DIGNIFIED RURAL LIVING, THE RIGHT TO DEVELOPMENT, MULTIPARTY POLITICS AND LEGISLATION IN MALAWI

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ABSTRACT
This article proposes that the notion of progressive dignified living is a more effective measure of the quality of rural life than other, prevailing means of assessment. The notion entails enjoyment of human rights, compliance with and advancement of human rights principles, and the performance of duties correlative to specific human rights, such as the right to development. In Malawi, where the culture of accountability is weak, evidence casts doubt on the effectiveness of legislation as a strategy to realise the right to development. At the same time, nascent developments indicate that the involvement of civil society and quasi-public organisations in catalysing the demand for human rights in rural areas can be an effective way of promoting the right to development. As formal processes for redress are largely ineffectual, it is through community insistence on enjoyment of the right to development that norms may emerge to protect accountability-related gains through legislation. This would constitute an example of people-determined reflexive law making.

I  INTRODUCTION AND BACKGROUND
As certain African countries, such as Malawi, transited from one-party systems of government in the 1990s, many thought that a multi-party system was synonymous with democracy and a better life. Malawi’s 1994 Constitution, for example, states that the quality of life in rural areas should be a key indicator of a country’s state of human development. As one of the principles of national policy, the State is required to ‘promote the welfare and development of the people of Malawi by progressively implementing policies and legislation’. Such legislation should aim, among other goals, ‘to enhance the quality of life in rural communities and to recognize rural standards of living as a key indicator of the success of Government policies’. The importance of such a provision is demonstrated by the fact that 87 per cent of Malawi’s population resides in rural areas.

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2 Malawi Constitution Act 20 of 1994 s 13(e).
This article interrogates the assumption that legislation in a multi-party political context leads to improved quality of rural life, and the related supposition that there is a positive correlation between legislation in a multi-party political environment and improvement in the quality of rural life. In examining these issues, we make use of the results from ongoing research conducted by the Faculty of Law of the University of Malawi on the quality of rural life and the state in Malawi. This research, which commenced in 2002, analyses the government’s performance of its legislative duties between 1994 and 1999, being Malawi’s first five years of multi-party politics, as well as in subsequent years. The focus of the research is on the realisation of the right to development as enshrined in s 30 of Malawi’s Constitution. The section closely resembles art 8 of the United Nations’ Declaration on the Right to Development 1986.

In full, the section reads as follows:

1. All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural, and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
2. The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
3. The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
4. The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

In addition, s 46(2) of Malawi’s Constitution provides that any ‘person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened’ can seek redress through the courts or advice from the Malawi Human Rights Commission and the Office of the Ombudsman. In conjunction with the need to regard the quality of rural life as a key indicator of the success of government policies, the enshrinement of the right to development creates a development imperative for Malawi’s successive governments. This article is a contribution towards independent evaluation of the performance of State duties to improve the quality of life in rural areas using legislation.

In this article we examine the role played by democracy and good governance in giving effect to the right to development. We focus on the specific notion of progressive dignified living, which has particular application for rural communities in Malawi. We argue that there is a disjuncture between legislation and the realisation of the right to development. Our conclusion raises a case for reflexive law based on processes of encouraging people in...
rural areas to demand enjoyment of their right to development and to engage in dialogue with duty bearers.

II THE RIGHT TO DEVELOPMENT, DEMOCRACY, GOVERNANCE, AND PROGRESSIVE DIGNIFIED LIVING

The incorporation of the right to development in Malawi’s Constitution is open to criticism. First, despite the insistence by such advocates as Arjun Sengupta that the right to development has a strong basis in international law, it has been a contentious subject, partly because it can become an excuse not to act on human rights. Second, as part of a United Nations-based legal system, the Declaration on the Right to Development is hard to isolate from imperialistic agendas and interests that have long dominated the United Nations. Third, as an aspiration, the right to development can easily be criticised as promising much, when human rights discourse has historically failed satisfactorily to deliver. Fourth, the right to development can also be criticised as being under the increasing dominance of ‘trade-related human rights’ characteristic of modern international capitalism.

However, for countries such as Malawi, the aspiration expressed in the right to development, the ‘enjoyment of economic, social, cultural and political development’, is a worthwhile goal, as established by the ongoing research at the University of Malawi. All rural communities so far visited have indicated that the goals and values expressed in the right to development are worthwhile aspirations. Indeed the right to development helps to ensure that there should be no disjuncture between human rights and development. The incorporation of the right, at least, entails a basis for people to demand accountability for their state of well-being. Accountability by the State for the performance of its duties to improve the quality of life is an essential task of good governance. Hence, Malawi’s Constitution requires the State to ‘justify its policies in accordance’ with the responsibility to respect the right to development.

10 For example I Shivji The Concept of Human Rights in Africa (1989).
12 For example, U Baxi The Future of Human Rights (2002).
13 Kamchedzera & Band (note 4 above).
14 Malawi Constitution (note 2 above) s 30(4).
(a) Dignity and the notion of progressive dignified living

People in rural communities visited during the research revealed that the need to lead dignified lives was foremost in their aspirations. As early as 2002, one community thanked the researchers, simply because ‘by coming here and talking with us, you probably think that we too are people like you’. The community members noted that previous and current governments had not approached them to discuss their well-being and concluded that all previous and current governments had given the community ‘nothing’. Later phases of the research have consolidated the finding that dignified living is a primary aspiration for people living in Malawi’s rural areas.

(i) The link between human rights and human dignity

It is crucial to clarify the relationship between human rights and the notion of human dignity. Human dignity signifies that all human beings possess inherent worth. Human dignity, as the intrinsic or inherent worthiness of every human being, is widely recognised in international law and often expressed in human rights instruments as a reason, goal, basis or rationale for prescribed human rights. The International Bill of Human Rights is a good example. The Universal Declaration of Human Rights declares that all ‘human beings are born free and equal in dignity and rights’. The preamble of the Universal Declaration of Human Rights states that the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. It further reaffirms faith ‘in the dignity and worth of the human person and in the equal rights of men and women’. Both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights express recognition of the ‘inherent dignity’ of every person. Both explain in their respective preambles that human ‘rights derive from the inherent dignity of the human person’.

The International Bill of Human Rights, however, is clear that dignity is merely one goal and reason for human rights and that certain conditions have to exist to ensure the enjoyment or flourishing of human dignity. Thus, art 22 of the Universal Declaration of Human Rights views the right to social security and the realisation of other social and cultural rights as ‘indispensable’ for a person’s dignity and the free development of potential. Similarly, a person who works has a right to ‘just and favourable remuneration ensuring “an existence worthy of dignity” for her or him and her or his family’. The International

15 Kamchedzera & Banda (note 4 above).
18 International Covenant on Civil and Political Rights GA res 2200A (XXI) 21 UN GAOR Supp (No 16) 52; UN Doc A/6316 (1966) 999 UNTS 171.
19 Universal Declaration of Human Rights (note 16 above) art 22.
20 Ibid art 23.
The Covenant on Economic Social and Cultural Rights views a ‘sense’ of dignity as a one objective for education. The International Covenant on Civil and Political Rights stresses that a person deprived of liberty must be ‘treated with dignity’. Such approbation of dignity is repeated in other human rights instruments based on the Universal Declaration of Human Rights, such as the Convention on the Rights of the Child.

Philosophically, though, many have linked the concept of dignity to Kant. According to the German philosopher’s concept of dignity, every human being should be perceived as an end in him- or herself and never merely as a means. For example, in South Africa, where the Constitution expressly underlines the importance of human dignity as value and principle, judges and constitutional commentators have accepted the philosophical connections of dignity to Kantian thought. Cornell, however, has made a strong argument for the African notion of ubuntu as foundation for a more nuanced constitutional jurisprudence than a Kantian notion of dignity.

