

Hazard or Right?
The Dialectics of Development Practice and the
Internationally Declared Right to Development,
with Special Reference to Indonesia

SCHOOL OF HUMAN RIGHTS RESEARCH SERIES, Volume 31

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Hazard or Right?
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Internationally Declared Right to Development,
with Special Reference to Indonesia

Irene Hadiprayitno



Antwerp – Oxford – Portland

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To that mammon
DEVELOPMENT
our high-priests
sacrifice
our customs
our culture
our traditions
and environment
and nobody cares

From *Kuala Juru – death of a village*
Cecil Rajendra

To the memory of my grandmother, M.P. Ginokariyo (ca. 1922-2008)

PREFACE

Any inhabitant of Jakarta knows that rain does not always bring good luck. The threat of flood during the rainy season has been haunting us annually, particularly during the months of January and February. While the poor suffer most from the detrimental effects of floods, everyone living in this city would be able to tell two or more personal stories about the negative effects of such a disaster. As a response, we Indonesians are capable of always finding ways to accept tragedies as destiny and assure ourselves that what happened is not that bad. Somehow we master the art of discovering the wisdom beneath every unfortunate moment. Nevertheless, floods in Jakarta should not be accepted as just a matter of fate, especially since this adversity cannot entirely fit into the profile of natural disasters. It happens partly because the local government prefers to build malls, hypermarkets or trade centres than deal with the increased loss of vegetation in the upper catchments of the rivers that flow into the Jakarta region.

Reflecting upon my drive to engage into some solid research concerning strenuous issues of human rights and development, I could not escape thinking about this annual tragedy, not only because I have experienced it myself, but also as the local media is now covering these avoidable disasters. Indeed, my focus on the right to development in light of development hazards has not been a coincidence. I sincerely hope that this book may enrich the debates on the right to development, while moving the focus of attention to the protection of victims in processes of imposed development.

Completing this book would not have been possible without the help and support of others. It is more than proper, therefore, for me to take this opportunity to express my sincere gratitude to everyone who has made this work possible. Unfortunately, it is evident that there are so many institutions and persons involved in the process that it is impossible to mention them all. This only shows my limitations and does not mean that their help has not been significant.

My love and thankfulness, first of all, properly go to my husband, Jeroen Zandbergen, for his encouragement and patience that have helped me enduring this journey. I also would like to give my foremost appreciation to my family, especially to my parents, Marcus Hadiprayitno and Lidwina Kamidah, for their prayers that have always brightened my days and for teaching me to live to my full potential.

Moreover, my gratitude goes to Professor Bas de Gaay Fortman, my supervisor, without whose involvement this thesis would not have been completed. His guidance was indispensable and his constant encouragement was fundamentally necessary. I am indebted to my other supervisor, Professor Fried van Hoof, who supported my application to conduct my research at the Netherlands Institute of Human Rights (SIM). His comments stimulated me to think critically. Furthermore, I would also like to thank

Professor Philip Quarles van Ufford for his willingness to be involved in the research. His suggestions were invaluable in improving my thesis and our discussions have always been inspiring. To all of them I owe my greatest intellectual debt.

To the members of the reading committee, Professor Rhoda Howard-Hassmann, Professor M.A. Mohamed Salih, Professor Nico Schrijver, Professor Nico Schulte Nordholt and Professor Cees Flinterman, I would like to present my appreciation for their time and comments on the thesis.

Being Indonesian does not always come with advantages, particularly in relation to field research and data collection. In this regard, I am deeply grateful to the population of Sendang Agung Village, Yogyakarta, not only for their hospitality, but also for giving me permission to carry out this study. I also want to thank Renata Arianingtyas and Atnike Nova Sigiro for their help in opening some doors during the process.

All of my old and new friends in Indonesia and The Netherlands, Indah Susanti, Chiseche Mibenge, Tamara Lahovski, Rizki Pandu Permana and Risma Ikawaty and too many to mention by name, who directly or indirectly made these past six years a fruitful and cheerful experience, I thank them very much. My foremost appreciation goes to my paranymphs, Birsen Erdogan and Bernadette Budhawara, for their support during the defence that took place on 13th February 2009.

I know for sure that the journey would have been tougher without the support of all members of the SIM family, especially the PhD candidates, for creating a pleasant and dynamic working environment. To this institution I owe my intellectual growth. The interdisciplinary approach of my study has benefitted from the welcoming atmosphere of SIM. I want to thank our director, Professor Jenny Goldschmidt for providing the possibility to finalise my research at SIM, and also to Marcella Kiel for her assistance throughout the research. I would like to thank Ian Curry-Sumner and Titia Kloos for editing and arranging the layout for this thesis.

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Utrecht, 23 March 2009

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LIST OF ABBREVIATIONS

ADB	Asian Development Bank
APBD	Anggaran Pendapatan dan Belanja Daerah (Regional Budget Year)
APBN	Anggaran Pendapatan dan Belanja Nasional (National Budget Year)
Apindo	Asosiasi Pengusaha Indonesia (Indonesian Business Association)
Bappenas	Badan Perencanaan Pembangunan Nasional (National Development Planning Board)
Bappeda	Badan Perencanaan Pembangunan Daerah (Regional Development Planning Board)
BPD	Badan Perwakilan Desa (Village Representative Board)
BPS	Biro Pusat Statistik (Central Agency for Statistics)
Bulog	Badan Urusan Logistik (Logistic Agency)
CPI	Corruption Perception Index
CSO	Civil Society Organisations
DAC	Development Assistant Committee
DFID	Department For International Development
DPR	Dewan Perwakilan Rakyat (People's Representative Council – the National Legislature)
DPRD	Dewan Perwakilan Rakyat Daerah (Regional People's Representative Council)
ECOSOC	Economic and Social Council
ELSAM	Lembaga Studi dan Advokasi Masyarakat
EU	European Union
GDP	Gross Domestic Product
HPI	Human Poverty Index
IACHR	Inter-American Court of Human Rights
Ibid	Ibidem
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDA	International Development Assistance
IDEA	Institute of Development and Economic Analysis
IDR	Indonesian Rupiah
INFID	International Forum on Indonesian Development
ILO	International Labour Organisation
IMF	International Monetary Fund
IRN	International River Network

List of Abbreviations

KPPOD	Komite Pemantauan Otonomi Daerah (Monitoring Committee of Local Autonomy)
KPR	Kredit Pemilikan Rumah (Home Loan National Program)
Komnas Ham	Komisi Nasional Hak Asasi Manusia (National Commission for Human Rights)
KONTRAS	Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan (Commission for Disappeared Persons and Victims of Violence)
KUD	Koperasi Unit Desa (Credit for Farmers)
LSM	Lembaga Swadaya Masyarakat
MDG	Millennium Development Goals
MPR	Majelis Permusyawaratan Rakyat (People's Consultative Assembly)
Musrembang	Musyawaharah Perencanaan Pembangunan (Deliberation of Development Planning)
NAM	Non-Aligned Movement
OECD	Organisation for Economic Co-operation and Development
OEWG	Open-Ended Working Group on the Right to Development
OHCHR	Office of High Commissioner for Human Rights
p.	page
pp.	pages
para.	paragraph
PRAMs	Participatory Rights Assessment Methodologies
Pertamina	Perusahaan Tambang dan Minyak Negara (State Oil Company)
Propenas	Program Pembangunan Lima Tahun (Five-year Development Programme)
Puskesmas	Pusat Kesehatan Masyarakat (Sub-District Health Centres)
Repelita	Rencana Pembangunan Lima Tahun (Five-year Development Plan)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
USAID	United States Agency for International Development
WB	World Bank
WHO	World Health Organisation
YLBHI	Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation)

CHAPTER 1

INTRODUCTION

1.1 DEVELOPMENT: HAZARD OR RIGHT?

In a developing country like Indonesia, development is far from being a clear cut matter. Illustrative is the Kedung Ombo Dam Project in Central Java. Partly financed by the World Bank¹, the project was aimed to create a 22.5 megawatts electricity generator, to supply irrigation to 87,000 farms on 59,000 hectares, to control flooding, and to supplement municipal water supplies for urban centres. The Indonesian government and the Bank claimed the project was successful in reaching its objectives.² On the other hand, this massive project has displaced 33 villages in 3 regions in Central Java – Sragen, Boyolali and Grobogan.³ Most families were not aware of relocation plans and the compensation paid by the government was too low.⁴ Such a low amount was in fact not surprising, because it was decided without prior negotiation or even discussion with the owners of the land. As a response, some families asked the assistance of local and national legal aid organisations in order to get more compensation for their land. Some suits were eventually successful. On 28th July 1993, the Supreme Court Decision No. 2263 K/PDT/1991 granted the claims coming from some families of Boyolali to have the government compensate their land according to the market price. Unfortunately, this favourable decision still has to be executed. Twenty-two years after the construction their case is pending⁵ and nearly 2,500 families residing in its surrounding areas continue to live in poverty.⁶ This case illustrates the downside of development: negative effects on entitlement positions of people at the grassroots. The term used in such a predicament is an astonishing euphemism: development-induced displacement.

1 The Kedung Ombo Multipurpose Dam and Irrigation Project was partly financed by Bank Loan 2543-IND, approved in May 1985 for US\$156 million.

2 See: The World Bank, Recent Experience With Involuntary Resettlement Indonesia -Kedung Ombo. Report No. 17540, 2 June 1998, p. 1.

3 The population of the Kedung Ombo area consisted of 21,938 families spread over 33 villages. Erman Rajaguguk, 'Law, Land and the Natural Environment in the Kedung Ombo Greenbelt Area at the Central Javanese Village of Giliredjo', *Law and Society Review*. 28 (1994) p. 623.

4 For compensation the government paid IDR 730/m² for a *pekarangan* (home garden), IDR 360/m² for *sawah* (wetland), and IDR 250/m² for *tegalan* (dry land). The compensation for houses was also considered quite low: IDR 3,080/m² for a semipermanent house and IDR 2,150/m² for a temporary house.

5 'Warga Gedung Ombo Labrak Komnas Ham', *Bernas*, 20 July 2006.

6 'Residents need help moving on', *The Jakarta Post*, 4 March 2009.

Yet, such ‘development’ is supposed to imply progress in the sense of a structural improvement in people’s possibilities to sustain their daily livelihoods, too. Indeed, it is not just economies that are to be uplifted but people themselves: as actors in their own development. Thus, both living standards and capabilities of those living at the grassroots level would be increased. Nevertheless, the example provided above shows that what is done in the name of development does not automatically bring improvement of entitlements for its supposed beneficiaries. Instead, it victimizes them, as a result of misinterpreted development policies. In such a phenomenon one might speak of a *development hazard*.

Development hazards habitually occur when development policies are imposed from above, without any opportunity to participate for those affected at the grassroots. It is particularly large-scale development project that tend to entail such negative consequences for people. Dam construction ventures, such as Kedung Ombo Project, constitute a type of development projects that bring about physical displacement. Studies from all around the world reveal how these plans with their related infrastructure – including power stations and irrigation canals – stand out as the largest source of development hazards.⁷

In some cases people do not benefited from development, because sometimes benefits from those projects could only be enjoyed by some. Others could be negatively affected and, hence without a proper compensation, would directly suffer and become its victims. In this context, calculation of whether development is a hazard or a right is not only on how development project is being implemented at the initial level, but also from the point of view of outcomes; in particular for whom.

In designing development policies, a primary concern should therefore be how to protect those affected by its consequences, and in particular, how to secure their access to decision-making on such policies and their execution. It is here attention is paid to the internationally accepted human rights standards and procedures. Actually, such rights pertaining to each and every human being constitute a response to the necessity of protecting people against abuse of power. As right-holders, those involved in processes of development would find protection against development hazards.

Human rights are intertwined with the pursuit of development. One implication is that a one-sided focus on productivity and macroeconomic growth without regard to implications in terms of people’s actual freedoms and entitlements, contravenes international human rights law.

In respect of development a major human rights instrument is the Declaration on the Right to Development that was adopted by the United Nations General Assembly in 1986.⁸ The Vienna Declaration, ratified at the UN World Conference on Human

7 See for examples: Michael Cernea ‘Understanding and Preventing Impoverishment from Displacement: Reflection on the State of Knowledge’, *Journal of Refugee Studies*. 8 (1995) p. 249, Michael Cernea, ‘The Risks and Reconstruction Model for Resettling Displaced Populations’, *World Development*. 24 (1997) p. 1570.

8 Declaration on the Right to Development. Hereafter: the Declaration.

Rights in 1993, reaffirmed this right to development as a universal and inalienable human right, and acknowledged it as an integral part of fundamental human rights.⁹ As the right to development takes its starting point in the need for consistent implementation of all human rights in all processes of development, there is good reason to take it as a starting point in an analysis of the complex interface between development practices and human rights standards and procedures.

The Declaration on the Right to Development defines development 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.¹⁰ In Article 1(1) the right to development is defined as:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Obviously, development is seen here as a process that encompasses economic, social, cultural and political aspects. Development is claimable as a right because it comprises the entitlement to participation during its process. In its preamble the Declaration states that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development.¹¹ Substantially this implies a structural uplifting that is primarily affecting human beings and not geographical entities.

The Declaration regards those affected by development policies as right-holders, who have to be protected against losing their entitlements. Accordingly, the right to development enables them in their struggles to secure freedoms and entitlements corresponding to their fundamental interests following from their basic human dignity. It stipulates free and meaningful participation and fair distribution of possible benefits as necessary freedoms and entitlements¹²

The history of operationalisation of the Declaration starts from the 1990s, when many development agencies, such as the United Nations Development Programme, have included these essential elements in their policy documents.¹³ The European Commission incorporated elements relevant to this right in their development coopera-

9 Part I, paragraph 10, Vienna Declaration and Programme of Action.

10 Paragraph 2, Preamble, Declaration on the Right to Development.

11 Paragraph 13, Preamble, Declaration on the Right to Development.

12 Andrea Cornwall and Karen Brock, 'Beyond Buzzwords, 'Poverty Reduction', 'Participation', and 'Empowerment' in Development Policies', *UNRISD Programme Paper*, No. 10, November 2005, p. 4-8.

13 UNDP clearly recognised human rights to be part of development cooperation. Two other human rights elements of the right to development have also been included in the UNDP reports, participatory development and distribution of benefits. See for example: United Nations Development Programme, 'Integrating human rights with sustainable human development', *UNDP policy document* (New York: UNDP, 1998).

tion framework based on the Lomé IV Convention.¹⁴ Similar actions were also taken by the Organisation for Economic Cooperation and Development (OECD). Their reports included the importance of a wider concept of development, which embraces, among other factors, people's participation.¹⁵

Nevertheless, inclusion of the basics of the right to development such as participatory development and a fair distribution of benefits in practice appears to be highly problematic. In fact, twenty years on from the Declaration, debates, controversies and scepticism¹⁶ remain, contesting the practical application of this right. Instead of creating improvements in respect of access to resources and increased opportunities for the rights holder in development policies, reality rather reflects development hazards, actually imperilling individual considered to be holder of a right to development.

This study of development and human rights concentrates precisely on that complex interface between these two different domains: human rights as represented by the right to development on the one hand and development as practiced on the other hand. Concretely, the empirical focus of this research is on Indonesia. In order to illustrate this argument attention will be paid to one particular case study in Yogyakarta.

The reason of choosing Indonesia as a reference is as follow. During the New Order regime (1966-1998) Indonesia has enjoyed macroeconomic success and has been praised by international community as an exemplary case study of development. On the other hand, the same international community, but in this context the non-governmental actors, has criticized the non-compliance actions of human rights in development practices in Indonesia during that period. After the Asian monetary crisis 1997-1998, the claimed and internationally praised success became meaningless, and the country needed to re-define its development programmes in accordance with its new committed international human rights norms.¹⁷ This positive development helped creating a good image for the government and it added Indonesia to the list of nations committed to upholding human rights. At the praxis level, this progress provides the Indonesians with legal and political opportunities to assert their entitlements according to universal human rights standards. In respect of development, it also offers more possibilities for the victims of development hazards to seek compensation and at the

14 Lomé Convention is a treaty of cooperation between the Commission, its member states, and ACP countries. The treaty is a mixed agreement as there is no general division of powers defined. The Lomé IV Convention was drafted in December 1989, revised in 1995 and entered into force in 1990-2000.

15 Organisation for Economic Cooperation and Development, Sustainable development strategies: What are they and how can development cooperation agencies support them?, *OECD Policy Brief*, 18 September 2001, p. 4.

16 Arguments in favour and against the Right to Development can be seen for example in Anja Lindross, *The Right to Development* (Helsinki: Eric Castern Pub., 1999) p 70-75.

17 After the New Order, Indonesia issued Law No. 39 of 1999 on Human Rights and Law No. 26 of 2000 on the Human Rights Courts. In October 2005 Indonesia adopted and ratified international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

same time obliges the Indonesian government to take all necessary measures to prevent development hazards.

