

**Draft 0 - for seminar discussions**

**THE RIGHT TO DEVELOPMENT, THE QUALITY OF RURAL LIFE,  
AND THE PERFORMANCE OF LEGISLATIVE DUTIES DURING  
MALAWI'S FIRST FIVE YEARS OF MULTIPARTY POLITICS**

***A Paper Based on Research on the Right to Development, the Quality of  
Rural Life, Legislation and the Performance of State Duties***

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**” The Right to Development, the Quality of Rural Life, and the Performance of  
Legislative Duties During Malawi’s First Five Years of Multiparty Politics”**

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## 1. Introduction

The quality of life is a useful indicator of a country’s state of human development. Accordingly, Malawi’s Constitution requires the state actively to promote the welfare of the people of Malawi through policies and legislation.<sup>1</sup> Although macro-indicators can indicate the level of general well-being in a country, the quality of rural life may be conflated. Levels of human development and well-being in rural areas are generally poorer than standards of life in urban areas.<sup>2</sup> Malawi’s Constitution hence stresses that “rural standards of living” must be recognised as “a key indicator of the success of Government policies”<sup>3</sup>.

The Government however has not issued any report to account for its performance of the obligation to enhance the quality of rural life. To issue such a report would be a step of good governance. As Sunstein has demanded, [d]emocratic governments should produce an annual “quality of life report”, designed to measure their performance in producing good lives for their citizens.”<sup>4</sup> This paper is a contribution towards independent evaluation of the performance of the state in carrying out its obligations to meet the human rights of people living in rural areas.

The paper is based on research conducted in 2001 by the authors. The aim of the research was to establish an indication of the performance of state legislative obligations in the improvement of the quality of rural life in Malawi. The research focused on legislation passed during the first five years of Malawi’s multiparty politics, 1994-1999. Legislation was the focus of the research because the law has a

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<sup>1</sup> . Malawi Constitution, section 13(e).

<sup>2</sup> . SAPES, UNDP, SADC, *SADC Regional Human Development Report 2000* (Harare; SAPES Books, 2000), at 21.

<sup>3</sup> . Malawi Constitution 1994, section 13(e).

<sup>4</sup> . Cass R. Sunstein, “Well-Being and the State”, *Harvard Law Review* [Vol. 107:1303 1994], (in this paper referred to as Sunstein:Well-being), at 1304.

claim to normative regulation, implying that it can be used as a prescriptive and facilitative instrument for development. The evaluation of the quality of life by rural communities however occurred as of at the time of the research, two years into the second five years of multiparty politics.

The paper is in six parts of which this introduction is the first. The second notes that Malawi's Constitution was intended to be within liberal democratic paradigm and underlines the dangers of contract doctrine regarding rural life. The third part examines several methods to measure well-being and advocates a human rights perspective for assessing well being. The fourth part describes the human rights-based methodology that the research used. Some early findings are also presented in this part. The fifth part presents the results of the assessment well-being in the context of the right to development and the legislation that Parliament passed or failed to pass during 1994 to 1999. The analysis in that part is based on six community visits carried out in six districts in Malawi. The sixth part is the conclusion, which underlines two points. The first is that the enjoyment of the right to development for rural populations has generally dropped since the inception of multiparty politics. The second point is that the poor quality of rural life is partly due to the state's failure to perform its legislative duties, to exercise such duties properly, and the state's disregard of human rights principles in its legislative and programmatic roles.

## 2. Contract Doctrine, Human Development and Well-Being

Research on Malawi's transition to multiparty politics has mostly analysed the political process that resulted in the transition from a single party to a multiparty system of Government. Authors in this trend have included Ng'ong'ola,<sup>5</sup> Nzunda and Ross,<sup>6</sup> Phiri and Ross,<sup>7</sup> and Wiseman.<sup>8</sup> Some of these authors have even mistaken democracy with a multiparty system of choosing political leaders. Assuming that democracy is established in Malawi, not many of the analysts have characterised its type. Only Kanyongolo has rightly argued that the process to change the system of choosing leaders was influenced by notions of liberal democracy.<sup>9</sup> Indeed, Malawi's constitution is strong on social contract ideas,<sup>10</sup> individual enjoyment of human rights,<sup>11</sup> and advancement of the market.<sup>12</sup>

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<sup>5</sup> . C. Ng'ong'ola, "Managing the Transition to Political Pluralism in Malawi – Legal and Constitutional Arguments", *The Journal of Commonwealth and Comparative Politics*, Vol. 34/2 (1996), 85-110.

<sup>6</sup> . M.S. Nzunda and K.R. Ross (eds.), *Church, Law, and Political Transition in Malawi 1992-94* (Gweru; Mambo, 1995).

<sup>7</sup> . K.M. Phiri and K.R. Ross (eds.), *Democratisation in Malawi: A Stocktaking* (Blantyre; Christian Literature in Malawi, 1998).

<sup>8</sup> . J.A. Wiseman (ed.), *Democracy and Political Change in sub-Saharan Africa* (London; Routledge, 1995).

<sup>9</sup> . Fidelis .E. Kanyongolo, 'The Limits of Liberal Democratic Constitutionalism in Malawi', in Kings M. Phiri and Kenneth R. Ross (eds.), *Democratisation in Malawi: Stocktaking* (Limbe; Christian Literature in Malawi, 1998) 353-375.

<sup>10</sup> . E.g., section 12(i) – (all political and legal authority of state deriving from the people of Malawi).

<sup>11</sup> . Malawi Constitution 1994, part IV.

<sup>12</sup> . Malawi Constitution, section 13(n).

## 2.1 Liberal Democracy as a Danger to Social Justice

Liberal democracy is currently trendy. Nevertheless, it is crucial to recognise its flaws in order to avoid unwitting perpetuation of social injustice. Historically heavily guided by Kantian philosophy, liberal democracy focuses on individual autonomy. A right, as postulated by Kant, “has to exist with freedom of the will of each and all in action.”<sup>13</sup> In the same vein, Locke<sup>14</sup> and Rousseau<sup>15</sup> emphasised that government must be based on a social contract, where reason and individual autonomy were crucial. More recent liberal democratic philosophers such as Rawls<sup>16</sup> and economists such as Sen<sup>17</sup> have focussed on freedom and choice in their work on social justice and the determination of well-being. Although contract doctrine may justify the free market, the theory is deficient because of its assumption that capabilities are equal or necessarily need to be equal.

Communitarian theories of social justice have demonstrated that well-being in society does not necessarily always flow from individual well-being.<sup>18</sup> In many cases, individual well-being is a product of overall societal well-being because people necessarily interdependent in communities. Above all, there are many people such as one-day old children, who are largely regarded as incapable of exercising choice to secure their well-being. Contract doctrine hence does not theoretically support the need to address the vulnerability and development interests of certain classes of people such as children and people who are poor. It does demand the prioritisation of actions that can result in the enhancement of rural life. Children, women, people with disabilities, the poor, the rural and other vulnerable people often lack the capacity that would be necessary for competent or autonomous participation in contract doctrine.<sup>19</sup> As it emphasises individual autonomy, contract doctrine lacks a logical theory of accountability to the weak.

## 2.2 The Law, Mitigation of Contract Doctrine and Well-Being

In most legal systems, the law is used to prevent the social injustice that may result from contract doctrine. In at least three pieces of jurisprudential work, Cotterrell has suggested that the concept of the trust and its notions could be used to improve

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<sup>13</sup> . Immanuel Kant, “The Science of Right”, in M.J. Adler (ed.), *Great Books of the Western World: Kant* (Chicago; Encyclopaedia Britannica, 1990), at 398.

<sup>14</sup> . John Locke, *Two Treatises of Government*, Edited by Mark Goldie (London; Everyman 1993).

<sup>15</sup> . Jean-Jacques Rousseau, *The Social Contract; Discourses* (Translated by G.D.H. Cole, Revised and Augmented by J.H. Brumfit and John C. Hall, London; Dent, 1990).

<sup>16</sup> . John Rawls, *A Theory of Justice* (Oxford; Oxford University Press, 1977)

<sup>17</sup> . Amartya Sen, *Choice, Welfare and Measurement* (New Delhi; Vedams eBooks, 1999), Reprint and Amartya Sen, *Development as Freedom* (New Delhi; Vedams eBooks, 2000)

<sup>18</sup> . Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (New York; Crown, 1993) (in this paper referred to as Etzioni); Also Will Kymlicka, *Liberalism, Community and Culture* (Oxford; Oxford University Press, 1989).

<sup>19</sup> . Garton Kamchedzera, ‘Access to Property, the Social Trust and the Rights of the Child’, Ph.D. Dissertation (Cambridge; University of Cambridge, 1996), chapter 3.

accountability and social interdependence if applied to situations where people have developed reliance and expectation interests and to regulate democracy and social justice.<sup>20</sup> Etzioni,<sup>21</sup> and Glendon,<sup>22</sup> are among the many writers who have powerfully argued about the importance of solidarity and social cohesion through the performance of duties. Malawi's Constitution hence attempts to mitigate or qualify contract doctrine in Malawi. It prescribes two types of fundamental principles to guide the rest of the constitutional provisions and subsequent legislation, policy and actions. The first set are constitutional principles, expressed in section 12.<sup>23</sup> The second set are principles of national policy, articulated in section 13 of the Constitution.<sup>24</sup>

Both sections 12 and 13 of the Constitution attempt to strike a balance between liberal democracy, on the one hand, and social democracy or at least social trust-based notions, on the other. Section 12 underlines what can be described as a social contract doctrine: that all "legal and political authority of the State derives from the people of Malawi" to be "exercised in accordance with" the Constitution "solely to serve and protect their interests."<sup>25</sup> This principle is followed by two tenets that expressly refer to the notion of trust. One requires all "persons responsible for the exercise of powers of State" to do so "on trust" to "the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi."<sup>26</sup> However, although terms such as "trust", "accountability", "good governance", and "transparent" which are in section 12 imply a social trust, but much of the Constitution remains dominated by contract doctrine.<sup>27</sup>

The principles of national policy must guide national policy and legislation, in section 13. That section stipulates that government policies and legislation must promote "the welfare and development of the people of Malawi." Such goals cover a wide range of areas including gender equality, health, the environment, people with disabilities, children, the elderly, economic management and public trust, good governance,<sup>28</sup> and rural life. Government is required to meet the goals established under each head progressively, abiding by the Constitutional principles that are enshrined in section 12.

Malawi's constitution goes further than constitutional and national policy principles. In part IV, it provides for a list of enforceable human rights. Amongst such rights is

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<sup>20</sup> . Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford; Clarendon Press, 1995), "Trusting in Law: Legal and Moral Concepts of Trust", in M.D.A. Freeman and B.A. Hepple (eds.) (1993) *46 Current Legal Problems, Part 2, Collected Papers*, 75-95, "Feasible Regulation for Democracy and Social Justice", *15 Journal of Law and Society* (1987) 77.

<sup>21</sup> . Etzioni, *supra*, note 18.

<sup>22</sup> . Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, the Free Press, 1991).

<sup>23</sup> . Malawi Constitution, section 12.

<sup>24</sup> . Malawi Constitution, section 13.

<sup>25</sup> . Malawi Constitution, section 12.

<sup>26</sup> . Malawi Constitution, section 12.

<sup>27</sup> . Garton Kamchedzera, in Joanna Lewis, Peggy Owens and Louise Pirquet (eds.), *Human Rights and the Making of Constitutions: Malawi, Kenya, Uganda*, Cambridge: University of Cambridge African Studies Centre, 1995, pp. 28-33.