(ii) **Human dignity distinguished from dignified living, and people in rural Malawi**

Cornell’s scepticism regarding the sufficiency of a Kantian notion of dignity for South Africa’s constitutional jurisprudence underlines the possibility that such a conception may not be congruent with the notion of dignity as expressed by the rural communities interviewed for this research. The people appreciated the opportunity to participate in the research, to express themselves and to examine their well-being in relation to duties that had to be performed by public and other functionaries. The statement ‘we too are people like you’ transcends the centrality of the individual. Instead, it links such individuality with a commonality of aspirations and being. The state-

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22 International Covenant on Civil and Political Rights (note 18 above) art 10.
23 Convention on the Rights of the Child GA res 44/25 annex 44 UN GAOR Supp (No 49) 167; UN Doc A/44/49 (1989) entered into force Sept 2 1990, Preamble and arts 23(1); 28(2); 37(c); 39 and 40.
25 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC); *Ex Parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa v Groothoom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *S v Maksawanye* 1995 (3) SA 391 (CC); *August v Electoral Commission* 1999 (3) SA 1 (CC); *Harksen v Lane NO* 1998 (1) SA 300 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).
27 See Ackermann ibid.
28 See Cornell (note 26 above).
ment further stresses the importance of one’s attitudes towards people. It is interesting that from a human rights perspective, one of the derivatives of the word ‘right’ is ‘righteous’.

(aa) The inadequacies of contract doctrine

One reason a Kantian conception of dignity may not be sufficient relates to the philosopher’s conception of rights and his adherence to contract doctrine. Kant’s conception of rights is deeply rooted in contract doctrine. Wills, reason, actions and individual autonomy are central to a contract-based conception of rights. For Kant, a right ‘comprehends the whole of the conditions under which voluntary actions of any one Person can be harmonised in reality with the voluntary actions of every other Person, according to universal Law of Freedom’.

A right, Kant continues, has to co-exist with ‘freedom of the will of each and all in action’. The aim of a contract-based conception of rights is the achievement of liberty and egalitarianism.

The emphasis on liberty, however, has led advocates of contract doctrine to conclude that vulnerable people such as children lack the capacity to participate in contract. As Maine has noted, a child could thus be classified in the same category as a ‘lunatic’. Philosophically, therefore, a contract-based conception of rights can easily exclude the vulnerable such as children from the class of potential subjects of human rights. The Malawian community members who wanted to be treated like ‘people too’ seemed to imply that vulnerability and marginalisation can be bases for demanding the enjoyment of rights.

However, even a social trust-based conception of human dignity must be distinguished from dignified living. The International Bill of Human Rights and other international human rights instruments imply that dignity does not flourish nor can it be enjoyed if certain conditions are not in place. Hence, while dignity is inherent in every person and therefore universal, enjoyment of such dignity – dignified living – is not universal. Cornell questions Nussbaum’s argument that a person can lose dignity if certain conditions are denied, because the person will not hence be dignified. The correct position, according to Connell, is that dignity is inherent in every human being and cannot be lost. However, to enjoy it, conditions need to be conducive. In this regard, the right to development can be viewed as a strategy to allow people to enjoy dignified lives as an expression of their innate dignity.

The Declaration on the Right to Development defines development as a

30 Kant ibid 398.
32 Cornell (note 26 above).
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.\(^{34}\)

Development is hence both an outcome and a process. As a strategy for well-being, the realisation of the right to development could significantly contribute to dignified living as conceived by people. The longing for dignified living among people in rural Malawi demonstrates that such people gauge the quality of their lives. In contrast to dominant methods to measure the quality of life, people use both material and non-material indicators to gauge their well-being. Indeed, a 1977 study found a wide range of indicators that people in Africa and Asia used to measure their well-being.\(^{35}\) The indicators, mostly expressed in negative terms, included lack of land, an inability to bury the dead decently, poor housing and inadequate financial, practical and emotional help in relation to the number of dependents in each household. They further extended to the effects of disruptive behaviour on families and communities, a lack of social support, pressure to put children into employment, demeaning or low status work and precarious food security. Implicit in such sentiments is not just living, but progressive dignified living.

(bb) The shortcomings of current dominant measures of the quality of life

This notion of dignified living cannot be adequately captured by prevailing approaches to the measurement of well-being. First, Gross Domestic Product (GDP) per capita is a flawed measure because it cannot illustrate the contribution to dignified living resulting from compliance with or advancement of human rights principles. GDP, as a measure of well-being, ignores the quality of relations between people. Further, it does not indicate any link between outcomes of well-being and performance of duties correlative to the right to development.

The second dominant measure, the Human Development Index (HDI), is an equally insufficient indicator of dignified living. The Human Development Report, which uses the HDI, has long indicated that health and length of life, education, and a decent standard of living using GDP per capita as a proxy are merely useful, but not comprehensive. Another shortcoming is that the measure selects only some human rights and fails to assess compliance with human rights principles. Ideologically, the definition of development on which the Human Development Report is based is rooted in contract doctrine. In 2000, the Report stated that:

Human development is the process of enlarging people’s choices, by expanding human functionings and capabilities. Human development thus also reflects human outcomes in these functionings and capabilities.\(^{36}\)

\(^{34}\) Declaration on the Right to Development (note 5 above) Preamble.


This definition refers to ideas of human rationality, capabilities, freedom and choices, a perspective similar to that held by Amartya Sen.\(^{37}\) For both Sen and the authors of *The Human Development Report*, focus is on those indicators considered essential for the exercise of choice. The exercise of freedom and choice, however, is not always the most important aspect for well-being. A one-day-old child, considered to lack the requisite mental capacity to exercise choice, would appear to be outside such conceptualisation of human development.

There are approaches to the measurement of the quality of life that may encompass the importance of human rights principles and performance of duties. The University of Helsinki has propounded a method termed ‘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.\(^{38}\) ‘Having’ includes health, education, and economic resources. ‘Loving’ is a catchword for the need to relate to other people and form social identities.\(^{39}\) ‘Being’ connotes the need for integration into society and living in harmony with nature. This method recognises that the needs necessary for quality of life are interrelated and it is important to measure the quality of life holistically.

Methods to measure the quality of life such as the University of Helsinki’s approach can easily be criticised for trying to measure the immensurable. However, Canadian researchers and *The Economist Magazine* have shown that it is possible, practically, to attempt to measure well-being more holistically. The University of Toronto and the Quality of Life Unit have adopted a quality of life model that underlines ‘being’, ‘belonging’, and ‘becoming’.\(^{40}\) The introduction of the concept of ‘becoming’ underlines the need to focus on the achievement of ‘personal goals’. The Canadian Well-being Measurement Act\(^{41}\) was introduced to set up a structure and required processes to monitor, evaluate and report on the state of improvement of well-being in that country. Similarly, *The Economist Magazine* uses subjective life satisfaction surveys and objectively obtained indicators to produce well-being tables for countries.\(^{42}\) However, these methods are rather haphazard and subjective in the choice of pertinent indicators.

Theoretically, Pogge’s adoption of the concept of human flourishing is promising.\(^{43}\) The concept leads Pogge to stress the importance of duties or responsibilities, components of well-being, and means to well-being. All these, he argues, are crucial. Pogge appreciates the importance of both personal value, relating to experiences and successes, and ethical value, relating

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\(^{39}\) Ibid 91.

\(^{40}\) See <http://www.flora.org/sustain/well-being.shtml>.

