights institution, starting its functions after the Human Rights Commission Act of 1998. Act No. 27 of 1998, The Malawi Gazette Supplement, 11 August 1998, reprinted in Kamal Hossain et al. (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hauge: Kluwer Law International, 2000) 540-550. In 2004 a total of 1,136 complaints relating to human rights violations were handled by the Commission. Twenty two (22) cases concerned the right to development and economic activity. Most of the cases have not been concluded. "Annual Report of the Malawi Human Rights Commission for the Year 2004", at 1. Available at http://malawihumanrightscommission.org/docs/2004_MHRC_AnnualReport_.pdf, visited 15 December 2011. There have been attempts to make the Human Rights Commission as accessible as possible in that exhaustion of other remedies is not a requirement for lodging a complaint and free legal aid can be applied for in cases before the Human Rights Commission. E.M. Singnini, "Malawi's Human Rights Commission" in Kamal Hossain et al. (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hauge: Kluwer Law International, 2000) 527-532, at 531.

obligations from the standard set in the Section 30 of the Constitution.[1339] Draft Sections 4 and 5, on the other hand, tackles specific problems experienced in Malawi, i.e., disasters and food aid. The problem of politicisation of food aid was dealt with in draft Section 5:

> (1) No person, entity or political party shall use food aid for political purposes.
> (2) No person shall with hold food aid from any vulnerable person for any reason based on political opinion, tribe, region, marital status, disability, or other status, nor shall food aid be used to induce change of political affiliation.

The intention was to *criminalise politicisation* of food aid or inputs. In draft Section 6, prohibited acts and omissions were defined. The question is whether this kind of violations and criminalisation discourse can underline and strengthen the accountability of duty-bearers, thereby also underlining the obligations side of human rights.

Considering that more than 85 percent of all economically active Malawians were employed in agriculture at the time o drafting,[1340] developing the agricultural sector is a key issue for food security. The draft bill, however, failed to link the right to food to broader issues of livelihoods or to government services in agriculture (for instance in the form of extension workers).

There are some question marks concerning what kind of state the member organisations are advancing in their advocacy through advocating the draft bill. There seems to be some hesitation even within the Right to Food Project as to what should be the *social role* of the government.

> I don't know how many people at the grassroots level who would think in terms of the social responsibilities of the Government. Our Constitution seems to be focused on economic liberalization, that people should be empowered so that they can stand on their own. Instead of the government giving direct services, some of us think this is just complementing or helping the government out but we need to get to a day when everyone stands for themselves. What the government should do is to provide the working environment that is conducive.[1341]

While this is not in direct opposition to the thinking on entitlements, this kind of rhetoric mainly suits the current market driven development agenda, and it can hardly be seen as an effort to advocate for a more ambitious agenda for social justice. Instead of creating a strong social role for the government in this area, along the lines of strengthening poor people's entitlements, the draft bill promoted "broad based economic development that is conducive to the promotion and sustainability of food and nutrition security" (3(7)).

One can also argue that since the drafting of the bill had taken place in a non-participatory manner and the content includes no rights-based services (something that we have seen made sense to community members in the SHSLP), this is what Baxi calls an ethic of human rights that insists on what communities and individuals *ought* to desire.[1342] The drafters had decided

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[1339] Section 30(2) of the Constitution reads: "The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure."

[1340] This figure is from 2003. See Sahley et al, "The Good Governance Dimensions of Food Security in Malawi", *supra* note 1286, at 7.

[1341] Interview No. 19 with NGO, Malawi 2006. A similar statement was made in Interview No. 1 with Malawi Human Rights Commission: "It has been understood as if that right [the right to food] is only about the State creating an environment where you can fend for yourself, not that the State has a direct responsibility to take care of you." FSD2727.

[1342] Baxi, *The Future of Human Rights, supra* note 358, at 7.

what communities and individuals ought to desire, and that did not include services in agriculture.

3.4.5 Policies as politics

Putting the Right to Food Project into a larger picture of how human rights discourse traditionally has dealt with issues of inequality, there is a clear global tendency to favour legal solutions to social problems. Gready and Ensor warn against what they call the 'legal reflex' within human rights discourse, i.e., the assumption that "resort to law is the most effective and perhaps only form of protection and remedy". Establishing legal recognition of human rights can at worst become an end in itself, and this again can lead to a reduction in creativity with regard to activism. These arguments do not deny the importance of the law, instead they seek to give equal importance to political and social processes in securing human rights.[1343] Gready and Ensor point out that an engagement with rights potentially stimulates a *political transformation*. This challenges the established, often hierarchical structures within society, and is therefore never a simple process.[1344] Furthermore, Hugo Slim observes that most importantly, rights-talk has the ability to politicise development[1345] issues such as food insecurity. However, Ratna Kapur points out that it is important to be aware how law can transform the "political discourse of human rights and depoliticize it"; law as a discourse tends to obscure power relations and decontextualise political claims.[1346] In other words, depolitisation also takes place in human rights discourse, and according to Kapur this occurs because of the strong role given to law and legal solutions.

The Right to Food Project is not an apolitical approach although there are differences in emphasis, especially concerning what social role the state should play, among the organisations taking part in the project. Clearly, law plays a political role in transforming society. Moreover, research from neighbouring Zambia shows that legal practitioners have "become intimately engaged with the state, and in doing so has become a form of politics."[1347] The situation is similar in Malawi and the legal profession contributed immensely to the political transformation of the early 1990s.[1348]

Some organisations within the Right to Food Taskforce seemed to have committed themselves to advocacy so that the Government makes better policies,[1349] indicating a commitment to using rights as form of *political* pressure. This approach was, however, not visible in the draft bill.

The main policy issue that was discussed during my field research visit was the on-going fertilizer input subsidy programme that was a government driven, yearly initiative to support small scale subsistence farmers since 2005. While the draft bill promoted "expanded access to agricultural inputs" (3(9)), subsidies as such were only mentioned in connection to vulnerable groups. Therefore, it is unclear whether fertilizer or other input subsidies were promoted in

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[1343] Gready and Ensor, "Introduction", *supra* note 70, at 9. This is also discussed in Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 66.
[1344] Gready and Ensor, "Introduction", *supra* note 70, at 23.
[1345] Slim, "A Response to Peter Uvin", *supra* note 57, at 3.
[1346] Kapur, "Revisioning the Role of Law", *supra* note 382, at 110-111.
[1347] Jeremy Gould, "Strong Bar, Weak State? Lawyers, Liberalism and State Formation in Zambia", 37 *Development and Change* (2006) 921-941, at 937.
[1348] See in Clement Ng'ong'ola, "Judicial Mediation in Electoral Politics in Malawi", in Harri Englund (ed.), *A Democracy of Chameleons: Politics and Culture in the New Malawi* (Uppsala: Nordiska Afrikainstitutet, 2002) 62-86, at 85.
[1349] Interview No 22 with civil society network, Malawi 2006. FSD2727.

the draft as a broad-base form of government intervention to support the right to food. In this context we should keep in mind that widespread application of fertilizers on the soils of Malawi is not environmentally sustainable – and the Committee on Economic, Social and Cultural Rights has made clear that sustainability is an aspect that needs to be taken into account in efforts to realise the right to food. "Sustainability" incorporates the notion of long-term availability and accessibility so that food is accessible for both present and future generations.[1350] In any case, the silence on this issue on behalf of the Right to Food Taskforce reveals a reluctance to make use of rights as an argument on this highly politicised issue.