<sup>28</sup> . Malawi Constitution, section 13.

the right to development, in section 30. The section closely resembles Article 8 of the Declaration on the Right to Development 1986. According to section 30 “all persons and all peoples” have the right to the enjoyment of economic, social, cultural, and political development.”<sup>29</sup>

### 3. Human Rights and Perspectives of Well-Being

Every body intuitively measures her or his well being from time to time. Researchers have facilitated exercises by rural people who are clear on what quality life entails in their local contexts. People in Asia and Sub-Saharan Africa, for examples have used the following criteria to indicate ill-being.<sup>30</sup> The extent to which material and non-material needs are fulfilled is

**Examples of Ill-Being as Indicated by Some Asians and Africans as Per Chambers (note 30 below):**

- Lacking land
- Unable to bury the dead decently
- More mouths to feed, fewer hands to help
- Bad housing
- Suffering the effects of disruptive behaviour
- Lacking social support
- Having to put children into employment
- Accepting demeaning or low status work
- Having food security for only some months of the

widely accepted as a satisfactory measure of people’s well-being.<sup>31</sup> Scientific measurement however has been problematic.

#### 3.1 The Focus on Gross Domestic Product Per Capita

Classical measurement of well-being concentrates on gross domestic. Gross Domestic Product per capita may be useful as a general indicator of income capabilities within a country. It is also a useful but not the only indication of a country’s general material resource base.

However, income is not all what matters in life. There are at least six reasons about the inadequacies or Gross Domestic Product as measure for well being.<sup>32</sup> First, Gross Domestic Product Per Capita does not include goods and services that are free. Second, the measure does not address unequal distribution of income and other resources. Third, Gross Domestic Product Per Capita does not correlate with other important economic indicators such as unemployment rates. Fourth, using Gross Domestic Product Per Capita as the single or most important measure of well-being ignores that the value of money depends on social and legal practices that determine what money can buy. Fifth, Gross Domestic Product Per Capita is merely aggregative and so effaces qualitative differences. Sixth, although Gross Domestic

<sup>29</sup> . Malawi Constitution, section 30(1).

<sup>30</sup> . Robert Chambers, *Whose Reality Counts? Putting the First Last* (London; Intermediate Technology Publications, 1977).

<sup>31</sup> . Sunstein: Well-being, *supra* note 4.

<sup>32</sup> . Sunstein: Well-Being, *supra*, note 4.

Product Per Capita serves as a proxy for valuables, its relationship with social aspirations is vague. For example, there is no inevitable correlation between Gross Domestic Product Per Capita and life expectancy. The case is strong therefore that development should not just be in pursuance of economically indicated goals.<sup>33</sup>

### 3.2 The Scandinavian Approach

Two Scandinavian methods have for long recognised that well-being cannot be reflected through Gross Domestic Product alone. The first method is associated with Sweden. This approach rejects the idea that well-being can be measured purely in subjective terms. The approach therefore requires an assessment of other variables necessary for well-being such as security, health and access to health, housing, education and skills, recreation and cultural activities, employment, and income and wealth. The Swedish approach requires a situation analysis of all these variables. As many of the core areas are general, this approach necessarily involves both quantitative and qualitative indicators.

The University of Helsinki propounded the second Scandinavian method. This method can be termed as “Having, Loving, and Being”, a catch-phrase intended to stress that there are certain needs without which a human being is unable to survive, avoid misery, and participate in society.<sup>34</sup> “Having”, includes health, education, and economic resources, “Loving” is a catchword for the need to relate to other people and form social identities.<sup>35</sup> “Being” connotes the need for integration into society and to live in harmony with nature.<sup>36</sup> The University of Helsinki’s method, like the Swedish one, underlines that both subjective and objective indicators must be used in carrying out well-being assessments. Both methods further seem to recognise that needs necessary for quality life are interrelated and it is important to measure the quality of life holistically. From a human rights perspective, therefore, a holistic approach to the measurement of well being must be preferred. However, although the variables for assessments relate to specific human rights goals such as education, the Scandinavian approach does not measure well being based on all human rights principles. Although “loving” may pertain to human rights principles such as non-discrimination, it helpful to undertake a situation analysis that specifically focus on such principles.

### 3.3 The *Human Development Report* Approach

Like the Scandinavian approach, the *Human Development Report* has since 1990 insisted that GDP per capita should not be the single or most important measure of human development. The Human Development Report’s own suggestion was

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<sup>33</sup>. Santos Mehrotra and Richard Jolly, *Development with a Human Face* (Oxford; Clarendon Press, 1997).

<sup>34</sup>. Erick Allardt, “Having, Loving and Being: An Alternative to the Swedish Model of Welfare Research”, in Martha C. Nussbaum and Amartya Sen (eds.), *The Quality of Life* (Oxford; Oxford University Press, 1993), at 88-94 (in this chapter referred to as Allardt: Having).

<sup>35</sup>. Allardt: Having, *supra*, note 34, at 91

<sup>36</sup>. Ibid, note 6, *supra*.

initially the Human Development Index, a ranking of countries according to three variables. The first is the length and health of life, using life expectancy at birth. The second is education attainment, using adult literacy and the combined gross primary, secondary and tertiary enrolment. The last variable is a decent standard of living, using GDP per capita as a proxy. The Human Development Index, in subsequent reports, has been supplemented by other measures essential to determine of well-being.<sup>37</sup> The Human Poverty Index,<sup>38</sup> the Gender Empowerment Measure and the Gender-related Development Index are now both understood as supplementary to the Human Development Index.

The Human Development tests of measuring human development or well-being however have significant shortcomings. First, equal weighting of three indicators in the index appears problematic. Second, the Human Development Index may obscure important disparities that must be regarded in the measurement of the quality of life. The Human Development Report itself has acknowledged the need to disaggregate the well-being indicators that it uses.<sup>39</sup> The Gender-related Index and the Gender Empowerment Measure are both commendable strides in addressing this deficiency. However, it is important to be sensitive to ethnic, geographic, and disability related disparities as well. In its discussions, the Human Development has hence stressed the need to consider and assess human rights-specific issues such as ratification of international human rights instruments and other governance indicators.<sup>40</sup>

### 3.4 Human Rights, Correlative Duties, Human Rights Principles

The Human Development approach to well-being, like the focus on Gross Domestic Product and the Scandinavian approach, seem not to underline that development is a human right or that it is inexplicable to human rights and human rights principles. For example, the Human Development Index is not fully human rights-based as it selects only some human rights and fails to assess compliance with human rights principles. There are three connected reasons for this failure. First, conceptually, the definition of development the Human Development report uses is rooted in contract doctrine. The definition underlines human rationality, freedom and choices, and capabilities:

Human development is the process of enlarging people's choices, by expanding human functionings and capabilities. Human development thus also reflects

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<sup>37</sup> . UNDP, *Human Development Report 1997* (Oxford; Oxford University Press, 1997).(in this paper referred to as UNDP:1997)

<sup>38</sup> . In particular, *UN:1997, supra*, note 37.

<sup>39</sup> . UNDP, *Human Development Report 2000* (Oxford; and New York; Oxford University Press, 200) (in this paper referred to as UNDP:200), Chapter 7.

<sup>40</sup> . Especially *UNDP:2000, supra*, note 39.



human outcomes in these functionings and capabilities.<sup>41</sup>

This perspective of the human development is similar to that held by the leading welfare economist, Amartya Sen. For both Sen and the Human Development Report, focus is on those indicators considered to be essential for the exercise of choice. Mental, physical, and economic capacities seem necessary only as functionings for the exercise of freedom and choice. The exercise of freedom and choice however is not always the most important aspect for well-being. A one day child, considered to lack the requisite mental capacity to exercise choice would appear to be outside the conceptualisation of human development. Sen and other development economists would argue that the definition's reference to choice helps underline that certain conditions must be met for such people to exercise their choices when they attain the required capacities. In that case, the definition is really underlining potential and not actual choices for such people. Well-being however is both about the present and the future state of an individual as well as group of people or a community. Well-being is not just about capabilities, but enjoying human rights. To enjoy human rights does not necessary mean ability to exercise choices although the net effect of enjoying such rights results in expanded choices and capabilities. Indeed, other welfare economists argue strongly that even civil and political human rights are essential for economic development.<sup>42</sup>

The second reason for failure to use a human rights-based approach to assess well-being is that some view development as separate from human rights. However, it is crucial to bear in mind that the link between development and human rights is inexplicable. The synergy between human rights and development has long been recognised. The UN Charter made that link in 1945.<sup>43</sup> The impetus to recognise development as human right globally however came with the adoption of the Declaration on the Right to Development in 1986, following the African Charter on Peoples' and Human Rights, which had in 1981 indicated that the right to development was a human right.<sup>44</sup> The Declaration on the Right to Development defines development as

A comprehensive economic, social, cultural and political process, which aims at the constant improvement of the 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 distribution of benefits therefrom.<sup>45</sup>

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<sup>41</sup> . UNDP, *Human Development Report 2000* (Oxford; and New York; Oxford University Press, 200) at 17.

<sup>42</sup> Partha Dasgupta, *In Inquiry into Well-Being and Destitution* (Oxford; Clarendon Press, 1993).

<sup>43</sup> UN Charter, Preamble.

<sup>44</sup> . OAU DOC. CAB/LEG/67/3rev.5. Article 24.

<sup>45</sup> . Preamble. Also: Subra Roy Chowdhury, Erik M.G. Denters and Paul J.I.M. de Waart (eds.), *The Right to Development in International Law* (London; Martinoff Publishers, 1992)

Since 1986, the inexplicable link between human rights and development, which is also a human right, has been strengthened partly through international conferences and declarations.<sup>46</sup> In 1998, the World Bank published a document that stated that the “World now accepts that human and sustainable development is impossible without human rights.”<sup>47</sup> Development then should no longer be measured in disregard of human rights. In the words of the Declaration on Social Development,

The well-being of people also requires the exercise of all human rights and fundamental freedoms, access to the provision of good education, health care and other public services and the development of harmonious relations within communities.<sup>48</sup>

The third reason for lack of adequate human rights-based assessment of well being is that there is little regard to the link between well-being and compliance with human rights principles. In this regard, five principles of human rights and three principles about human rights realisation are important. The first principle is universality, which means that human rights are for everyone. Although human rights are universal however, enjoyment is not universal and an assessment of which rights are not being enjoyed and for whom is a pertinent question to assess well being in a country. The second principle is non-discrimination, which demands that no one should be prevented from enjoying her or his human rights because of characteristics or attributes that she he could not choose or those that could prejudice her or his other human rights. Examples of factors that must not be considered for the realisation of human rights are contained in Malawi Constitution.<sup>49</sup> Attributes that people do not choose include sex, birth, race, disability social origin, and ethnicity. Those that are also recognisable human rights include language, religion, political and other opinion, nationality, and property. The third principle is to respect human dignity and subjectivity. This entails that every human is of equal worth and a holder of rights. The fourth principle is participation, entailing that people must be recognised as key actors in their and overall development and other matters that concern them. The fifth principle is interdependence, which has two significations. One is that that all rights are interrelated, indivisible and interdependent. The second is that all social units require solidarity to realise human rights. In addition, there are three principles that pertain more to the enjoyment and realisation of human rights than to their nature. The first of these is accountability. The implication of every human right is that some people are accountable and can be held responsible for its non-realisation or unsatisfactory realisation. The second is that resources must used to the maximum extent in enjoying human rights. The third is that there must be responsible enjoyment of human rights.

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<sup>46</sup> . E.g., International Conference on Population and Development (A/CONF.171/13; the Vienna Declaration and Programme of Action (A/CONF. 157/24, Beijing Declaration and Platform of Action and the Copenhagen Declaration and Platform of Action on Social Development

<sup>47</sup> . The World Bank, *Development and Human Rights: The Role of the World Bank* (World Bank; Washington, 1998), at 2.

<sup>48</sup> . Programme of Action of the World Summit for Social Development, par 2.