\(^{41}\) Proposed by Motion M-385.

\(^{42}\) See <http://www.economist.com/media/pdf/QUALITY_OF_LIFE.pdf>.

to character and ethical achievement. All these, Pogge argues, are essential to the measurement of quality of life. However, even Pogge admits that the concept of human flourishing ‘appears differently to us depending on the perspectives we take’.

Missing in Pogge’s conception is the importance of human rights principles in the determination of attitudes, approaches, processes, and practices. Further, Pogge’s theory ignores the interconnectedness of duties correlative to human rights at all societal levels.

(b) Human rights, democracy, good governance and progressive dignified living

From the perspective of the right to development, other human rights, democracy, and good governance, the notion of progressive dignified living appears to have five components, as established by the present research. This ongoing research has so far confirmed the relevance of all the five components through a focus on the commonalities between human rights, democracy, and good governance.

(i) The convergence and focus on the right to development

The first commonality between human rights, democracy, and good governance is that all are essentially about the right to development. The State, managed through the government, is the principal duty-bearer to ensure well-being. In this regard, as General Comments on economic, social, and cultural rights have underlined, the government has primary duties to respect, promote, protect, and provide for the enjoyment of human rights. Poor or non-enjoyment of human rights is often practically manifest in a lack of dignified living. Democracy accentuates the need for a governance system that is about the achievement of common aspirations or ‘constant improvement of the well-being’ of the ‘entire population’ and individuals.

People in rural Malawi were able to make the link between human rights, democracy and good governance, but questioned why a shift to a multi-party system of government seemed not to have led to fulfilment of many of their aspirations. While appreciating the benefits of increased civil and political rights, many people wondered why there had not been sufficient realisation of their right to development.

(ii) Attainment of human rights or well-being outcomes

The second commonality is that human rights, democracy and good governance are all about outcomes related to the quality of human life. The Copenhagen Declaration on Social Development more clearly links human rights and development as outcomes in the following terms:

44 Ibid 30.
45 For example General Comment No 3: ‘The Nature of States Parties’ Obligations’ HRI/GEN/1/Rev 7 para 14.
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.\(^{46}\)

Well-being, in this regard, is comprehensive and holistic. This can be partly conceptualised in the form of outcomes regarding the quality of life. In this sense, the broad goals of human rights – which include human dignity – relate to dignified living. Also crucial for the dignified living of people are more specific rights-based goals. Like the broad goals for human rights, the more specific goals for dignified living are synergistic or indivisible. For its part, the right to development has outcome-related components. From s 30 of Malawi’s Constitution, the components include basic social services, education, health, food, shelter, employment, and infrastructure. The research has accordingly focused on these outcome areas.

(aa) Broad constitutional guidance

With the exception of shelter, infrastructure, and ‘other basic social services’, there are ample broad standards on the right to development in Malawi. Firstly, on health, the constitutional goal for legislation and health is ‘to provide adequate healthcare, commensurate with the health needs of the people of Malawian society and international standards of health’.\(^{47}\) No enforceable right in the Constitution complements this goal. Similarly, secondly, there is no specific target on food, with the Constitution setting a goal to ‘achieve adequate nutrition for all’.\(^{48}\) There is no explicitly recognised right to either food or education.

Thirdly, on education, policy and legislation have to aim at eliminating illiteracy in Malawi, having a compulsory and free primary education service, greater access to higher and continuing education, and promote national goals, such as unity and elimination of intolerance.\(^{49}\) These aspirations on education, however, are merely directory, although courts are entitled to use them.\(^{50}\) The enforceable provision, s 25, is much weaker, providing neither free nor compulsory education nor specifying commitments or targets on illiteracy and higher and continuing education. The section merely provides that all persons are entitled to education, that primary education must consist of at least five years, and that private schools are permissible provided they register as schools and maintain standards that are not inferior to those in state schools.

Fourthly, with regard to employment, the Constitution grants every person ‘the right freely to engage in economic activity, to work and pursue a livelihood

\(^{47}\) Malawi Constitution (note 2 above) s 13(c).
\(^{48}\) Ibid s 13(b).
\(^{49}\) Ibid s 13(f).
\(^{50}\) Ibid s 14.
anywhere in Malawi.\textsuperscript{51} The Constitution enshrines further enforceable rights. These rights are to ‘fair and safe labour practices and fair remuneration’,\textsuperscript{52} ‘to form and join trade unions’,\textsuperscript{53} and ‘fair wages and equal remuneration for work of equal value without distinction or discrimination’.\textsuperscript{54}

(bb) Weak, vague or debt-related statutory provisions on outcomes

The legislation related to the outcomes envisaged in the right to development has been weak or vague on targets, benchmarks, or vision. When specific, the statutes have been to authorise government to borrow money. First, since the transition to a multiparty system of government, successive governments have used legislation pertaining to health mainly to borrow money, passing at least six pieces of legislation between 1998 and 2005.\textsuperscript{55} Otherwise, the principal legislation remains a 1956 Act,\textsuperscript{56} passed well before Malawi became an independent nation in 1964.

Second, on education, the legislation has included Acts purpose for the sourcing of money to spend on education,\textsuperscript{57} and three statutes respectively to establish a new university,\textsuperscript{58} science and technology,\textsuperscript{59} and vocational training.\textsuperscript{60} The main statute however remains a 1962 Education Act.

Third, with regard to food, there has been legislation related to agriculture, to borrow money, and on iodisation of salt, pesticides, veterinary and para-veterinary practitioners, and irrigation.\textsuperscript{64} There were at least 12 pieces of legislation to borrow money, for example, between 1998 and 2002.\textsuperscript{65} None of the post-1994 legislation on agriculture and food has directly addressed the food insecurity that characterises rural life.

Fourth, on shelter, possible broad framework legislation that could facilitate initiatives is the Environment Management Act.\textsuperscript{66} This framework legislation

\textsuperscript{51} Ibid s 29, 
\textsuperscript{52} Ibid s 31(1), 
\textsuperscript{53} Ibid s 31(2). 
\textsuperscript{54} Ibid s 31(3).
\textsuperscript{56} Public Health Act 1956.
\textsuperscript{58} The Mzuzu University Act 33 of 1997.
\textsuperscript{59} Technical, Entrepreneurial and Vocational Education and Training Act 16 of 2003.
\textsuperscript{60} Science and Technology Act 6 of 1999.
\textsuperscript{61} Iodisation of Salt Act 10 of 1995.
\textsuperscript{62} Pesticides Act 12 of 2000.
\textsuperscript{63} Veterinary and Para-Veterinary Practitioners Act 7 of 2001.
\textsuperscript{64} Irrigation Act 16 of 2001.
\textsuperscript{65} For example The International Fund for Agricultural Development (Smallholder Flood Plains Development Programme) Loan (Authorisation) Act 16 of 1998.
grants all inhabitants of Malawi the right to a healthy living and working environment. The housing-specific legislation passed since 1994 has related to housing finance, with minor amendments to the Building Societies Act, to increase the amount of dividends for members. 67

Fifth, there have been three substantive pieces of legislation related to employment. The Employment Act 68 was intended to ‘reinforce and regulate minimum standards of employment’ to ensure ‘industrial peace, accelerated economic growth and social justice’, 69 significantly adopting international labour standards. The Labour Relations Act 70 attempts to promote freedom of association, effective collective bargaining and expeditious dispute resolution. 71 It tries to guarantee freedom of association, collective bargaining, and codetermination. 72 The Workers Compensation Act 1999 73 replaced old legislation to create a compensation fund in cases of injuries, death, and diseases suffered in the course of work. The most direct likely impact for rural people relates to tenants and sharecroppers working on other people’s farms, who are now entitled to the protection offered by employment law. 74