1.2 METHODOLOGICAL OBSERVATIONS ON HUMAN RIGHTS AND DEVELOPMENT

For this research, the analysis of the right to development in theory and practice takes its methodological starting point in certain observations presented in the *Human Rights* entry in the Elgar Companion on Development Studies.¹⁸ Crucial in this methodology is the distinction between rights that have merely been internationally *declared* and rights that have already been historically *acquired*. In the latter case, the protection provided by legal recognition of the interests at stake refers to actually existing freedoms and entitlements, in the former case these would still have to be acquired. For instance, freedom of speech in some countries is protected by a historically acquired practice of free expression, and in other countries, although based on an internationally declared right, it is structurally violated by those holding political power. In the case of economic, social and cultural rights general recognition at the centres of power in the global economy is even lacking.¹⁹

1.2.1 Human Rights Deficit

Naturally, the ideal environment for the implementation of human rights is where those rights have already been adequately acquired, and where society functions in a way that enables rights to be realised. This implies a well-functioning legal system and a socio-political culture in which human rights have been well received. Accordingly, claims that are based on entitlements connected to these rights are honoured. A judicial machinery exists that provides remedies and compensation for victims of human rights violations.

In the real world, however, the international endeavour for the realisation of human rights suffers from a huge *deficit* that tends to be disguised in the general euphoria of human rights' declarations, conferences, committee meetings and workshops. De Gaay Fortman identifies the manifestations of this deficit in four distinct realms:²⁰

- (1) the precarious struggle against impunity of state-related perpetrators of violations of civil and political rights;
- (2) the apparent lack of protection of minorities;
- (3) the persistent inability of state law to protect people behind the walls of privacy, and its paralysing effects on the struggle against domestic violence; and
- (4) the non-fulfilment of economic, social and cultural rights (ESCR) in a world in which so many people's basic needs apparently remain denied.

18 Bas de Gaay Fortman, 'Human Rights', *The Elgar Companion to Development Studies*. (UK: Edward Elgar, 2006) p. 263.

19 *Ibid.*

20 *Ibid.*

Relevant for an analysis of the right to development are particularly the impunity deficit, including violations perpetrated by non-state actors in economic, social and cultural rights, and structural non-fulfilment of the economic, social and cultural rights of the poor.

Human rights, therefore, often remain confined to an abstract political domain. They do not directly matter for the rights-holders, especially those who are suffering from abuses of power while supposed to be protected from daily hardships resulting from unjust manifestations of power. In regard to development, interests of the poor are often overruled by political considerations or macroeconomic interests. Human rights' protection from development hazards often appears to be limited to just a political discourse. The fact that numerous people are victims of house eviction without acquiring alternative shelter, for instance, confirms that they do not enjoy access to possible benefits of a public housing policy. Especially for the poor, human rights tend to constitute an abstract recognition of their basic needs without guaranteeing any actual entitlements. Yet, for them it is the actual entitlement that matters, not the universally declared rights.

This situation pertains with regard to the right to development. The right to development remains merely a political discourse on the international level, rather than providing actual protection of the declared rights holder against development hazards. In fact, the Committee on Economic, Social and Cultural rights has noted this problem. In their 18th Session, the Committee mentions that the Declaration was not designed to be of use in an 'operational context'. It says that 'although the Declaration rightly emphasises the hitherto long-neglected international dimensions of human rights promotion, its great strength lies more in stating broad principles rather than identifying specific measures to be taken at the country level.'²¹ It is in this light that studies, reviews, lengthy debates and annual resolutions on the right to development that are performed in the United Nations setting have had meagre concrete results and provide hardly any practical implications for the duty-bearers and the rights holder. Anja Lindross argues in this connection that much work at the international level has been poured into theoretical and political debate without any concrete proposals for the national and local levels.²²

1.2.2 The Right to Development as a Tool in Development Practice

Thus, although the idea of human rights is based upon the expectation that evident violations would lead to judicial actions, they often remain without effective implementation. Where the embodiment of the internationally declared rights in national

21 Committee on Economic, Social and Cultural Rights, 'The incorporation of economic, social and cultural rights into the United Nations Development Assistance Framework (UNDAF) process', comments adopted by the Committee on Economic, Social and Cultural Rights, 15 May 1998, paragraph 5.

22 Anja Lindross (1999) p. 83.

legal systems has already been achieved non-implementation tends to be due to two crucial obstacles: firstly, the often prevailing inadequacy of law as a check on power and secondly, the lack of reception of these rights in many cultural and politico-economic contexts.²³

Nevertheless, such critical constraints in the practice of universal human rights do not mean that these rights lose their meaning in development processes and in eradicating poverty. While in Western countries human rights are historically derived through processes of societal transformation, in developing countries these rights are positioned at the beginning of processes of emancipation and social change. Their role, in other words, is not so much *protection*, but rather *transformation*.²⁴ This means that the internationally recognised human rights play their part not merely as legal resources but also as political instruments in the sense of internationally enacted standards of legitimacy that facilitate right-holders in their efforts to secure the necessary entitlements.

Hence, the remaining challenge is the operationalisation of the right to development. In that respect, this right shall be considered both as a legal resource as well as a political instrument.

1.2.2.1 The Right to Development as a Legal Resource

The right to development as a legal resource originates from the United Nations as an internationally authorized setting to declare such a right. This context provides legitimacy in efforts to create more than mere acceptance of the right in the international community, but also *de facto* implementation.²⁵

The construction process of a right also contributes to its legal nature, implying the ways and means in which it relates towards rules and procedures. In this respect Habermas emphasises first pragmatic discourses that initiate legitimate law-making.²⁶ This is followed by a bargaining process and a moral-political process in which ethical questions²⁷ are debated and the universal values are tested on which the right is supposed to be based. In this context, it is the values and goals regarding development and human rights that had to be put to the test of universality. Once such a test succeeds, it will terminate at the level of juridical discourse in which the final outcomes will be in the form of resolutions concerning legal programs and policies formulated in legal language.

23 De Gaay Fortman (2006) p. 263.

24 *Ibid.*

25 Jurgen Habermas, 'Remarks on Legitimation through Human Rights', *the Postnational Constellation, Political Essays* (Massachusetts: MIT Press, 2001) p. 113.

26 Jurgen Haberman, *Between Facts and Norms*. (Massachusetts: MIT Press, 1996) p. 159.

27 Ethical reasoning adopts a collective perspective or a individual perspective. At this level those goals and values that are raised during the pragmatic discourse are reassured, confirmed, or filtered. Results of ethical and bargaining processes should be put to the test of moral discourses. *Ibid.*, p. 160.

The democratic transcendence from pragmatic ideas and moral discourses to formal legality, which occurred during the formulation stage within the United Nations' setting, did indeed serve as a substantial legitimisation with regard to the right to development as a legal instrument. Such a process certainly sustains and cultivates the construction and outcome of a positive right. It implies the orientation towards rules and regulation that function as modern law. This is why the history of the emergence of the right to development becomes important. Pragmatic questions raised and considered during this process reflect rational thought processes and suggest intended objectives.

Moreover, the right to development acquired the character of a legal resource intended to function as law of coercion. Such legitimisation in the process of construction of a right facilitates its implementation and enforcement. It means that the states as duty-bearers must guarantee further legitimate law-making and de facto enforcement.²⁸ Through follow-up rules and regulations and through penalties, if necessary, states must ensure compliant behaviour. Furthermore, they have to create enabling conditions for the realisation of the newly declared right to development.²⁹

Rights as legal resources always relate to corresponding duties. In this regard, Joseph Raz argues that '[t]o say a person has a right is to say that an interest of his is sufficient ground for holding another to be subject of duty'.³⁰ Raz's definition of human rights concentrates on their correlative duties. The existence of corresponding duties and their significance in concrete situations influence the enforceability of human rights. Here lies the basis for litigation in cases involving violation of the right to development, such as what was earlier typified as 'development hazards'.

1.2.2.2 The Right to Development as a Political Instrument

As a political instrument, the right to development must be regarded as standard of legitimacy on the basis of which the right-holders may challenge any execution of power that violates the freedoms and entitlements incorporated in the Declaration. The right-holders can activate the entitlements by necessarily connecting them to the presentation of claims. Claims may be defined as calls for the acceptability of something that is admittedly contestable.³¹ This refers not only to the act of making a justified requirement by the right-holder upon the duty-bearers, but also enjoyment of the possible advantage.³² It corresponds to the freedom of creating an act based on the legal nature of a right that justifies the process and the relevant outcomes. Society in

28 Habermas (2001) p. 115.

29 *Ibid.*

30 Joseph Raz, 'Legal Rights', *Oxford Journal Legal Study* 4 (1984) p. 5.

31 Alan White, *Rights*. (Oxford: Clarendon Press, 1984) p. 115.

32 Andrew Halpin, *Rights and Laws and Analysis of Theory*. (Oxford: Hart Pub., 1997) p. 90.

this regard is expected to function in such a way that rights are respected whilst claims based on entitlements connected to those rights are also honoured.³³

Notably, rights do not function as automatic guarantees, but rather as instruments of mediation and negotiation of claims.³⁴ In this regard, the primary responsibility for their implementation rests with the right-holders. They are the primary actors who can act and present claims based upon their presumed entitlements.

Thus, the right to development as a political instrument signifies the practical application of it in individual or collective action. This tends to elevate the status of enforceability of the right to development. The experiences of several organisations in South America³⁵ illustrate this function. These institutions, which were established as centres of resistance against violations of human rights redefined themselves, expanding their agendas to include projects involving both litigation and active presentation of claims based on economic, social and cultural rights. They are working closely with the right-holder and encourage litigation in the public interest to promote conscientization of people's human rights. In this way legal resources are combined with the use of rights as political instruments. According to their experience, litigation to protect economic, social and cultural rights must be based on careful selection of flagship cases. They also employ forms of collective action which create potentially high social impact that can pave the way for social advances.³⁶ This is where human rights as political instruments can advance the path to empowerment. In turn the impact of collective action encourages a favourable environment for legal activism and therefore promotes the status of the human right in question.

As a political instrument, the right to development should be seen as a way of legitimating development related claims. Hence, it is important to examine the right-holder's perception of what they are due in terms of development-related entitlements. Contrary to regarding the right to development as a legal resource, this cannot simply be deduced from internationally declared standards.³⁷ Such perceived development entitlements are to be determined inductively in communication with the right-holder themselves.

Thus, action-oriented perceptions of the right to development may advance this right not merely as rules and regulations of coercion. This enlivens the right to

33 Bas de Gaay Fortman, *Persistent Poverty and Inequality in an Era of Globalisation: Implications of a Rights Approach*, in Paul van Seters, Bas de Gaay Fortman and Arie de Ruijter (eds), *Globalization and Its New Divides: Malcontents, Recipes, and Reform*. (Amsterdam: Dutch University Press, 2003) p. 156.

34 A.A. Annaim, 'Human Rights and the Culture of Relevance: The Case of Collective Rights', in M. Casterman-Holleman *et al*, *The Role of the Nation States in 21 Century: Human Rights, International Organisation and Foreign Policy*. (The Hague: Kluwer International, 1998) p. 8.

35 For example 'the Legal and Social Studies Centre' in Argentina, 'Forja' in Chile and 'National Network of People's Lawyer' in Brazil. See: Flavia Piovesan, 'The Implementation of Economic, Social, and Cultural Rights: Practical Experience', in Berma Goldewijk *et al*, *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights*. (Antwerp: Intersentia, 2002) pp. 121-124.

36 *Ibid*, p. 124.

37 De Gaay Fortman (2003) p. 158.

development particularly in hazardous situations, such as abject poverty or devastating natural disasters. In extreme settings such as these, judicial coercion is likely neither to be possible, nor would it have much effect. Therefore, in collective action based on the right to development, claims relating to required entitlements will be expressed as a forceful moral rhetoric, with a political case by case approach. Eventually, such action might enhance the quality of development policies.

1.3 FOCUS AND STRUCTURE OF THIS STUDY

As already mentioned above, this thesis sets out to analyse the complex interface between human rights and development. In particular, it focuses on (the lack of) protection in development. Here, the right to development is examined as a potential remedy.

This study focuses on the right to development as the right to processes of development that includes freedoms and entitlements following from *participation*. It specifically concentrates on participatory clauses as stipulated by Article 2(3) and Article 8(2) of the Declaration. In this respect, both articles are considered as having both the protective as well as the transformational functions of human rights, whilst they are also at the same time regarded as two different approaches representing the dynamic of corresponding actors in participation.

Article 2(3) of the Declaration states:

States have the right and the duty to formulate appropriate national development policies that aim 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 fair distribution of the benefits resulting therefrom.

The Article stresses the requirement of participatory processes in development and the duty of the state to provide enabling environment for participation. This is where the right to development is transformed from an idea into practice. It corresponds to what may be seen as a top-down approach to development: programmes and policies confronting people with interventions from above.

Participation is also mentioned in Article 8(2) of the Declaration. Here the term used is ‘popular participation’. It states that:

States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

This type of participation suggests actions on the part of all, first and foremost at the initiative of the right-holder themselves. It is these people at the grassroots level who are seen as actors believing in the impact of their own initiatives. The duty of the State is to create an environment conducive to a dynamic in which people themselves initiate development. What this all means in theory and practice is the focus of this research.

Following the methodological observations on human rights in development, this thesis will analyse especially the entitlement of participation as protected by the right to development as both a legal resource and a political instrument. Here, two assumptions pertain. Firstly, the formal declaration made by states at the international level means that the right to development would have to be officially endorsed by states at the national and the local level. Secondly, codifying the moral ideas behind the right to development will enhance to implementation at the national and local levels. Consequently, the analysis of this thesis is divided in two parts. The first step is to analyse the relevant characteristics of the entitlement to participation in the context of the right to development that may legitimate coercive responses to damages caused by development hazards. The second is to assess the current practices of implementation at the international, national and local levels.

The next chapter focuses primarily on the international legal domain. Thus, the meaning of the right to development is analysed from a legal and jurisprudential perspective. The main objective of Chapter 2 is to scrutinize whether the right to development provide protection to development. Particular attention is also given on the current status of three levels of (non-) implementation: the international, the national and the local.

Chapter 3 aims to understand the phenomenon of development hazards. This chapter assesses the impact of development policies and projects. In this respect, development is analysed from different perspectives, namely economic growth, as a normative concept, and the way in which entitlement positions are being affected. The primary focus of this chapter is the faces and practices of combating development hazards.

Chapter 4 examines the particular protection that the right to development offers to development hazards, which is the entitlement to participation. This chapter discusses the ways and means in which the international community approaches participation in development and how it can be considered as a necessary element in implementing the right to development. Chapter 4 also investigates how the entitlement to participation can function as both remedy and prevention to the phenomenon of development hazards.

The analyses of the dynamics in empirical application of the right to development are divided into three chapters. Chapter 5 examines how the human rights enter the Indonesian domain. It depicts the proliferation of human rights discourse in the legal and political arenas. In this chapter, attention is paid to how they are having an impact while being effectively treated as both legal resources and political instruments. Here, the role and the dynamic relationship between actors in human rights implementation will be examined.

In Chapter 6, the process of development in Indonesia will be discussed. This chapter investigates how the human rights that are acknowledged and incorporated in the Indonesian legal and political system are being adopted in the development process. In this regard, the human rights deficits resulting from development policies

as emergences of hazards will be the focus of the study. Three cases of development hazards in Indonesia will be analysed.

Chapter 7 presents an illustrative history of a development practice in Indonesia in the form of a case study on the Kebon Agung Bridge Construction Project in Sendang Agung village, Yogyakarta. It appraises the entitlement to participation in the village. The case study is analysed using the principle of participation stipulated in the newly implemented decentralisation policy. It particularly examines to what extent participation could be a means to influence development process and also to what extent it is adapted, adjusted or rejected in accordance with the right-holder's or the duty-holders' development interests. This chapter reviews the process of adaptation and implementation of participation by analysing the role and perceptions of all actors involved and the inter-relation between actors.

Finally, Chapter 8 closes the study with a conclusion that assesses whether the implementation of the right to development on the international, national and local levels are interlinked in combating development hazards. In this chapter the struggle between the right to development as both a legal resource and a political instrument will be examined. In particular, attention will be paid to analyse how judicial and moral ideas shape values and practices at the three levels of implementation; the international, the national and the local.

CHAPTER 2

DEVELOPMENT AS A RIGHT: THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

2.1 INTRODUCTION

In Chapter 1 the right to development was already introduced as a possible tool to protect right-holders against development hazards. In this respect, it might serve as both a legal resource and a political instrument. This chapter further elaborates upon the implications of the right to development. In particular it investigates whether the right offers protection in the process of development. For this purpose, the chapter will focus on the meaning and potential implementation of the right to development.

The analysis will be presented in the following six sections. The second section will elaborate upon what it means to establish development as a human rights concern. The third section will describe the history of the right to development. Analysis of the legal basis of the right to development will be provided in the fourth section. Thereafter the fifth section will examine the nature of the right to development as a human right, focusing primarily on the contents mentioned in the Declaration. The sixth section of this chapter will illustrate the current implementation of the right to development at three levels of organisation: the international, the national and the local levels.