Moreover, the Taskforce has not carried out thorough *analysis* of which policies contribute to food insecurity and hunger and which policies reduce the level of food insecurity and hunger. In 2006, Church and Society hosted an international fact-finding mission coordinated by two international NGOs, Rights & Democracy and FIAN International. The findings and recommendations concerning the right to food in Malawi can be read in the report The Human Right to Food in Malawi. "In order to fulfill its human rights obligations, a State party to the ICESCR must develop and implement policies and programs aimed specifically at the progressive realization of the rights contained therein, including the right to adequate food."[1351] The report does not, however, give any guidance as to how this could be carried out in practice. Furthermore, there is no analysis of the elements of the right to food (accessibility, availability, acceptability)[1352] nor is there any analysis of the obstacles to why the rights-holders fail to demand the right to food and why the duty-bearers fail to meet their obligations. There is simply no situation analysis with reference to the right to food; instead the report gives a general overview of the food security situation in the country. The relationship between the fact-finding mission and the Right to Food Project is unclear; the report does refer to the project and also recommends the government to "adopt the Human Right to Food Bill" as proposed by the National Right to Food Taskforce but it does not indicate what benefits this would bring.[1353]

The draft bill only made reference to policies and programmes on a very general level:

> The Government shall put in place mechanisms, budgetary allocations, safety net programmes, credit programmes and schemes, wage policies and legislation, land tenure policies and legislation to ensure the accelerated full realization of the right to food and nutrition security for all without adverse discrimination. (3(3))

Therefore, the drafters of the bill seemed to represent the view that legislation should only give certain guidance to the duty-bearer on what steps to take, not stipulate particular policies. The question is if the bill implies that the schemes mentioned in 3(3) should be rights-based, and if so, what does it mean? E.g. a credit programme does not *automatically* advance the right to food, nor is it self-evident that safety net programmes are rights-based services. There are more than 150 food security projects coordinated by the Ministry of Agriculture,[1354] but it is unclear if the right to food has a role in this context. In the draft bill it was *assumed* that all programmes that claim to support food security are beneficial as to the right to food.

Around 2006, there were plans in Malawi to move away from safety nets (mainly food assistance) to social protection in the form of, *inter alia*, unconditional cash transfers to the

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[1350] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 7.
[1351] Samdup, "The Human Right to Food in Malawi", *supra* note 145, at 45.
[1352] General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 15.
[1353] Samdup, "The Human Right to Food in Malawi", *supra* note 145, "recommendations".
[1354] Field diary, notes from discussion with Adviser in Technical Secretariat, 12 December 2006.

poorest of the poor.[1355] In Malawi thus far social protection policy had been characterised by a range of *ad hoc*, small scale and short term interventions rather than a coherent and sustained set of government driven social protection measures.[1356] This kind of welfare approach to assist the part of the population that is unable, for reasons beyond their control, to either produce food or buy food, would be worth investigating from a right to food perspective. Food-based safety net programmes to save lives following e.g. drought dominate policy response at present but we should keep in mind that these interventions are neither predicable nor comprehensive. The ideal form of social protection would be guaranteed, predictable transfers to all chronically vulnerable groups – and this remains a distant ambition,[1357] but the right to food movement in Malawi could integrate the growing interest for social protection with efforts to strengthen legal protection of the right to food. In other southern African countries rights-oriented civil society actors have shown signs of assuming an activist role by advocating for basic social protection as a right.[1358] However, the draft bill only included one short and general reference to social protection[1359] and according to Church and Society there has been no serious discussions about minimum social protection as a right.[1360] Furthermore, the question of the new *land policy* was not addressed in the draft bill or by the Right to Food Project despite its potentially considerable effects on the right to food.[1361]

3.4.6 What is the role of human rights principles in the draft bill and the Right to Food Project?

In the following I discuss non-discrimination, participation, accountability and empowerment and compare their role and meaning in the draft bill and the Right to Food Project to the role and meaning of these principles in the two other projects.

The principle of *non-discrimination* has a surprisingly weak position in the draft bill. In the first substantive section of the draft the old-fashioned notion of "himself and his family" (compare with the ICESCR) is used: "Every person has the right to food and nutrition security including a standard of living adequate for the health of himself and his family". This could be interpreted as discriminatory against female-headed households. Moreover, there is no general discrimination clause in the draft bill. Instead, with-holding of food aid "from any vulnerable person for any reason based on political opinion, tribe, region, marital status, disability, or other status," is prohibited in draft Section 5(2). This means that the focus was on *upholding non-discrimination in targeting of food aid*. Special consideration of so called vulnerable groups, on the other hand, was emphasised. According to the definition given in Section 2 "Vulnerable groups means and includes children, pregnant women, lactating mothers, illiterate persons, persons with disabilities, the poor, the widowed, the orphans, the

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[1355] Interview No. 24 Department of Poverty and Disaster Management Affairs, Malawi 2006; Interview No. 3 with donor, Malawi 2006. FSD2727. 'Social protection' can include safety nets but is broader in scope and more diverse in practice. See Stephen Devereux, "Social Protection Mechanisms in Southern Africa", a report by Regional Hunger and Vulnerability Programme, June 2006, at 1. Available at http://www.ids.ac.uk/files/ RHVP_ Review_of_SP_Report.pdf, visited 10 May 2012.

[1356] Devereux, "Social Protection Mechanisms in Southern Africa", *supra* note 1355, at 7.

[1357] *Ibid*., at 2.

[1358] *Ibid*., at 5. See also Karen Tibbo, "The Role of INGOs in the New Social Protection Agenda in Africa", a report by Regional Hunger and Vulnerability Programme, February 2008. Available at http://www.wahenga.org/ node/1023, visited 10 May 2012.

[1359] Section 3(11): "Government shall progressively increase annual budgetary allocation for the programmes in para. 8 as part of social protection for vulnerable groups." 3(8) focus on programmes to strengthen dietary diversity rather than safety-net programmes.

[1360] E-mail interview with Church and Society, August 2012.

[1361] On this issue, see De Schutter, "The Emerging Human Right to Land", *supra* note 553, at 323-324.

elderly;" This means that the majority of Malawi's population is part of a 'vulnerable group' (especially since 'the poor' is being defined as vulnerable). It is not surprising that there was no proper analysis of the relationship between discrimination and vulnerability in the draft itself, but it is surprising that these 'vulnerable groups' are included in the bill without *any* kind of background analysis.

In all of the three cases analysed, the principle of equality and non-discrimination has focused on targeting processes, i.e., the process of identifying needs and responding to these needs. *None of the projects used discrimination and marginalisation as a lens for analysis.* The focus was not on finding out who are most marginalised or vulnerable as to *discrimination and exclusion*, but on who are vulnerable to food insecurity or malnourishment or resource constraints in general.

The principle of *participation* was even weaker than that of non-discrimination: there was no mention of opportunities for public participation in policy formulation concerning food security issues in the draft bill. Furthermore, lack of participation in the drafting process itself was an obvious defeat of 'human rights principles'. The Right to Food Project was in this regard a sad example of the non-participatory nature of human rights work that aims at changing laws and practices from above, with limited or no input from below.

As we have seen in the previous parts of this chapter, *accountability* was given quite different meaning in the two approaches to food security analysed so far. What was common to the JEFAP food assistance programme and the Oxfam rights-based livelihoods programme in Shire Highlands was that accountability expressed the concern for checks and oversight, monitoring and institutional constraints on the exercise of power.[1362] While the WFP and its partner NGOs had a managerial and apolitical approach to accountability Oxfam and its partners had an advocacy and political approach, in which accountability was linked to obligations on the part of government institutions to deliver certain services. What is interesting in the Oxfam programme was that accountability was linked to obligations (characteristic of human rights discourse) but without making explicit reference to legal provisions and without using the normative framework as an avenue for accountability. The legal approach in the Right to Food Project, for its part, had a strong focus on achieving increased accountability through providing stronger legal protection of the right to food. (Naturally, there can be a close connection between action to achieve political accountability and action to achieve legal accountability. Advocacy that perhaps starts as demands for political accountability may later lead to misuse of power being dealt with in a court.)