<sup>49</sup> . Malawi Constitution 1994, section 20.

Achieving human rights goals such as freedom or the highest attainable standard of health are development outcomes whose sustainability and quality depends on two crucial human rights-related issues: the enjoyment of other rights and compliance with human rights principles. For example, enjoyment of human rights for some amidst discrimination has an adverse impact on the well-being of those excluded. The fifth reason for the failure to have adequate human rights-based perspectives of well being is that duties correlative to the right to development are conflated within developmental needs. Since development and human rights are inseparable and because there is a right to development, it is important not to negate duties because of the importance of freedom and choice. Rights are meaningless without corresponding duties. This principle, which is also recognised in the Universal Declaration of Human Rights<sup>50</sup> and the philosophy of law,<sup>51</sup> signifies that for some to have rights realised, duties must be carried out; and there is no choice about duties. The performance of these duties are, in themselves, essential for well-being. Duties correlative to human rights fall into four categories:<sup>52</sup>

- *The duty to respect human rights.* This entails that the duty bearer must refrain from decisions and actions that would result in the infringement, violation, neglect or abuse of somebody's human rights.
- *The duty to protect.* This is a duty to intervene and protect the enjoyment of human rights when such rights are threatened or at risks because of the decisions or actions of a third party.
- *The duty to promote.* This means that the duty bearer must advance the need for rights holders to demand their human rights and for duty bearers to perform corresponding obligations.
- *The duty to provide.* This requires direct provision of goods and services to rights holders especially those in positions of disadvantage.

The duties correlative to human rights are at all levels of society. Such duties form a pattern.<sup>53</sup> For example, lower level duties required the performance of upper level duties for the pattern to be cogent. The failure at a lower level to perform a duty entails that a certain duty bearer at a higher level is not performing her or his or duties or performing such a duty improperly.<sup>54</sup> In the performance of such duties, all actors must comply with human rights principles. In many instances, development will tarry if duty bearers stress their freedom and choice. Duty bearers must not

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<sup>50</sup> . Wesley, Newcomb ,Hohfeld, "Some Fundamental Legal Conceptions as Applied to Judicial Reason", 23 *Yale Law Journal* 16.

<sup>51</sup> . Article 29.

<sup>52</sup> . See also:Asbjorn Eide, Catarina Krause and Alan Rosas (eds), *Economic, Social and Cultural Rights* (Dordrecht; Martinus Nijhoff Publishers, 1995) (in this paper referred to as Eide and Others), and UNDP:2000, *supra*, note39. This paper prefers the typology in South Africa's Constitution, which uses promote instead of, facilitate. Further, the paper regards all these types as pertaining to 'fulfil' and hence does not adopt the typology that uses two prongs of facilitate: facilitate to fulfil and facilitate to provide.

<sup>53</sup> . Garton Kamchedzera, "Child Rights and the Capacity of Poor Households", in Eugene Verhellen, *Understanding Children's Rights 1999* (Children's Rights Centre – University of Ghent, 2000), 315-326.

<sup>54</sup> . Garton Kamchedzera, "Child Rights, Duties and the African Child Charter", in Eugene Verhellen, *Understanding Children's Rights 1999* (Children's Rights Centre – University of Ghent, 2000), 519-526..

choose whether to comply with human rights principles. They may choose specific actions within the ambit of a particular principle, but they must not abandon such principle. In addition, the performance of duties must be balanced against the enjoyment of the duty bearers' human rights. Otherwise the enjoyment of rights by one rights holder may result in the non-enjoyment of rights by the duty bearer. If that happens, the principles that human rights are indivisible and that every one is a holder of rights will have been infringed.

Several attempts have been made to assess well-being from the context of human rights.<sup>55</sup> The *Human Development Report 2000* demonstrates one very useful approach.<sup>56</sup> The Report shows that it is possible to derive or not to separate human development indicators from human rights indicators, but that more indicators must be developed as benchmarks are established and accomplished.

#### **4. Rural Communities Are People Too: The Research's Methodology**

Research on the quality of life necessarily demands recognition that the law is merely one of the many forms of power in society. Accordingly, focus in the research was not just on the written law. The research examined norms and commentaries on national and international law. However, the research placed significance on interactions with rural communities and some un-sampled politicians and bureaucrats. Between the rural communities and the politicians and bureaucrats, the research placed less importance on the expressed or possible opinions of politicians and bureaucrats. These are some of the specific duty bearers to the right to development. Greater emphasis, instead, was on the need to listen and learn from the rural community members, who have experiential knowledge of their enjoyment or non-enjoyment of the right to development.<sup>57</sup>

##### **4.1 Communities Not Easily Reached as Research Priority Areas**

The research recognised that rural areas are not equally easily reachable. The research proceeded on the basic fact that the further away an area is from an urban area, the more rural that area will be. The research hence deliberately sought to ensure that most of the areas visited were not easy to reach. All the areas were chosen after analysis of socio-economic indicators to rank the development of Malawi's 27 districts by rural areas and examination of district maps. As it turned out, it is not difficult in Malawi to find communities that are not normally reached by development programmers and most researchers. The research team would branch at least three times from main and feeder roads, staying on village roads that would end, usually at rivers or mud streams. The team would then cross the rivers

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<sup>55</sup> . Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Measurement', (2001) 21 *Human Rights Quarterly* 1062-1097.

<sup>56</sup> . UNDP: 2000), *supra*, note 39, chapter 7.

<sup>57</sup> . For a similar approach in law-related research, see Ann and Robert Seidman, *The State and Law in the Development Process: Problem Solving and Institutional Change in the Third World* ( London; Heinmann; 1994), chapter 4.

or mud streams and walk along footpaths to villages on the other sides. Often, the community would initially be surprised, but quickly remarkably facilitated the work of the research team.

The research team did not give any notice to the villagers visited, for two reasons. The first was to avoid a right answer syndrome as much as possible. Notices may result in community members being prepared by leaders and others to respond in certain ways. The team, despite such caution, encountered the right answer syndrome. However, the researchers had trained to exercise patience and seek to transcend the immediate response, always looking for layers of reasons and evidence of any proffered fact. The second reason for giving the communities no notice was to minimise the exclusion of community members who often do not participate discussions at village level.

The researchers' interests in the community members well-being was highly valued by the villagers. In one instance, a young Village Headman said the following during the sum up and feedback session of the discussions:

"I would like to thank you on behalf of this village. I would like you to know that under the previous regime, we expected nothing and we received nothing in this village. With the new Government, we again expected nothing and we have received nothing. When we saw you enter our village, we expected nothing and we do not think you will give us anything once you return to where you have come from. Why then should I thank you? Because we think that by taking the effort to come here and discuss issues with us, you probably think that we too are people just like you."<sup>58</sup>

## 4.2 The Right to Development and the Six Stages of the Research

The community interactions however were the last of the six stages followed in the research. The other stages were examination of literature, development of tools, district ranking and data analysis.

### 4.2.1 Literature Examination

The first was literature review, focussing on Malawi's Constitution and Vision 2020<sup>59</sup>, the supposed development strategy framework for the country's development work. The research further examined other policy documents and one Government

**Examples of Areas of Focus to Realise the Right to Development:**

- Basic resources
- Education
- Health services
- Food
- Shelter
- Employment
- Infrastructure

<sup>58</sup> . Per Village Headman Chimutu of Salima.

<sup>59</sup> . Malawi Government, 'Vision 2020: National Long Term Perspective Study' (Lilongwe; National Economic Council, Government of Malawi, 1998)

document analysing various policies.<sup>60</sup> An examination of such documents and the counterpart international instruments underlined the need to focus the research on the right to development.

Countries are increasingly enshrining the right to development in their respective constitution or giving it legal effect. In Malawi, the Constitution makes the right to development an enforceable human right. "All persons and peoples have a right to development",<sup>61</sup> stipulates Malawi's Constitution. The Constitution gives examples of areas of focus in realising the right to development. The areas specified are also commonly used as indicators of the quality of life. The Constitution gives seven examples that must galvanise state decisions and actions and contributing to the greatest enjoyment of the right to development.

The rest of the stages for the research focussed on the seven examples listed in the Constitution. The Constitution, of course, does not state that these seven areas are comprehensive. The Declaration on the Right to Development, from which the examples in Malawi's Constitution were taken, includes "fair distribution of income"<sup>62</sup> as one of the focus areas as states take "all necessary measures"<sup>63</sup> for the realisation of the right to development. The research however chose not to add to the content of section 30 of the Constitution, but preferred, for a start, to determine the degree to which the right to development is being met in Malawi within the guidelines of the nation's Constitution.

#### 4.2.2 *Development of Tools*

The second stage of the research was the development of tools based on the focus areas given in the Constitution. The tools were designed to capture the following research outputs:

- A matrix of all pieces legislation passed between 1994 and 1999, the first five years of multiparty politics in Malawi. Each piece of legislation was listed by objective and its relevance to the enhancement of the quality of rural life in Malawi.
- Intimations and reasons by politicians and bureaucrats on what they considered to be the legislative thrusts that were designed to enhance the quality of rural life in Malawi.
- Manifestations of the poor enjoyment of the right to development and the immediate, underlying and basic causes for such enjoyment.
- The expectations of the rural people about the quality of their lives with the change from a one-party to multi-party system of Government.
- Known legislation, policies and programmes that the villagers were benefiting from as a result of the change of Government.

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<sup>60</sup> . For example, *Malawi Government, Policy Analysis Initiative* (Lilongwe; Office of the Vice President, 1999).

<sup>61</sup> . Section 30(1).

<sup>62</sup> . Article 8.

<sup>63</sup> . Ibid.

- The human rights compatibility of the processes used by government to formulate and implement its policies, legislation and programmes.
- Whether the communities visited were, in 2001 (two years after the end of the first five years) better off than they were in 1992, two years before the transition.

### 3.3.3 *Analysis of Legislation*

The third stage of the research initially aimed at producing a compendium of legislation passed in Malawi between 1994 and 1999. The research found though that the Malawi Institute of Democratic and Economic Affairs (MIDEA) had commissioned work to digest laws passed by Parliament between 1994 and 1999. Chilenga undertook the work on behalf of MIDEA.<sup>64</sup> The digest provided an initial useful source, but it had some gaps. For example, in addition to the 114 statutes that Chilenga digested, the research team analysed a further 24 statutes. Even after that, it was not possible to perfectly list the statutes sequentially. The team could not use Bill Numbers, as some of the Bills never became law. The record keeping by the state about its own legislation is appalling and the team had to rely on other libraries to assemble as complete a list of legislation as possible.

Analysis of the legislation revealed six important points about nature of the legislation that was passed during 1994 and 1999. The first point is that with the exception of very few statutes that referred to a rural area,<sup>65</sup> there was no legislation that expressly related to rural areas, let alone quality of rural life. The research hence had to imply that certain legislation might have ended up enhancing standards of rural life, subject to verification during the subsequent community visits. The second point is that Parliament actually appears not to have thought about the quality of rural life as an object of any of its legislation. None of the 138 pieces of legislation had an objective that made any reference to standards of rural life or rural areas. Indeed, many Parliamentarians appeared at a loss when asked to mention any legislative thrust passed between 1994 and 1999 to enhance the quality of rural life. Many were surprised that the Constitution actually required legislation and policies to enhance the quality of rural life and to use rural standards as a “key indicator of the success of government policies. The third point about the legislation passed during 1994 to 1999 was that a fair number related to loans. The loans ranged from the finance of the Malawi Social Action Fund, often mentioned as landmark programme by politicians from all parties, to servicing the deregulation programme.<sup>66</sup> A fourth significant point was that the Constitution was amended

<sup>64</sup> . Marshall Chilenga, ‘The Statute Book’ (Lilongwe; MIDEA, 1999)

<sup>65</sup> . The Kuwait Funds for Arab Economic Development (Naminga- Mangochi Project) Loan (Authorisation) Act, No. 29 of 1998 and the Arab Bank for Economic Development in Africa (Naminga-Mangochi Road Project) Loan Authorisation Act, No. 10 of 1999.