2.2 ESTABLISHING DEVELOPMENT AS A HUMAN RIGHTS CONCERN

Amartya Sen, a 1998 Nobel Laureate in Economics, explains development as the expansion of freedom of choice for human beings, both in terms of processes that allow freedom of actions and decisions, as well as the actual opportunities that people have, given their personal and social circumstances.¹ He clarifies that development implies overcoming problems such as persistent poverty and unfulfilled elementary needs, occurrence of famine, and widespread hunger, violation of elementary political freedoms as well as basic liberties, extensive neglect of the agency of women, and worsening threats of our environment and the sustainability of our economic and social lives.²

Establishing development as a human rights concern is a controversial subject as it brings moral dimensions to the development debate. In fact, it leads to a vision of what *ought* to be, contesting this with what is lacking. This is tricky business, as it involves contradictory rationale between the distinct domains of human rights and

1 Amartya Sen, *Development as Freedom*. (Oxford: Oxford Univ. Press, 1999) p. 17.

2 *Ibid*, p. xi.

development. Development theories do not have the same basis as human rights. They originated from the work of economists, while focusing on the State and macro-economic phenomena. The social aspects were secondary to the goal of economic growth and transformation and were used as a means to ensure a more effective use of resources instead of a goal.³ Human rights on the other hand are concerned with the protection of people's actual freedoms and entitlements. It is thus inevitable that current development policies often contradict with human rights, inhibiting people's freedoms and entitlements. This manifests itself in cases of persistent poverty, unsolvable debt burdens and inequitable conditionalities of foreign aid.

First of all, establishing development as a human rights matter implies perceiving the development beneficiary⁴ as right-holder. It means providing human rights protection measures during the development process. In effect, the process of development becomes a human process, a process which aims at empowerment and the uplifting of human dignity. Human dignity refers to the inherent worth of each and every human being, simply as an innate consequence of human existence whether or not an individual person is herself convinced of that.⁵ Inherent means that human dignity is a matter of being rather than having.⁶ Hence, the development process should improve the condition of well-being of the development beneficiaries, and not be measured by physical or statistical indicators only. The Declaration on the Right to Development recognises this by describing development as a process that aims for the constant improvement of the well-being of the entire population and of all individuals.⁷

Particularly for developing countries, this is not a simple matter. There is a contradictory precedence transpiring between development and human rights. Developing countries often focus their development agenda on accelerating their economy, by providing an enabling environment to be conducive to investments and growth, while neglecting people's freedoms and entitlements. It becomes complicated for developing countries as their development agenda is usually confronted with, for example, poverty problems that already impair the capabilities of the development 'beneficiaries' in their social, political and cultural life.⁸ Poverty in general creates a critical vulnerability and

3 Hans Otto Sano, 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development', *Human Rights Quarterly*, 3 (2000) p. 739.

4 The terms development beneficiary in this book refers to the terminology 'benefits' in the Declaration on the Right to Development.

5 Cf. Matthijs de Blois, 'Self-Determination or Human Dignity: The Core Principle of Human Rights', in M. Bulterman *et al* (eds). *To Baehr in Our Minds: Essays on Human Rights from the Hearth of the Netherlands*. (Utrecht: Netherlands Institute of Human Rights, 1998) p. 531.

6 Bas de Gaay Fortman, 'In Search of a New Paradigm: Development Interventionism from a Human Dignity Perspective', *The Development of Religion, The Religion of Development*. (Delft: Eburon, 2004) p. 23.

7 Paragraph 2, Preamble of the Declaration on the Right to Development.

8 An example for this is the road construction projects in Jakarta, Indonesia, where it was observed that development of these transportation infrastructures through land acquisition had added to the problem of the low income people. The Jabotabek (Jakarta Bogor Tangerang Bekasi) Urban Development Project, funded by the World Bank between 1982 and 1992, has displaced over 50,000 people.

subjective daily assaults on human dignity, which imperils not just access to resources but negatively affects the capabilities, choices, security and power of the intended development beneficiary, too. Under such conditions, the instigation of wrong priorities could victimise the intended beneficiary and this is when human rights are needed to provide protection for the development victims.

Secondly, establishing development as a human rights matter will result in granting opportunities for legitimate claims that address correlated obligations or duties. Thus, human rights-based strategies stress availability of remedies and realisation of claims, represented in individual cases or violations. With regard to development, human rights demand the inclusion of right-holders in development policies, which entails both participation in the process and the possibility to claim and seek compensation for lost entitlements.

An illustration on this is the Yanomami Case,⁹ in which a group of civil society organisations (CSOs) filed a petition to the Inter-American Court of Human Rights (IACHR) complaining about the unjust development policies implemented by the Brazilian Government towards the Yanomami groups, the largest Indian tribe in South America.¹⁰ The case found its background in the construction of a road and mining activities in indigenous land in 1973, which led to a massive presence of foreigners in the said territory and had serious effects on the community's well-being, including; the alteration of their traditional organisation, the emergence of female prostitution, epidemics and diseases, forced displacement to lands unsuitable to their ways of life, and the death of hundreds of Yanomamis.

After noting the various legal protections that existed under Brazilian law in 1985, the IACHR concluded that exploitation of natural resources in the Amazon compelled thousands of Yanomami to abandon their homes; that civilian invasions were carried out without prior and adequate protection for the safety and health of the Yanomami and adversely affected the lives, security, health, and cultural integrity of the Yanomami. The State was responsible for failing to take timely and effective measures to protect the Yanomamis' rights to life, liberty, personal security, residence, movement and health. The IACHR recommended that the State proceed to protect the Yanomami and to demarcate the boundaries of the Yanomami Park, to continue adopting preventive and remedial sanitary measures aimed at protecting the life and health of the Yanomami, and to ensure education, and social integration programmes aimed at the

According to a senior advisor of the World Bank, Michael Cernea, compensation in order to relocate was paid only to those who were the owners of the land or of businesses registered in the formal sector. However, even this compensation was not sufficient to buy an alternative plot of similar quality. Tenants received very little, if anything, and some displaced families were made homeless. Many informal businesses were destroyed or relocated at enormous expense with no compensation. Michael Cernea, 'Metropolitan development and compulsory population relocation: Policy issues and project experiences', *Regional Development Dialogue*. 10 (1989) pp. 88-106.

⁹ Yanomami vs Brazil, Inter-American Court, Resolution No. 12/85, Case No. 7615, March 5, 1985.

¹⁰ David Harris and Stephen Livingston, *the Inter-America System of Human Rights*. (Oxford: Oxford Univ. Press, 1998) pp. 323-328.

Yanomami to be carried out in consultation with the indigenous community, as well as expert scientific, medical and anthropological advisors. In 1992, the land of the Yanomamis was finally demarcated as ‘Yanomami Park’.

The Yanomami case demonstrates how development victims can redress a misinterpreted development concept using human rights mechanisms. Development is no longer determined by the power of the State since it can also be claimed by the beneficiary as the legitimate right-holder. As a human rights concern, development honours the entitlements of the right-holder, to be protected and placed at the centre of its process. From the Yanomami case, one can also observe that the language of rights had raised consciousness of the development beneficiaries about their oppression which delivered the possibility of change.¹¹

In summary, establishing development as a human rights concern means granting human rights protection to the intended beneficiaries. Development is determined by the development beneficiaries as both the subject and priority of development, which is therefore considered as having moral and ethical functions to protect their dignity and entitlements. In this respect, development beneficiaries are regarded as right-holders and are thus entitled to claim protection from the related duty-bearers and to use human rights as a legitimate instrument against adverse development policies. Internationally, the declared right to development is a mechanism with which development beneficiaries are juridically enabled to seek realisation for their claims in development processes.

2.3 THE HISTORY OF THE RIGHT TO DEVELOPMENT

The origin of the right to development in international law can be traced back to from the content of the Declaration of Philadelphia adopted by the General Conference of the International Labour Organisation (ILO) in May 1944. This Declaration touches upon the right to material well-being and spiritual freedom.¹² In 1945, the United Nations Charter recognised the subject of international economic and social cooperation, also in the context of development. Article 55 of the Charter stipulates that the United Nations shall promote higher standard of living, full employment and conditions for social and economic progress of development. In Article 56, this commitment is strengthened by stating that all members pledge themselves to take joint and separate action to achieve that purpose.

11 Yash Ghai, in his paper Human Rights and Social Development, argued how the language of rights can raise consciousness and lead to the possibility of change. See Yash Ghai, ‘Human Rights and Social Development’, *UNRISD Programme Paper*. No. 5, October 2001, p. 12.

12 The Declaration of Philadelphia has similar concerns that are touched upon by the Declaration on the Right to Development. The Declaration of Philadelphia Concerning the Aims and Purposes of the International Labour Organisation of 10 April 1944 stated that: ‘all human beings, irrespective of face, creed or sex have the right to pursue both their material well being and their spiritual freedom in conditions of freedom and dignity, of economic security and equal opportunity’. See Anja Lindross, *The Right to Development*. (Helsinki: Eric Castern Pub., 1999), p. 3.

During the preparatory process of the Universal Declaration of Human Rights, the notion of development was also conferred, but not expressly addressed as a right in the Declaration. Article 28 of the Universal Declaration merely recognises the importance of development for the realisation of human rights, by confirming that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration are recognised.

A significant demand for an international right to development transpired in the 1960s, when a numerically dominant group of developing countries emerged as a result of the wave of decolonisation. At the initiative of Sukarno (Indonesia), together with Jawaharlal Nehru (India), J.B. Tito (Yugoslavia), Gamal Abdul Nasser (Egypt), and Kwame Nkrumah (Ghana), a conference of Asian and African states was organised at Bandung (Indonesia), which established the Non-Aligned Movement (NAM). The purpose of the NAM, as stipulated in the Havana Declaration, 1979 is 'to ensure the national independence, sovereignty, territorial integrity and security of non-aligned countries in their struggle against imperialism, colonialism, neo-colonialism, apartheid, racism, including Zionism and any forms of foreign aggression, occupation, domination, interference and hegemony as well as against great power and bloc politics'.

Notably, at that time, there were feverish resentments over the negative consequences of colonialism. The former colonial powers were reticent in recognising continuing obligations towards the people concerned, whereas the Third World countries were undaunted and they called for reparations.¹³ Particularly, these newly-decolonised countries proposed economic development to be an international concern because it was considered as a necessary condition for them to compete and obtain a similar level of prosperity in the developed countries.

The economy of the developed countries at that time was already a step ahead in terms of strategy and innovation. They had established a significant competitive advantage and accordingly taken a protectionist stance to guard their own economies.¹⁴ On the other hand, as a legacy of colonialism, development in the decolonised countries was seen as a process to replicate what had been successfully practised in the developed countries in order to obtain the same level of achievement, while concurrently supplying the demand raised in the developed countries. Naturally, this strategy hindered the process of development based on indigenous resources and competence.¹⁵

13 N.J. Udombana, 'The Third World and the Right to Development', *Human Rights Quarterly*. 22 (2000) p. 763.

14 *Ibid*, p. 760.

15 Evidence corresponding to this historical background is article 5 of the Declaration which stipulates that 'states shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognise the fundamental right of peoples to self-determination.'

From this particular setting, developing countries looked for a formal measure within the human rights framework, a strong international mechanism to effectively address the issues of imbalance in economic development. Development was required to be internationally organised, to deliver a fair transfer of technology, capital, or other goods and services, primarily through foreign aid and investments. In short, it was a call for development cooperation to be regarded as a right and not an act of welfare or charity.¹⁶

Responding to this demand, the United Nations General Assembly (UNGA) adopted several documents on the subject of human rights and development. The General Assembly (GA) Resolution 1161 of 1957, for instance, recognises the element of economic and social progress and the lack of knowledge on how to combine them in such a way as to promote optimum development.¹⁷ The Resolution also states that a balanced and integrated economic and social development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and the observance of and respect for human rights and fundamental freedoms.¹⁸ Later on, the UN Study on Development in 1960-64 suggested the importance of balancing human rights with development and warned against the danger of overemphasising economic development and not human rights.¹⁹

Thereafter in 1961, the United Nations General Assembly adopted Resolution No. 1710 to acclaim the United Nations Development Decade. This Resolution called for all Member States to intensify their efforts to mobilise and support the measures required to accelerate progress towards self sustaining growth.²⁰ In 1964, the United Nations also organised the first United Nations Conference on Trade and Development (UNCTAD), in which it was declared that sovereign equality is meaningless without a more equitable distribution of the world's economic resources.²¹

Aside from all acknowledgements made in the United Nations' documents as to the question of the relationship between human rights and development, formulation of

16 Philip Alston, 'Revitalising United Nations Work on Human Rights and Development', *Melbourne University Law Review*. 18 (1992) p 219.

17 Preamble of the General Assembly Resolution 1161 (XII) 1957, Balance and Integrated Economic Progress, paragraph 2.

18 *Ibid*, paragraph 3.

19 In this regard, study mentioned: 'One of the greatest dangers in development policy lies in the tendency to give to the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten in the preoccupation of the means. Human rights may be submerged, and human beings seen only as instruments of production rather than as free entities for whose welfare and cultural advance the increased production is intended The recognition of this issue has a profound bearing upon the formulation of the objectives of economic development and the methods employed in obtaining them ... the growth and wellbeing of the individual and larger freedom, methods of development may be used which are a denial of basic human rights'. Para 90, UN Doc. E/3347/Rev. 1, *Five Year Perspective, 1960-64*.

20 Resolution 1710 (XVI), The United Nations Development Decade, A Programme for International Economic Cooperation, paragraph 1.

21 Russel Lawrence Barsh, 'The Right to Development as a Human Right: Result of the Global Consultation', *Human Rights Quarterly*. 13 (1991), p. 324.

the designated concept of the right to development was considered a lengthy procedure. Just in the year of adoption of the Human Rights Covenants (1966), the concept of the right to development was firstly mentioned by the Foreign Minister of Senegal, in the context of a call for a new international economic order. Yet, in the following declarations adopted by the United Nations to grant a stronger foundation to human rights and development, particularly the Proclamation of Teheran in 1968,²² the Declaration on Social Progress and Development in 1969,²³ and the Declaration on the Establishment of a New International Economic Order in 1974,²⁴ there was still no reference to the concept of the right to development.

Regardless the lack of enthusiasm in the international arena, in 1972 the concept of a right to development was again put forward by the Chief Justice of Senegal, Keba M'baye, who introduced the concept of the right to development as a human right. At the same time Karel Vasak (later the director of UNESCO's division of human rights and peace) launched his theory on 'the third generation' of human rights, which include the right to peace, the right to healthy and balanced environment, the right to a common heritage of mankind and the right to development.²⁵

Following the ongoing discussion, the UN Commission on Human Rights adopted Resolution No. 4 (XXXIII) of 1977 to advance the development of the right to development.²⁶ This was the first UN's resolution to mention the concept of the right to development. Both M'baye and Vasak were instrumental in ensuring the Commission on Human Rights passed the resolution. In this resolution, the UN Commission on Human Rights decided to pay attention to and prepare a study on the international dimensions of the right to development as well as obstacles hindering the full realisation of economic, social and cultural rights. On the basis of that study, the Commission

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- 22 The International Conference in Teheran addressed the issue of realizing human rights in the international community, and linked human rights to major global issues in a structural approach that stresses the indivisibility of human rights, advocating a global agenda, taking the overall context of the various societies into consideration. In this regard it also refers to the issues of development. See Proclamation of Teheran, paragraph 12 and 13.
- 23 Article 2, Resolution 2542 (CCIV), the Declaration on Social Progress and Development, stipulates that social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice.
- 24 Declaration on the Establishment of a New Economic Order specifically accommodates the subject of the right to development. This Declaration referred to a wide range of trade, financial, commodity, and debt-related issues. Soon after, this was followed by an agenda for a discussion between industrial and developing countries that focused on restructuring the world's economy in order to permit greater participation by, and benefits to, developing nations. Resolution 3291 (S-VI), Declaration on the Establishment of a New Economic Order.
- 25 In his lecture for the Tenth Study Session of the International Institute of Human Rights in Strasbourg 2-27 July 1979, he presented his theory on 'The Third Generation of Human Rights: The Rights of Solidarity'. See: Anja Lindross (1999) pp. 4-5.
- 26 Commission on Human Rights Resolution 4 (XXXIII) of 21 February 1977, the Question of the Realisation of the Economic, Social and Cultural Rights.

on Human Rights Resolution 5 (XXXV) of 2nd March 1979 affirmed the existence of the right to development.²⁷

Unfortunately, regardless of the progress made by the Commission, the substance of the right was considered vague and the Commission on Human Rights was unable to unanimously agree on the resolution.²⁸ The Resolution was mainly advocated by the developing countries, whereas the United States and seven Western States had abstained. The resolution, however, did raise the international awareness about the persistent efforts towards the establishment of the right to development.