Sixth, in addition to legislation to authorise loans, successive governments have passed legislation to liberalise the provision of infrastructural services. A national authority on roads was established 75. Pieces of legislation on loan authorisation have been numerous, at least 14 between 1997 and 2005. 76 In the spirit of deregulation, there have been attempts to liberalise the electronic media market. 77 The government further passed legislation to regulate shipping in the country. 78

Lastly, notable legislation on other basic services, has been on water and energy. A Waterworks Act provided a framework for the establishment of water boards in 1994. The work of such boards however has largely been linked to the consumer who can pay for water. The concentration therefore has been in urban areas, with government schemes to install boreholes as the hallmark of any hope for improved access to safe and potable water in rural areas. There has been some legislation on water, to borrow money, at least four between 1995 and 2005. 79 In contrast, the legislation on energy has been substantive,
including an Act to establish authorities that can regulate and implement rural electrification.\(^{80}\) An Electricity Act\(^{81}\) passed in 1998 was replaced by another in 2004.\(^{82}\) The authorities established under that Act complement the work of the Electricity Supply Commission under the Electricity Commission Act.\(^{83}\) That Commission’s functions are said to be the generation, acquisition, supply and the investigation of new electricity sources in the country. A general Act on energy, the Energy Regulation Act\(^{84}\) was passed in 2004 as was another on the production and supply of liquid fuel.\(^{85}\) The Energy Regulation Act is supplemented by a rural electrification programme, which receives financial support from the World Bank consultants.\(^{86}\)

### (cc) Continued low human development

As successive governments have passed legislation related to the outcome areas of the right to development, the levels of human development in Malawi have continued to be low. Rural people appreciate the greater freedoms brought about by the multiparty system, but consider the same changes as the main causes of decline in economic well-being. Ranked 164 out of 177 countries in 2008,\(^{87}\) the country’s HDI increased a year after the transition to a multiparty system of government, with 1990 as a base.\(^{88}\) The Index rose to 0.412 in 1995, from 0.371 in 1990. At the end of the first term of the first post-1994 government, the Index had dropped, to 0.402, in 2000. A year before the third post-1994 government, the index rose slightly to 0.404, still below the 1995 base and the 2003 sub-Saharan average of 0.515.\(^{89}\) In 2005, the country’s Index exceeded that of 1995, to 0.437.\(^{90}\) Such increases however conceal disparities in Malawi’s society. The share on income or consumption for the poorest ten per cent was 1.9 per cent in 1997, three years after the transition to multiparty politics, compared to 42.2 per cent for the richest 20 per cent.\(^{91}\) The Gini Co-efficient was at 50.3 (33 per cent). Very little changed between 2004 and 2005.\(^{92}\) The share of income or expenditure for the poorest ten per cent had risen only by one per cent on its 1997 base, compared to 31.8 per cent for the richest ten per cent. The share for the poorest 20 per cent was seven per cent, compared to 46.6 per cent for the richest 20 per cent. The Gini

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82 Electricity Act 22 of 2004.  
83 Electricity Supply Commission of Malawi Act 20 of 1998.  
84 Energy Regulation Act 20 of 2004.  
89 Ibid.  
90 UNDP (note 87 above) 237.  
91 UNDP (note 88 above).  
Co-efficient was 39.0. In terms of gender equality, the country was ranked 129 out of 140 countries in 2005.

By 2005, people in rural areas largely remained deeply dissatisfied with the quality of their lives.\(^93\) Only 2.7 per cent and 22.6 per cent of respondents indicated that their lives were either much better or better respectively; 31.8 per cent stated that there was no change. There were many more however who indicated that they were worse off or much worse off, respectively at 37.3 per cent and 5.6 per cent. The quality of life by the subjective indicators was worse in rural areas. Whilst 8.2 per cent of the urban population stated that they were much better in 2005, only 2.0 per cent shared the perception in rural areas; 34.7 per cent of the urban population indicated that their lives were better, compared to 20.9 per cent of the urban population who shared this view. The proportions of those who noticed no change were close, at 31.7 per cent for urban populations and 31.9 per cent for rural people; 23.4 per cent and two per cent of the urban population indicated that they were worse off and much worse respectively. For rural populations, the respective proportions were 39.2 per cent and 6.1 per cent respectively. Overall, at the national level, 62.1 per cent of people stated that they were either very unsatisfied or unsatisfied with life. Amongst the rural population, the proportion was 66.3 per cent compared to 50.1 per cent in urban areas.

These satisfaction levels are corroborated by low indicators in the outcome areas related to the right to development. People in rural areas underline that well-being outcomes have deteriorated with regard to education, health, shelter and food. A decision immediately to introduce free primary education is said to increase access to basic primary education by 60 per cent, but this has resulted in poor quality education due to insufficient properly trained teachers and lack of teaching and learning resources.\(^94\) The completion rate remained low, ‘approximately 25 per cent’.\(^95\) On health, life expectancy in 2004 was 40 years at birth. The country’s infant mortality rank in 2005 was 19, out of 192 countries.\(^96\) Preventable diseases such as malaria, AIDS, and tuberculosis are rampant and the country is off-course to meet the related Millennium Goal,\(^97\) despite positive reporting.\(^98\) In the area of food, lived experiences in rural areas are much about years of famine, malnutrition, and lacking food reserves soon after harvest. A significant proportion of the population, 77 per cent, indicated in 2004–05 that they had been adversely affected by rises in food prices.\(^99\) On shelter, 66 per cent of houses in Malawi were neither ‘permanent’ nor ‘semi-permanent’ according to the National Statistics Office.\(^100\) Seventy-five

\(^{95}\) Ibid.
\(^{99}\) Note 94 above 148.
\(^{100}\) Ibid 87.
per cent\textsuperscript{101} of people in Malawi are farmers, largely in subsistence agriculture. Ninety-one per cent of the population own the hoe, the highest level of asset ownership in the country.\textsuperscript{102} Most of those indicating that they were farmers were rural based, where 81.4 per cent of the people are farmers.\textsuperscript{103}

(iii) Human rights principles-based attitudes and processes

The third commonality between human rights, democracy, and good governance is that they all relate to right processes, approaches, styles and attitudes necessary for well-being or dignified living. Hence, the second component of progressive dignified living is how every person should be treated. Malawi’s enshrinement of the right to development invokes or implies at least five human rights principles, whose advancement could contribute to dignified living for rural people. The principle that human rights are universal is invoked in that the right is conferred on all persons and people. Section 30 requires special consideration for women, children, and people with disabilities.\textsuperscript{104} The principle of non-discrimination is clearly recognised when s 30 is read in conjunction with other provisions in the Constitution. The principle of respect for human dignity and subjectivity is invoked by the stipulation that all ‘persons and people’ are holders or have the right to development. The principle of accountability is also invoked in s 30. The State is required to justify its policies in accordance with the responsibility to respect the right to development. It underlines that in realising the right to development, priority decisions and actions must be in favour of ‘women, children and [people with disabilities]’.\textsuperscript{105} As human rights principles are indivisible, those invoked in s 30 of Malawi’s Constitution are complementary to others in human rights law.