<sup>66</sup> . E.g. International Development Association (National Water Development Project) Loan Authorisation Act, No. 14 of 1995; International Development Association (Fiscal Restructuring and Deregulation) (Amendment) Act, No. 2 of 1996; Kuwait Fund for Arab Economic Development (Telecommunications) Development Project) Loan (Authorisation) Act, No. 3 Of 1997; Skandinaviska Enskilda Banken AB (Publ) (Scada Rehabilitation and Expansion Project) Loan (Authorisation and Ratification) Act, No 6 of 1997;

numerously. By 13<sup>th</sup> August, 1999, seven Constitutional (Amendment) Acts<sup>67</sup> had been passed, making forty-eight changes. A fifth point is that several significant pieces of legislation were compatible with the Government's embrace of the free market, deregulation, and privatisation.<sup>68</sup> The last point is that there was an attempt to pass legislation facilitating the operation of those bodies envisaged by the Constitution to be essential for the consolidation and maintenance of democracy and the enjoyment of human rights.<sup>69</sup>

### 3.3.4 *Ranking Malawi's Districts by State Indicators on Quality of Rural Life*

The fourth stage of the research analysed socio-economic data to rank districts according to quality of life in rural areas. Two Government-produced reports were instrumental in this stage, one on the socio-economic status of households<sup>70</sup> and the other on the state of the population as a whole.<sup>71</sup> The indicators confirm that the quality of life in Malawi's rural areas is poorer in urban areas and the conditions of life in the country are appalling. Whilst the mean household size is the same for both urban and rural areas, at 4.3, the dependency ratio is 1.1 in rural areas compared to 0.8.<sup>72</sup> The net primary school enrolment rate is 83.4 % in urban areas but 77% in rural areas.<sup>73</sup> Although mean distances to school are shorter in urban areas, 3.4 km

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International Development Association (Environmental Management Project) Loan (Authorisation Act) Act, No. 7 of 1997; International Development Association (Fiscal Restructuring and Deregulation Programme) (Second Amending Agreement) Loan (Authorisation and Ratification) Act, No. 15 of 1998; International Fund for Agricultural Development (Smallholder Flood Plains Development Programme) Loan (Authorisation) Act, No 16 of 1998; African Development Fund (Smallholder Macadamia Development Project) Loan (Authorisation) Act, No. 30 of 1998; International Development Association (Second) Social Action Fund Project) Loan ( Authorisation) Act, No. 31 of 1998; International Development Association (Second Fiscal Restructuring and Deregulation Programme) Loan (Authorisation) Act, No. 32 of 1998; International Development Association (Second Fiscal Restructuring and Deregulation Technical Assistance Project) Loan (Authorisation) Act, No. 33 of 1998; International Development Association (Population and Family Planning Project) Loan (Authorisation and Ratification Act, No. 34 of 1998; OPEC Fund for International Development (Nkhotakota District Hospital Project) Loan (Authorisation and Ratification) Act, No. 44 of 1998; Nordic Development Fund (National Water Development Project) Loan Authorisation and Ratification Act, No. 12 of 1999; International Development Association (Road Maintenance and Rehabilitation Project) Loan (Authorisation and Ratification) Act. No. 15 of 1999.

<sup>67</sup> . Act No. 20 of 1994, Act No. 31 of 1994, Act No. 6 of 1995, Act No. 7 of 1995, Act No. 1 of 1997, Act No. 38 of 1998, and Act No. 11 of 1999.

<sup>68</sup> . E.g., the Public Enterprises (Privatisation) Act, No. 7 of 1996 and the Compensation and Fair Trading Act, No. 43 of 1998.

<sup>69</sup> . E.g., The National Compensation Tribunal (Miscellaneous Provisions) Act, No. 8 of 1995; Advisory Committee on the Granting of Pardon Act, No. 9 of 1995; Ombudsman Act, No. 17 of 1996; Local Government Elections Act, No. 24 of 1996; Parliamentary and Presidential Elections (Amendment) Act, No. 10 of 1998; Electoral Commission Act, No. 11 of 1998; Parliamentary Service Act, No. 35 of 1998; Local Government Act, introduced as Bill No. 39 of 1998, Law Commission Act, No. 13 of 1998.

<sup>70</sup> . National Statistical Office, *Integrated Household Survey 1997-98: Statistical Abstract* (Zomba; National Statistical Office; 2000) (in this paper referred to as NSO:Integrated)

<sup>71</sup> . National Statistical Office, *1988 Malawi Population and Housing Census Report of Final Results* (Zomba; National Statistical Office, 2000) (in this paper referred to as NSO:Census)

<sup>72</sup> . NSO:Integrated, *supra*, note.

<sup>73</sup> . NSO:Integrated, *supra*, note 70.



compared to 3.7 km in urban areas, rural children take more time to reach school because of transportation problems.<sup>74</sup> In rural areas, children take 27.5 minutes to travel to school compared to 23 minutes in urban areas. About 5.9% of the rural population spend less than K50 per month.<sup>75</sup> In the urban areas, this very poor population constitute only 0.1%. A large part of the entire population, 60%, spends between K100 to K600 per month.<sup>76</sup> In the category of people who spend more than K1000 per month, the rural areas have only 2.5% whilst urban areas have 24.6% of their population in this “high” expenditure band. Whilst the mean annual per capita expenditure is K12,087 for urban areas, it is merely K3,483 in the rural areas.<sup>77</sup> Mortality in rural areas is higher than in urban areas, at 22 per 1000 compared to 15.8 per 1000.<sup>78</sup> About 94% of Malawians still use firewood and only 2%, mostly in urban areas used electricity. In terms of housing, most of the country’s population, 66% live

in dwelling units that have thatched roofs with mud walls or walls made wattle.<sup>79</sup> These poor housing structures are mostly in rural areas. Similarly, of the 22% of the population who do not have access to toilet facilities, the majority are in rural areas, 329,812 compared to 6358 in urban areas.<sup>80</sup>

The research team used indicators from both reports to produce a list of districts according to quality of rural life in 2000. The UNDP’s Development Report provided guidance in the selection of the indicators.

To rank the districts according to the quality of rural life, the research used the following indicators:

- Food/expenditure ratio
- Access to safe water
- Source of energy
- Access to toilets
- Literacy
- Access to health and other public services
- Death

Points were assigned to each district according to its position out of the 25 districts. A scale of 10 (for the district with the best indicator on a variable) to 270 points (for the district

**The Districts Ranked**

Rank	District	Points	Region
1	Balaka	530	South
2.	Chiradzulu	550	South
2	Ntcheu	550	Centre
3	Karonga	580	North
4	Blantyre	610	South
5	Lilongwe	700	Centre
6	Rumphi	720	North
7	Zomba	740	South
8	Chitipa	780	North
9	Mulanje	790	South
9	Mzimba	790	North
10	Likoma	830	North
11	Nkhatabay	830	North
11	Ntchisi	830	Centre
12	Mchinji	910	Centre
12	Phalombe	910	South
12	Dedza	910	Centre
13	Thyolo	920	South
14	Mangochi	930	South
15	Nkhotakota	960	Centre
16	Dowa	1010	Centre
17	Kasungu	1050	Centre
18	Chikwawa	1060	South
19	Salima	1100	Centre
20	Mwanza	1120	South
20	Nsanje	1120	South
21	Machinga	1130	South

<sup>74</sup> .. NSO:Integrated, *supra*, note 70.

<sup>75</sup> . NSO:Integrated, *supra*, note 70.

<sup>76</sup> . NSO:Integrated, *supra*, note 70.

<sup>77</sup> .. NSO:Integrated, *supra*, note 70.

<sup>78</sup> . NSO:Census, *supra*, note 71.

<sup>79</sup> . NSO:Census, *supra*, note 71.

<sup>80</sup> NSO:Census, *supra*, note 71.

with the worst indicator) was used. The points were then aggregated and the districts ranked.

At the top were two districts adjacent to each other, Balaka and Ntcheu, which was joint second with Chiradzulu. Interestingly, Balaka's other large neighbour, Machinga, was ranked the poorest in terms of quality of rural life using the macro-economic indicators. The three poorest districts are all located in the Southern region, where the two most well-to-do districts are according to the figures. The difference between the top and bottom districts is large, 600 points.

### 3.3.5 Interactions with Six Communities and Some Politicians and Bureaucrats

The fifth stage of the research was in two prongs. The first was random interviews with some politicians and bureaucrats. Among those interviewed were a former Leader of the House in Parliament and former Minister of Finance, a Chief whip for the second largest opposition party, the Clerk of Parliament, and some Members of Parliament from all the three parties represented in Parliament.<sup>81</sup> The second prong were focussed group discussions by sex. These discussions took place in six communities visited. Two were from the

#### The Communities Visited:

- Chimutu in Salima
- Chitule in Dedza
- Gomea in Ntcheu
- Kumwimwa in Machinga
- Mbozo in Mzimba
- Nsanja in Chiradzulu

Southern Region, Chiradzulu and Machinga. Chiradzulu was joint second on the district rankings. Machinga was ranked not only poorest in the Southern Region, but in the whole country. The research team visited three districts in the Central Region. Ntcheu was visited because it ranked joint second with Chiradzulu and adjacent the top district, Balaka. There was 50 points difference between Balaka and Ntcheu. The other two Central Region districts visited, Salima and Dedza. Salima was ranked poorest among Central region districts. Dedza was among the districts in the middle of the rankings. The community visited in Dedza was also used to determine whether proximity to a fairly good road makes a difference in terms of the enjoyment of the right to development. Chitule Village in the district was the only community that was easy to reach during the research. In the North, as in the Central and Southern, the second poorest district, Mzimba, was visited.

Arriving in each community without notice was probably not fair to the rural people, but the effort to reach communities that are rarely visited by researchers and development workers was well-appreciated. The team would allow the communities to take time to mobilise themselves for the focussed group discussions. The group discussions focussed on the right to development, identifying manifestations of enjoyment or lack of enjoyment, analysing immediate, underlying and basic causes for the manifestations, identifying duties and duty bearers at various levels of society, and analysing the capacity strengths and gaps of those duty bearers and the

<sup>81</sup> . The United Democratic Front (UDF), the Malawi Congress Party (MCP) and the Alliance for Democracy (AFORD).

rights holders. The communities, despite the surprise visits, wanted to thrash out their problems and would sometimes insist that the discussion should continue.

### 3.3.6 Final Analysis

The last stage of the research was the final analysis. This was in two sub-stages. First, the entire research team discussed and noted significant insights. Second, the principal researchers, the authors of this paper, re-analysed the information gathered and interpreted it in the light of the right to development and its correlative state duties.

## 4. The Right to Development, Legislation, Outcomes and Processes in Rural Malawi

The right to development as enshrined in the Declaration on the Right to Development<sup>82</sup> is as both an outcome and process that must result in well-being for every one.<sup>83</sup> The areas specified for focus in Malawi are entry points with regard to well-being as an outcome. The research sought to find out whether rural people in the communities visited were better off or worse off compared to the period before the transition to a multi-party system of Government. The overall finding was that people were worse off. According to the analysis by the community members themselves and to observations by the researchers, there were clear manifestations that the quality of life was poor in the areas.