At that moment, the Commission established a Working Group of Governmental Expert on the Right to Development in 1981.²⁹ This Working Group has delivered various influential reports that were followed by a positive discussion between the Commission and the General Assembly. Eventually, the General Assembly adopted the Resolution 37/199 to declare that the right to development is an inalienable human right.³⁰ In this resolution, the Commission was also mandated to take necessary measures to promote the right to development and to deliver a draft of declaration on the right to development as soon as possible. In 1984 the Working Group submitted a report, with a draft of the Declaration, at the forty-first session of the Commission on Human Rights.³¹ This report was transmitted to the General Assembly to enable it to adopt the Declaration on the Right to Development. In 1986, the UN General Assembly adopted the Declaration on the Right to Development by a vote of 146 to 1 and 8 abstentions.³²

After the Declaration, it remained necessary to clarify the meaning and the implications of the right to development. In reality, one could observe that not only the developed countries experienced anxiety towards the establishment of the right to development, but developing countries had concerns too. According to Philip Alston, one of the reasons was that these countries were concerned with demanding concessions from the developed countries and constraining them in respect of various policy options, but were unprepared to accept any constraints on their own freedom of

27 In paragraph 4 it was stated that: 'Recommends the Economic and Social Council to invite the Secretary General, in cooperation with United Nations Economic Social and Cultural Organisations and the other competent specialised agencies, to undertake a study on the subject *'the international dimensions of Right to Development as human rights in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the NIEO and the fundamental human needs'* and to make this study available for considerations by the Commission on Human Rights at its thirty-five session.' Resolution 5 (XXXV) of 2 March 1979, the Question of the Realisation of the Economic, Social and Cultural Rights.

28 Anja Lindross (1999) p. 4.

29 Resolution 36 (XXXVIII) of March 1981, the Question of the Realisation of the Economic, Social and Cultural Rights.

30 A/RES/37/199, Alternate approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms, paragraph 7.

31 E/CN.4/1985/11, Report of the Working Group of Governmental Expert on the Right to Development, other title: Declaration on the Right to Development.

32 146 in favour, USA (1) against, and 8 abstentions from UK, France, Japan, Israel, Denmark, Finland, Iceland and Sweden.

action.³³ While the two different positions even in their extreme forms were hardly surprising, they also helped to ensure a relatively unproductive debate. Moreover, there would be many who could argue that the ‘ambit claim’ suggested within the framework of the right to development was much too broad and was actually designed to conceal an effort to accord absolute priority to economic rights at the expense of civil and political rights.³⁴ This was particularly pronounced in the countries that rely their economic policies on the non-democratic systems.

Therefore, although the Declaration had been universally established, it was still complicated to argue if the right to development had delivered its purpose. Its origin, which was based on demands to add a compelling moral dimension to arguments against imbalanced economic development through intensifications of foreign aid and investment, had instituted this right as a ‘state to state’ right. This characteristic generated uncertainty on the question of the right-holder, which inhibited its enforceability and nourished reluctances to implement the right to development.

Recently, the development of the right to development has evolved around the idea of putting the individual at the centre of the development process. The premise was emphasised in the studies performed by the Independent Expert of the Right to Development, Dr. Arjun Sengupta, on the implementation of the right to development as the right to the process of development.³⁵ In one of his reports, he wrote that:

‘The right to development as the right to a process of development is ... the right to a process that expands the capabilities or freedom of *individuals* (emphasise added) to improve their well being and to realise what they value. It is possible for individuals to realise several of the rights separately such as the right to food, or to education, or to housing. Indeed, it is also possible that these rights are separately realised following the human rights approach, that is, with transparency and accountability, in a participatory and non-discriminatory manner, and even with equity and justice. ... The process must be distinguished from the outcomes of the process. The realisation of the different rights, i.e. civil and political rights as well as the economic, social, and cultural rights...’³⁶

Understanding the right to development as a right to the process, which identifies the individual as the main centre of concern, enables the right to be enforced as an ‘individual’ right. The individual is the main beneficiary of development and consequently the holder of the right to development. The primary focus of the right to development is no longer on development cooperation or transfer of resources, but on

33 Philip Alston (1992) p. 220.

34 *Ibid*, p. 233.

35 The mandate of the Independent Expert is to present a study on the current state or progress of the implementation of the RTD. In subsequent resolutions, the Commission on Human Rights also requested the independent expert to focus on specific topics and to prepare additional studies, such as country-specific studies relevant to the proposed operational model of his development compact or a study on the impact of international economic and financial issues on the enjoyment of human rights.

36 E/CN.4/2000/WG.18/CRP.1, Report of the Independent Expert on the Right to Development, paragraph 22.

the protection of as the right-holder against non-fulfilment of their freedoms and entitlements in development processes.

2.4 LEGAL STATUS OF THE RIGHT TO DEVELOPMENT

The right to development is codified in a declaration and is, therefore, non-binding. The only treaty that regulates the right to development is the African Charter on Human and Peoples' Rights.³⁷ In Article 22 of that treaty it is stipulated that 'all peoples shall have the right to their economic, social, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind', and that 'States shall have the duty, individually and collectively, to ensure the exercise of the right to development'. In 2003, another legal basis to the right to development was again granted by the African system of human rights. Article 19 of the Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa presents an elaborate provision on the right to sustainable development.³⁸ This, however, is only binding in a regional human rights regime, for the African states that are party to the African Charter.

Yet one can find a stronger legal basis to the discourse of development and human rights in the United Nations Charter. In general, the Charter recognises the relationship between maintaining international peace and security and the creation of conditions for economic stability. Specifically, Article 55³⁹ asserts the importance of social progress and development and respect for human rights and fundamental freedoms, while Article 56 stipulates joint cooperation for these purposes.⁴⁰

37 In 1981, the African regional human rights system was the first that gave clear legal recognition and expression of the right to development. Early studies on the right to development naturally focused on the African Charter provisions. But, even then, some scholar viewed the right as a derivative of the international community's efforts to operationalise obligation under the Charter of the United Nations (see explanation on the history of the right to development in this chapter). Others argued that the right to development derived specifically from article 55 of the Charter and the African regional system only clarified it and gave it a regional legal recognition. Paragraph 11, E/CN.4/Sub.2/2004/16, the Legal Nature of the Right to Development and Enhancement of its Binding Nature.

38 Article 19, Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa, stipulates that: women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to: a) introduce the gender perspective in the national development planning procedures; b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes.

39 Article 55, the United Nations Charter, states that: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

40 Article 56, the United Nations Charter, all member pledges to take joint and separate action in cooperation with the UN for the achievement of the purpose set up in Art. 55.

Furthermore, the International Covenant on Economic, Social and Cultural Rights (ICESCR) also presents a significant reference to issues of development and human rights.⁴¹ In particular Article 11(1) of the ICESCR asserts the right of everyone to an adequate standard of living and the continuous improvement of living conditions. Notably, by entailing the State's duty to secure continuous improvement of living conditions, the article reflects the substantive content of the right to development. The second part of this article requests the States Parties to take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent. This particular obligation signifies that the State parties to the ICESCR are also bound to the moral ideas of development, including those recognised in the Declaration on the Right to Development. In this connection, Article 11(1) of the ICESCR could also serve as a stronger legal basis for claims related to the right to development.

Additionally, a formal acknowledgment for the right to development is to be found in the Vienna Declaration. Notably, the Vienna Declaration, although not binding, enjoys some reputation in the current debate over the status right to development. Adopted by the UN World Conference on Human Rights held in Vienna in 1993, the Vienna Declaration reflects a new consensus on the right to development and reaffirms this right as a universal and inalienable human right. It also delivered a break-through effect in General Assembly Resolutions on the subject of the right to development between 1993 and 1998.⁴² While resolutions before 1993 simply reiterated the importance of the right to development, the new resolutions after the Vienna Declaration started to include aspects that stemmed from the Vienna Declaration, such as affirming the central role of the individual in development.

Paragraph 10 of the Vienna Declaration mentions that:⁴³

'The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights.'

This paragraph not only stipulates that the right to development is a fundamental human right, but it also asserts that 'the human person is the central subject of

41 Articles 1, 2, 6, 7, 11, 12, 13, and 15 of ICESCR are the most commonly referred to the Right to Development.

42 The resolutions of 1997 and 1998 could not, however, be adopted without a vote [(GA Resolution 52/136 of 12 December 1997 (102-12, 33 abstentions), the states voted against were: Czech Republic, Denmark, Finland, Iceland, Japan, Luxemburg, the Netherlands, Norway, Sweden, United Kingdom and United States. GA Resolution of 52/155 of 9 Dec 1998 (125-1, 41 abstentions)] This was largely due to the developing countries' claim to widen the scope of the resolution, by adding the right to development in the practice of international economic relations and in the bill of rights.

43 Part 1, paragraph 10, UN Doc. A/CONF. 157/23, Vienna Declaration and Programme of Action.

development'. The choice of words in this paragraph represents a compromise made on the right to development. The first part of this paragraph satisfies the proponents of the right to development whereas the latter part is a manifestation of the view of mainly developed countries. The differences in standpoints are further indicated in the subsequent statement which stipulates that 'while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights.' Again, this corresponds to the intention of the developed countries to contain the use of development in non-democratic countries as an excuse for violations of human rights.

In the previous section, it has been introduced how the origins of the right to development contribute to the lack of enthusiasm in the enforceability of the right. This section started by recognising the legal limitation of the Declaration on the Right to Development. Actually, the form of declaration was chosen during the preparatory process to accommodate the early debates over the right to development. It was regarded as a compromise to the on-going demands and the concurrent unfavourable perspectives. Moreover the form of a declaration would allow states to learn the implication of one particular subject, in this regard the establishment of the right to development. During the years surrounding its adoption, development as a human rights matter was considered new and complex. The underlying problems of establishing development as a human rights concern might not be well understood. States, on the other side, were unclear as to how to anticipate all possible consequences of a legalised arrangement. This was why soft legalisation in the form of a declaration provided a more attractive alternative for dealing with such uncertainty. The States were allowed not only to reduce the precision of their commitments but also to protect their interests from the hidden costs or unforeseen contingencies that they might be locked into. Paragraph 10 of the Vienna Declaration represents such uncertainty manifested in a form of different backgrounds and motivations behind the right to development.

However, although declarations are considered to be non-binding, those that have been adopted by the General Assembly are also said to have normative value in certain circumstances. Especially in the United Nations human rights regime, a declaration carries more weight than an ordinary resolution.⁴⁴ It is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated; a common example given for this is the Universal Declaration on Human Rights.

From this perspective, the question of the legal basis of the right to development is, therefore, no longer about whether this right is binding or not, as it has been

44 In this regard Brownlie suggests the UN resolutions as non binding *but* may elucidate and develop the customary law. He goes on by saying that 'when a resolution of the General Assembly touches on subjects dealt with in the United Nations Charter, it may be regarded as an authoritative interpretation of the Charter'. I. Brownlie, *Principles of Public International Law*, 4th Ed (Oxford, Clarendon Press, 1990) pp. 698-701.

declared as a genuine human right, but whether there is a state practice supporting this right to show its lasting importance and applicability. A state practice can be defined as ‘any act or statement by a state from which views about customary law can be inferred; it includes physical acts, claims, declarations in abstracto, national law, national judgements, and omissions.’⁴⁵

In support of this argument, in the study of the Commission on Human Rights on the legal nature of the right to development conducted by Professor Shadrack Gutto, from the University of South Africa, Pretoria, it was argued that voting for the declarations is believed to be the expression of the willingness to abide the content set out in the declarations.

‘The concept of ‘binding’ in relations that create legal obligation needs to be understood not only by lawyers but more importantly by the general public. Existing international and regional human rights instruments – treaties – have different element that make them binding. The expression of consent through signatures and ratifications or accession by state parties is but one element. This is the reason why voting for resolutions and declarations is deemed to be another form of expression of willingness to abide by the requirement set out in such instrument’.⁴⁶

Notably, the positive response acquired with the adoption of the Declaration on the Right to Development (with 146 countries in favour) and the agreement reached in the Vienna Declaration evince the states’ consents to the state practices required to justify the right to development as a human right.

In addition, other positive expressions and acceptances have also been demonstrated in the number of resolutions adopted by UNGA with the aim to strengthen the recognition of the international human rights regime⁴⁷ towards the right to development. A string of resolutions and expert studies have been released to translate this right into applicable recommendations policies. Besides displaying the international commitment to the right to development, this effort also signals a paradigm shift that places development on the agenda as a central element of human rights thought.⁴⁸

Against these arguments, one might conclude that although the commitment to the provisions in the Declaration on the Right to Development may not be legally binding,⁴⁹ the evidence of the state practice manifested in the setting of the United

45 D.J. Harris, *Cases and Material on International Law*. (London: Sweet & Maxwell, Ltd, 1997) p. 58.

46 E/CN.4/Sub.2/2004/16, the Legal Nature of the Right to Development and Enhancement of its Binding Nature, paragraph 41.

47 International regime is defined as norms and decision-making procedures accepted by international actors to regulate an issue or an area. It is composed of widely accepted substantive norms with largely internationalised standard setting procedures and some promotional activity. Jack Donnelly, ‘International Human Rights Regime Analysis’, *International Organisation*. 40 (1986) p. 604 and p. 615.

48 Hans Otto Sano (2000) p. 739.

49 Actually there has been an effort to strengthen the binding nature of the right to development. In the session of the Commission on Human Rights and the General Assembly in 2003, the Commission requested its sub-commission ‘to prepare a concept document establishing options for the implementa-

Nations has the force of consensus and legitimacy which is almost equally binding on all.⁵⁰ The right to development should thus be recognised as a real human right. The international resolutions and recommendations issued by the United Nations as a legitimate international regime show the positions of the states towards the right to development and have created the enhanced expectation that governments will move from merely political commitment to legal obligation for which they may be held accountable.

Therefore, observation of the status of the right to development should be shifted in the practical domain, presenting the real evidence of the efforts to implement the right to development. In Chapter 1 it has been explained that this can be achieved by considering the right to development as both a legal resource and a political instrument. As a legal resource, one would need to study the actual practices, constituting the deployment of a number of tools for monitoring and enforcement process, procedures and mechanisms, as well as their effectiveness.⁵¹ At the international level, these include one or a combination of the following: independent experts, periodic states (or shadow) reports, quasi judicial individual or groups complaints or communications procedure; quasi judicial inter-state communication or complaints procedures; ad hoc finding missions; or permanent and *ad hoc* judicial forums. Moreover, the status of the right to development will also be stronger when sanctions for failure to meet the minimum agreed levels of achievement of the fulfilment of the right to development are clearly defined and effectively and fairly applied.⁵² On the other hand, effective remedies for development victims and survivors of development hazard and non-fulfilment are also put in place. These measures should be made attainable at the level of national implementation.

Furthermore, the evidence of the state practices towards the right to development also enables the political struggles against development hazards. Local human rights groups often acquire greater legitimacy and political prominence in their struggle against human rights violation when the Government makes formal and tactical concessions.⁵³ It encourages them to engage the issue politically and to express the injuries in terms of the legal entitlements deriving from the right to development. Formal institutional arrangements accompanying the state practices towards the right

tion of the right to development and their feasibility, inter alia an international legal standard of *a binding nature*, guidelines on the implementation of the right to development and principles for development partnership'. The reference to a binding legal instrument came from an initiative of the Non-Aligned Movement (NAM) at its meeting in Malaysia earlier that year. See, Stephen Marks, the Obstacles to the Right to Development, unpublished paper (2003) p. 3, retrieved online http://www.hsph.harvard.edu/xfbcenter/FXBC_WP17--Marks.pdf, at October 29, 2008 at 11.50.

50 E/CN.4/1999/WG.18/2 Study on the current state of progress in the implementation of the Right to Development, paragraph 6.

51 E/CN.4/Sub.2/2004/16, the Legal Nature of the Right to Development and Enhancement of its Binding Nature, paragraph 46.

52 *Ibid*, paragraph 47.

53 Ryan Goodman and Derk Jinks, 'Measuring the Effects of Human Rights Treaties', *European Journal of International Law*. 14 (2003) p. 176.

to development are also likely to increase awareness and documentation in human rights violations in development process. As more parties are involved in practice, the more human rights violation will be recorded and exposed and therefore the related duty-bearers are forced to meet their obligations.

2.5 CONTENT OF THE RIGHT TO DEVELOPMENT

The right to development has been declared to vest the development process with the legal protection afforded to all human rights.⁵⁴ The provisions contained in the Declaration attempt to combine the different links between human rights and development. It incorporates development, civil and political rights, and economic, social, and cultural rights into one framework. This right includes an ambit claim on sovereignty over natural resources, self-determination, popular participation in development, equality of opportunity, equitable distribution and the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights.

The Declaration on the Right to Development defines the right to development as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.⁵⁵ Based on this definition, the right to development suggests two entitlements in the development process; *a substantial entitlement*, in relation to the fair distribution of development benefits, and *a procedural entitlement*, which is related to the involvement of the right-holder in the development process. This section will first discuss the entitlement of fair distribution and later elaborate the question of participation in the development process.