The need to comply with and advance human rights principles is consistent with the view that development is much a process as it is an outcome.\textsuperscript{106} First, compliance with the principle of universality entails recognition that although human rights inhere in every person, enjoyment of those rights is not universal. Second, the principle of non-discrimination entails that no one should be prevented from enjoying her or his human rights because of characteristics or attributes that she or he could not choose or those that could prejudice her or his rights. Third, dignity as a principle entails the need to respect that everyone is a holder of human rights. Fourth, participation is imperative as both a process and an outcome. Fifth, the principle of interdependence, because all ‘human rights are universal, indivisible and interdependent and interrelated’\textsuperscript{107} entails solidarity or a trust to realise human rights as well as holistic and multi-sectoral perspectives in matters of well-being or development. Sixth,
the principle that available resources must be used to the maximum extent to realise human calls for well-being-based management and allocation of economic, organisational, and human resources. Seventh, this requirement is connected to the principle of accountability, the need to ensure that there are systems and processes that duty bearers account, and if necessary, are held responsible for their decisions and actions. Eighth, in line with article 29 of the Universal Declaration of Human Rights, the principle that human rights holders must enjoy their rights responsibly entails proper balancing in the exercise of human rights among people.

(aa) The State and haphazard invocation of human rights principles
The reflection of these human rights principles has at most been haphazard and lacked coherence and vision. Those recognised include respect of human dignity, through legislation to recognise the importance of the right to bail, and universality of human rights through legislation on the prevention of domestic violence. An amendment to criminalise the dispossession of widows and surviving children shows appreciation that widows and children are people too. Well-recognised has been the principle of non-discrimination, through the Constitution and the Employment Act. There is however no clear legislation enshrining the principle of accountability to rights holders. For example, the Constitution requires Ministers to be ‘responsible to the President’ and, by implication, to Parliament. Indeed, Parliament quickly repealed a provision for constituents to recall a member of Parliament soon after the transition to a multi-party system of government. The human rights principle of interdependence is promoted through the Cooperative Societies Act, to facilitate voluntary collaborative enterprise.

There is one key reason for the haphazard invocation of human rights principles, lack of a cohesive approach to the realisation of the right to development. The Constitution stops short of requiring a legislative agenda for Parliament’s consideration. It merely requires the President before each budget session to address Parliament on ‘the state of the nation’ and report on previous and future policies. Furthermore, the agency created in the multiparty era to spearhead law reform, the Malawi Law Commission, has so far been reactive to donor and political demands. Its approach, in that regard, has been to review current laws and draft recommended legislative provisions.

One result of the haphazard invocation of human rights principles has been continued non-compliance with these principles in government and commu-
nities. Females, orphaned and children in general, and people with disabilities are victims of discrimination. Women do most of the work to support their families, but men are regarded as superior. Some customary practices, such as polygamy, are inherently discriminatory against women. People perceive government to be discriminatory in the implementation of its projects, which are often politicised.

(bb) The State as violator of human rights principles

The State has emerged as a dominant violator of human rights principles, some of which it has legislatively recognised. The importance of accountability has largely been in financial circles. The Constitution requires accountability of Ministers to the President, but there is yet to be a provision to underline accountability to rights holders. The legislation on political parties regulates only registration and deregistration of parties, but never the conduct of leaders and members of political parties. The legislation on public audit, public finance management, and public procurement is about financial accountability to bureaucratic functionaries. The Corrupt Practices Act has created new crimes with regard to money laundering and terrorism, but this has largely been to respond to pressure from the United State of America’s fight against terror. The Ombudsman Act has increased avenues for legal redress, but this has been largely for those who are legally aware or literate. The principle of affirmative action has been ignored by the State in law and practice.

The lived experiences of rural people underline that in its programmes, the State treats people as objects of charity and is increasingly making development work no longer a matter of duty. Instead, development programmes and projects are a disguised form of benevolence in search of political support. In many communities, the government’s approach to development has created dependency, expectations, frustration, and helplessness, in that order. Such dependency syndrome and its counterpart, the begging syndrome is replicated at various levels, including at the national level. Many community members confirm that the begging and dependency syndromes have become rampant at all levels in Malawi since the transition to multiparty politics. Participation, if any, has been token and often through chiefs and other leaders. In some rural communities, people disclose that traditional chiefs and village headmen instruct community members who to vote for, following deals with politicians. ‘One person one vote’ is hence a farce in Malawi’s multiparty era. Similarly, both the state and the communities violate the principle that

118 Section 64A of the Wills and Inheritance Amendment Act, introduced by Act 22 of 1998.
119 The Political Parties (Registration and Regulation) Act 15 of 1993.
120 Public Audit Act 6 of 2003; Public Finance Management Act 7 of 2003; Public Procurement Act 8 of 2003.
121 Act 17 of 1995.
123 Act 17 of 1996.
resources must be applied to the maximum extent. The communities strongly feel that government officials and politicians use resources primarily to serve personal interests and not to advance the welfare of people in rural areas. The general impression among communities in rural Malawi is that the onset of multiparty politics and liberalisation of the market has partly contributed to increasing crime, corruption, and dereliction of duty at various levels, particularly between 1994 and 1999.

(iv) Human rights-based decisions and actions

The fourth component of dignified living, derived from the commonality between democracy, human rights, and good governance, is about the importance of actions and decisions, particularly duties, to attain well-being. As Hohfeld\textsuperscript{124} usefully adumbrated, rights correlate to duties. In human rights discourse, the duties are rarely comprehensively expressed. Indeed, it might be difficult to express them exhaustively. This is because what should be done to improve well-being varies from time to time and place to place, depending on the manifestations and causes of the state of enjoyment of human rights. Like causes of poor or satisfactory enjoyment of human rights, duties and duty bearers form a pattern across societal levels. In such patterns of duties and duty bearers, lower level duty bearers are rights holders against upper level duty bearers. In this sense, the causes of poor well-being are connected to failures to perform duties or improper performance of such duties. Such duty bearers, at each societal level, are accountable for the enjoyment of human rights at all societal levels.

Section 30 of Malawi’s Constitution places the duties correlative to the right to development primarily on the State. The State has must ‘take all necessary measures for the realization of the right to development.’\textsuperscript{125} It must further ‘take measures to introduce reforms aimed at eradicating social injustices and inequalities.’\textsuperscript{126} In its duty to respect the right to development, the State must ‘justify its policies in accordance with this responsibility.’\textsuperscript{127}

(aa) The dominance of neo-liberal policies without use of the law

Political ideology and personal economic interests, rather than the performance of correlative duties, however, have largely influenced governance and legislation in Malawi, particularly with regard to the first post-1994 governments. The three post-1994 governments have not had clearly expressed ideologies, leading others to conclude that political parties in Malawi lack

\textsuperscript{124} W Newcomb Hohfeld ‘Some Fundamental Legal Conceptions as Applied to Judicial Reasoning’ (1913–14) 23 \textit{Yale Law J} 16.
\textsuperscript{125} Malawi Constitution (note 2 above) s 30(2).
\textsuperscript{126} Ibid s 30(3).
\textsuperscript{127} Ibid s 30(4).
ideological direction. Kanyongolo however rightly argued that the process to change the system of choosing political leaders was influenced by notions of liberal democracy. Neo-liberalism has influenced the content of policy frameworks, which in turn have had greater importance than legislation. This is because government finances have been associated with such frameworks, backed by the World Bank and the International Monetary Fund.