As we have seen in the analysis of the JEFAP food assistance programme, there were certain accountability gaps in food distribution. Beneficiaries were left alone with possible complaints about mismanagement without avenues for holding duty-bearers to account. What complicated the picture even further is that food assistance operations were largely in the hands of donors, international agencies, and NGOs, delegated to local structures, i.e. not the government that has ratified the human rights treaties. The question is if a right to food act would fill the accountability gap experienced by the beneficiary who did not receive the bag of maize as she expected?

There is no doubt that one main aim of the organisations behind the draft bill was to increase the level of legal accountability for violations of the right to food, especially in food assistance processes (thereby focussing more on the respect dimension of state obligations and less on the protect and fulfil obligations). It is difficult to speculate about the possible future usage of such a possibility: nobody knows if victims of violations were able to access

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[1362] Compare with Schedler, "Conceptualizing Accountability", *supra* note 803, at 13.

legal advice and representation that is required for a successful case. It is also impossible to predict if the act would lead to judicial activism around the right to food, and if that would have beneficial outcomes in terms of remedies for violations. (Of course, it is natural to expect that those organisations that have initiated the Food and Nutrition Security Bill would also make use of it in a case where it was adopted.) However, it goes without saying that even when accountability institutions are in place these may display variable outcomes for the people suffering from food insecurity and hunger.[1363]

The way the draft bill appeared in 2006, suggested that cases would focus mostly on the negative aspects of obligations under the right to food and less on the positive aspects of taking steps to realise the right. However, since politicisation of food assistance was widespread and contributed to the view that food assistance is a charity-based service (a 'favour')[1364] it would be welcome if courts and other forums were to tackle this issue. It is also clear that the drafters were aware of the limited access to justice that poor people face in Malawi. The idea behind the Food and Nutrition Security Authority was actually to have an institution that is easier to access than courts. "You want to provide for a mechanism, an administrative mechanism within the law that ensures it can be enforced without necessarily going to court. So you create that kind of authority that will be responsible, it's responsible for the implementation, for the monitoring to make sure it's being complied with. It's also a kind of tribunal to settle disputes."[1365]

The importance of *empowerment* was underlined by many of the member organisations in the Taskforce on the Right to Food. The possible future usage of a right to food act would depend on the empowerment of rights-holders. In this context we are speaking of rights-holders being empowered to claim the right to food from duty-bearers, not of empowerment in general (or capacity development in general as the term was interpreted in the JEFAP).

The context in which empowerment was raised in the Right to Food Project, however, suggests that it was interpreted as the opposite to being 'dependent' and 'relying on handouts': "The right to food was initially seen as a means to getting handouts but it's not only handouts, it's empowerment."[1366] In Malawi handouts are usually synonymous with food assistance. (And there was no effort to make these 'handouts' into a rights-based service.)

This view of a contradiction between empowerment and 'handouts' is prevalent in human rights discourse and is not unique to the Right to Food Project. Even when the question whether food assistance and other forms of direct assistance does indeed create 'dependency' has not been solved[1367] with such arguments as "if you continue feeding them day after day, they may lose the incentive to provide for themselves, and thus become disempowered, weakened by the help"[1368] are surprisingly common in literature on human rights. The

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[1363] On this issue in the context of the right to water, see Lyla Mehta, *Unpacking Rights and Wrongs: Do Human Rights Make a Difference? The Case of Water Rights in India and South Africa* (Brighton: IDS Working Paper 260, November 2005). Available at http://www.drc-citizenship.org/system/assets/1052734463/original/1052734463-mehta.2005-unpacking.pdf?1289493063, visited 10 May 2012.
[1364] "So people are still used to, when they get services from the government, oh this is a favour, this government is very considerate, they are concerning our plight, not our rights but our plight." Interview No. 19 with NGO, Malawi 2006. FSD2727.
[1365] Interview No. 16 with draftsperson of Food and Nutrition Security Bill, Malawi 2006. FSD2727.
[1366] Interview No. 15 with Church and Society, Malawi 2006. FSD2727.
[1367] On the debate among scholars and organisation whether food aid creates 'dependency' see, e.g. FAO, *The State of Food and Agriculture 2006*, *supra* note 1044, at 35; Lentz and Barret, "Food Aid and Dependency" *supra* note 1076.
[1368] Kent, *Freedom from Want*, *supra* note 83, at 121.

argument states that helping people to provide for themselves, or 'teaching people how to fish', as the saying goes, is synonymous with empowering them.[1369]

However, one could also argue that empowerment is about rights-holders becoming aware that, in their struggle to provide for themselves and their livelihoods, they have the right to demand various means of support from the government (claiming needs as rights), and that the government has to be accountable for implementing rights and services. When everything else fails they have the right to demand temporary support in the form of food assistance or cash transfer as social protection. Creating an empowerment agenda around these issues would mean broadening the agenda for social justice and strengthening the entitlement aspect of human rights discourse.

According to Englund, this was, however, not what the human rights movement in Malawi was doing in the first half of 2000. Englund argues that the notion of 'responsibility' had come to complement the emphasis on rights and freedoms in human rights discourse in Malawi.[1370] It seemed human rights NGOs (during civic education sessions in communities) had put a lot of responsibility on the side of the rights-holder in fulfilling human rights. Sometimes the concept of empowerment had been linked to *encouraging self-reliance* and strengthening of the capacity of community members to manage their own affairs and to work harder for their 'development', and this was the case also in the Right to Food Project.

> For instance in the element of food security you'd empower somebody by helping them how they can on their own manage their agricultural life, their needs and the like. When you just come and donate bags, and say this is your food, that is not empowerment. But even education that you can give them, and other basic needs that actually propel them to a better future, that is empowerment, through education. Once you have showed somebody you should be able to go back and see the people do the same things but now on their own without your assistance, that is empowerment.[1371]

How empowering is the right to food when combined with market logic and emphasis on everyone fending for oneself and being responsible for one's own rights (self-reliance as a form of empowerment)? If no strong social role for the state is advocated, the question is what added value the right to food has. When too much responsibility is put on the weaker party, i.e. the rights-holder, there is a risk that empowerment becomes disempowerment in the face of the seemingly impossible task to realise one's own right to food with minimum outside support.

3.4.7   Concluding remarks

Human rights discourse in Malawi is not stable or static and naturally the heightened interest in socioeconomic rights and the right to food contributes to its change. The entitlement dimension of the draft bill is, however, surprisingly weak, much weaker than international interpretations of the right to food, such as that given by the Committee on ESCR in General Comment No. 12. The fact that the draft bill has, as of 2012, not been adopted may indicate that its content did not resonate with human rights discourse dominating at the time of drafting and advocating for its adoption.

[1369] Kent, *Freedom from Want, supra* note 83, at 121.
[1370] Englund, *Prisoners of Freedom, supra* note 414, at 67. This was confirmed in Interview No. 1 with Malawi Human Rights Commission; Interview No. 32 with CARE Malawi and Interview No. 24 Department of Poverty and Disaster Management Affairs; Interview No. 5 with Oxfam; Group Interview No. 2. FSD2727.
[1371] Interview No. 15 with Church and Society, Malawi 2006. FSD2727.

Having an act on the right to food that would promote clearly defined duties for the state in the area of food assistance, social protection, as well as services relevant for agriculture would advance a human rights-based approach to food security. It would strengthen as well the position of the rights-holders in their struggle to demand services as a matter of fulfilling their human right to food instead of as favours that may or may not be handed out. However, the actors in the Right to Food Taskforce seem to underline a perceived contradiction between empowerment and 'handouts'. Advocating for making these 'handouts' into rights-based services that could be claimed from accountable duty-bearers was not clearly spelled out. Instead the draft suggested individual criminalisation of the politicisation of food assistance or inputs. Focus was thereby on the respect dimension of the obligations coming with the right to food, while the protect and fulfil dimensions remained weak.