2.5.1 Fair Distribution

The entitlement to fair distribution of development benefits is recognised in Article 8(1) of the Declaration on the Right to Development. This article evokes the entitlement of the right-holder in terms of access to basic resources, education, health service, food, housing, employment and *the fair distribution of income*.⁵⁶ In a similar vein, Article 2(3) also highlights the obligation of the State to formulate appropriate national development policies that aim at the fair distribution of the benefits resulting from development.⁵⁷

54 The right to development is more than development itself; it implies a human rights approach to development, which is something new. Paragraph 44, E/CN.4/1995/11, Report of the Working Group on the Right to Development.

55 Article 1(1), Declaration on the Right to Development.

56 Article 8(1), Declaration on the Right to Development.

57 Article 2(3), Declaration on the Right to Development.

The entitlement to fair distribution of benefits was again reaffirmed in the Vienna Declaration. Paragraph 11 of the Vienna Declaration extends the notion of equitable access to the benefits of development to embrace the notion of intergenerational equity.⁵⁸ It states that, ‘the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.’⁵⁹ Such developmental needs, quoting from the UNGA Resolution on the World Social Situation,⁶⁰ include for example employment, education, health, nutrition, housing facilities, crime prevention and the wellbeing of children.

Fairness in distribution of benefits for the development beneficiary implies that development policies ought to be impartially designed to serve and to be favourable for everyone. As it has been argued above, development used to be identified with economic indicators, which revolved around accelerating growth. However, this precedence does not always have an auspicious effect for the entire population. Some might benefit more than others. Hence, a provision on fair distribution of benefits is a valuable instrument to address such problems in the development process. It entails viewing development’s benefits as an entitlement of the entire population to improve their well being.⁶¹

The entitlement of fair distribution of benefits may be regarded as the core of reasoning to use the right to development as an instrument against development hazards. It implies that structural degradation caused by development could actually be addressed. This entitlement does not exist in either the ICCPR or ICESCR. Particularly, compare to the economic, social and cultural rights that are arguably relevant in the context of development, the entitlement of fair distribution of benefits inserts an additional meaning to how development should function.

The entitlement to fair distribution of benefits suggests that there have to be beneficial effects in development processes and they will be distributed fairly among right-holders. That calls for a mutually advantageous relationship between the developers (the state or other development agents) and the beneficiaries. Therefore, harmful activities should be structured so that those who reap the benefits must bear the burdens.⁶² Such liability is regulated particularly in the field of tort law.⁶³

58 Anne Orford, ‘Globalisation and the Right to Development’, in Philip Alston (ed), *Peoples Rights*, (Oxford: Oxford Univ. Press, 2001) p. 140.

59 Paragraph 11, Vienna Declaration.

60 A/RES/45/87, World Social Situation. This resolution was adopted by 146 to 1 (USA) with 4 abstentions (FRG, Israel, Japan, and UK).

61 The concept of ‘wellbeing’ in this context extends beyond the conventional notions of economic growth. It includes the expansion of opportunities and capabilities to enjoy those opportunities. See Arjun Sengupta, ‘On Theory and Practice of the Right to Development’, *Human Rights Quarterly*. 24 (2002) p. 848.

62 Gregory C. Keating, ‘Distributive and Corrective Justice in the Tort Law of Accidents’, *Southern California Law Review*. 74 (2000) p. 195.

63 Tort law regulates trespass, nuisance, waste, detinue, conversion or trover, breach of statutory duty, libel, slander, deceit, slander of goods and slander of title, passing off, conspiracy, malicious prosecution, maintenance, inducement of breach of contract, domestic relations and negligence. See: C.A.E.

Tort law can be viewed as having two broad functions; compensation and punishment. The compensation function focuses on the victims' losses arising out the damaging event and serves to satisfy the victims' needs. Whereas the punishment function focuses on the quality of the injurer to rectify the victims' loss.⁶⁴ In principle, tort law allows an injured party in development processes to act against a perpetrator who has caused damages so that the costs of the degradation of their quality of life can be quantified and reflected in an award of compensation. In this regard, negative consequences of development processes, which can be observed through the occurrence of damages, correspond to the failure in honoring the entitlement to fair distribution of benefits and this can be redressed through a legal action that aim to seek for a compensation.

In practice, an example of applying this entitlement of fair distribution of benefits could be employed in the struggle against corruption, collusion and nepotism. Clearly, the occurrence of these development diseases reflects injustice in the development process and they infringe upon the idea of development that should be mutually beneficial to all parties. These errant practices violate the entitlement of others for the purpose of vested interests, where only one party would be counted as having the benefits of development. As a result, such development processes create more inequalities by keeping the poor in their disadvantageous position

In summary, the entitlement of fair distribution provides protection for the legal actions taken by the right-holders against injuries occurred because of the injustice in distribution of development benefits. Applying the tort law in the implementation of this entitlement adds a legal value to the implement of the right to development and provides the entitlement to acquire remedies for forms of deliberately inflicted harms, caused by unaccountable and hazardous development policies, programmes, and projects. In particular the imbalance in the failed development processes may be corrected from the victims' viewpoints.

2.5.2 Participation

The procedural aspect of the right to development aims at the inclusion of the right-holder in the development process. In this regard, the Article 2(3) of the Declaration emphasises that participation is crucial in reaching the ultimate objective of the development process and therefore states are obliged to formulate the favourable development policies that accommodate participation.⁶⁵ The Article 8(2) of the

Uniken Venema, *Van Common Law en Civil Law: Inleiding tot het Anglo Amerikaanse recht in vergelijking met het Nederlandse*, (Zwolle: Tjeenk Willink Pub., 1970) pp. 99-100.

64 David G. Owen, 'Deterrence and Desert in Tort: A Comment', *California Law Review*. 73 (1985) p. 666.

65 Article 2(3), Declaration on the Right to Development stipulates that: states have the right and the duty to formulate appropriate national development policies that aim 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 fair distribution of the benefits resulting there from.

Declaration also uses a comparable approach, although it introduces the term of ‘popular participation’. Using ‘popular’ as an integrated concept of participation, this article suggests a different way of looking at how participation should be conducted.⁶⁶

Both articles show strong emphasis in participation as a principle to implement the right to development. The right to development entails an entitlement to be consulted and to be involved in the formulation of development policies. In fact, participation is the cross-cutting principle in the right to development and enables it to be characterised as a ‘participatory right’.⁶⁷

At the national level, the freedom and entitlement to participate should be honoured as a right guaranteed by the national legislation, granting it not only in the civil and political arena, but also in economic, social and cultural life.⁶⁸ This entails ensuring the access to participate in the decision making of development policies, securing the entitlement of right-holders, not only to prevent injustice resulting from development policies, but also to seek remedies if such injustice occurs. In this regard, participation is taking the form of a political action in addressing injustice of development processes, which could add or replace the possibility of a legal action. Ultimately, the objective of the principle of participation is to add value to development processes at the national level. Development is not merely about improving living conditions but more importantly it is about advancing the positions of the right-holders. An active involvement of the right-holders represents their political or leverage positions.

From this perspective, one might conclude that the right to development attaches a new consequence to the discourse on human rights, particularly with regard to the implementation of the economic, social and cultural rights. While economic, social, and cultural, rights require the process of promoting and protecting the availability of and access to resources, participation according to the right to development enriches that process with the entitlement to be consulted and involved in the decision making policies towards the realisation of this set of rights. For example, realising the right to development in relation to the right to food will not only require a state obligation to the availability of food resources, but also the opportunity and access of the right-holder to participate in the state’s decision making on food policy. Similarly, for health issues the right to development introduces the involvement of the rights holder in the formation of health policies.

In this regard, the entitlement to participation of the right to development possesses a transformational value for the right-holders. Their ultimate aim in development process is not merely to fulfil of material needs, but the right to development also empowers them to politically address the injustice occurred in development processes.

66 Article 8(2), Declaration on the Right to Development, stipulates that: states have the right and the duty to formulate appropriate national development policies that aim 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 fair distribution of the benefits resulting there from.’

67 Konrad Ginther, ‘Participation and Accountability: Two Aspect of the Internal and International Dimension of the Right to Development’, *Third World Legal Studies*, (1992) pp. 55-57.

68 E/CN.4/1994/21, Question of the Realisation of the Right to Development’, paragraph 43.

In effect, as the political action is coming from the side of the right-holders, this will help to expose more human rights violations and add to the efforts of promoting human rights in general.

2.6 THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT

In this section discussion will centre on the nature of the right to development as a human right. The first sub-section will go into ‘the third generation’ character of the right to development. This will be followed by clarifying the three categories of right-holders mentioned in the Declaration on the Right to Development; states, people and individuals. Thereafter, the third section will deal with the duty holders of the right to development, both state and international organisations, in this regard particularly international financial institutions. The last sub-section is devoted to the right to development as a composite of rights, a perspective suggested by the Independent Expert of the Right to development.

2.6.1 ‘The Third Generation’ Character

The notion of ‘three generations’ of human rights was advanced by the French jurist, Karel Vasak. He was inspired by the three themes of the French Revolution, which were: ‘the first generation’ of civil and political rights (*liberté*); ‘the second generation’ of economic, social, and cultural rights (*égalité*); and ‘the third generation’ of solidarity rights (*fraternité*). Vasak’s model is, of course, a simplified expression of an extremely complex historical record. Moreover, it is not intended to suggest a linear process in which each ‘generation’ gives birth to the next and then the former dies away. Nor is it to imply that one ‘generation’ is more important than another. ‘The three generations’ must be understood to be cumulative, overlapping, and, it is important to note, their interdependence and inter-penetration.⁶⁹

‘The first generation’ of human rights stresses the concept of individualism. These rights eventually became known as civil rights or freedom rights. They aim to protect the individual against unnecessary interference by the state within her or his private sphere of life. Belonging to ‘the first generation’ are the rights set forth in Articles 2 to Article 21 of the Universal Declaration of Human Rights (UDHR), and of course, those rights regulated in the International Covenant on Civil and Political Rights (ICCPR).

‘The second generation’ of human rights is mainly accommodated in Articles 22 to Article 27 of the UDHR. They are formally adopted in the Covenant International

⁶⁹ In this regard, Stephen Marks argues that: ‘not only is proliferation of rights considered to be dangerous, but also the use of the term ‘generation’ implies, the detractors say, that the rights belonging to earlier generations are outdated. It is also frequently said that the new generation of rights is too vague to be justiciable, are no more than slogans...’. Stephen Marks ‘Emerging Human Rights: A New Generation for the 1980s?’, *Rutgers Law Review*. 33 (1981) pp. 435-451.

Covenant on Economic, Social and Cultural Rights (ICECSR). This ‘generation’ of human rights also signifies individual rights that are based on the equality idea of livelihood.⁷⁰ Therefore they require state interventions and realisation programmes. ‘The second generation’ of rights brings the positive nature into human rights with the notion of ‘rights to’ instead of ‘freedom from want’, which were possessed by ‘the first generation’ of human rights and gave the negative nature of them.

‘The third generation’ of human rights is composed of solidarity and collective rights, which emerged as a product of the dynamic nature of the nation States in the latter half of the twentieth century. It found its main legal basis under Article 28 of the UDHR, which proclaims that ‘everyone is entitled to a social and international order in which the rights set forth in this declaration can be fully realised’. The rights that belong to this ‘generation’ are the right to peace, the right to self-determination, the right to common heritage of mankind, the right to a clean and healthy environment, and, of course, the right to development.

According to Karel Vasak, the problems confronting any contemporary society can no longer be solved by even the most resolute action of any single state. A state on its own cannot satisfy the obligations imposed by even the first and second ‘generation’ of human rights.⁷¹ Indeed, the objectives of the ‘third generation’ of human rights are to respond to the rapid dynamic of global interdependence, to overcome the autonomy of competing individuals and to achieve a social solidarity that will enable individuals to develop their full human potential through cooperative participation in the social life of the various communities to which they belong.⁷²

‘The third generation’ of human rights entails numerous joint obligations of individuals, states, other public bodies, private groups and the entire international community. Maintaining peace, protecting the environment, and encouraging a sustained and equitable development of all economies require cooperative action on the national and, especially, the international level. Because of these characteristics, ‘the third generation’ of human rights are also defined as solidarity rights. Actually

70 Some argue that this generation of human rights came from communist countries. They considered human rights depending on the particular situation of a particular country at a particular time, which correlates to Karl Marx’s idea of human rights. Karl Marx was one of the strongest critics of the American and French human rights documents. He emphasised that the rights of the human rights documents originated from the capitalist bourgeois society in which the social nature of people is ignored and in which egoistic individuals, separated from their fellow people, merely looked after their own interests. According to Marx, the human rights of the famous documents only guaranteed freedom and equality in a formal-juridical sense, which implied that in reality those rights would be of benefit to the bourgeoisie, those who own and control the means of production, at the expense of the least advantageous. This started the Marxist idea that human rights do not enable people to live a life worthy of human beings if certain economic and social preconditions are not met. Rob Buitengeweg, ‘Dilemma of ‘Development’: The Right to Development as a Human Right?’, *Peace & Change*. 22 (1997) pp. 414–431.

71 Roland Rich, ‘The Right to Development: A Right of Peoples’. in James Crawford (ed.), *The Right of Peoples*, (Oxford: Clarendon Press, 1988) pp. 39-41.

72 Carl Wellman, ‘Solidarity, the Individual and Human Rights’. *Human Rights Quarterly*. 22 (2000) p. 642.

solidarity is needed in both the first and ‘the second generation’ of human rights. However, ‘the third generation’ of human rights requires a primary focus on solidarity.

Notably, the right to development embraces joint obligations contained in ‘the third generation’ of human rights. First, it addresses the cooperation between States, both bilaterally and multilaterally. Article 3(1) of the Declaration stipulates that States ‘have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development’. This article suggests that states are not the only actors responsible to create favourable conditions to implement the right to development within their jurisdiction, but there is also the responsibility to create favourable international conditions, which naturally requires coordinated joint actions. In the same vein, Article 3(3) also implies joint obligations. It calls for a multilateral approach to realise the right to development, specifying that states have the duty to cooperate with each other in ensuring development and eliminating obstacles to development.⁷³ Nevertheless, while the joint obligations thesis reigns supreme, it does not seek to exclude the role of the individual entirely,⁷⁴ especially as the right-holder.

2.6.2 *Right-holders: State, People or the Individual?*

One of the obstacles that inhibit the implementation of the right to development is whether this right should be identified as a people’s right, a states’ right or an individual’s right. This question arises because the right to development implies the fulfilment of the right to self-determination, which venerates people as the right-holder. In Article 1(2), the Declaration asserts this by stating that ‘the human right to development ... implies the full realisation of the right of peoples to self-determination’.⁷⁵ The second classification occurs because the right to development enables states to address imbalance as an entitlement for the development cooperation. Article 3(3) affirms this entitlement by stating that ‘states have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realise their *rights* and fulfil their duties in such a manner...’⁷⁶ Confusion transpires since Article 2(1) of the Declaration strongly affirms that the human person *is* the central subject of development.⁷⁷

Establishing people as the right-holders is a common phenomenon in the third ‘generation’ of human rights. This does not mean, however, that the first and second ‘generations’ of human rights ignore the notion of people. In fact, people as the right-holders have a strong legal basis in the two major main human rights covenants;

⁷³ Article 3(3), Declaration on the Right to Development.

⁷⁴ Article 2(2) of the Declaration says that ‘all human beings have a responsibility for development, individually and collectively...’

⁷⁵ Article 1(2), Declaration on the Right to Development.

⁷⁶ Article 3(3), Declaration on the Right to Development.

⁷⁷ Article 2(1), Declaration on the Right to Development.

Article 1 of both the ICESCR and the ICCPR acknowledges people as the right holders in respect of self-determination. In relation to the right to development, Article 1(2) asserts the right of peoples to dispose freely of their natural resources and that in no case a people may be deprived of its means of subsistence.

Nevertheless, establishing people as the right-holders of human rights is not without any complication. In this regard, Donnelly once argued, if the right to development is given to others, in this regard the state or the people it can be misused.⁷⁸ According to the origin of the notion of people and its definition in international law related to the minority issues, establishing people as the right-holder to the right to development is considered debatable.⁷⁹ Particularly, understanding the right to development as a state right will represent a radical re-conceptualisation of human rights and an especially a dangerous one as the designated right-holder could at the same time be the potential actor that infringe human rights.⁸⁰ Human rights are rights that protect the individual against the State or in other words ensure that the State guarantees to each individual certain minimum goods, services and opportunities.⁸¹ Thus the motivation to establish state as the subject in the right to development would be irrelevant.

Furthermore granting the right to development to people can also lead to similar risk, interpreting it as ‘the right of the states’. Examples to this are easy to be found in many Asian governments. Yash Ghai, who specifically questioned the championing of the right to development by Asian governments, says that the support of this right by those governments is part of a broader agenda of establishing the primacy of

78 The discussion on the right to development to be given to people and state rather than individual can be found in: Jack Donnelly, ‘In Search of the Unicorn: the Jurisprudence and Politics of the Right to Development’ in *California Western International Law Journal*. 15 (1985) pp. 473-475. In this article Donnelly sees a close connection between understanding people and state as the subjects to the right to development. Donnelly perceives the term of people as an obstacle to the promotion of human rights. He argues how human rights can be misused if they are given to others rather than an individual. He said that ‘in the case of a right held by a people, or by society as a whole, the most plausible ‘person’ to exercise the right is, unfortunately, the state’.