### 4.1 Education

International instruments and General Comments by the Committee on Economic, Social and Cultural Rights have established indicative duties for the state to facilitate enjoyment of the right to education.<sup>84</sup> The state must guarantee that education contributes to the full development of the human personality and sense of dignity, the strengthening of human rights, and the protection of the environment.<sup>85</sup> It must ensure that education enables a person to participate effectively in a free society, and promote understanding, tolerance and friendship.<sup>86</sup> Primary education must be free and compulsory.<sup>87</sup> Secondary education, the state must provide and facilitate that such education is generally and widely available.<sup>88</sup> The state must further provide and facilitate the accessibility of technical and vocational education to achieve

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<sup>82</sup> . G.A. Res. 41/128 of 4 December, 1986.

<sup>83</sup> . Article 1(2) and preamble.

<sup>84</sup> . General Comment No. 13, E/C. 12/1999/10. Also: Commission on Human Rights, Annual Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, Submitted in Accordance with Resolution 2000/9, E/CN.4/2001/52.

<sup>85</sup> . General Comment No. 13 and ICESCR, Article

<sup>86</sup> . ICESCR, Article,13 the CRC, Articles 28 and 29

<sup>87</sup> Ibid.

<sup>88</sup> . Ibid.

productive and full employment.<sup>89</sup> The state must also guarantee that higher education is equally available on the basis of merit. For needy pupils and students, the state must provide fellowships and bursaries.<sup>90</sup> A state must guarantee and facilitate the improvement of the material conditions of teaching staff.<sup>91</sup> Any services offered in these areas must be available, accessible, acceptable, and flexible to needs.<sup>92</sup>

The members of the communities visited showed an incredible understanding of state obligations on education. Community members though thought that their expectations were partially met. They acknowledged that education was free though not compulsory. As the members of Gomeya Village in Ntcheu put it, “a lot of children go to school because it is free.” However, the rural communities visited indicated that to them, education had become more expensive because of the costs of “contributions” demanded by head teachers for the maintenance of schools and school services. Secondary school education, according to the communities, had become more expensive. The conditions of service for teachers were, generally, perceived to be poor. The community members further noted that teachers were poorly motivated and not properly trained. The greatest complaints on education however were about the quality of education. The communities indicated that their children receive inferior education as compared to the education offered before 1994. The test, for the rural communities visited, to judge the quality of education was what a student or former student could do with her or his learning. Hence ability to read and write, fluency in English, and securing a reasonable employment were the indicators that the communities used to evaluate education. On this, the community members noted that girls were worse off than boys. In Chimutu’s Village in Salima, the community could only mention one girl who had gone past the last available class, standard six.

The rural communities confirmed that literacy levels were very low, especially for adults. In all areas, there was high demand for a resuscitation of adult education programmes, which existed under the one-party regime. Low literacy levels were largely a result of insufficient schools. In the area adjacent to Chimutu Village, for example, there was only one school in an uncompleted building. The available school was two classes short of full primary school. The distance from the village to the school was long, as was the case in all the communities, except the community in Dedza. Drop out rates were very high in all the areas visited, mainly due to poor infrastructure during the rain season, early marriages, low incomes by parents, and poor motivation because of bleak employment prospects.

The communities did not know of any legislation that had been passed to address their problems about education. However, on the statute book, there was legislation passed related to University education. One established a new University<sup>93</sup> and the

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<sup>89</sup> . Ibid.

<sup>90</sup> . ICESCR, Article, the CRC, Article, African Child Charter, Article

<sup>91</sup> . ICESCR, Article, the CRC, Article, African Child Charter, Article

<sup>92</sup> . Ibid.

<sup>93</sup> . Mzuzu University Act, No. 33 of 1997.

other amended the Act establishing the country's main university.<sup>94</sup> Any legislation that may have benefited rural communities in education probably did so only indirectly. There were, for example, in addition to the many statutes about borrowing money, statutes on taxes levying taxes.<sup>95</sup> Presumably, the money raised may be distributed to as far as the rural areas.

There was evidence of programmes that that the Government had tried to have schools constructed, but the buildings remained uncompleted. Further, the schools were poorly resources in terms of teaching and learning materials and facilities. The Government also seemed to have tried to have some adult education programmes at least in around Chimutu's area in Salima. The community members however found the education unacceptable as it was too repetitively rudimentary and incapable of enlarging their capabilities.<sup>96</sup>

### 4.3 Health

The state must ensure that there are sufficient, accessible, and acceptable functioning health care facilities, goods and services for everyone, especially the vulnerable.<sup>97</sup> It must facilitate that the population participates in health-related decision making at all levels of society.<sup>98</sup> The state must further create conditions that ensure access to basic preventive, curative, rehabilitative, health services and health education.<sup>99</sup> Essential drugs must be free of charge to the maximum extent of available resources.<sup>100</sup> Every Government must sustain programmes that prevent, treat and control endemic, epidemic, occupational and other diseases.<sup>101</sup> It must undertake programmes to reduce the still birth and infant mortality rates. Some of the facilities that a state must provide or facilitate are programmes that promote child development.<sup>102</sup> Like education, health services offered by Governments, according to international standards, must be available, accessible, adequate, and acceptable.<sup>103</sup> In addition, health facilities, goods and services must be "scientifically and medically appropriate and of good quality."<sup>104</sup>

The communities described their state of health and health services as acutely problematic. The communities were unanimous that their expectations from the Government were not met. Morbidity and mortality, according to the communities had increased in all the areas. One cause of such an increase is the incident of HIV

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<sup>94</sup> . University of Malawi (Amendment) Act, No. 12 of 1998.

<sup>95</sup> . E.g., Malawi Revenue Authority Act, No. 14 of 1998 and the Taxation (Amendment) (No. 2) Act, No. 18 of 1998.

<sup>96</sup> . To use the language of the Human Development Report. In particular, UNDP: 2000 (Oxford; Oxford University Press) and UNDP, *Human Development Report 2001* (Oxford; Oxford University Press, 2001).

<sup>97</sup> . Distr GENERAL, E/C.12/2000/4, CESCR, General Comment No. 14, 14 July 2000

<sup>98</sup> .ICESCR, Article 12.

<sup>99</sup> . C.12/2000/4, CESCR, General Comment No. 14, 14 July 2000

<sup>99</sup> .ICESCR, Article 12.

<sup>100</sup> . Ibid.

<sup>101</sup> . Ibid.

<sup>102</sup> . Ibid.

<sup>103</sup> . Ibid.

<sup>104</sup> .Ibid.

infections that result in AIDS cases. Other diseases manifested in the communities were malaria, scabies, airborne diseases such as common coughs, waterborne diseases such as diarrhoea and cholera. Many children also appeared malnourished. When sick, people from the remote villages have to travel long distances to the nearest clinic where the attitude of health workers is “unhelpful and rude.”. As evident from the manifestations of poor health, the causes include absence of preventive health services, poor sanitation, unsafe drinking water, poor knowledge of the causes of disease, lack of adequate health facilities, goods and services, and lack of resources to use the little health information the community members obtain when they attend clinics. For example, in Chimutu’s village, women indicated that they did not “know” a balanced diet because although they had been told about such a diet, such food was not readily available.

The communities knew of no legislation that was passed to address their problems. The statute book confirmed that no new legislation had been passed to deal with health problems as manifested at the community level, except a loan authorisation Bill for a hospital at NkhotaKota district.<sup>105</sup> There was one statute passed to regulate the nurses and midwives as profession<sup>106</sup> but any targeting of the manifestations, immediate, underlying and basic causes of poor health would, in all generosity, be indirect. One Bill, called the Health Supplies Corporation of Malawi Act<sup>107</sup> was withdrawn.

#### 4.4 Food

International standards require the enjoyment of the right to adequate and nutritious food.<sup>108</sup> For this right to be realised, the state must carry out certain duties as a principal duty bearer. It must put in place systems and programmes that guarantee availability and accessibility of food that is sufficient in quantity and quality to meet dietary needs.<sup>109</sup> It must enact and enforce laws that guarantee that food is acceptable by consumers and free from substances adverse to health.<sup>110</sup> The state must further facilitate an environment that would allow and empower households and consumers to perform their duties in the production, processing, allocation, marketing and consumption of food.<sup>111</sup> It must further take measures to improve methods of production, conservation and distribution of food making full use of

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<sup>105</sup> . OPEC Fund for International Development (Nkhotakota) District Hospital Project) Loan Authorisation and Ratification Act, No. 44 of 1998.

<sup>106</sup> . Nurse and Midwives Act, No. 6 of 1995.

<sup>107</sup> . Bill No. 22 of 1996.

<sup>108</sup> . Committee on Economic, Social and Cultural Rights, 12/05/99. E/C.12/1999/5, General Comment No 12. Commission on Human Rights, ‘The Right to Food; Report of the Special Rapporteur on the Right to Food, Mr Jean Ziegler, Submitted in Accordance With Commission on Human Rights Resolution 2000/10, E/CN.4/2001/53, 7 February 2001. For a compilation of international standards: Katarina Tomasevski (ed), *The Right to Food: Guide Through Applicable International Law* (Dordrecht; Martinus Nijhoff Publishers, 1987).

<sup>109</sup> . ICESCR, Article 11.

<sup>110</sup> . Ibid

<sup>111</sup> . Ibid

technical and scientific knowledge.<sup>112</sup> It must disseminate knowledge of the principles of nutrition.<sup>113</sup> The state must furthermore undertake necessary agrarian reforms for sustainable and most efficient utilisation of natural resources.<sup>114</sup>

There was variety in the food situations of the communities visited. The people of M'bozo Village in Mzimba reported that their food stocks lasted for at least three quarters of the year. In Gomeya's Village, Ntcheu, the community reported that malnutrition rates had increased in the village since 1994. In Kumwimwa Village in Machinga, a village where the men were polygamous and wives and children did most of the farm work, there was reported starvation. None of the communities however reported self sufficiency in food and all the communities were engaged in subsistence agriculture. The causes of the dire food situation included selling food stuffs, as a coping mechanism to alleviate poverty, poor access to farm inputs such as fertilizer, crude farming methods such as the use of hoes, lack of technical advice in agriculture, over-dependency on maize, and increasing population. In Machinga, the communities mentioned that the chief was corrupt and would sell land belonging to the villages or certain families. In Chimutu's Village in Salima, a village located near a game reserve, wild animals were also partly responsible for the destruction of crops. All the communities visited were unanimous that they preferred the pre-1994 period in terms of food security, access to agricultural loans, availability of agricultural extension workers, and subsidised fertiliser.

The community members did not know of any law passed to improve their food situation. The research however found that several pieces of legislation related to Agriculture<sup>115</sup> and micronutrients<sup>116</sup> had been passed. In the spirit of deregulation, both Government and senior opposition leaders cited deregulation measures to liberalise the agriculture sector, continuing a process that had started in 1987.<sup>117</sup>

#### 4.5 Housing

The Committee on Economic, Social and Cultural Rights has given examples of state duties in facilitating adequate housing for inhabitants.<sup>118</sup> The state must ensure security of tenure for its citizens.<sup>119</sup> It must undertake programmes to promote availability, accessibility, affordability and acceptability of housing services, materials, facilities and infrastructure.<sup>120</sup> The state must enact and enforce laws to

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<sup>112</sup> . Ibid.

<sup>113</sup> . Ibid.

<sup>114</sup> . Ibid.

<sup>115</sup> . International Fund for Agricultural Development (Smallholder Flood Plains Development Programme); Loan (Authorisation) Act, No 16 of 1998; African Development Fund (Smallholder Macadamia Development Project) Loan (Authorisation) Act, No 30 of 1998; Fertilisers, Farm Seeds and Remedies (Amendment) Act, No 8 of 1996.

<sup>116</sup> . Iodisation of Salt Act, No. 10 of 1995.

<sup>117</sup> . Through the Agriculture (General Purposes) Act 1987.

<sup>118</sup> . Distr GENERAL ESCR General Comment No. 4 (1991)

<sup>119</sup> . Ibid.