To conclude I will try to relate the legal approach to food security to my assumptions about the possible added value of human rights in food security efforts. My first assumption was that a *human rights language* changes the mindset of the actors in development, underlining the legally binding nature of addressing food insecurity, and contributing to empowerment of rights-holders. It seems obvious that an act of legislation on the right to food would contribute to *underlining the legally binding nature of addressing food insecurity*. Duty-bearers in Malawi need to be reminded that addressing food insecurity is a matter of fulfilling human rights obligations, and food assistance (or social protection schemes) should be rights-based services. Therefore, legislation on the right to food is valuable as long as it serves the end goal that the right to adequate food is realised for all Malawians.[1372] Legislation is, however, not an end in itself but instead it is merely a stepping stone in a social and political struggle for increased equality. There is a risk that if this is forgotten the Taskforce on the Right to Food will resort to the 'legal reflex' that is common in human rights discourse.[1373] Having a national law on the right to food does not *automatically* further the realisation of this right.

The content of the draft bill was not very *transformative* as it failed to put forth a clear and strong obligation for the state to take positive measures to realise the right to food. It can be questioned whether the draft challenged the status quo in a way that would potentially strengthen the position of the rights-holder. Naturally, the *idea* to create a law on the right to food is as such transformative (legislation can be a step towards social and political transformation), but the problem with the draft was the vague nature of state obligations and the unclear role of the duty-bearers. From the perspective of the position of the rights-holders it is important that, first of all, there are available services, and second, that these are guaranteed; that there are long term and predictable rather than short term interventions based on more or less arbitrary criteria.

With regard to the second part of my assumption about the value of human rights language, that such *language is empowering for the rights-holder*, the question is whether a stronger protection of the right to food can contribute to a new human rights discourse in Malawi, with an emphasis on rights *and* obligation, entitlements *and* freedoms rather than one-sidedly on freedoms. Due to the non-participatory nature of the Right to Food Project the empowerment element was weak: drafting a bill on the right to food was not taken as a possibility to increase dialogue on the meaning of the right to food.

[1372] The Committee on Economic, Social and Cultural Rights states that "[t]he right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement." General Comment No. 12, (1999) on the right to adequate food, *supra* note 577, para. 6.
[1373] See Gready and Ensor, "Introduction", *supra* note 70, at 9.

The idea behind the second assumption about *human rights situation analysis* was that when such an analysis raises questions such as what actors should take measures towards progressively realising the right to food, and what obstacles are hindering these steps from being taken, focus should be on *structural* issues such as: policy, power and politics, action and non-action by institutions, exclusion and marginalisation, as well as rights-holders' lack of possibilities to participate. In the Right to Food Project itself there had been no human rights-based situation analysis outlining the pattern of rights and obligations, rights-holders and duty-bearers or obstacles in the way of realising the right to food. Perhaps lack of analysis as a preparation for drafting the Food and Nutrition Security bill was the reason why it failed to address deeper structural causes of food insecurity and hunger (e.g. lack of land, inputs, and agricultural services).

My third assumption proposed that human rights offer a platform from which to demand the *accountability* of duty-bearers. If the Food and Nutrition Security bill is adopted Malawians will have one more platform to hold duty-bearers accountable. At least there would be an explicit avenue to demand legal accountability e.g. for misuse of food assistance and that could prove to be useful for the effectiveness of these yearly programmes. However, it is highly unrealistic to think that every Malawian would have to go to court (or another similar forum) every time his right to food is violated, and therefore efforts to achieve increased legal accountability need to be combined with broader advocacy efforts.

3.5   Conclusions and review of assumptions

Based on the analysis it is possible to develop a number of criteria for what is *characteristic* of (1) the FFA programme within JEFAP ('charity-based service'); (2) the sustainable livelihoods programme SHSLP ('rights-based approach'); and (3) the Right to Food project ('legal approach to food security').

It can be said that food assistance is charity-based service addressing *symptoms* instead of trying to change underlying structures that gave rise to hunger. In JEFAP symptoms were addressed through *service delivery* that was in the hands of NGOs and local elites rather than government structures. Although much effort was put into the targeting process and the principle of non-discrimination and focus on the most vulnerable were given high priority, there was a certain level of *arbitrariness* in the process where it was determined who was chosen as a beneficiary and who was excluded. The food assistance service was not seen as a matter of human rights, i.e., meeting an obligation by providing a mandatory service to rights-holders who would have been selected based on clearly defined criteria. Instead the service remained a *charity*, i.e., a favour that may or may not be provided to beneficiaries based on more or less arbitrary criteria. The principles of 'good development practice' were taken seriously, but in the JEFAP participation and accountability remained *tools* to increase effectiveness in reaching the intended beneficiaries; instead of dealing with these principles as a relationship between the government and its citizens. When trying to avoid the political games of food aid, the development actors turned the programmes into a technical process, thereby also sidestepping accountability as a democratic principle. Food assistance was a *technical* operation where a service was being delivered by an international development agency in partnership with NGOs, on behalf of the government, and through the support of donors.

In the rights-based approach the role of *duty-bearers* was stronger. Everything that the programme did was informed by the aim of supporting the capacity of the district level duty-bearers to deliver rights and at the same time generating *awareness* of and *demand* for these

rights among communities. In this context 'rights' meant services – and services were dealt with as a rights issue (services seen as 'just entitlements'). There was no clear link to the legal framework to support the line of reasoning that services should be rights, which meant that the express linkage to a legal rights framework was missing. Instead, there was a strong focus on *advocacy* and efforts to *mobilise* rights-holders to demand services as a matter of rights and to demand *accountability* of duty-bearers. Programme activities aimed at changing policy and practice and there was a *transformative* element side by side with traditional service delivery that tried to alleviate symptoms of, for example, drought. Rights *language* played an important role in *empowerment* processes. The principles of accountability, participation and non-discrimination were more than tools to be used at the programme level: they also informed the ambitions to make *societal* level changes of how these principles are respected in the relationship between rights-holders and duty-bearers. There was a difference between charity-based and rights-based approaches in terms of working methods. RBA challenged the status-quo by trying to achieve change at different levels, seeing equality and non-discrimination, accountability, participation and empowerment at the level of society and not only the project level.

Even though certain basic needs (related to freedom from hunger) were seen as rights in the legal approach to food security, and my assumption was that this would have implications for the working processes, the irony is that the Right to Food Project had not been very mindful of so called human rights principles (with the exception of legal accountability). The draft Food and Nutrition Bill was drafted by a lawyer with input from a very limited number of stakeholders. Furthermore, within the draft bill the principles of non-discrimination and participation were weak. (It is too early to judge if the proposed Food and Nutrition Act would strengthen these principles in the relationship between the rights-holders and the duty-bearers in the process of realising the right to food.) The programme represented an *elite* and *legalistic* approach with limited or no involvement of people struggling to feed their families through subsistence farming. Instead, there was strong focus on increasing *legal accountability* of duty-bearers, especially for misuse of food assistance. The idea of creating a law on the right to food is, as such, *transformative* (social transformation through legislation) and when combined with *advocacy* efforts, an ambition to achieving structural change can be seen. The content of the draft bill did, however, not provide for a strong social role for the government as the ultimate duty-bearer of fulfilling the right to food.

In all three approaches, targeting was in principle based on needs, but it was only in the rights-based approach that services were seen as a matter of fulfilling a rights agenda and people started to claim needs as rights. It makes better sense to distinguish between a charity-based and a (human) rights-based approach than between a needs-based and a (human) rights-based approach. Needs do not disappear because the focus is placed on rights; needs continue to play a role and this is not alien to human rights thinking. However, according to human rights standards on economic and social rights certain (basic) needs should be entitlements and fulfilling of these needs is seen as obligations rather than charity.

The charity-based and the legal approaches have more in common than one would think. The draft bill on the right to food did not put forth rights-based services but focussed instead on how to avoid abuse and corruption in the targeting process (focussing on individual accountability and criminalisation). The view on empowerment as the opposite to hand-outs is another example of similar ideas being upheld in both approaches.