79 The notion of people is related to the principle of self-determination and that may be defined as a group which has a distinct character defined by a number of varying criteria such as race, nationality, culture, language, religion, etc. Defining the right-holder of the right to development cannot the same kind of criteria that have been used to define minorities, because the right to development aims at the improvement of every right-holder and is not established only to protect entitlement of some groups. Furthermore, although the right to development emerged with the demands raised within the newly decolonised states in the 1960s that considered themselves as minorities in the world systems, this argument cannot be applied to examine the newly decolonised states as minority against other powerful states as the majority. See James Crawford, ‘The Right of Peoples: Peoples or Governments?’, in James Crawford (ed.), (1988) p. 5, and John Rawls, *The Law of Peoples*, (Cambridge: Harvard Univ. Press., 1999) pp. 23-25. There are also particular difficulties in identifying ‘minorities’ and ‘people’. See for example: Peter Malanczuk, *Akehurst's Modern Introduction to International Law*. (London: Routledge, 1997) p. 105.

80 Cf. Bedjaoui, ‘The Right to Development’ in M. Bedjaoui (ed.), *International Law: Achievement and Prospects* (Dordrecht: Martinus Nijhoff, 1992) p. 1184.

81 Jack Donnelly (1985) p. 498.

economic development over human rights.⁸² The promotion of this ideology justifies repression in the national domain and the evasion of responsibility abroad.

Based on this argument, this study focuses specifically on the right to development in its individual dimensions. This will be done without disregarding the Global Consultation (1990),⁸³ the UN General Assembly resolutions⁸⁴ the working groups' report,⁸⁵ and the Declaration on the Right to Development, which all states individual, peoples, and States as the right-holders. This is not only to enhance its practicality and to avoid those misinterpretations that are not favourable to the right-holder, but also it is congruent with the main definition of the right to development provided in the Declaration. Article 1(1) of the Declaration on the Right to Development explicitly asserts that it 'is an inalienable human right by virtue of which every *human person* and all peoples are entitled...'⁸⁶ Moreover, Article 2(1) of the Declaration also provides a stronger provision by affirming that 'the human person is the central subject of development...'⁸⁷ Not only that, the status of the human person as the subject of the right to development has acquired similar if not stronger recognition in the UN's resolutions and reports⁸⁸ and been also been emphasised in the Vienna Declaration. Particularly in the Vienna Declaration, the human being was unanimously confirmed as the central subject of development.⁸⁹

Thus, the terms people and state as used in the Declaration as an environment in which individuals as right-holders are bound to advance their entitlements. Indeed, the debate about whether the right to development is an individual's or people's right is considered as being rather pointless since an individual's rights cannot be exercised in isolation from the community.

2.6.3 *Duty-Bearers of the Right to Development*

Article 10 of the Declaration on the Right to Development states that 'steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative

82 Yash Ghai, 'Human Rights and Governance: the Asian Value', *Asian Pacific Journal on Human Rights and International Law*. 1 (2000) p. 21.

83 E/CN.4/1990/9/Rev.1, Report on the Global Consultation on the Realisation of the Right to Development, paragraph 147; See also R. L. Barsh, 'The Right to Development as a Human Right: Result of the Global Consultation'. *Human Rights Quarterly*. 13 (1991) p. 329.

84 A/RES/48/130, Preamble; A/RES/49/183, paragraph 1; A/RES/50/184 paragraph 1; A/RES/52/136, paragraph 1; A/RES/53/155 paragraph 2.

85 E/CN.4/1993/16, paragraph 15; E/CN.4/1994/21, paragraph 35.

86 Article 1(1), Declaration on the Right to Development.

87 Article 2(1), Declaration on the Right to Development.

88 A/RES/48/130, Preamble; A/RES/49/183, paragraph 1; A/RES/50/184 paragraph 1; A/RES/51/99, paragraph 2; A/RES/52/136, paragraph 2; A/RES/53/155 paragraph 2. The high level task force on the right to development also emphasises individual as the right holder in the criteria for assessing the realisation of global partnership of the right to development. E/CN.4/2005/WG.18/TF/3, paragraph 82.

89 Vienna Declaration, part I paragraph 10.

and other measures at the national and international levels'. The Article implies that there are two natures of obligation in respect to the right to development, namely the state obligation and the international obligation. The following sub-sections discuss these obligations in the respected order.

2.6.3.1 State Obligations to the Right to Development

The Declaration asserts the central role of state as the duty-bearer to the right to development. Article 3(1) says that: 'states have the primary responsibility for ... the realisation of the right to development'. Similarly, the African Charter on Human Rights,⁹⁰ the Vienna Declaration,⁹¹ and various UN resolutions on the right to development⁹² also emphasise the respective role of the states as the main duty-bearer.

The Declaration mentions a range of states obligations to the right to development. They include the responsibility to create enabling environments for the right-holder to fully realise the right to development. In this regard, it is the duty of the State to formulate appropriate national development policies and to undertake all necessary measures for the realisation of the right to development and encourage popular participation. States are also obliged to remove obstacles to development resulting from failure to observe civil and political rights as well as economic, social, and cultural rights⁹³ and to eliminate the massive and flagrant violations of the human rights affected by situations such as apartheid, racial discrimination, colonialism, foreign domination.⁹⁴

The right to development covers progressive realisation of civil, political, economic, social and cultural rights. Therefore, an analysis of the characteristics of the state obligations concerning this right has to focus particularly on the International Covenant on Economic Social and Cultural Rights (ICESCR). Many authors have elaborated on the states' obligations, creating divers typologies. However, in spite of different wording, the essence of each level and typology is similar.⁹⁵ This research

90 Article 22, African Charter of Human Rights stipulates that: 'states shall have the duty, individually and collectively, to ensure the exercise of the right to development.'

91 Vienna Declaration, part I paragraph 10.

92 A/RES/52/136, paragraphs 5 and 6; A/RES/51/99, paragraphs 2, 6, and 11; A/RES/50/184, Preamble

93 Article 6(2), the Declaration on the Right to Development.

94 Article 5, the Declaration on the Right to Development.

95 Typology of obligations of the State under ICESCR. See M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research Series, Utrecht University, (Antwerp: Intersentia, 2003).

shall use the typology of states' obligations adopted by the Economic Social and Cultural Committee. This typology was also acknowledged as the state obligations to the right to development by the Intergovernmental Group of Experts on the Right to Development. In their report on the Questions for the Realisation of the Right to Development, the Group of Experts affirmed that 'state responsibility for the realisation of the right to development can also be examined at three levels: the obligation to respect, the obligation to protect, and the obligation to fulfil'.⁹⁶

State Obligations to Respect

The obligation to respect requires the state, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the right-holder or infringes on his or her opportunity to exercise the right to development. Actions or policies that may contravene the obligation to respect include the adoption of laws or policies manifestly incompatible with human rights standards, or other international legal obligations, or in pre-existing domestic law, and the repeal or suspension of legislation necessary for the continued enjoyment of human rights.⁹⁷

In the Declaration on the Right to Development, the obligation to respect is regulated in Article 6(1). This Article requires the State to have respect for all human rights and fundamental freedoms without any distinction as to race, sex, language or religion.⁹⁸ In light of this article, the Report of the Intergovernmental Group of Experts mentions the obligation of states to take economic and social measures to avoid the exclusion of certain marginalised groups.⁹⁹ In a similar vein, the Commission on Human Rights has called for a gender perspective and gender analysis in relation to the right to development.¹⁰⁰ Similarly, in February 2002, the meeting of the Open Ended Working Group on the Right to Development (OEWG) emphasised the importance of involving women in the realisation of the right and of applying a gender

Shue	Avoid deprivation	Protection from deprivation	Aid deprived		
Eide	To Respect	To Protect	To Facilitate	To Fulfill	
Van Hoof	To Respect	To Protect	To Ensure		To Promote
Steiner & Alston	To Respect	To Protect/To Prevent	Create Institution-ary Machinery	Provide Goods and Services	To Promote
ESC Committee	To Respect	To Protect	To Fulfill		
			To Facilitate	To Provide	

⁹⁶ E/CN.4/1998/29, Question of the Realisation of the Right to Development, Chapter 2, paragraph 66.

⁹⁷ Paragraph 50, General Comment No. 14, The right to the highest attainable standard of health; Paragraph 37, General Comment No. 12, The right to adequate food; Paragraph 23, General Comment No. 18, The right to work; Paragraph 47, General Comment No. 13, The right to Education.

⁹⁸ Article 6(1), Declaration on the Right to Development.

⁹⁹ E/CN.4/1998/29, Question of the Realisation of the Right to Development, Chapter 2, paragraph 68.

¹⁰⁰ E/CN.4/RES/2001/9, The Right to Development, paragraphs 14-16.

perspective to the entire process.¹⁰¹ These international recommendations advocate that States to redress the problem of inequality and discrimination in development practices.

The Intergovernmental Group of Experts on the Right to Development corresponds the obligation to respect to the right to development with the state obligation to preserve natural resources in the development process. Their report on the Question of the Realisation of the Right to Development in 1998 calls particularly for the attention of the State to respect the natural resources and their economy, based on the condition of life of the local population.¹⁰² This means that the State is obliged to respect natural economy resources, which also includes local economy interests in designing development policies that aim at improving the conditions of life. This perspective leads to the inclusion of the right-holder through participation in designing development policies that may affect or exploit natural or indigenous resources.

A specific approach on looking to the obligation to respect the right to development is to understand it as an obligation not to damage or cause harm.¹⁰³ As stated previously, an obligation to respect compels the State to withdraw from human rights violations. In this regard, causing harms in development processes thus means that the State is taking part in or even acting as an offender in relation to the entitlement to fair distribution of benefits.

State Obligations to Protect

The obligation to protect means not allow others to deprive the right-holder of the guaranteed right. It requires the State to take all measures, including passing and enforcing laws, to ensure that the individual under its jurisdiction are protected from infringements by third parties (individual, groups or corporations). In Article 8(1) the Declaration stipulates that the State should undertake, at the national level, all necessary measures for the realisation of the right to development. In this regard, the state is required to adequately regulate the action of other entities, preventing them from denying or limiting the enjoyment of these rights. The obligation to protect also implies addressing any harmful practices by aggressive entities, such as powerful economic interests.¹⁰⁴ Particularly with regard to natural resources, the obligation to

101 E/CN.4/2002/28/Rev.1, Report of the Open Ended Working Group on the Right to Development on its Third Session, paragraph 105 (b).

102 E/CN.4/1998/29, Question of the Realisation of the Right to Development, Chapter 2, paragraph 69.

103 David Beetham, 'The Right to Development and Its Corresponding Obligation', in B.A. Adreassen *et al*, *Development as a Human Right: Legal, Political and Economic Dimension*. (Cambridge: Havard School of Public Health, 2006) p. 84-85.

104 Asbjørn Eide *et al*, *The Right to Development and Human Rights in Development: A Background Paper*, Prepared for the Nobel Symposium organised in Oslo from 13-15 October 2003, Nobel Symposium 125, Norwegian Centre of Human Rights, Oslo University, p. 16.

protect compels the State to protect the economic basis and conditions of life of the local population.¹⁰⁵

In the study on the implementation of the right to development in Cambodia by the François-Xavier Bagnoud Center for Health and Human Rights, Harvard University, it was observed that the Cambodian Government failed to carry out their obligation to protect the right to development in employment.¹⁰⁶ The research revealed that regardless of the ongoing practices of injustices, mainly physical abuses and discriminations, the Cambodian Government was not adopting any policies to eradicate the problems. In fact the Government priorities and policies, which were predominately related to economic growth and lack of access to participation, aggravated the situation. There was short of sound representation by unions, as some were sponsored by political networks. The Cambodian Government preferred to have the disputes between employees and employers settled at the management levels, without states' interventions.¹⁰⁷

The right to development may be seriously infringed by international arrangements that have been initiated or sustained by multinational corporations. An illustration is one of BPs latest projects, the Tangguh Liquefied Natural Gas (Tangguh LNG) Project, a multinational collaborative business plan to develop the natural gas fields in Bintanu Bay, Papua, Indonesia.¹⁰⁸ The Tangguh LNG extracts natural gas from a large offshore reservoir and pipe it to an LNG plant for conversion to LNG. For international costumers, the project will provide sustainable gas supplies with a competitive price, as the gas allocation in Tangguh is considered to be one of the biggest explorations in the world. On a national level, the project is expected to significantly contribute to the Indonesian Government achieving sustainable economic growth.

Aside from the increased revenue flows to the national and the provincial governments, as a risk, there will be a negative impact on environmental and social matters,

105 E/CN.4/1998/29, Question of the Realisation of the Right to Development, Chapter 2, paragraph 69

106 Kao Kim Hourn, *Final Report The Right to Development Project, Country Study No. 2: The Right to Development in Cambodia*, François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, January 1, 2001-December 31, 2004, p. 17.

107 For instance, Article 74 of the National Labor Code of Cambodia states that labor contracts may be terminated by one of the contracting parties but the initiator of termination must give prior notice, but in reality terminations can be arbitrary. The Second Clause of Article 74 states that there shall be no dismissal of an employee without valid reason, such as inadequate skills or poor behavior. This second clause of course emphasises the importance of the workers' productivity in light of her or his contributions to the company. Unfortunately, it does not prevent arbitrary dismissal by employers in cases of sexual harassment, verbal and physical abuses and aggravated assaults. *Ibid*, pp. 17-18.

108 The project is regulated through production-sharing contracts by the government of Indonesia (BPMIGAS), BP, and their partners where BP Berau Ltd acts as the operator of the Project. BP has 37.16% of reserves, with the balance shared by China National Offshore Oil Corporation (16.96), Mitsubishi Corporation-INPEX Corporation (16.30%), Nippon Oil Corporation and Japan National Oil Corporation 12.23%, Kanematsu Gas (10.00%) and LNG Japan Corporation (7.35%). Asian Development Bank (ADB), *BP Tangguh LARAP on Land Acquisition and Resettlement Action Plan 2005*. Resettlement Planning Document, Project Number 38919, July 2006, pp. 11-22.

as the exploration will bring some significant changes. The gas exploration will increase the intensity of noise and pollution, and create environmental damage to the bay.¹⁰⁹ Moreover, the project will actually lead to socially negative impacts such as landlessness, homelessness, loss of access to common property resources, unemployment, food insecurity, increased morbidity, community disarticulation, and marginalisation.¹¹⁰

In the case of the Tangguh Project, the Indonesian Government has failed to meet its obligation to protect. Although the risks of implementing the project have been known, the Government does not take any measures to protect right-holders against any harm caused by the enforcement of the project. The problem persists as there is neither protection nor access to redress or to seek compensation against the negatives impacts. Again in this case the Indonesian Government prefers to have an increasing national income rather than protecting the right-holder from the hazards caused by the Tangguh project.

State Obligations to Fulfil

The obligation to fulfil compels the duty-bearer to work actively to establish political, economic, and social systems and infrastructures to provide access to the right in question. This duty requires the State to proactively realise the rights of everyone by way of facilitation or direct provisions. For example, the State has the obligation to see that actions to adopt reforms to combat poverty are implemented and effective. The State also has the duty to oversee private institutions or companies that provide basic infrastructure throughout the country and to ensure that their services are adequate and appropriate according to the human rights standard committed by the country.

The obligation to fulfil is broken down into the obligation to facilitate and the obligation to provide. Under the obligation to facilitate the State is obliged to engage in activities intended to enable and assist individuals and communities to enjoy economic, social and cultural rights. The obligation to provide entails the State providing necessary conditions for the right-holder to realise the right themselves by the means at their disposal.¹¹¹

In respect of the right to development, the obligation to fulfil is reflected in Article 3(1). This article stipulates that the State must create national and international

109 The project will produce intensity of noise and light pollution, gas emission including sulphur dioxide, nitrogen dioxide, carbon dioxide, and hydrogen sulphide; liquid and solid waste from gas drilling, LNG processing, solid waste including mercury contaminated activated carbon, sanitary waste, port activities interfering with local fishing and shrimp industry, the airport attracting 'unauthorised settlement' placing a higher burden on local ecology, water from LNG tankers affecting the bay ecology. See: Patricia Rinwigati Waagstein, 'From 'Commitment' to 'Compliance': the Analysis of Corporate Self-Regulation in the BP Tangguh Project, Indonesia', *Jurnal hukum internasional UNPAD*, Vol. 5 (2006), no. 2, pp. 105-109.