<sup>120</sup> . Ibid.

ensure that housing is habitable in terms of space and protection from damp, heat, rain, wind or health hazards.<sup>121</sup>

The communities did not expect something dramatic after the end of Banda's era. Hastings Kamuzu Banda, president under the one party political system before 1994 had a policy that in addition to food security and clothes, "his" people had to stay and sleep in houses that could not leak when it rained. Most of the members in the communities visited indicated that they used to have houses that would not leak. Seven years after the political change however, the communities judgement was that housing conditions were worse, especially in those areas that were not near a forests. In Chiradzulu, the community indicated that their houses leak mainly because thatch is becoming scarce as the environment is degraded, farmed or habited. Community members have therefore resorted to using plastic paper to reinforce their thatched roofs, but money is in short supply for many. Community members described how they sometimes spend nights standing in their houses because of leaking roofs. In contrast, in Chimutu Village in Salima, a settlement near a game reserve and in Kumwimwa Village in Machinga, near a forest reserve, community members indicated that building materials were not a problem. The houses nevertheless were substandard and constructed with non-permanent materials. Some laws passed between 1994 and 1999 can be described as related to housing. Of these, the most important is the Environment Management Act,<sup>122</sup> which grants all inhabitants of Malawi the right to healthy living and working environment.<sup>123</sup> The communities however were unaware of such laws; neither did they know about the Public Health Act,<sup>124</sup> which attempts to regulate habitation standards. An old Act, some of its standards are still potentially useful. The state however has failed miserably to enforce or facilitate the enforcement of such standards. With regarded to housing finance, the state passed minor amendments to the Building Societies Act to, increasing the amount of dividends for members. .<sup>125</sup>

#### 4.6 Employment

The Committee on Economic, Social and Cultural Rights has not issues specific guidelines on the human rights associated with employment. There are also numerous ILO standards. However, there are enough general duties stipulated in the International Covenant on Economic, Social and Cultural Rights.<sup>126</sup>

The state has a duty to encourage programmes that seek to provide full employment.<sup>127</sup> It must enact and enforce laws that prevent any person from being

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<sup>121</sup> . Ibid.

<sup>122</sup> . Act No. 23 of 1996. Also a loan authorisation Act, International Development Association (Environmental Management Project) Act 1997.

<sup>123</sup> . Section

<sup>124</sup> . Act No. No. 12 of 1948, especially sections 59-77, 78-95, 98-102, and Public Health Minimum Building Standards for Traditional Housing Areas) Rules, GN 89/1971 and Application of Public Health (Minimum Building Standards for Traditional Housing Areas Rules, G.N. 90/1971, 253/1971. 263/1971.

<sup>125</sup> . Building Societies (Amendment) Act 1997.

<sup>126</sup> . ICESCR, Articles 6, 7, 8, 9.

<sup>127</sup> . Ibid.



excluded from employment.<sup>128</sup> The state must further enact laws that prevent any person from forcing workers to be employed by her or him.<sup>129</sup> The state has a standing obligation as long as there is unemployment, to reduce the unemployment rate through conducive economic policies and measures.<sup>130</sup> Vocational guidance and training services therefore become imperative for many people.<sup>131</sup> For those in employment, the state must enact and enforce legislation that guarantees that contractual terms are fair and clear.<sup>132</sup> The state must, furthermore, guarantee and prevent the arbitrary setting of salaries and employment perks and other benefits.<sup>133</sup> Safe and healthy conditions at work must also be guaranteed. The state must guarantee and enforce a wage that would ensure dignity and reasonable well being for the worker and her or his household.<sup>134</sup> There should also be laws to prescribe that employers can only require a reasonable number of working hours in a day and a week.<sup>135</sup> The state must require employers to grant periodic, sick and other holidays with pay to all employers. For female workers, the state has a duty to ensure that employers do not offer to women conditions that are inferior to those offered to men.<sup>136</sup>

Most of the rural people met during the research are subsistence farmers, but they had expected to have greater access to income through employment or otherwise, with the change of Government. They all did not know of any law that the Government had passed on employment. In fact, the Government had passed two major pieces of legislation, the Labour Relations Act,<sup>137</sup> and the Employment Act<sup>138</sup>. The Employment Act was intended to “reinforce and regulate minimum standards of employment” to ensure “industrial peace, accelerated economic growth and social justice”.<sup>139</sup> It adopts many of the international standards on employment.<sup>140</sup> The Labour Relations Act attempts to promote freedom of association, effective collective bargaining and expeditious dispute resolution within the context of social justice.<sup>141</sup> It tries to guarantee freedom of association, collective bargaining, and codetermination.

Although the Employment Act applies to tenants on farms,<sup>142</sup> these two statutes remain of limited utility for purposes of improving the quality of rural life in Malawi, where the labour forced and market is very small. Only % is in formal employment in Malawi. However, many people enter into work-related contracts

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<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Act No. 23 of 1996.

<sup>138</sup> Introduced as Bill No. 23 of 1999.

<sup>139</sup> Long Title of the Act.

<sup>140</sup> The explanatory notes to the Bill.

<sup>141</sup> The Long Title of the Act.

<sup>142</sup> Employment Act 1999, section 3(b).

that have unfair terms. For example, the people of Chimutu's Village in Salima complained that they were being mistreated and exploited at a farm ten kilometres from the village. All the communities expressed indignation and fear that their children were increasingly unable to find paid work, upon leaving school.

#### 4.7 Infrastructure

There are no General Comments on infrastructure. However, international standards are not in short supply. The World Summit for Social Development recognised that the "opportunities for income generation, diversification of activities and increase productivity in low-income and poor communities."<sup>143</sup> In this regard, the state has a duty to improve the availability and accessibility of transportation, communication, power and energy services at the local or community level, especially for "isolated, remote and marginalized communities."<sup>144</sup> A Government must further ensure that "investments in infrastructure support sustainable development at the community level."<sup>145</sup>

The communities visited, with the exception of Chitule Village in Dedza, remained very isolated and lacking adequate access to markets, schools and health facilities. Ownership of radios was minimal and so, access to the electronic media was negligible. Television, which is a recent phenomenon in Malawi, remains a subject of mere imagination by many of members in all the communities visited.

The Government in Malawi passed legislation related to infrastructure, notably the National Roads Authority Act,<sup>146</sup> which gives power to a statutory body to exact a fuel levy for the construction and maintenance of roads. In the spirit of deregulation, various statutes have sought to liberalise electronic media market.<sup>147</sup> Under the Malawi Social Action Fund Programme, the Government had, since 1994, upgraded some roads, partly using contributions from the local communities. The Government also passed legislation to regulate shipping in the country.<sup>148</sup>

#### 4.8 Other Basic Services

One area that is underlined by section 30 Malawi's Constitution is access to basic services. In general, basic services are necessary for an adequate standard of living. In addition to health, education, and food, other important basic services include water and energy..

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<sup>143</sup> . Programme of Action of the World Summit for Social Development, Chapter 2, par 31.

<sup>144</sup> .Par 31(a).

<sup>145</sup> . Par 31(b).

<sup>146</sup> . National Roads Authority Act, No ??? and the National Roads Authority Amendment Act, No. 28 of 1998.

<sup>147</sup> . Posts and Telecommunications Act, No. 5 of 1994 (to let posts and telecommunications services be offered by a corporation and not the Government); the Communications Act, No. 31 of 1998 (to consolidate the law on the area)

<sup>148</sup> . Inland Waters Shipping Act, No. 12 of 1995.

The state has a duty to ensure that every person in its jurisdiction is progressively enjoying a decent standard of living.<sup>149</sup> In this regard, the state must ensure that all available resources are being committed to the attainment of well being for every person in its jurisdiction, especially those that are vulnerable.<sup>150</sup> In this respect, the state must provide assistance to families in need especially to meet the nutritional, food, housing and clothing needs of children.<sup>151</sup> It must enact laws and institute and encourage programmes and efforts to protect every person against unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond her his control.<sup>152</sup> As regards water and sanitation, the Committee on Economic, Social and Cultural Rights has underlined that it is the duty of the state to guarantee that people have access to safe and potable water, as this is one of the strong determinants of health.<sup>153</sup>

The research found some boreholes along the way to the communities visited. Of the communities, only Chitule Village in Dedza had access to safe and potable water. The rest of the communities drew their water from rivers or unprotected wells. Some of the boreholes seen along the feeder roads could not pump water out, as had been drilled in sites that had poor water retention capacity. Service providers tend to drill boreholes close to roads, for their own transportation convenience or near chiefs and other leaders houses. The communities that are difficult to reach largely remain without access to safe and potable water. As sanitation is also largely poor in those areas, waterborne diseases such as cholera and diarrhoea are common.

As regards energy, all the areas visited had no access to electricity. Energy was derived from fuel wood. In areas that were near protected forest reserves such as Kumwimwa in Machinga and Chitule in Dedza, there were conflicts between Government officials and the local population in search of firewood.

It could be pointed out that there have been attempts to facilitate the right to an adequate standard of living for rural communities. This however has not been through legislation, but rather charity-based programmes. Such unsustainable initiatives have included a 'Starter Pack' scheme, whereby all rural families were given a small pack containing fertiliser, legume seed, and maize seed. In the second year of the scheme, the Government restricted class of recipients to those who were old or orphaned children. In all the areas visited, there was no evidence of credit schemes, which were an early thrust of the Government's initiatives to reduce poverty. A much talked about programme, the Bakili Muluzi Health Initiative, purporting to provide free essential drugs and health services at the community level was not evident in all the communities visited.

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<sup>149</sup> . Asbjorn Eide, 'The Right to an Adequate Standard of Living Including the Right to Food', in Asbjorn Eide, *Economic, Social and Cultural Rights* ( London; Martinus Nijhoff Publishers, 1995), at 89-106, Article 25 of the Universal Declaration of Human Rights, G.A.. Res. 217 A(III) of 10 December, 1948.

<sup>150</sup> . ICESCR, Article 11; CRC, Article 27.

<sup>151</sup> . Ibid.

<sup>152</sup> . Ibid.

<sup>153</sup> . Distr, GENERAL, E.C. 12/2000/4, CESR General Comment 14, 4 July 2000 on the Right to Health. Also: 'The Realisation of the Economic, Social and Cultural Rights: The Right of Access of Everyone to Drinking Water Supply and Sanitation Services, Working Paper by Mr El Hadji Guisse, Special Rapporteur, Under Sub-Commission Resolution 1997/18, E/CN.4/Sub.2/1998/7, 10 June 1998.

The Government passed legislation on energy and water between 1994 and 1999. A new Electricity Act<sup>154</sup> was passed to establish a council charged with the administration and regulation of electricity generation, distribution, and use. This council is different from an electricity commission, established under a separate Act, the Electricity Supply Commission Act. That Commission's functions are said to be the generation, acquisition and supply and the investigation of new electricity sources in the country.<sup>155</sup>

#### 4.9 Compliance With Human Rights Principles

Well-being is as much about outcomes as it is about and processes.<sup>156</sup> Whilst outcomes must relate to human rights goals such as the highest attainable standard of health, the process must comply with human rights principles.<sup>157</sup> Hence, in addition to attaining certain outcomes related to development, the state has obligations to comply with the principles of human rights. All the General Comments issued by the Committee on Economic, Social and Cultural Rights underline this point.<sup>158</sup> Malawi's Constitution, similarly, requires compliance with principles of human rights. The constitution requires "special attention in the application" for women, children, and people with disabilities.<sup>159</sup> Although not all relevant groups in positions of disadvantage are mentioned, the Constitution gives an indication that the principles of universality of human rights must prevail in attaining the outcomes of the right to development. The Constitution further requires "equal opportunity" in the attainment of the outcomes of the right to development,<sup>160</sup> thereby stressing compliance with the principle of non-discrimination. With regard to current discrimination and unequal enjoyment of the right to development, the Constitution demands that the state must introduce "reforms aimed eradicating social injustices and inequalities."<sup>161</sup> This underlines the need to comply with the principles of non-discrimination and universality. The principle of participation is heavily implied because development is necessarily defined as a participatory process.<sup>162</sup> Implied too is the principle that all duty bearers must respect everyone's human dignity and subjectivity because the Constitution declares that all "persons have a right to development" and that the state must recognise the "inherent dignity and worth of each human being."<sup>163</sup> The Constitution

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<sup>154</sup> . Act No. 19 of 1998.