What I call a legal approach to food security was a conventional human rights approach to food security in the sense that 'the right to food' was accepted as being defined in legal processes and forums. In the rights-based approach analysed, there was no clear link to human

rights as defined in international norms and standards, nor in national legislation. The approach taken by Oxfam and its partners resembled an actor-oriented approach to human rights in development in that they allowed actors to give meaning to the concept of human rights. The rights-based approach is a 'development approach' to human rights that in many ways takes participation and empowerment to levels where human rights discourse has not managed to go due to a non-inclusive agenda in the process of giving meaning to the human rights concept itself.

Based on the assumptions made before the field research as to the value added by human rights in development and food security efforts I can conclude and reformulate the assumptions.

1) The first assumption was that *human rights language* changes the mindset of the actors in development, underlining the legally binding nature of addressing food insecurity, and contributing to empowerment of rights-holders. There is evidence that when actors in development, both duty-bearers and rights-holders, become aware that food security and services related to fulfilling it is a matter of rights instead of a 'favour' or charity, this does change their mindset. However, the process of giving meaning to the human rights concept, including the right to food, is essential to whether the human rights language is going to be empowering for the rights-holders or not. Human rights language is often associated with an elite, using top-down approaches, and there is often a fine line between empowerment and disempowerment. All actors must be included in the processes and dialogues about what human rights mean, everyone must 'own' the rights-language so that it makes sense in a lived reality to use it.

2) The second assumption was that *human rights-based situation analysis* implies that a whole range of new and different questions, which have a basis in the normative human rights framework, are raised in a development context. There is evidence that thinking in terms of rights and duties has led to actors raising new questions in the context of radio listening clubs deciding which development problems to bring to the attention of service providers. These questions are, however, not based in the normative human rights framework but instead based on what actors themselves feel they are justly entitled to (an actor-oriented approach). In the other two projects analysed no situation analysis had been carried out that was based on the thinking of rights and duties, however, I do think the Right to Food Project would have benefitted from such an analysis.

3) The third assumption was that human rights offer a platform from which to demand the *accountability* of duty-bearers. There is evidence in my data that human rights offered such a platform in the Shire Highlands programme on a political, or rhetoric level, but not on a legal level. There was no analysis of how the existing legal framework could be used to demand accountability, instead it was the act of identifying rights-holders and duty-bearers that was key. Accountability was linked to obligation in the sense that citizens put pressure on government representatives to deliver certain services that were seen to be part of a rights agenda, but there was no link to legal provisions. In the Right to Food project increasing legal accountability and broadening avenues for making legal and para-legal accountability claims was a central aim behind drafting the bill on the right to food. However, the content of the draft bill suggests that the negative side of the obligations under the human right to food would probably be subject to legal claims rather than using the act to demand positive action from duty-bearers in the area of livelihoods. The draft bill represented a rather limited agenda for social justice.

We can draw parallels to four dimensions in the 'new accountability agenda' advocated within a human rights-based approach to development, as raised by Sano. Firstly, as there is strong emphasis on the demands of the rights-holders and the obligations of the duty-bearers, this implies "a more direct role for ordinary people and their associations in demanding accountability from the authorities."[1374] This was certainly true for the Shire Highlands programme, especially in the case of the radio listening clubs. So far the role of the rights-holders has been limited within the Right to Food Project. The way the draft bill was formulated in 2006 there was, however, potential to advance their role, especially through associations, in legal accountability claims.

The second and third new dimension of the accountability agenda is "a broadening and diversification of the areas within which accountability is demanded;" as well as "a growing repertoire of methods that are established in order to make demands operative."[1375] We can see examples of this both within the Shire Highlands programme and the Right to Food Project. In the former, the main focus was on demanding accountability through putting pressure on the duty-bearers using various avenues such as meetings and the radio to raise claims, and in the latter the main focus was on achieving accountability through para-legal means, i.e. not only court proceedings.

The fourth dimension raised by Sano is "a more ambitious agenda for social justice", presuming the existence of a stronger state than the neo-liberal state.[1376] If demanding services from government institutions as a matter of a rights issue can be seen as advancing a more ambitious agenda for social justice, and I argue it can, this was true for the Shire Highlands programme. With regard to the Right to Food Project there are some question marks concerning what kind of state the member organisations are advancing in their advocacy and through putting forth the draft bill. There seems to be some hesitation within the Right to Food Project as to what should be the *social role* of the government.

[1374] Sano, "Does Human Rights-Based Development Make a Difference?", *supra* note 55, at 72.
[1375] *Ibid.*, at 72.
[1376] *Ibid.*

PART IV   CONCLUDING DISCUSSION

This thesis has explored the role of human rights (as standards, as principles, as rhetoric) in development policy and practice in general and food security in particular. It has explored what, if any, transformative potential human rights have in these contexts, which often involve struggles over power and resources needed for economic and social rights and services. It has asked whether human rights can have a counter-hegemonic function in the face of hegemonic development; and whether human rights create space for agency and empowerment. In this pursuit, it has tried to reveal contradictions, paradoxes, and tensions in how human rights are used to further transformation and 'good change'.

In part II of the thesis the author has critically analysed concepts such as development, human rights, human rights-based approaches to development and food security, and principles of non-discrimination, accountability, participation and empowerment. The overall purpose of part II was to give theoretical explanations as to how these concepts have been defined by various actors in various contexts as well as answers to the general questions concerning the transformative potential of human rights in development practice and food security posed in part I. The conceptual analysis also helps to understand the role of these concepts in food security in Malawi as well as to understand what difference human rights make as they enter into development programmes and projects, what new elements are brought in, and what value is added. The author wanted to understand the characteristics of the so called human rights-based approaches to development cooperation, compared to 'good development practice' and 'legal approaches'.

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The transnational human rights community has used considerable resources to create an international system of legal human rights standards and institutions responsible for the monitoring of these standards. Whether this system is working or not was not the subject of this thesis. However, it is relevant to notice that when human rights are institutionalised it means they also become part of the power that upholds certain dominant structures – and for transformation to take place the system of dominance, *inter alia*, authoritarianism, capitalism, and patriarchy have to be challenged. As human rights are further integrated in development efforts they often become part of the social engineering and institutionalisation in a top-down manner. Human rights become tools of external quality control, a way of imposing conditionalities. Whether this is 'good' or 'bad', and for whom, must be assessed in a specific context. In general, this tendency does have implications for the potential to use human rights in mobilisation and advocacy against arbitrary power and domination, thereby creating space for agency.

We cannot assume that official human rights advancement automatically leads to progress and success. This thesis has pointed out that lack of *theories of change* in studying human rights forces researchers to be humble about the possible role of human rights in processes of change. The theory that does exist, the so called 'spiral theory', define human rights narrowly as 'legal freedoms rights'. There is no theory of change concerning the role of human rights defined more broadly. The thesis has identified the fact that studying grassroots women's groups, and the way they apply human rights discourse to achieve change in their lives, would be a good case study to develop and test a hypotheses concerning the role of human rights as a counter-hegemonic tool in struggles for social change.

As regards the 'spiral theory', it is unclear what comes after the final stage of change, i.e., 'norm-consistent behaviour'. Can human rights be effectively used as a political and legal tool by rights-holders to improve the conditions of their lives? A certain level of institutionalisation and acceptance of human rights norms is only a first step and cannot as such be equated with success or social change. It might be that human rights are foremost used by domestic elites for hegemonic purposes, i.e., to exert social, cultural, ideological, or economic influence. We can find examples of such usage of human rights in Malawi. In Malawi human rights are very much part of an official discourse used by dominant groups. Human rights are also guaranteed in the Constitution and monitored by courts and the Malawi Human Rights Commission. However, as using legal avenues for redress is out of reach for most Malawians a certain degree of institutionalization of human rights has little impact in creating social change.