This is one reason for the apparent tokenism of the country’s supposed long-term development strategy, Vision 2020, which was not very neo-liberal in trying to capture the aspirations of the people of Malawi. Vision 2020 had underlined human rights, the rule of law, accountability, participation and security, in addition to other areas related to the right to development. The World Bank and the International Monetary Fund however supported the Malawi Poverty Reduction Strategy Paper (MPRSP). The thrust of MPRSP, developed during the term of the second post-1994 government, was predominantly economic, with good governance encapsulated to entail political will and mindset, security and justice, and responsive and effective public institutions. The third post-1994 government strongly underlined economic growth through its Malawi Growth Development Strategy (MGDS). Infrastructural development became the main means to reduce poverty, according to the MGDS. The MGDS, as was the case with its precursors, regards governance as important, though not a priority area. The tenets of governance under the MGDS are human rights, justice and the rule of law, public policy formulation, fiscal management, public sector management and corruption; security; macro-economic growth, decentralisation and corporate governance.

Without using legislation, the development planning frameworks have been complemented by the creation of state-linked funds, companies, and bodies outside the scope of specialised or dedicated legislation. The poverty alleviation programme has involved a World Bank loan-financed Malawi Social Action Fund and the Malawi Rural Finance Company. The Malawi Social Action Fund provides material needs for community projects on condition that the community concerned contributes in kind. The Malawi Rural Finance Company is an example of remnants of the numerous credit schemes introduced by the first post-1994 government. The second post-1994 government introduced less enduring initiatives. These included a rural housing scheme and a widely publicised ‘One Village, One Product’ project, an idea borrowed from Japan to promote production and marketing.

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of local produce from rural areas. On its part, the third post-1994 government opted to continue micro-credit schemes, further introducing and implementing the Malawi Rural Development Fund.\textsuperscript{134} This fund provides business and other loans to rural people. The third post-1994 government has further implemented a fertilizer subsidy programme and embarked on the rehabilitation and construction of roads in addition to the distribution of treadle pumps. The programmes are often marred by allegations of corruption at the distribution level.

(bb) Use of legislation for neo-liberal purposes
There have been many examples of legislation designed to promote neo-liberalism, particularly, deregulated markets. Successive post-1994 governments in Malawi have passed ample legislation to borrow money to help in the liberalisation of the economy, structural adjustment, and privatisation. There were at least seven pieces of loan authorisation legislation for fiscal restructuring and deregulation between 1998 and 2001.\textsuperscript{135} Legislation has repealed at least two Acts establishing public enterprises.\textsuperscript{136} Successive regimes have used a series of Acts on taxation to promote trade and provide incentives mainly to those in business. For example, there were at least ten such pieces of legislation between 2000 and 2005.\textsuperscript{137} Legislation to enable privatisation has been in place since the inception to multiparty system of government.\textsuperscript{138} In 2003, Parliament passed three pieces of legislation in line with World Bank and International Monetary Fund demands, respectively on public audit, public management, and public procurement.\textsuperscript{139}

(cc) The promotion of governmental convenience and elite self interest
Post-1994 legislation, in addition to the promotion of neo-liberalism, has significantly promoted governmental convenience and personal interests rather than the right to development. Ironically, in its principles, Malawi’s Constitution requires trusted and good governance-based leadership. To promote the ‘welfare and development of the people of Malawi’, the State is required to:

\textsuperscript{134} Government of Malawi ‘Malawi: Letter of Intent and Memorandum of Economic and Financial Policies’ (18 July 2005).
\textsuperscript{135} For example, the International Development Association (Fiscal Restructuring and Deregulation Programme) (Second Amending Agreement) Loan (Authorisation and Ratification) Act 15 of 1998; and the International Development Association (Regional Trade Facilitation Project) Loan (Authorisation) Act 11 of 2001.
\textsuperscript{136} Agricultural Development and Marketing Corporation (Repeal) Act 8 of 2004; Malawi Development Corporation (Repeal) Act 13 of 2003.
\textsuperscript{137} For example, the Taxation (Amendment) Act 9 of 2000; and the Customs and Excise (Amendment) Act 8 of 2005.
\textsuperscript{138} The Public Enterprises (Privatisation) Act 7 of 1996; and the Compensation and Fair Trading Act 43 of 1998.
\textsuperscript{139} Public Audit Act 6 of 2003; Public Finance Management Act 7 of 2003; Public Procurement Act 8 of 2003.
... introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions.\textsuperscript{140}

The requirement for trusted and good governance-based leadership is compatible with the Constitution’s principles. The Constitution 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’.\textsuperscript{141} Section 12 of the Constitution further underlines several aspects of good governance that must imbue governmental leadership in Malawi. These characteristics are the exercise of powers of State for the people of Malawi, openness, accountability, transparency, respect for human rights, facilitation of peaceful human interaction, constitutionalism, the rule of law, and informed and democratic choice.\textsuperscript{142}

Post-1994 governments have enacted legislation about leadership or governance. This legislation has been of three types. The first relates to loan authorisation in the name of good governance, transparency and accountability.\textsuperscript{143} The second has been about the establishment and regulation of institutions deemed necessary by the Constitution to consolidate democracy and constitutionalism in the post-1994 era.\textsuperscript{144} The third has been constitutional and other amendments to consolidate political power and convenience. The regime amended the Chiefs Act to provide for the promotion of traditional leaders to Senior Chiefs as a form of reward for loyalty and control.\textsuperscript{145} During the first two post-1994 governments, there were two peace-threatening attempts to amend the Constitution to allow a third or unlimited term for the President. Of the 194 amendments effected to the Constitution between May 1994 and May 2002, 51.5 per cent had been about the legislature and the executive.

To counter perceptions of corruption and greed, the three post-1994 governments have introduced or continued to support legislation and institutions that attempt to facilitate prudent management and prevent corruption. Hence, soon after the transition to multiparty politics, the Corrupt Practices Act\textsuperscript{146} was passed. Wide-spread dissatisfaction with the implementation of the Act resulted in an amendment partly to alter the power of the Director of Public Prosecutions to refuse consents to prosecutions.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{140} Malawi Constitution (note 2 above) s 13(o).
\item \textsuperscript{141} Ibid s 12(ii).
\item \textsuperscript{142} Ibid s 12.
\item \textsuperscript{143} For example, the African Development Fund (Support for Good Governance Programme) Loan (Authorisation) Act 9 of 2002; and the African Development Fund (Support for Good Governance Programme) Loan (Authorisation) Act 24 of 2004.
\item \textsuperscript{145} Chiefs (Amendment) Act 5 of 1999.
\item \textsuperscript{146} Corrupt Practices Act 17 of 1995.
\item \textsuperscript{147} Corrupt Practices (Amendment) Act 17 of 2004.
\end{itemize}
Three other pieces of legislation that could be described as having been passed mainly because of pressure from donors are on public finance management,\textsuperscript{148} public procurement,\textsuperscript{149} and public audit.\textsuperscript{150} The Public Finance Management Act, the Public Procurement Act and the Public Audit Act have been used by the third post-1994 government to elicit donor support, as examples of good governance measures. The legislation is meant to instil fiscal discipline and accountability for public functionaries who handle public resources. The accountability, however, like in most legislation in Malawi, is towards political superiors.