<sup>155</sup> . Electricity Supply Commission of Malawi Act, No. 20 of 1998.

<sup>156</sup> . *Supra*.

<sup>157</sup> . Garton Kamchedzera, *Child Rights, Correlative Duties, and a Human Rights-Based Approach to Programming* (book manuscript) (in this paper refereed to as Kamchedzera:manuscript)

<sup>158</sup> . Commentaries: Eide: Rights, *supra*, note

<sup>159</sup> . Malawi Constitution 1994, section 30(1).

<sup>160</sup> . Malawi Constitution, section 30(2).

<sup>161</sup> . Malawi Constitution, section 30(3).

<sup>162</sup> . Declaration on the Right to Development, Article 1.

<sup>163</sup> . Malawi Constitution, sections 30(1) and section 12(iv).

reflects the principle of interdependence because it demands enjoyment of “economic, social, cultural and political development.”<sup>164</sup>

The principles related to the enjoyment of human rights could also be inferred from Malawi’s Constitution and national policy principles. The Constitutional principles require accountability and transparency.<sup>165</sup> The principles of national policy entail maximum use of resources to realise the right to development because it demands “a sensible balance between the creation and distribution of wealth through the nurturing of a market economy and long term investment in health, education and economic social development programmes.”<sup>166</sup> In addition, political and legal authority in Malawi must be exercised “solely to serve and protect” the interests of the people of Malawi.<sup>167</sup> Admittedly, this requirement is not as strong as in international instruments where the principle is expressly stated.<sup>168</sup> The principle of responsible enjoyment of human rights was also omitted from the Constitution, but a law commission proposed in 1998 that Parliament should add it.<sup>169</sup>

The research found that the processes of development and legislation in Malawi do not abide with human rights principles. The principle of universality of human rights is infringed not only by the state, but also many community members. The research found that orphans are “oppressed.” The aged are increasingly not being accorded optimum care. There is increasingly no special help for people with disabilities in the communities. Girls and younger women, in particular are restricted from exercising their participation rights such as freedom of expression.

The research established that although some legislation had been passed to outlaw discrimination in employment, the Government itself is perceived as discriminatory in some of its programmes and has failed to legislate against discriminatory practices. Some politicians mentioned the outlawing of the deprivation of deceased estates as a legislative thrust that would enhance the quality of rural life.<sup>170</sup> The legislation however was of general application and implementation has failed. The required special prosecutors have not been appointed, no civic education programme has been designed, contrary to the stipulations of the new law. Above all most community members did not know about the legislation. All members however knew about the Government’s Starter Pack Programme, which in its second year became a “Targeted Input Programme”, restricting benefit only to those considered to be most vulnerable. The Government never accompanied the programme with any means-testing. The communities described the Targeted Input Programme as discriminatory within, the context of abject poverty and social solidarity. The community members failed to understand why the programme provided goods only to certain groups of vulnerable people when most people were poor and when other community members take care for those considered to be most

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<sup>164</sup> . Ibid.

<sup>165</sup> . Especially section 12(iii).

<sup>166</sup> . Malawi Constitution, section 13(n).

<sup>167</sup> . Malawi Constitution, section 12(i).

<sup>168</sup> . E.g., Convention on the Rights of the Child, Article 4 and the International Covenant on Economic, Social and Cultural Rights, Article

<sup>169</sup> . Malawi Law Commission, Report on the Technical Review of the Constitution

<sup>170</sup> . Wills and Inheritance (Amendment) Act 1997, No. 22 of 1998.

disadvantaged. Although all the community members had heard about the Malawi Social Action Fund, they expressed concern that distribution of benefits under the programme was often unfair or difficult to explain. Some members of Parliament corroborated such allegations. They stated that the first years of the programme were mostly for government-controlled constituencies. Some of these Members of Parliament further complained that the ruling party was using the programme for political gain, threatening that the programme would not be implemented in areas that would vote for opposition parties.

Within the communities, members agreed that females, orphaned children and children in general, and people with disabilities were victims of discrimination. Women do most of the work to support the family. Men are generally favoured in Malawi. Some customs, such as polygamy, which exists in Kumwimwa's Village, are inherently discriminatory against women. People of M'bozo Village stated that women there do not tend to attend political meetings as that role was assigned to men. The oppression of orphaned children was confirmed further in the context of discrimination. The communities also discriminated against people considered to be outsiders. In Kumwimwa Village in Machinga, such "outsiders" were not liked because they were using money to grab land from the locals through payments to chiefs. In M'bozo's Village in Mzimba, the community stated categorically that they do not welcome "outsiders" to stay permanently in their village.

The principle to respect for human dignity and subjectivity requires that the state must intervene to stop practices that treat people as objects both during development work and ordinary day to day life.<sup>171</sup> The research found that the state is a dominant violator of this principle. The state treats people as objects of charity and is increasingly making development work no longer a matter of duty, but a disguised form of benevolence in search of popularity. As the state agents such as the President seem to enjoy cheap popularity through "gifts", the communities visited thought that many political leaders and bureaucrats help themselves out of public funds and that the gifts to communities are residues. On this, the communities had heard about a law against corruption, but were very sceptical about its real intent. Such law had indeed been passed resulted in the establishment of an Anti-Corruption Bureau<sup>172</sup> has promoted its role and discouraged corruption through the mass media. The scepticism of the rural people however indicates that the strategies of throwing messages at people without meaningful participation does not only demean human dignity, but is also ineffective.

The principle of participation is neglected in most of the state's development work. The lack of knowledge of legislation amongst community members was overwhelming. Rural communities do not participate in the legislative process and their Members of Parliament are detached. According to the Constitution, such members are supposed to represent the interests of their constituents in their deliberations when making laws.<sup>173</sup> The research found that participation, if any, was token and often through chiefs and other leaders. Agents of the state tend to tell

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<sup>171</sup> . Malawi Constitution 1994, section 15(1).

<sup>172</sup> . Corrupt Practices Act, No 17 of 1995.

<sup>173</sup> . Malawi Constitution, section 8.

rural people what is wrong and what to do. In M'bozo Village in Mzimba, the community indicated that "nothing had happened in the community that has allowed us to participate in projects." In the other communities, the Malawi Social Action Fund had asked people to mould bricks for schools, but the people complained that they are just told what to do. As people in Chimutu Village put it, "when we participate, it is when we are ordered to do so." In all the areas, the discussants complained about "food for work programmes", which they thought were unnecessarily extractive and draconian. Some of such programmes are implemented by Non-Governmental Organisations, but the NGO Act that the Government passed does not require that community capacity development work should be participatory.

Some of the politicians interviewed indicated that the legislative implementation of the decentralisation policy through the Local Government Act<sup>174</sup> was a legislative thrust. This act was passed very late in the first five years and it imposes the structures for local governance. Rural people indicated that they felt ignored by the state structure of Government as if they were not people.

The principle of interdependence also entails a trust to realise human rights. In human rights, social interdependence and cooperation are required. For the state, this entails that the realisation of human rights must be holistic and that people interdependent in realising those rights. The research established that the social cohesion that used to cement African societies may be weakening as a result of a collusion between patriarchy and capitalism<sup>175</sup> People though continue to bond according to common problems, locality, or aspirations.<sup>176</sup> However, in this research, only the community in Chimutu's Village in Salima indicated that people used to work together to achieve tasks for the benefit of each other. This was the remotest community of the six. The communities complained that state agents and their chiefs do not "consult" them and so it is difficult to work together. The research found that any Government initiatives in or near the communities were segmented and lacking positive impact. As many laws are being passed to advance contract doctrine,<sup>177</sup> it is crucial that the social interdependence and a holistic approach to realise human rights is also legally supported.

The research found no evidence about compliance with the principles that are necessary to realise human rights: accountability, responsible enjoyment and use of resources to the maximum extent. Political and bureaucratic functionaries do not account to rural people. Instead accountability is to political and bureaucratic superiors. Even the Constitution requires Ministers to be "responsible to the President."<sup>178</sup> Ministers, of course explain policies and legislation to Parliament, but Parliament appears not interested to account to its people. The provision that

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<sup>174</sup> . Introduced as Bill No. 39 of 1998 but passed later.

<sup>175</sup> . Confirming previous research: Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge; Cambridge University Press, 1985).

<sup>176</sup> . Kamchedzera: manuscript, *supra*, note 157.

<sup>177</sup> . E.g., The Public Enterprises (Privatisation) Act, No. 7 of 1996. Interdependence could easily have been cemented through the Cooperative Societies Act, Act No 36 of 1998.

<sup>178</sup> . Malawi Constitution, section 97.

dissatisfied constituents could recall their Member of Parliament<sup>179</sup> was one of the provisions Malawi's law makers repealed first from the Constitution.<sup>180</sup> Community members in the Speakers constituency, as was the case in other communities visited, felt that their member of Parliament had ignored local interests and never accounted to the people. The community members indeed questioned whether a speaker should continue to represent her or his constituents as "there is nowhere to report" about the situation of her or his constituency. In Nsanja community in Chiradzulu, members thought that their Member of Parliament did not account to them because they had never elected him. The community thought that the Government had rigged the elections in his favour against an independent candidate who was favoured in that rural community. In Salima, most of the community members did not even know their Member of Parliament. When his name was mentioned, the community members burst into surprised and derogatory laughter.

Evidence of lack of responsible enjoyment of human rights was also abundant from the research. Community members stated that people were increasingly becoming irresponsible. They ironically attributed such irresponsibility to "human rights." This may be because the discourse of human rights that has been disseminated in Malawi parochially underlines freedom. The communities well-appreciated that the enjoyment of civil and political rights had increased, compared to the one party system of Government. In both Kumwimwa and M'bozo villages, the communities pointed out that the current research was possible because the civil and political climate had changed for the better. However, the research also found that whilst the enjoyment of civil and political rights had increased in general, people in Machinga seem to have lost such enjoyment in so far as evaluating the role of Government was concerned. The reason seemed to be rooted in not wanting to be seen to criticise a President who belonged to the district. In that community, it was further established that older women have a strict control on younger women's enjoyment of civil and political rights. This seems to be in line with the general cultural norm that children are expected to listen.<sup>181</sup>

The principle that resources must be used to the maximum extent to realise human rights appeared violated by both the state and the communities. The communities visited strongly felt that Government officials and politicians were using resources primarily to serve personal interests and not to advance the welfare of rural areas. The communities felt that Government had wrong priorities. As the Government and politicians were not explaining their resource-related problems to rural people, the research found a strong perception among the communities that Government had enough resources. Within the communities, the charity orientation to development work had created dependency in all the communities who appeared unable to identify and use their own resources. The people of Kumwimwa in Machinga, for example, have for years been unable to construct a bridge over a small stream because they expect Government to do that for them. Every year, the people of

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<sup>179</sup> . The repealed section 64 of the Constitution.

<sup>180</sup> . Through Act No 6 of 1995.

<sup>181</sup> . P. Ntata and Sinoya, 'Customary Law and the Conventions on Women's and Children's Rights' (Lilongwe; UNICEF, 1998).