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In this thesis we have seen that human rights have played, and continue to play, diverse roles in development policy and practice. An early attempt to integrate the two spheres of development and human rights was the right to development, with debates in the UN going on long before the adoption of the Declaration in 1986. The Southern states that pushed for the adoption of the Declaration used human rights as arguments for global equity among states and donor obligations but this never had the impact they had hoped for. Today various human rights-based approaches have a stronger position in development policy and practice than the right to development. Most Northern donors have chosen to integrate human rights into their policies and practices through negative human rights conditionality and the demand for good governance. As a way of giving support to the capacity to live up to the conditionalities put on aid recipients, they are offered 'positive support' to democracy, human rights and governance. What these strategies have in common is that the demand for rights comes as a measure of outside quality control.

Reviewing how the concept of 'development' has been defined and what kind of development is the aim in human rights-based strategies is revealing. In the right to development and human rights-based approaches to development there are elements of people-centred *human development*, with a strong role to be played by the state. In these approaches the objective of 'development' is the realisation of human rights as defined in treaties. Since human rights discourse tends to avoid political questions, there is no clear position on economic systems and the question about growth. There is no fundamental critique or questioning of the very foundational (Western) idea of 'development' as constant growth or improvement; the human rights-based model simply puts some limitations on what actions can be legitimized in the name of development as well as offers 'new' principles, based in human rights norms, for the development process. Human rights-based approaches to development, as defined in the Common Understanding among UN agencies, or among donors, do not question hegemonic development, which of course is not surprising.

In bottom-up (or 'alternative') development it is accepted that 'development' will always mean very different things in different contexts and for different people. When the objective of development is *given* (from above as stipulated in human rights instruments and by expert-led institutions) there is less room for formulating people's own visions of what kind of development they might value. Rights talk has been popular also within the 'alternative development' paradigm that puts emphasis on agency and from below action. It seems that the way rights are used in this context resembles an actor-oriented approach (the definition is left open) rather than a human rights-based approach that is linked to definitions given in international human rights treaties.

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All kinds of conditioned aid, human rights related or not, can be seen as deliberately trying to impose your idea of change and thereby 'development' on the recipient of support. In contrast, in support that respects the autonomy of the actors, the helpers help the actors to help themselves. This can be through reducing obstacles or supplying resources to enable the actors to do what they were already motivated to do. There is compatibility between this approach and certain human rights values such as freedom of choice and autonomy. However, this kind of 'radical capacity building' is difficult to use in a human rights-based approach that aims at supporting capacity for pre-defined human rights-conforming development aims.

This thesis finds that the concept of 'rights-based approaches' can be more useful for creating space for agency and empowerment than 'human rights-based approaches' that are strongly linked to the international human rights regime. The first concept leaves more room for actors to define development and rights in a political process; the international human rights regime may serve as a source of inspiration but actors do not lock themselves into certain pre-determined goals, defined in international human rights agreements.

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Human rights discourse is often an excluding and elitist discourse in the global South, not least in Malawi. This study has argued that human rights discourse needs to be expanded and opened up for a public political dialogue taking place at all levels of society rather than kept as expert knowledge. While acknowledging the importance of the international legal human rights framework this thesis wants to highlight that global movements for social justice have challenged aspects of this system, thereby contributing to its evolution and reformulation. Specific human rights have to be given content and meaning not only by legislators and courts ('from above') but also by actors within social movements and community development ('from below'). Rights-based approaches to development can at best help in advancing a localisation and politicisation process of human rights. Opportunities for agency are created when the political space in which individuals and groups are able to claim their rights and participate in decisions that affect their lives is expanded. In the process of formulating development and food security-related human rights claims, the actors reshape and broaden what is normally understood to be human rights. In Malawi we have seen actors taking the human rights agenda into the area of services. This is an example of how rights-based approaches challenge the traditional understanding of 'human rights'.

An *actor-oriented approach* to human rights questions the position of experts as sole agents in the process of meaning-giving; it contributes to rethinking and reframing human rights as contextual and dynamic concepts, and thereby also gives human rights discourse a new language. This is challenging and certainly not risk-free but is in the interest of diversity. Diversity should not be seen as a virtue only when exercised within the limits the 'liberal paradigm'. There must be trust in the wisdom and change from below, seeing that there are opportunities and challenges for change in all cultures and all situations. We should move beyond blaming 'culture' for human rights violations and posing universal human rights principles embodied in formal laws as the solution. Reality is far more complex. This study finds that the most fruitful approach to the universal human rights debate is viewing 'rights as culture' instead of 'rights versus culture' or 'rights to culture'. The task of people doing human rights-based development work is about assisting the process so that poor people's claims are heard, seen and reflected, and not one of imposing their idea of help, or change. The task also includes putting some limits to self-direction so that everyone's human rights are respected.

Actors such as Oxfam, together with local groups, adopt new rights and reformulate existing rights in a way that makes sense to the people they work with. Thereby they contribute to giving meaning to human rights in a new way, challenging the dominant meaning given to human rights. Radio listening clubs in Southern Malawi questioned the idea that human rights need to be introduced by experts and created an alternative debate on injustice. At the same time we have seen that Oxfam's local partners and rights-holders tend to prioritise short-term needs when setting agendas for development rather than striving for structural changes in economic and social policies. However, if we take agency seriously, we must let actors themselves speak about human rights and development – despite the risks – also when they make decisions that are 'wrong' from the perspective of the human rights expert.

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In the chapter on food security and food rights we have seen that food security programmes and food aid have been the development response to hunger while the human rights response has been establishing a legal entitlement that in theory can be claimed from duty-bearers. Despite the either/or thinking that has been characteristic of human rights discourse in the past it seems that today UN-led experts have embraced the right to food as an individual, legally enforceable entitlement while at the same time not avoiding putting the right to adequate food into a political and economic context, calling for structural reforms such as land and agricultural reform. Similarly, the right to food does, according to General Comment 12, sometimes include a right to receive food assistance or other support. The State has the fulfil-obligation to provide the right to food directly to victims of natural or other disasters.

Despite differences in emphasis, the two discourses of food security and the right to food are closely related to each other, both underlining physical and economic access to food. 'Food security' has evolved from a focus on supply and availability of food at a national level to access to food on the household and individual level. Similarly, physical and economic access to food has become a key factor in how the right to adequate food has come to be defined in General Comment 12 of 1999. Before the adoption of the general comment, the normative content of the right to food was less clear. Moreover, other efforts have been made to define the right to food and envision the steps towards its realisation. In 2000, the Human Rights Commission appointed a Special Rapportuer on the Right to Food and in 2002 the World Food Summit called on the FAO council to establish an Intergovernmental Working Group to elaborate a set of voluntary guidelines to support Member States' efforts to achieve the progressive realisation of the right to adequate food in the context of national food security. These so called Right to Food Guidelines were adopted in 2004, and are said to be a human rights-based practical tool addressed to all states.

The Guidelines are designed to clarify and help states in developing strategies, policies and programmers which are rights-based. This means they should be *based on legal obligations* – as the claimed added value of a human rights approach to food security lies in the emphasis of addressing food insecurity as a matter of obligation, not benevolence. However, the Right to Food Guidelines give very little attention to obligations and what is even more confusing is that they fail to clarify the essential fulfil/provide dimension of the tripartite obligations used in General Comment 12. States that want to establish and maintain safety nets or other assistance, as part of their right to food strategies, for individuals who are unable to provide for themselves, will not find guidance in the Guidelines. The Guidelines seldom link the right to food to an obligation, and does not use the concepts of 'rights-holders' and 'duty-bearers'; concepts that were already introduced into the food security debates in the 1980s. For these reasons, it remains unclear what exactly is the role of duty-bearer institutions, rights-holders,

and different stakeholders such as donor states and international agencies in strategies aiming at progressive realization of the right to adequate food.