110 ADB (2006) pp. 31-32.

111 Magdalena Sepulveda (2003) p. 199.

conditions favourable to the realisation of the right to development.¹¹² Another obligation to fulfil addressed in the Declaration is related to participation. Article 8, as mentioned before, asserts the role of the States to undertake all the necessary measures to encourage popular participation.¹¹³

Procedurally, this obligation implores the State to establish or strengthen structures for the coordination of national institutions.¹¹⁴ Furthermore, the State is also obliged to assign and specify the agents who have the corresponding duties to bring about the fulfilment of these entitlements.¹¹⁵ From the right-holder's perspective this obligation compels the State to take all the necessary measures to enable them to participate. This includes empowerment actions, focusing particularly on education and disbursement of information and policies. These would endow the right-holder with necessary capabilities to examine and question development policies. In this respect, new legislations may be necessary to, for example, facilitate participation in development policies or provide the basis for a fair distribution of benefits.

2.6.3.2 International Obligations under the Right to Development

The obligation of States toward their own population in enforcing human rights is considerably more established and encouraged than those of multinational and international organisations. However, beside the State obligations, the Declaration on the Right to Development also addresses the general duty of all States. The Declaration mentions the obligation of 'States to co-operate with each other in ensuring development and eliminating obstacles to development'.¹¹⁶ Particularly in Article 4, the Declaration proclaims that: 'States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to Development'.¹¹⁷ These articles confirm the State's obligation to take the international measures necessary to implement the right to development. Other legal bases for such international obligations can be found in several other articles of the Covenant on Economic, Social and Cultural Rights that indicate the importance and necessity of international cooperation, particularly Article 11,¹¹⁸ Article 22¹¹⁹ and Article 23.¹²⁰

112 Article 3(1), Declaration on the Right Development.

113 Article 8(2), Declaration on the Right to Development.

114 E/CN.4/1998/29, Question of the Realisation of the Right to Development, Chapter 2, paragraph 70.

115 Arjun Sengupta (2002) p. 900.

116 Article 3(3), Declaration on the Right to Development.

117 Article 4(1), Declaration on the Right to Development.

118 Article 11(2) provides that: The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through *international cooperation*, the measures, including specific programmes, which are needed:... (emphasis added).

119 Article 22 provides that: The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialised agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of

In the General Comments No. 3 on The Nature of States Parties Obligations under the Covenant, the Committee on Economic, Social and Cultural Rights emphasises that States should use the ‘maximum resources’ to realise the economic, social and cultural rights. What the Committee mean with ‘maximum resources’ include both those ‘existing within a State and those available from the international community through international cooperation and assistance’.¹²¹

‘It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognised therein. It emphasises that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.’¹²²

Hence, the need for an international obligation to realise the right to development, has been duly recognised. The report of the Independent Expert of the Right to Development identifies the international obligation in regard to ‘solving the debt problem, decreasing commodity prices and the instability of export earnings, reducing protectionism in developed countries and dealing with the inadequacies of the international financial system’.¹²³ It is argued that if these problems are not taken care of, by the international community, governments of developing countries will not have the manoeuvrability to implement any effective plan or programme of policies that would enable them to realise the right to development.

Furthermore, the Independent Expert also introduces two dimensions of international obligation, which are not mutually exclusive. First, he suggests that development cooperation measures should be conceived and executed in a multilateral process in which all developed countries, multilateral agencies and international institutions could participate by providing facilities to which all qualifying development countries could have access.¹²⁴ Secondly, he adds that bilateral facilities or

international measures likely to contribute to the effective progressive implementation of the present Covenant.

120 Article 23 provides that: The States Parties to the present Covenant agree that international action for the achievement of the rights recognised in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organised in conjunction with the Governments concerned.

121 Paragraph 13, General Comment No. 3, the Nature of State Obligations.

122 Paragraph 14, General Comment No. 3, the Nature of State Obligations.

123 A/55/306, Report of the Independent Expert to the Right to Development, paragraph 32.

124 Arjun Sengupta, ‘The Human Rights to Development’, *Development as Human right: Legal, Political, and Economic Dimensions*, edited by B.A. Andreassen and S.P. Marks, (Cambridge: Harvard School of Public Health, 2006) p. 32.

country-specific arrangements would supplement them to deal with problems requiring measures adapted to a particular context.¹²⁵

In this respect, Sengupta put forward the concept of development compact to be a model of implementing the right to development. This model is based not only on the obligation of State authorities but also on that of the international community. The Development Assistance Committee (DAC) of the Organisation for Economic Cooperation and Development (OECD) is proposed as the institution to co-ordinate negotiations with the developing countries on behalf of the industrialised countries. A developing country interested in this compact should request the DAC and then design its own programme. Here, although the developing country must receive technical assistance, the country concerned has to be reassured that it remains the 'owner' of the programme. Furthermore, the developing country should also design a programme in consultation with civil societies. Once the development programme is drawn up, the DAC should organise a support group for that developing country, including states, as well as the OHCHR and other international agencies. The development compact should specify the obligation of both the national and the international community.¹²⁶

The difference between a development compact and the existing development agreements is that a development compact is a mechanism for ensuring that all stakeholders recognise the 'mutuality of obligations'. Therefore the obligations of developing countries to carry out rights-based programmes are matched by reciprocal obligations of the international community to cooperate to enable the implementation of such programmes.¹²⁷ As for traditional development agreements, the Independent Expert expresses his concern that participation has been rather problematic, while this could be resolved with the development compact with the principles of accountability, transparency, equity, and non-discrimination.

Development compact strategy indeed offers a practical example to implement the right to development by means of cooperation. Yet, as explained earlier, if the implementation of the right to development is emphasised in development cooperation, it establishes the State as the right-holder rather than as the duty-bearer. Therefore this study proposes that attention to international obligation should be mainly focussed on the obligation of international actors, particularly the international financial institutions such as the World Bank and the International Monetary Fund (IMF).

As institutions that possess legal personality, the World Bank and the IMF have obligations according to international law.¹²⁸ These obligations are not similar to those of States, but they are also determined by the procedural and material norms of international law. In the World Health Organisation (WHO) vs. Egypt case, the

¹²⁵ *Ibid.*

¹²⁶ E/CN.4/2002/WG.18/2, Fourth report of the independent expert on the right to development, Section III.B on Development Compacts.

¹²⁷ E/CN.4/2002/WG.18/6, Fifth report of the independent expert on the right to development, paragraph 14.

¹²⁸ Sigrun I. Skogly, 'The Human Rights Obligations of the World Bank and the IMF', *World Bank, IMF and Human Rights*. (Tilburg: Wolf Legal Publisher, 2003) p. 46.

International Court of Justice concluded that organisations, similar to the World Bank and the IMF are bound by the rules of international law.¹²⁹ Therefore they also have human rights obligations.

The Intergovernmental Group of Experts on the Right to Development has recognised the importance of international obligations of both the World Bank and the IMF in realising the right to development. In their report in 1998, they urged the High Commissioner for Human Rights to pursue dialogue with the World Bank, the International Monetary Fund and other financial institutions with a view to their incorporating the principles underlying the right to development in their policies, programmes and projects.¹³⁰ The Working Group also recommends that ‘in particular, the High Commissioner should stress that in their activities and sub programmes, the international financial institutions should give the highest priority to an action-oriented approach to the right to development in its multidimensional aspects’.

The High Level Task Force of the Right to Development also affirmed the international obligation on the right to development and referred this as a partnership for global governance.¹³¹ The Task Force relates the implementation of the right to development with Goal 8 of the Millennium Development Goals, which aims to develop global partnership in development. This international obligation is suggested to take place in three levels of partnership; regionally, inter-regionally, and internationally.¹³² All of these embrace actors from regional organisations; inter regional organisations and international financial institutions.

2.6.4 *The Composite of Rights*

The right to development embraces both sets of rights embodied in the Universal Declaration of Human Rights. The preamble and Article 1(1) of the Declaration envisage development as a comprehensive process. The preamble and Article 6(2) requires that equal attention be given to both economic, social and cultural rights as well as civil and political rights. It can be said that the Declaration attempts to realise the idea of the indivisibility and interdependence of human rights in the development process. Thus as its first presupposition, the right to development is obviously a right

129 The Court said that ‘international organisations are subjects of international law and, as such, are bound by any obligations, incumbent upon them under general rules of international law, under their constitutions or under international agreement to which they are parties’. International Court of Justice, the World Health Organisation (WHO) vs. Egypt case, *Advisory Opinion*, ICJ Reports 1980, 73, pp 89–90, paragraph 37.

130 E/CN.4/1998/29, Question of the Realisation of the Right to Development, Chapter 2, paragraph 40.

131 E/CN.4/2005/WG.18/TF/3, Report of the High Level Task Force on the Implementation of the Right to Development on its Second Meeting, paragraph 82.

132 In this regard, the Task Force used the African Peer Review Mechanism, development cooperation between EU and ACP countries, and for the international level; the Paris Declaration on Aid Effectiveness. E/HRC/4/WG.2/TF/2, Report of the High Level Task Force on the Implementation of the Right to Development on its Second Meeting, Section 2.

having both economic, social and cultural rights as well as the civil and political rights as its components.

Based on this characteristic, the independent expert on the right to development, Arjun Sengupta, defines the right to development as a composite right.

‘The right to development is a composite right to a process of development; it is not just an ‘umbrella’ right, or the sum of a set of rights. The integrity of these rights implies that if any one of them is violated, the whole composite right to development is also violated. The independent expert describes this in terms of a ‘vector’ of human rights composed of various elements that represent the various economic, social and cultural rights as well as the civil and political rights. The realisation of the right to development requires an improvement of this vector, such that there is improvement of some, or at least one, of those rights without violating any other.’¹³³

This ‘vector’ approach translates the nature of development processes, which embrace all aspects in human life, into a composite right. Furthermore, the Independent Expert proposes the right to food, the right to primary education and the right to primary health as the three rights vital to practically implement the right to development.

‘These three rights have been chosen because they are closely related to the right to life – the most basic of all human rights. Food is essential for survival; primary health care is indispensable as a minimum requirement for living without illness, at least in the early years; and primary education is necessary for the mental development of a young person to be able to grow up as a full individual. The choice has also been influenced by the fact that several international organisations have been working in these areas with action plans which may be more easily built up into a feasible, global human rights programme.’¹³⁴

Prioritising these rights assigns in making priorities in development processes. However, one should bear in mind that implementing the right to development is more than just fulfilment of the right to food, right to education, or right to health. Therefore, one of the criticisms of the composite of rights is that fulfilment of these selected economic, social and cultural rights requires an environment where entitlements con-

133 The name of umbrella of rights or synthesis of rights represent the argument on the originality of the right to development as a synthesis of rights, which thus is not considered valuable contribution to the existed sets of rights. E/CN.4/2002/WG.18/6, Fifth Report of the Independent Expert on the Right to Development, paragraph 6.

134 E/CN.4/1999/WG.18/2, First Report of the Independent Expert on the Right to Development, paragraph 34. At paragraph 35 the independent expert continues by saying that he was fully aware that several other areas of human rights could be chosen by the international community as being of equal importance. In fact, there is no way of choosing a few among them in preference to others except through discussions and deliberations in the international forums, spelling out the implications of the choice and their feasibility within the possible supply of national and international resources. The only point the independent expert would like to make is that, at least to begin with, the choice should be limited to a minimum of a few areas and to attempt to make a success of the programme, which can then be extended to other areas with equal success.

nected with civil and political rights are also guaranteed. Therefore, in the context of the right to development, claims related to these rights should be perceived as being based on the entitlement of participation in all aspects of development, including food, education, or health.

2.7 IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT: CURRENT PRACTICE

This section aims to describe the current practice of the implementation of the right to development at three levels of organisation; the international, national and local level. Particularly at the international level, this section will elaborate the work that has been done in the setting of the United Nations or the international financial institutions and their activities regarding development cooperation. Discussion on the national and local levels requires examining the state practice in national and local domains.

2.7.1 *International Level*

2.7.1.1 The High Commissioner for Human Rights and the Office of the High Commissioner for Human Rights

The main role of the High Commissioner in respect of implementation of the right to development is to follow and review progress made in promotion and protection of the right to development. This role is done by submitting annual reports to the General Assembly and the Human Rights Council (previously Commission on Human Rights) and to provide interim reports to the Open-Ended Working Group (hereinafter the Working Group) and the Independent Expert. In particular, the Office of High Commissioner for Human Rights (OHCHR) is mandated to ensure widespread dissemination and promotion of the Declaration, in close cooperation with States and inter-governmental organisations, national institutions, academia and interested civil society organisations worldwide. Secondly, the OHCHR is tasked to project the role and importance of the right to development, as part of the overall efforts to implement human rights. The third task of the OHCHR is to consult regularly on a formal and informal basis with all States on the follow-up to the Declaration.¹³⁵

With respect to the first role, the OHCHR is executing the task by, for example, publishing free booklets and publications, and disseminating information on the current progress of the right to development through workshops and seminars.¹³⁶ As to the second role, the High Commissioner provides technical and substantive support

¹³⁵ E/CN.4/RES/1998/72, The Right to Development, paragraph 10.

¹³⁶ For instance, the OHCHR, UNDP and the Government of Norway jointly organised in Oslo on 2 and 3 October 1998 the Symposium on Human Rights and Human Development, which focussed on the right approach to developmental issues. Its outcome should enhance the reflection on indicators and benchmarks as tools for measuring the impact of developmental activities on the full enjoyment of human rights. E/CN.4/1999/19, Report of the High Commissioner for Human Rights, paragraph 7 (d).

to the Independent Expert,¹³⁷ the High Level Task Force on the Right to Development, and the Working Group on The Right to Development. The High Commissioner also undertakes a dialogue with the World Bank¹³⁸ and other development institutions with regard to the right to development, including initiatives, policies, programmes and activities that can promote the right to development.

To fulfil the third role the High Commissioner cooperated, for example, with the United Nations Development Assistance Framework (UNDAF).¹³⁹ In this cooperation, the High Commissioner was sponsoring a training session for UNDAF focal points/hotlines on the subject of the right to development. Another example is cooperation between the OHCHR and UNDP in the Human Rights Strengthening programme (HURIST). This programme has been active in some 30 countries in all regions of the world, focusing on piloting a human rights-based approach to the activities of UNDP. In one of their activities, this programme tried to explore capacity development as a tool for a human rights-based approach in poverty reduction, access to justice, parliamentary development, and strengthening linkages between treaty body reporting and national level development processes.¹⁴⁰

2.7.1.2 The Commission on Human Rights

The Commission on Human Rights, now replaced by the Human Rights Council,¹⁴¹ has played a considerable role in the history of the establishment of the right to development. In 1977, it was the Commission that first declared the existence of the right to development in their resolution.¹⁴² Having engaged in several studies, in 1981, the Commission was responsible to the tasks carried on by the Working Group on the

137 The Commission on Human Rights requested to appoint an independent expert with high competence in the field of the right to development, with a mandate to present to an open-ended working group at each of its sessions a study of the current state of progress in the implementation of the right to development as a basis for a focused discussion, with the substantive support of the Office of the High Commissioner. In August 1998, Mr. Arjun Sengupta (India) was appointed as independent expert. See: E/CN.4/RES/1998/72, The right to development, paragraph 10 (b); E/CN.4/1999/19, The right to development, paragraph 1.

138 For example: the OHCHR has provided support to the independent expert on the question of human rights and extreme poverty, Arjun Sengupta, who held consultations from 7 to 11 March 2005 with staff at the International Monetary Fund and the World Bank in Washington, D.C., to discuss issues relevant to his mandate, including the poverty and social impact analysis and poverty reduction strategy papers. See: E/CN.4/2006/24, The right to development, paragraph 22.

139 The United Nations Development Assistance Framework (UNDAF) is the centre-piece of United Nations development cooperation at the country level and is intended to serve as a process of ongoing United Nations teamwork, responsive to countries development priorities.

140 E/CN.4/2006/24, The right to development, paragraph 46.

141 In 2006 the General Assembly decided to establish the Human Rights Council in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly. See: A/RES/60/251 Resolution of the General Assembly, paragraph 1.

142 Commission on Human Rights Resolution 4 (XXXIII) of 21 February 1977.

Right to Development. The Working Group worked for five years before the adoption of the Declaration on the Right to Development in 1986, and held sessions until 1989.

Since 1993, the Commission on Human Rights has established several Working Groups on the Right to Development.¹⁴³ A breakthrough was achieved when the Commission adopted by consensus a resolution on the Right to Development on April 22, 1998 and recommended to the Economic and Social Council (ECOSOC) to establish a follow-up mechanism initially for a period of three years.¹⁴⁴ Another noteworthy discussion of the Commission was on the possibility of extension and reformulation of the Declaration, in order to make its contents more precise and more accessible to implementation and enforcement, for which the Independent Expert on the Right to Development was specifically tasked for.

Nevertheless, with regards to the general assessment on the Commission's work on the implementation of the right to development, Anja Lindross points out that:¹⁴⁵

'The Commission's lengthy debates and its annual resolutions on the right to development have however, had few concrete results. Much work has been put into a theoretical and political debate has been put into a theoretical and political debate without any concrete proposals... The commission can merely debate and propose a development agenda, but possesses few means to ensure realisations'.