Despite the Corrupt Practices Act, the Public Finance Act, the Public Procurement Act, and the Public Audit Act, indications are strong that multiparty democracy did not necessarily result in trusted and good governance. The country’s subjective indicators on governance are poor. The indicators rose soon after the transition, but dropped dramatically and remained very low. A government-supported survey in 2005 confirmed that public trust in public institutions was very low, with governmental agencies being perceived as corrupt and inefficient.\textsuperscript{151} Not surprising, rural community members express grave distrust in political leaders, who they perceive as only interested in votes, obedience, and self-aggrandisement.

\begin{figure}
\centering
\includegraphics[scale=0.5]{governance_trends.png}
\end{figure}

\textsuperscript{148} Public Finance Management Act 7 of 2003.
\textsuperscript{149} Public Audit Act 6 of 2003.
\textsuperscript{150} Public Procurement Act 8 of 2003.
\textsuperscript{151} IFES and Millennium Consulting Ltd Malawi ‘Governance and Corruption Baseline Survey’ (2006).
Poor iteration or failure to facilitate iterative decisions and action-taking

Since 1994, there has been little iteration in the making of law. Local governance has been one area where the successive post-1994 governments in Malawi have showed poor iteration in law making or failed to catalyse iterative decision-making and action-taking in rural areas to realise the right to development. The Constitution underlines that local authorities have a duty to represent ‘people over whom they have jurisdiction, for their welfare’. Specific duties include the formulation and implementation of local development plans and the encouragement of business enterprise to promote ‘infrastructural and economic development’. The local development plans, according to the Constitution, are to work as demand tools to central government authorities, as the local authorities promote ‘awareness of local issues to national government’. The local authorities have a further duty to consolidate and promote ‘local institutions and democratic participation’, the ‘delivery of essential and local services’, and birth and death registration. Parliament, according to the Constitution, has a duty to ‘provide that issues of local policy and administration be decided on at local levels under the supervision of local government authorities’.

Parliament has passed legislation on local government, but not as envisaged by the Constitution, let alone to facilitate iterative assessments, analyses and actions at local levels. It has amended the Local Government Act several times since its enactment. The Act, however, does not yet facilitate iterative assessments, analyses, and actions, let alone development plans. A Local Government Elections Act exists for the election of leaders at local levels. The absence of effective local government and decentralisation has resulted in numerous development gaps, increasingly occupied by non-governmental organisations (NGOs).

Adequate capacities to demand rights enjoyment and perform correlative duties

The fifth component for dignified well-being is the need to develop capacities to demand the enjoyment of human rights and the performance of duties. For the right to development and other human rights to be enjoyed, duty bearers must respect, protect, promote or provide for the enjoyment of such rights. When this is not satisfactorily done, rights holders need to demand the enjoyment of their rights or the realisation of their aspirations.

A conservative and formalistic approach to human rights enforcement

The realisation of the right to development would, significantly depend on the capacity of rights holders to demand the performance of correlative duties when the right is nor respected, protected, promoted, or fulfilled. Section 46(2) of Malawi’s Constitution provides that ‘[A]ny person who claims that a fundamental right or freedom guaranteed by this Constitution has been

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152 Malawi Constitution (note 2 above) s 146.
153 Ibid.
infringed or threatened’ should be entitled to two recourses. The first is to apply to a court ‘to enforce or protect such a right or freedom’. The second is to apply to the ‘Ombudsman or the Human Rights Commission’ to secure ‘assistance or advice as he or she may reasonably require’.

Malawian courts, particularly the Supreme Court of Malawi, on several occasions, have refused to accept that ‘any person’ should be construed literally. Instead, using English and Australian decisions, the court, unlike other top tribunals in Africa, has held that any person means a person with ‘sufficient interest, special or substantial interest or existence of a legal right or interest in the outcome of a suit’. The Court stated that it wished to ‘make it very clear that there is no reason to make apology for affirming the standard of sufficient interest for determining locus standi, in the field of public law’ and denies that its position is a failure to promote human rights. Instead, the Court has insisted that such a criterion be used in human rights-respecting legal systems and recognised in Malawi’s Constitution. In overruling a High Court Judge who had held that the new Constitution had ushered in an era of public interest and similar litigation, the Malawi Supreme Court of Appeal put its position in these terms:

The concept of locus standi, expressed in terms of **sufficient interest, special or substantial interest** or existence of a **legal right or interest** in the outcome of a suit should not be misunderstood as failure to promote or respect human rights. Respectable democracies renowned for their respect of human rights such as United States of America, some Commonwealth countries including Australia and a number of countries which are parties to the European Convention on Human Rights and Fundamental Freedoms require locus standi expressed in the standard as earlier discussed. Would it be sensible to suggest as Chipeta, J., does that the judiciaries in these countries cling hard to a **narrow, legalistic and pedantic** version of locus standi? The Americans are so proud of their version of locus standi that they entrenched it in their Constitution. There is no justification for us to be too shy to express frankly the idea of **sufficient interest** as a standard for locus standi which our Constitution provides.

Gloppen and Kanyongolo have noted that litigation or use of the courts and other public justice delivery institutions is hampered by a ‘legal culture that is predominantly formalistic, patriarchal and conservative’. They have identified two major factors: lack of litigation support and barriers against public interests litigation. Remedies are too high court-based, in an environment

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156 For example, Regina v Secretary of State for Foreign and Commonwealth Affairs Ex-parte World Development Movement Limited (1995) 1 WLR 386.


158 For example, the Cerac case, ACHPR/COMM/A044/1 (27 May 2002).

159 Civil Liberties Committee v Ministry of Justice note 154 above.

160 Ibid.

161 Trustees of the Public Affairs Committee v The Attorney General Civil Cause 1861 of 2003.

162 Civil Liberties Committee v Ministry of Justice note 154 above (authors’ emphasis).

where redress infrastructure is insufficient, litigation costs are too high for poor people, English is the formal courtroom language, and legal expertise is out of reach. The adverse effects of the adversarial system have exacerbated the courts’ refusals to recognise public interests litigation, insisting on strict criteria for standing.  

(bb) An alternative informal route

Until 2007, a significant and seemingly difficult-to-close gap related to rural people’s ability to demand the enjoyment of their human rights, particularly the right to development. The explanation was that there was little literacy and legal awareness in the country, inaccessibility to public service institutions, and weak local government despite the existence of a policy, a programme, a legal framework, and reviews on decentralisation.  

By 2007, these factors largely remained challenges. For example, by 2006, although 60 per cent of Malawians had heard the term ‘human rights’, only 28 per cent were able to identify two human rights.

However, by 2007, there were signs that it was possible to mitigate such challenges. There were further signs that the work of non-governmental and quasi-public organisations working on human rights education, justice facilitation, and human rights-based empowerment of rural communities was able to catalyse the demanding and enjoyment of human rights and the promotion of public and democratic accountability. These results were largely attributable to a nationwide project on democracy consolidation, governance, and human rights, the Democracy Consolidation Programme.

The project, as implemented, focused on the creation of demand in the realisation of the right to development. It used dialogue and civil liberties instrumentally to create animators, facilitators, and trainers. In particular, one quasi-public organisation, the Development Broadcasting Unit chose deprived and marginalised areas to form radio clubs structured around a radio programme. The clubs would make and record radio programmes and used the recordings for regular iterative dialogue between community members and public functionaries and other service providers. Activities such as these, collective in nature, participatory, and community-owned, generated empowerment, with community members demanding dialogue with political and public functionaries and access and control of services.

Community members demonstrated that their involvement in such activities was resulting in strides towards dignified living. For example, in 2007 the biggest public clinic in Phalombe District was a direct result of a recording

164 Ibid.
166 UNOPS ‘Baseline Survey for Civic Education in Malawi’ (2006) 27.
followed by dialogue with the Malawi Social Action Fund. In the area around the clinic, there is evidence of increased ownership of livestock, fishponds, a maize mill, water pumps, and orphaned children supported using proceeds from the maize mill. Such results can be traced to recordings and dialogues made by members of the Ekari Orama Radio Listening Club. Similarly, in Balaka, the Kachere Radio Listening Club has had a bridge constructed and manages a paraffin pump, among many achievements resulting from its recordings and dialogues with public functionaries and service providers. Communities participating in the project recount dialogues with ministers, members of Parliament, other public functionaries, and representatives of NGOs.