Kumwimwa put one blue-gum pole across a seasonal river and cross it naked, holding the pole as they walk in the water underneath the blue gum pole. During the dry season, the community fetches sand and buries the a section of the river so that they can travel easily to the other side, where schools and markets are. When the heavy rains return, the sand is washed away and the people of Kumwimwa put another blue gum tree across the river. The people in that village indicated that they had not thought about putting more blue-gum poles across the river as they thought Government would construct a bridge for them. Such dependency syndrome and its counterpart, the begging syndrome is replicated at various levels, including at the national level and a begging syndrome, has taken root in the country. In all the areas, the dependency syndrome seems to have been galvanised by the Malawi Social Action Fund, which asks communities to make a contribution through labour intensive work such as moulding bricks. The communities do their part and the project people do not return or tarry the work, with the communities believing that they cannot do anything else on their own. Many community members confirmed that the begging and dependency syndromes had become rampant at all levels in Malawi since the transition to multi-party politics.

## 5. Well-Being, State Obligations and Common Excuses

States often give excuses for their poor performance of duties correlative to human rights. The Committee on Economic and Social Rights and other forums have accordingly issued clarifications and instructions regarding some of the problems that state parties often advance.<sup>182</sup> In the Malawian context, there is an added legal excuse that could be advanced. The provision requiring that rural life must be enhanced is expressly stated to be non-enforceable.

### 5.1 The Enforceability of the Duty to Enhance the Quality of Rural Life

The state in Malawi could attempt to advance an argument that section 13, in which the duty to enhance the quality of rural life is contained, is not enforceable but merely “directory”.<sup>183</sup> Two reasons can be advanced to refute any such argument. First, the same provision that states that section 13 is directory, adds that courts must have regard to the principles enshrined in the Constitution interpreting all laws and in “determining the validity of decisions of the executive.”<sup>184</sup> There is indeed precedent on such sections as 12 and 13. The Philippine Supreme Court held that the stipulation that national policy principles in a Constitution are “directory”

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<sup>182</sup> . E.g., General Comment No. 3 (1990): The Nature of State Party Obligations, UN, Doc. E/1991/23 E./C.12/1990/3; General Comment No. 4, 36 UN GAOR, supplement No. 40 (A./36/40. Annex VII; General Comment No. 9 on the Domestic Application of the Covenant on Economic, Social, and Cultural Rights, UN Doc. E/C.12/1998/24 (1998).

<sup>183</sup> . Malawi Constitution, section 14.

<sup>184</sup> .Ibid.

underlines the obviousness of the requirements.<sup>185</sup> In any case Malawi's Constitution provided that such policies as stipulated in the Constitution can be used to hold Government decisions invalid. The second reason the Government cannot advance an excuse on the basis of non-enforceability of the obligation to enhance the quality of rural life is that the right to development is enforceable in Malawi.<sup>186</sup> The right is enforceable not just for a person not enjoying it, but also by "[a]ny person who claims" that the right has been "infringed or threatened."<sup>187</sup>

## 5.2 The 'Insufficiency' of Resources

One other classical excuse by Governments that are not economically developed, which has also been used in Malawi, is that resources are insufficient to carry out the duties correlative to the right to development. In particular, the use Article 2(1), a principle regarding the realisation of human rights has been misunderstood. The Article, reflected in other Conventions and carefully avoided in African human rights instruments state that each state party:

Undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Three arguments have been advanced and used using this provision.<sup>188</sup> The first argument is that the word "progressively" is an acknowledgement that to realise these rights is difficult and would take long. The second argument is that states can only meet such rights as the right to development if they have available resources. Poor states, therefore, should not be expected to realise certain rights as well as rich states. The third argument that has been advanced is that realisation of such rights as the right to development assumes the existence of international assistance. To be fair, the pleas of poverty have been heeded and the trend is to accept that poverty is a danger to the realisation of human rights although it must not be used as an excuse not to respect, neglect, or violate human rights.<sup>189</sup>

These arguments used to make sense until it was realised that certain states were using them to escape rightful obligations. There is however one powerful argument

<sup>185</sup> . *Minors Oposa v Secretary of the Department of Environment and Natural Resources (DNR)* 33 I.L.M. 173 (1994)+

<sup>186</sup> . Malawi Constitution, section 46.

<sup>187</sup> . Malawi Constitution, section 46(1).

<sup>188</sup> . Discussion: Asbjorn Eide, 'Realisation of Social Economic Rights and Minimum Threshold Approach', *10 Human Rights Law Journal* 35-51.

<sup>189</sup> . Vienna Declaration and Programme of Action , A/CONF. 157/24. Also, Commission on Human Rights, 'Report of the Expert Seminar on Human Rights and Extreme Poverty, 7-10 February, 2001, E/CN.4/2001/54/Add.1.

against all the three arguments that attempt to invoke poverty as “the mother” of laziness, neglect, abuse or dictatorship. The unanswerable argument is that the provision requires the state to demonstrate that available resources have been and are being used to the maximum extent to realise the right in question. The argument about resources therefore invites the conclusion that the state must account to the people of the country before an excuse about the inadequate resources is accepted. The research found that most rural people think that their welfare is not a priority for Government and that certain Government officials corruptly serve personal ends using public resources. In the case of Malawi, the research further found that the state has so far not been able to demonstrate that available resources are being used to the maximum extent to realise the right to development. Instead, government officials and bureaucrats invoke lack of resources or poverty as a broad excuse for poor well-being in rural areas.

Invoking lack of resources or poverty broadly is unacceptable in international law and even, technically, under Malawi’s Constitution. The Constitution nowhere uses the phrase available resources. Section 13, underlines progressive realisation not for the rights, but the principles and goals of national policy outlined in that section. The right to development itself is not subject to a similar qualification. In both international law and under the Constitution, the state must not plead poverty if it has not demonstrated that it lacks capacity, not just resources.

### 5.3 The Capacity of the State

Resources are just one component of capacity, and the research established that these resources are not the primary problem in meeting the right to development in Malawi. Capacity to carry out duties correlative to human rights signifies four components or conditions.<sup>190</sup> The first condition is that the duty bearers must understand and be motivated to carry out what should be done if a right is threatened or is least being realised. This entails that the duty bearer must know the nature of the rights holder’s needs necessary to enjoy the right, understand her or his or its duty, and be motivated to carry out what is necessary to have the right enjoyed. The research found that the state in Malawi know the rights of rural people but choose not to address the manifestations and causes of poor enjoyment of the right. In cases where Government was acknowledged to have done something about the enjoyment of the right to development, the research established that Government gave the impression that its services were a matter of charity, to be appreciated. As such, not many people in rural areas are in the habit of claiming their rights. Instead, it is institutionalised in the culture of development in Malawi that rural people must eloquently, through song or otherwise, praise political leaders in appreciation of “gifts”.

The second condition for accountability is that the specific duty bearers must have the relevant authority.<sup>191</sup> Relevance of authority relates both to types and quantity.

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<sup>190</sup> Kamchedzera:manucript, *supra*, note 157.

<sup>191</sup> . Kamchedzera: manuscript, *supra*, note 157

As authority necessarily implies limits, too much authority is risky because rights holders may fail to question the duty. Further, the right type of authority, not necessarily legal, should be available for duty bearers. The research made two significant findings in this regard. Firstly, the research found that in Malawi, both political leaders and bureaucrats tend to have too much authority when dealing with rural populations. In some areas, such as Chiradzulu, where community members had several times complained against the attitude of a health worker, nothing was done to address their problems and the duty bearer continued to abuse his authority. Secondly, the research established that whilst government officials and political leaders may have the necessary legal or political authority, they often lack cultural and moral authority. As a result, the duty bearers are largely unacceptable in the rural areas. This is compounded by the fact that such duty bearers fail to facilitate meaningful participation.

Resources are the third accountability condition for the right to development.<sup>192</sup> The research found that in Malawi, politicians and bureaucrats confuse economic resources to mean resources. As Parker has pointed out,<sup>193</sup> however, resources fall into three synergistic categories. There are the economic resources, which include money, equipment and land. In addition, there are human resources such as numbers of people, skills, commitment, time, and talents. Lastly, there are organisational resources, which include families, institutions, work processes and laws and regulations. Organisational resources are instrumental to the generation, preservation and multiplication of economic and even human resources.

The research made two further findings on resources. The first is that human resources in the rural areas are much under-utilised because certain capacity gaps especially with regard to self confidence. Although the people's own analysis during the research showed that they had certain solutions with regard to many of their problems, they are too dependent on Government. The second finding is that Government, especially at the political levels, sometimes tries to do too much by invoking cheap popularity and presenting money and other needs as charity. Members of Parliament stated that they could not live in their constituencies or indeed visit them frequently because "we do not have enough people to give to people." Such money is usually given during funerals and other public functions. Many people in rural areas think that they are recipients of Government favours and not participators in their own development.

The fourth accountability condition is appropriate communication.<sup>194</sup> Communication is a crucial capacity component because it can turn capacity into capabilities or it can be used to exclude some people. Primarily, in communication, knowledge is crucial for the enjoyment of the right to development. The research found that rural communities know the manifestations of the causes of poor health, education, housing, infrastructure, unemployment and shortage of food. However, they do not always know the causes of such manifestations and certainly do not link

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<sup>192</sup> . Kamchedzera: manuscript, *supra*, note 157

<sup>193</sup> . David Parker, 'Resources and Child Rights: An Economic Perspective', Innocenti Occasional Papers, CRS 6 (Florence; International Child Rights Development Centre, 1994).

<sup>194</sup> . Kamchedzera: manuscript, *supra*, note 157

the manifestations and causes to duty bearers. In other words, rural Malawians do not have the knowledge about the how failure to perform duties by certain duty bearers result in the poor enjoyment of their right to development. There is other communication related-reason linked to this poor knowledge. The people do not own the communication channels that are used in development work. Instead, the channels are either owned by outsiders or influenced by outsiders. An example of a communication channel that is influenced by outsiders is the chief, who, as a channel, is often what to say by politicians and development workers. The method of development communication by agents of the state is too message-based and communication processes are facilitated resulting in poor or no processing of information, which is sometimes also inaccurate. The community rarely freely uses its own communication channels and indigenous knowledge to assess, analyse, and take actions. Very little facilitation of assessments, analyses are done for rural communities to take necessary actions. In all the areas visited by the research, the community members appreciated the assessment and analysis that they had done with the research team and asked not for money, but similar exercises. The lack of optimum assessments and analyses with regard to the right to development is also related to gender relations, which way heavily against women and girls. In the community where its members cross a river naked at some times of the year, the males migrate to and fro the community, trading. Although the discussants during the research agreed that the men were duty bearers, the community had never met to analyse its problems and identify who should do what about what.

## 6. Conclusions

This paper was based on research about the quality of rural life and the extent to which the state used or failed to use legislation to enhance rural standards of life during Malawi's first five years of multi-party politics. The well-being of rural communities is related to the people's right to development. This entails that the state is the principle duty bearer for the right to development, which is well entrenched in Malawi's Constitution.

Using a human rights perspective to the assessment of well-being, the research found that the quality of standards in rural areas is worse than it was before the transition from one party rule. The approach adopted by the research and this paper concludes that the state is largely responsible for the lack of or poor enjoyment of the right to development. As a principle duty bearer, the state failed to legislate to address the manifestations and causes of the ill-being that is rampant in the rural communities visited. When, the state carried out some actions that may enhance the quality of rural life, it did so improperly. The state in Malawi has failed properly to carry out its duties through its neglect of the principles of human rights in its legislative and development programming process. The state failed to attain the goals established by the Constitution as necessary to realise the right to development. The processes adopted in its legislative and development programming processes have contributed to the ill-being in the rural areas visited. One result of the state's failure to make maximum contribution to the enjoyment of

the right to development without infringing human rights principles has been that rural people feel neglected and wonder whether they too are people. Ironically, rural people are yet to start claiming their right to development.