The process of giving meaning to the right to food continues and various actors influence it: UN-led expert institutions based in Geneva and New York, NGOs and other civil society actors that work locally as well as transnationally, and national courts on the national level. The regional, India-based woman's organisation PWESCR's efforts to establish a right to livelihoods in the international human rights system and the Right to Food Campaign in India are examples of how civil society actors strive to contribute to giving meaning to food rights in a way that makes sense to them and the people they work with. They urge for redefinition and expansion of current legal interpretations of the right to food, calling for what they feel are 'just entitlements'. For the PWESCR and its partners the right to livelihoods makes better sense in the lived reality of marginalised groups, especially women, they claim to represent. Women produce 60-80 percent of the food in most developing countries (more than 80 percent of the food in Africa) – and yet they are disproportionately vulnerable to hunger and receive only 7 percent of agricultural extension time and resources.[1377] What the actors behind the Right to Food Campaign in India as well as the Right to Livelihoods campaign at the transnational level have in common is the ambition to link food rights to broader issues of livelihoods, emphasising that a livelihoods perspective gives agency to rights-holders.

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Despite the fact that most agencies work with their own definition of a human rights-based approach to development cooperation, there seems to be agreement on the core elements defining it: this approaches works to strengthen the capacity of duty-bearers to respect, protect and fulfil their human rights obligations; simultaneously, the rights-holders' capacity to demand and claim that their human rights are respected, protected and fulfilled is strengthened; the aim of human rights-based development is human rights realisation and the process of how this aim is reached is informed by *human rights principles*.

The problem is that it is not always clear what 'human rights principles' add to 'good development practice', which also works to strengthen equality, accountability, participation and empowerment.

From the review of how these principles are interpreted and applied in the human rights discourse, in its conventional legal form, the development discourse and in the practices that come into being as these two discourses meet, it is clear that a human rights perspective does bring in a new dimension. However, it is less clear whether a focus on human rights and human rights principles create space for empowerment and agency. There seems to be a contradiction in the discourses linking human rights and development; as on the one hand it is aimed at people becoming active agents rather than passive beneficiaries, while on the other hand it does not fully allow these same people to be part of a discussion on the meaning of concepts such as participation, empowerment, and human rights. Often the agenda has been set by organisational priorities that again are informed by ready-made definitions given by experts.

Change is a disorderly process, and it is clear that the role of human rights in these processes can be static and disempowering or 'alive', claimed in the moment, and empowering. The context and the process matter. The issues at stake are especially concerned with who sets the agenda, who decides what issue to mobilise around, and what happens in the process of translating people's daily challenges into a human rights language.

[1377] *Halving Hunger: It can be done*, *supra* note 549, at 5.

As a human rights principle, *equality and non-discrimination* should not remain on the project or programme level but also have implications for advocacy and mobilisation efforts to challenge structures that uphold inequality in society. In a similar way, when human rights enter into development policies and practices, new *accountability relationships* and frameworks emerge. There is stronger focus on the state-citizen relationship compared to the donor-implementing agency accountability relationship that tends to dominate in 'good development discourse'. In human rights-based approaches to development, the relationship between *rights-holders* and *duty-bearers* is at the heart of demanding accountability; accountability is about making sense of rights and obligations. The act of identifying rights-holders (and their entitlements) and corresponding duty-bearers (and their obligations) potentially raise levels of accountability in the development process. Advocacy and mobilisation around issues of lack of practical implementation of rights/services are important aspects of the enforceability and responsiveness dimensions of accountability. In some countries, judicial activism also plays an important role in these broader struggles for accountability. In these struggles, accountability is not apolitical, even when resorting to a court.

Accountability has in common with *participation* the fact that it strives to enable people to actively draw on their civil and political rights in order to achieve something else, often their economic, social and cultural rights. In this way, accountability and participation strive for a broader change agenda. The aim is to increase participation in the relationship between people as citizens and rights-holders and the different power holders such as government institutions, donors, and corporations that make policy decisions that have great impact on poor peoples' lives. In human rights-based approaches the aim would be participation in societal decision-making; the participatory relationships include the relationship between the government and its citizens, not only the 'beneficiary' and the project. This is deeply political and fits uneasily within organisations that try to maintain that they do apolitical human rights awareness raising. Transformative participation must consider ways of challenging broader structures, and this requires political strategies.

In the matter of participation, there is, however, a tendency both within the development and human rights communities that, when experts are involved, they think they know what is best for 'the poor' and participation becomes consultation or superficial involvement in activities. Both accountability and participation can be defined narrowly as a way to improve development outcomes and increase effectiveness.

Another key challenge is that human rights-based approaches which are linked to human rights norms and standards tend to have pre-defined goals. This fits uneasily with transformative development, as it goes against the very idea of participation and allowing the 'beneficiaries' to be in control, making obvious their own intentions for development. In an actor-oriented approach to human rights this does not have to be a problem: actors are free to give meaning to 'human rights' instead of relying on pre-defined concepts, unless actors produce demands that violate other actors' human rights.

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In the empirical section, we have seen that the development policy and practice has focused on responding to immediate needs during the repeated food crises in Malawi while the human rights community has mainly focused on freedoms rather than entitlements. The human rights work has been characterised by talk rather than action. Civic education has been the main mode of 'sensitising' the Malawian public to issues such as human rights and democracy. In

civic education, participants are expected to take 'human rights' as given concepts and therefore there has been very little dialogue about the meaning and value of human rights.

The projects in Malawi analysed in this thesis use the human rights concept in different ways. Oxfam and its partners in the SHSLP operated with a rather loose definition of human rights, where there was room for the local actors to give meaning to the concept, in a way that resembles an actor-oriented perspective on human rights while the Right to Food Project applied an elite, from above approach to human rights with limited or non-existent participation in the definition process. The latter approach used a legal approach, accepting human rights to be those rights that are defined in legal documents while the former approach saw human rights as cultural practice.

My empirical data supports the conclusions reached in part II. The way that non-discrimination, accountability, participation and empowerment were used in the charity-based approach, rights-based approach and legal approaches indicate that it is in the rights-based approach that human rights in general and these principles in particular have the greatest transformative potential. The strong focus on claiming needs as rights in the rights-based approach is a considerable shift in human rights discourse in Malawi, which has previously focused on rights as freedoms rather than as entitlements. Having such a strong focus on the responsibility of the duty-bearer is also a change from a discourse that has emphasised the responsibility of the rights-holder. There was, however, no strong link to the legal framework to support the line of reasoning that services are rights; 'rights' were rather dealt with as 'just entitlements'. It is thereby possible to put the approach into the conceptual framework of an actor-oriented approach to rights-based development: the understanding of 'rights' were shaped through actual struggles informed by people's own understandings of just entitlements.

In the analysis of the FFA programme, (representing a 'charity-based approach') participation, empowerment and accountability remained tools to increase effectiveness in reaching the intended beneficiaries; instead of viewing these principles as a something that should govern the relationship between the government and its citizens. There was no questioning of the status quo. Avoiding the political games of food aid meant that the influential development actors also avoided hunger as a political problem.

The right to food, or human rights law in general, had few implications for the way the FFA project was implemented in Malawi. The notable exception was that the right of *non-discrimination* and focus on the most vulnerable people in theory had a strong role in the selection of beneficiaries, meaning that only the neediest people should receive food and that there should be no discrimination in the targeting process. (In practice the targeting process had its problems of course.) This can partly be seen as the donors' way of trying to guarantee that food was not misused for political purposes, and that targeting was indeed based on needs. In a way this was sort of 'human rights conditionality'.

In all of the three cases analysed the principle of equality and non-discrimination focused on targeting processes, i.e., the process of identifying needs and responding to these needs. None of the projects used discrimination and marginalisation as a lens for analysis. Focus was not on finding out who is most marginalised or vulnerable to discrimination and exclusion, but on who is vulnerable to food insecurity or malnourishment or resource constraints in general.