The success of the project is attributable to four factors, none of which relates to legislation passed in Parliament. The first was the project’s gradual focus on the right to development and its components and outcomes. The second was the increasing promotion of a human rights-based approach. This entailed that the focus on outcomes was complemented by focus on human rights principles and a duty-based perspective in the management and implementation of the programme. The third was the use of civil society and quasi-public organisations. One key finding is that government support of civil society is an efficient way of consolidating democracy, realising human rights and catalysing good governance, as civil society and quasi-public organisations outperformed public institutions in efficiency, effectiveness and impact. This was largely because civil society organisations were freed from slow and bureaucratic work processes and adopted activist approaches to their work, displaying a sense of urgency. The fifth was that though answerable to a steering committee chaired by the Chief Secretary to the President and Cabinet, the project office was detached from government, freeing it from the bureaucratic, political, and programmatic limitations associated with government in Malawi.

The positive results in the empowerment of rural people to demand the enjoyment of the right to development are too nascent to offer sustainable dignified living. First, the positive results related to civic education activities and the project performed poorly with regard to law reform and the strengthening of parliamentary and political institutions. Second, there is still low responsiveness from public duty bearers. As against each other, community members were increasingly able to defend the enjoyment of their rights. Public functionaries’ accountability to rights holders remained weak, neglected, and a missing link in Malawi’s democracy. For example, DBU-catalysed dialogues, the most successful, showed a low responsiveness rate from duty bearers. Out of the 47 dialogues stemming from a leading programme, only 17 yielded immediate results. Further, dialogues with NGOs and District Commissioners constituted 60 per cent and 35 per cent respectively, compared to one per cent for politicians and four per cent with traditional leaders, faith-based organisations and others. Third, there is yet to be created a critical mass to sustain any transformation. The radio listening clubs were few and far apart. A key approach under the project, the use of community-based educators appeared
to have reached its stretch, once there was human rights awareness. Further, the resource capacity of civil society organisations was very low and too dependent on donors. Fourth, upper level duty bearers neither recognised nor claimed the enjoyment of their rights for the performance of their duties, preferring to ignore demands from rural people or asking them to provide means for the performance of the public functionaries’ duties. Hence, there was a broken pattern in the performance of duties.

(cc) A possible supplementary approach of demand-based reflexive law

It is ironic that an informal strategy should prove more effective to realise the right to development when both national and international legal systems tend to favour legislation. A necessary question therefore remains whether legislation is a plausible strategy for the attainment of dignified living. The post-1994 governments in Malawi seem systematically to have neglected the use of legislation, preferring to have policies and programmes.

There are at least three reasons for the apparent neglect to use dedicated legislation regarding programmes expressed to be for the direct benefit of rural life. The first is that the neglect of the law allows politicians and political parties to politicise the programmes and thereby consolidate political strength. Political parties controlling the Presidency have used both the Malawi Social Action Fund and the Malawi Rural Development Fund as bait for political support. The second reason is that the operation of the initiatives and programmes unregulated by specialised law allows diversion of resources for personal and administrative convenience. Thus there have been ghost schools, teachers, bridges, and corrupt awards of government contracts. The third reason for the non-use of the law is that implementing such initiatives and programmes allows governmental duty bearers to adopt a charity approach to development. A charity approach, in turn, allows governmental officials not to carry out development work as a matter of duty, and to avoid accountability to rights holders.

An appreciative approach to legislation suggests that potentially, legislation can contribute to dignified living through the facilitation of accountability and participation. Firstly, the General Comments related to well-being show a reliance on legislation for the realisation of human rights. General Comment 12, on the Right to Adequate Food, for example, advises on the use of benchmarks and framework legislation for the respect, protection, promotion and provision for the enjoyment of the right. Similarly, the Committee on Economic, Social and Cultural Rights promotes framework legislation for the realisation of the right to the highest attainable standard of health. General Comments


require the use of legislation as a strategy for progressive well-being with regard to work and water, and as a protective measure against forced evictions with regard to the right to adequate housing. Secondly, legislation is normative, entailing that it can prescribe duties. The existence of a duty establishes a basis for reliance and expectation interests. A duty further entails a trust relation. In other words, there is a fiduciary relationship between State or public functionaries and rights holders. In a similar regard, Cotterrell has suggested that the concept of the trust and its notions could improve accountability and social interdependence if applied to situations where people have developed reliance and expectation interests. Legislation can also regulate democracy and the pursuit for social justice. The law, as a normative system, gives force and facility for the demand that duty bearers must perform their duties properly, but also enables rights holders to demand the enjoyment of their rights. Thirdly, legislation, as a normative system not only operationalises the rule of law, but also provides a sure basis for accountability of those entrusted with governance. The assumption in Malawi’s Constitution is that the State is accountable with regard to the realisation of the right to development. Fourthly, legislation can advance participation if it requires or permits the representation of various interests and reflexive determination of problems and pursuit of aspirations. This potential attribute of legislation appears essential in Malawi, where dialogue among community members seems to yield positive results.

The idea of reflexive law may be worth considering to realise the right to development in Malawi’s context. Teubner has characterised rules or legal systems that promote self-regulation as reflexive. If such rules promote interdependence and participation as methods of control and realisation of aspirations, they could be instruments for the realisation of the right to development. In the words of Barnard and Deakin,

the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation, rather than to intervene by imposing particular distributive outcomes. This type of approach finds a concrete manifestation in legislation which seeks, in various ways, to devolve or confer rule-making powers to self-regulatory processes.

In Malawi, however, the State-based notion of reflexive law however has been characterised by a failure noticeably to contribute to the progressive dignified living of people in rural areas in Malawi. An example of such failure is in the area of local government, where the Constitution specifically requires Parliament to make such law. The research has found that people in rural areas think there is non-compliance with the law at higher levels of governance and absence of law at the local government level. The low satisfaction levels in the contribution of bodies associated with representative democracy and public accountability such as Parliament, and the Malawi Human Rights Commission indicate the need for demand-based reflexive law.

A different form of reflexive law, however, may be suitable for Malawi, where demanding of the enjoyment of the right to development through dialogue and similar means seems to be more effective than litigation. The suitable reflexive law would have to be that which can catalyse collective iterative processes that result in the demand for the enjoyment of the right to development. The State-based law could then respond in two ways. First, it could articulate duties on duty bearers as such duties emanate from the dialogue between rights holders and duty bearers. Second, the law could create remedies and channels to respond to the types of demands articulated by people in rural areas in a quest to enjoy the right to development.

IV Conclusion

Malawi’s enshrinement of the right to development in its Constitution is welcomed by rural people. However, Malawi’s era of multiparty politics has been characterised by the use of legislation not based on this right. In the same period, progressive dignified living, a more holistic concept to measuring the quality of life, has declined if judged according to the components of the right to development as enshrined in Malawi’s Constitution.

The research by the University of Malawi’s Faculty of Law on the linkage between legislation and the quality of rural life has so far established two key points about multiparty politics and legislation. The first is that a transition to a multiparty system of government does not necessarily lead to improvement in the quality of rural life. This is despite that the country’s Constitution requires that the quality of rural life should be a measure for the success of government’s policies and legislation. The second point is that civil society-catalysed iterative processes for the assessment, analyses, and action-taking to advance the enjoyment of the right to development is more efficient, effective, and has a greater impact than the use of legislation and public institutions. In particular, the ability of rural people to demand the enjoyment of the right to development, the reflexive norm-making through dialogues, and public and service providers has proven promising in the production of democratic accountability. The use of legislation may discover its usefulness if it captured such emerging norms and demand-based process, and preserves and encourages them through the authority of the law.