The principle of *accountability* was in the rights-based approach used as a basis to put pressure on government institutions to comply with promises that were made during meetings between service providers and community members. This line of reasoning is definitely a step away from the managerial approach to accountability that was characteristic of the charity-

based approach. While the WFP and its partner NGOs in the charity-based approach had a managerial and apolitical approach to accountability Oxfam and its partners in the rights-based approach had an advocacy and political approach, in which accountability was linked to obligations on the part of government institutions to deliver certain services. What is interesting in the Oxfam programme was that accountability was linked to obligations (characteristic of a human rights discourse) but without making explicit reference to legal provisions and without using the normative framework as an avenue for accountability. The legal approach in the Right to Food Project, for its part, had a strong focus on achieving increased accountability through providing stronger legal protection of the right to food. The main aim of the organisations behind the draft bill was to increase the level of legal accountability for violations of the right to food, especially in food assistance processes. The entitlement dimension of the draft bill was, however, surprisingly weak. The content of the draft bill was not very transformative as it failed to put forth a clear and strong obligation for the state to take *positive* measures to realise the right to food. It can be questioned whether the draft challenged the status quo in a way that would potentially strengthen the position of the rights-holder.

In the rights-based approach there was strong emphasis on particularly women's *participation* (a groups that traditionally has been outside of decision-making structures) in political structures and formal or informal decision-making. This indicates that participation had a broader meaning and agenda behind it than was the case in the food assistance programme. Women and men did not participate merely as 'beneficiaries' but also as citizens and rights-holders. In the legal approach, the principle of participation was weak: there was no mention of opportunities for public participation in policy formulation concerning food security issues in the draft bill created by the project. Furthermore, lack of participation in the drafting process itself was an obvious failure of 'human rights principles'.

In the rights-based approach, Oxfam and its partners were working to create a culture of human rights where rights-holders would be able to claim needs as rights and where duty-bearers would be clear that they have an obligation to respond. *Empowerment* was in this case a process that leads these people to perceive themselves as able and entitled to make claims and demand accountability.

The importance of empowerment was underlined in the legal approach. In this context we are speaking of rights-holders being empowered to claim the right to food from duty-bearers, not of empowerment in general (or general 'capacity development' as the term was interpreted in the charity-based approach). However, due to the non-participatory nature of the project the empowerment element was non-existent: drafting a bill on the right to food was not taken as a possibility to increase dialogue on the meaning of the right to food. The context in which empowerment was raised in the Right to Food Project, moreover, suggests that it was interpreted as the opposite to being 'dependent' and 'relying on handouts'. In Malawi handouts are usually synonymous with food assistance in some form. (And there was no effort to make these 'handouts' into a rights-based service.)

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This study finds that human rights are useful in shifting the attention of development policy and practice to obligations, accountability and the 'do no harm' principle. A human rights-based situation analysis can, moreover, contribute to raising new questions that contribute to analysing structural challenges and the relationship between rights-holders and duty-bearers. However, when human rights are conventionally defined as rights guaranteed in international agreements they tend to serve as outside quality control in a way that serves the interests of

hegemonic development. In order for human rights to play a role in counter-hegemonic struggles in social resistance, creating space for agency and empowerment, they need to be open to public dialogue. An actor-oriented approach to human rights in development may contribute to reshaping and diversifying human rights discourse.

SVENSK SAMMANFATTNING

Avhandlingen är en analys av den roll som mänskliga rättigheter spelar i utvecklingssamarbete i allmänhet och tre matsäkerhetsprojekt i Malawi i synnerhet. Författaren undersöker huruvida mänskliga rättigheter kan bidra till samhälleliga förändringsprocesser. Förändring skapas av individer och grupper (aktörer) med en vision för det samhälle som de vill leva i. Den teoretiska utgångspunkten är att individer och grupper inte endast formas av sin värld utan också har makt att förändra den. Undersökningen har en diskursiv syn på mänskliga rättigheter; rättigheter ses som sociala konstruktioner skapade av människor, konstruktioner som förändras i takt med att aktörerna ger dem ny mening.

Avhandlingen frågar huruvida mänskliga rättigheter, när de integreras i utvecklingssamarbete, kan skapa utrymme för egenmakt hos lokala aktörer. Är det möjligt för mänskliga rättigheter att utgöra en anti-hegemonisk strategi – då utgångspunkten är att 'utveckling' har kommit att få en hegemonisk position? Genom en analys av hur 'utveckling' har definierats i människorättsbaserade strategier samt i diskursen kring rätten till utveckling finner författaren att mänskliga rättigheter snarare minskar utrymmet för aktörers egenmakt: målet för utveckling ges uppifrån, via människorättskonventioner. Inom alternativa utvecklingsteorier accepteras det att målet för och innehållet i 'utveckling' alltid varierar. Mänskliga rättigheter har kommit att utgöra yttre kvalitetskrav och villkorsklausuler vilket påverkar deras möjligheter att skapa utrymme för att ifrågasätta dominerande strukturer.

Författaren ser möjligheter i ett aktörsperspektiv på mänskliga rättigheter där definitionen lämnas öppen. 'Rättigheter' definieras genom strävanden att få dem respekterade och förverkligade. Aktörernas egen uppfattning om berättigade anspråk påverkar vilken innebörden blir i enskilda sammanhang. När aktörernas egenmakt är utgångspunkten kan dominerande ekonomiska, politiska, sociala och kulturella strukturer ifrågasättas.

Vad gäller människorättsbaserade utvecklingsstrategiers mervärde finner författaren att de riktar uppmärksamheten mot olika aktörers skyldigheter att förverkliga fattigas ekonomiska och sociala behov samt vikten av att mänskliga rättigheter inte får kränkas genom utvecklingspolitiska beslut. En utvecklingspolitisk analys som utgår från mänskliga rättigheter kan leda till att nya frågor lyfts fram: vem har skyldigheter, vem har rättigheter, och varför förverkligas inte dessa? Fokus flyttas till hur politiska, ekonomiska och juridiska strukturer kan förändras så att de främjar mänskliga rättigheter, samt till olika aktörers ansvar.

Författaren använder empiriskt material från Malawi för att visa vilken roll mänskliga rättigheter och så kallade människorättsprinciper såsom icke-diskriminering och ansvarighet spelar inom tre projekt: (1) ett mathjälpsprojekt som syftar till att stärka lokala tillgångar; (2) ett rättighetsbaserat projekt med fokus på att stärka småskaligt jordbruk och andra strategier för livsuppehälle; samt (3) ett juridiskt projekt med målet att skapa en lag som skyddar rätten till föda. Analysen kommer fram till att det rättighetsbaserade projektet i den mittersta kategorin strävade efter den mest djupgående samhälleliga förändringen. Människorättsprinciperna ansvarighet och deltagande handlade inte endast om verksamheten inom projektet utan man strävade efter att stärka dessa principer också mellan medborgare och myndigheter. Rättigheter – som ett sätt att tala, tänka och handla – inte som abstrakta juridiska normer, påverkade de lokala aktörernas sätt att kräva bl.a. tjänster av lokala myndigheter. Teoretiskt kan man säga att projektet representerar ett aktörsperspektiv på mänskliga rättigheter där aktörernas egna uppfattningar om vad de är berättigade till samt

krav på myndigheters ansvar formade vilken betydelse rättigheter kom att få. Till skillnad från det juridiska projektet spelade expertkunskap en mindre roll.

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Alessandra Sarelin

Exploring the Role and Transformative Potential of Human Rights in Development Practice and Food Security: A Case Study from Malawi

A study in International Law

This thesis investigates the interplay between human rights and development. It explores the role of human rights (as standards, as principles, as rhetoric) and their transformative potential in terms of challenging the status quo in favour of marginalised rights-holders.

The study contains an analysis of the role of human rights in three food-related interventions in Malawi representing different approaches to development and food security: (1) a charity-based approach); (2) a rights-based approach); (3) a legal human rights approach.