The lack of operational components in the work of the Commission on development issues is prone to be the source of indistinctness, particularly with regard to what development organisations, actors or agencies, the Commission would practically address the resolutions to. Overall, the resolutions have no problem playing a role of reaffirming and reemphasising the importance of the right to development or of showing a general direction towards the realisation of the right to development. They are also used to provide other bodies such as the High Commissioner, the Working Group and the Independent Expert a mandate to further elaborate measures in details. However, they infrequently deliberate the issues of creating an environment to implement the right to development.

143 In 1993, the Commission decided to establish a second Working Group on the Right to Development for a three years period (see E/CN.4/RES/1993/22, The right to development, paragraph 10). The Working Group was split by a divergence of views and its contribution to the implementation remained modest. In 1996, it was also decided to establish a new Working Group and Intergovernmental Working Group of 10 Experts, for a two years period with the goal of elaborating the strategy for the implementation and promotion of the right to development (E/CN.4/RES/1996/15, The right to development, paragraph 15).

144 E/CN.4/RES/1998/72, The right to development, paragraph 9.

145 Anja Lindross (1999) p. 83.

2.7.1.3 The Working Group

The first Working Group¹⁴⁶ on the Right to Development was established in 1981.¹⁴⁷ During its first establishment, the key Western delegations supported the formation of the Working Group as it would ensure that the Declaration would not be used as a mean of resuscitating NIEO, nor would it create any entitlement to a transfer of resources.¹⁴⁸ Currently the mandate of the working group is to monitor and review progress made in the promotion and implementation of the right to development at the national and international levels, and to provide recommendations and further analyses on the obstacles to its full enjoyment.¹⁴⁹

The Working Group in their initial works tried to concretise and identify obstacles to the implementation of the right to development.¹⁵⁰ In their report of 1997, for instance, they listed general problems which hinder the realisation of the right to development, by categorising them into economic, social, cultural, and civil and political aspects in both international and national level.¹⁵¹ This list, however, consisted of merely general issues which could only be a formula of inaction. In fact in this report, the Working group mentioned that they did not have time to elaborate strategies on how to implement and to eliminate the obstacles to the right to development.¹⁵² The Working Group's report merely provided general recommendation rather than concrete proposals, e.g. that adequate attention should be given to international peace and security.¹⁵³

Comparable inadequacies of the Working Groups' work were also observed, although in 1998 during the third period of their roles they were supported by the studies of the Independent Expert. The Independent Expert was mandated to report his studies to the Working Group. However, this did not necessarily indicate an optimistic development. Procedure of endorsing the Working Group's reports in the General Assembly experienced significant tension and negative votes.¹⁵⁴

146 The Working Group is an open-ended working group, meaning that all UN Member and Observer States, inter-governmental organisations and civil society organisations with ECOSOC consultative status may attend its public meetings. The mandates of the open-ended Working Group are to monitor and review progress, to review reports and other information submitted by States and international or civil society organisations, and to submit a seasonal report to the Commission on Human Rights.

147 Commission on Human Rights Resolution 36 (XXXVII) of 11 March 1981.

148 Stephen Marks (2003) p. 2.

149 E/CN.4/RES/1998/72, The right to development, paragraph 10.

150 E/CN.4/1997/22, Question of realisation of the right to development, paragraph 47.

151 *Ibid*, Annex II, pp. 18-21.

152 *Ibid*, paragraph 48.

153 *Ibid*, paragraph 66.

154 Voting in the Commission on Human Rights and the General Assembly is the principal indicator of these cleavages. At its 2003 session, the Commission adopted a resolution on RTD by a vote of 47 in favor and 3 against, with 3 abstentions, 7 the United States, Australia and Japan casting the negative votes, and Canada, Korea and Sweden abstaining. In December 2002, the General Assembly endorsed the conclusion of the Open Ended Working Group on the Right to Development over the negative votes of the United States, Australia, the Marshall Islands and Palau and the abstention of 47 other countries,

In this regard Stephen Marks observes that:¹⁵⁵

‘This politicisation of the right to development discussion in the UN has been maintained throughout the various Working Groups and even during the period of the Open Ended Working Group (OEWG) and the Independent Expert, established pursuant to resolution 1998/72. The interventions of delegations are rarely substantive and often reflect stale political rhetoric that is far removed from the good intentions expressed – perhaps not entirely sincerely – in resolutions.’

The Working Group is definitely a place where the discussions and negotiations on the right to development are taking place. It has witnessed the evolution and development of an understanding from different perspectives and interests. Political diplomacy is the main theme of their work, accommodating different politicised views from the binding nature of the right to the importance of transfer of resources.¹⁵⁶

2.7.1.4 The Independent Expert

Dr. Arjun Sengupta, a highly experienced economist from India, was appointed as the Independent Expert of the Right to Development in 1998. His mandate was to present a study on the current state or progress of the implementation of the right to development.¹⁵⁷ In subsequent resolutions, the Commission on Human Rights also requested the independent expert to focus on specific topics and to prepare additional studies, such as country-specific studies relevant to the proposed operational model of his development compact or a study on the impact of international economic and financial issues on the enjoyment of human rights.

The Independent Expert worked until 2004 and submitted a series of reports covering the different subjects on the right to development. The first report dealt with the current state of progress in the implementation of the right to development.¹⁵⁸ The second report connected the right to development with the problems related to poverty.¹⁵⁹ The third report clarified the questions raised at the discussions at the

thus perpetuating the politicisation of the issue. The previous year the vote was 123 to 4 (Denmark, Israel, Japan, and the United States) with 44 abstentions. Among the abstaining countries were Australia, Austria, Belgium, France, Germany, Norway, Sweden and the UK, that is those countries in the best position to support developing countries for which the right to development. Stephen Marks, (2003) p. 3.

¹⁵⁵ *Ibid*, p. 2.

¹⁵⁶ The NAM delegation has proposed to strengthen the binding nature of the right to development in 2003. The NAM functions at the Working Group primarily through the ‘Like-Minded Group’ whose members are Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, Philippines, Sri Lanka, Sudan and Vietnam. Their interest is that developing countries continue to face difficulties in participating in the globalisation process, and that many risk being marginalised and effectively excluded from its benefits’. Stephen Marks (2003) p. 5.

¹⁵⁷ E/CN.4/RES/1998/72, The Right to Development, paragraph 10 (b).

¹⁵⁸ E/CN.4/1999/WG.18/6, First report of the Independent Expert on the Right to Development.

¹⁵⁹ E/CN.4/2000/WG.18/CRP.1, Second report of the Independent Expert on the Right to Development.

Working Group and recapitulated some of the main subject raised in the previous report.¹⁶⁰ In the fourth report he studied the concept and content of the right to development as the right to process and recommended some possible national actions.¹⁶¹ The fifth report tried to develop an operational model of the right to development by proposing the concept of development compact.¹⁶² In the last two years of his mandate, the Independent expert also conducted a study on the impact of international economic and financial issues¹⁶³ and reviewed progress and obstacles in the promotion, implementation, operationalisation, and enjoyment of the right to development.¹⁶⁴

Since the Working Group is a political body that meets once a year for two weeks, it was really the Independent Expert who had to provide extensive and fresh ideas on the right to development. So far he has been able to select key issues and venture new ideas, which are considered by the Working Group according to political inclinations rather than on the basis on their merits.¹⁶⁵ Practically, his works are backed up by the François-Xavier Bagnoud Center for Health and Human Rights, Harvard University. In 2001 a series of country reports were commissioned by the Independent Expert and his team with the support of the Government of the Netherlands. The studies were taking place in seven countries, namely the Philippines, Mali, Ghana, Cambodia, Bangladesh, Sri Lanka and India. They present assessments of the development process in these countries from the perspective of rights-based development in general and the right to development in particular.¹⁶⁶

2.7.1.5 The High Level Task Force

The high-level task force on the implementation of the right to development (the Task Force) was set up in pursuance of the Commission on Human Rights Resolution 2004/7, within the framework of the Working Group on the Right to Development. Its mandate was renewed in the Commission on Human Rights Resolution 2005/4 upon recommendation of the Working Group at its sixth session. The Task force was granted a limited mandate of one year to examine Millennium Development Goal 8 on a global partnership for development and suggest criteria for its periodic evaluation with the aim of improving the effectiveness of global partnership with regard to the realisation of the right to development.¹⁶⁷ Since 2007, the task force members have consisted of Stephen P. Marks (USA), Solita Collas-Monsod (Philippines), Nicolaas J. Schrijver (the Netherlands), Margaret Sekaggya (Uganda), and Jorge E. Vargas (Columbia).

160 E/CN.4/2001/WG.18/2 Third report of the Independent Expert on the Right to Development.

161 E/CN.4/2002/WG.18/2/Add.1, Fourth report of the Independent Expert on the Right to Development.

162 E/CN.4/2002/WG.18/6, Fifth report of the Independent Expert on the Right to Development.

163 E/CN.4/2003/WG.18/2, Preliminary Study of the Independent Expert on the Right to Development.

164 E/CN.4/2004/WG.18/2, Preliminary Study of the Independent Expert on the Right to Development.

165 Stephen Marks (2003) p. 10.

166 E/CN.4/2004/22, The Right to Development, paragraph 9.

167 Paragraph 5, Commission on Human Rights Resolution 2005/4.

Hitherto, the Task Force has been successful in providing the opportunity for elaboration and discussion on important implementing issues for those actors that are related with the implementation of the right to development. It is an innovative construction, as it has brought together human rights experts and representatives of international development, finance and trade institutions under the formal auspices of a UN human rights mechanism.¹⁶⁸ During their meetings the representatives from States, regional organisations and international organisation, including the World Bank and the IMF reported their progress and activities on the right to development.

The work of the Task Force has been particularly on implementing the right to development as part of the developing cooperation. Reference is made to Goal 8 of the UN Millennium Development Goals, which aims to develop a global partnership for development. The Task Force highlighted the relevance of Goal 8 as it encompassed important aspects of debt, aid and trade.¹⁶⁹ Predominant subjects within these aspects are the role of the private sectors, migration and partnership for global governance. There are three exemplary partnerships suggested in this respect; the African Peer Review mechanism, EC/OECD-DAC Mutual Review of Development Effectiveness in the context of NEPAD, and the Paris Declaration on Aid Effectiveness. In 2007, the Task Force created the list of indicators on the Criteria for Periodic evaluation of Global Development Partnership from a right to development perspective.¹⁷⁰

The most recent work of the Working Groups and the Task Force that also deserves special attention is opening a new dialog on strengthening the legal basis of the right to development. Notably, the non-binding nature of the Declaration provides some limitations to the implementation of the right to development. The progress of the work done by the Working Group and the Task Force in enhancing the operationalisation of the right to development illustrates the need for a stronger legal basis in order to advance the coercive value of the right. In this respect, in Resolution 62/161 of 18 December 2007, the General Assembly has given the mandate to the Working Group to prepare guidelines on the implementation of the right to development that can evolve into a basis for consideration as an international legal standard of a binding nature.

2.7.1.6 Development Cooperation

Development cooperation enjoys special attention as a measure to implement the right to development because the right itself was historically established to accommodate development cooperation between developing and the developed countries. One of the

168 M.E. Salomon, 'Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development', *Netherlands Quarterly of Human Rights*, 23 (2005) p. 410.

169 E/CN.4/2005/WG.18/TF/3, Report of the High Level Task Force on the Implementation of the Right to Development on its Second Meeting, paragraph 17.

170 E/HRC/4/WG.2/TF/2, Report of the High Level Task Force on the Implementation of the Right to Development on its Second Meeting, Annex II, Criteria on Periodic Evaluation of Global Development Partnership from the Right to Development Perspective.

main objectives of development cooperation is to eradicate development problems, achieving equality in the international community. The right to development in this regard is considered to accommodate claims in the area of economic justice, primarily concerned with the transfer of resources and the favourable treatment of developing countries in international trade and finance.¹⁷¹ Such accommodation is reflected in Article 3(3) of the Declaration, addressing the importance of development cooperation.¹⁷²

Accordingly, the common international perception of the implementation of the right to development is thus centred on how the international community could implement the right through development cooperation, risking it to the actual implementation of a 'state to state' right. Understandably, it is particularly the developing countries that hold up the implementation of the right to development as a claim for development cooperation. Although it has been reaffirmed and emphasised by the United Nations and many human rights' experts that the right to development aims at the improvement of the well being of individual, this right remains to rhetorically amplify the Third World's demands on the industrialised world for a transfer of resources, in the form of foreign aid or debt forgiveness. Such a demand has been frequently and uniformly addressed by the developing countries.

Regardless of such a common perception, the implementation of the right to development through development cooperation has been observed as rather difficult. First of all it fails to exploit the potentiality of the right. In fact, such perception has been raising merely ineffective actions and hindering the implementation practice of the right to development not only at the international level but also at the national level.

One of the main problems is that such a perception receives negative responses negatively from the donor countries.¹⁷³ This forms an obstacle while implementing the idea of development compact, a mechanism of development cooperation suggested by the Independent Expert of the Right to Development, at a multilateral level. A preliminary assessment by the High Level Task Force on the practice of development compact states that:¹⁷⁴

'First, this procedure [development compact] complies in large measure with several right-to-development criterias, namely those relating to national ownership, accountability and sustainability. Secondly, there was less congruence with the criteria relating to the incorporation of human rights and the right to development in national and international development policies. Thirdly, the mechanism did not focus specifically on the poor and most

171 E/CN.4/2002/WG.18/2, The Fourth Report of Independent Expert to the Right to Development, paragraph 43. See also Arjun Sengupta (2002) p. 876.

172 Article 3(3) Declaration on the Right to Development stipulates that 'states have the duty to co-operate with each other in ensuring development and eliminating obstacles to development'.

173 For the discussion on the North-South Debate, see: Lindross (1999) p. 69-70.

174 E/HRC/4/WG.2/TF/2, Report of the High Level Task Force on the Implementation of the Right to Development, paragraph 64.

marginalised. Finally, the active and meaningful participation of relevant stakeholders was not evident.’

Additionally, obstacles to implement the right to development through development cooperation occur at the bilateral mechanism. Donors’ countries are not enthusiastic in implementing a right to development in their aid programme. Only a limited number of them were recorded in the United Nations’ activities on the right to development. Moreover, they were actually involved in the issues that are not only related with the right to development but also with the right based approach to development.

For instance, in 2000, the United Kingdom delegation and a representative of Rwanda presented a project at the Working Group meeting that was very close to being a ‘right-to-development’ development compact or at least a precursor thereof.¹⁷⁵ At the High Level Task meeting in 2005, the country presentation on Belgium explained how the right to development had been integrated into Belgian international cooperation for development. Efforts had been made to raise awareness among the population on international cooperation and fair trade and the requirement development cooperation would have to be consistent with international human rights law. During the same meeting, the delegation from Finland also presented Finland’s comprehensive approach to the Millennium Development Goals and efforts have been made to incorporate a rights-based approach in development cooperation.

Merging the right to development with the right-based approach to development also transpires in the practice of donor agencies. For example, DFID has focused their programme in community participation in service delivery and civil society advocacy.¹⁷⁶ DFID engaged the right to participation with the obligation of national governments to the right to development, by implement a project on Participatory Rights Assessment Methodologies (PRAMs).¹⁷⁷ A Swedish development agency, SIDA, on the contrary, has focused on institutions of governance and democratisation, which is also related to the contents of the right to development, but does not specifically use the term rights-based approach or the right to development.¹⁷⁸

2.7.1.7 The International Financial Institutions: The World Bank

The World Bank is one of the important institutions in the implementation of the right to development. The World Bank in particular is an active actor, which is involved in many development processes in developing countries. The Bank, although often recorded as the cause of development hazards, can on the contrary promote the right

175 Stephen Marks (2003) p. 5.

176 DFID, *Realising Human Rights for Poor People* (2000), p. 7, retrieved online <http://www.dfid.gov.uk/pubs/files/tsphuman.pdf>, 29 October 2008, at 12.39.

177 Mary Ann Brocklesby and Sheena Crawford, *Operationalizing the Rights Agenda: DFID’s Participatory Rights Assessments Methodologies (PRAMs) Project*. London: DFID, 2004.

178 Andrea Cornwall and Celestine Nyamu-Musembi, ‘Putting the ‘right based approach’ to development into perspective’, *Third World Quarterly*. 25, (2004) p. 1427.

to development. Assessing the role of the World Bank in implementing the right to development is not a clear-cut matter. Indeed, their position as duty-bearers under international law would arise from their power to impact on the exercise of human rights and their control in affecting the fulfilment of human rights, including via their control over other agents who are supposed to deliver human rights, notably the national governments of developing countries. However, while these institutions are to a certain extent reflecting human rights discourse in their programmes; they are not prepared to declare that they are in any way bound by international human rights law.¹⁷⁹

The World Bank has generally refused to implement any UN General Assembly resolutions.¹⁸⁰ It takes the position that its mandate does not allow it to become involved a civil and political matters, to which human rights are referred to. It does, however, confirm its role in ensuring good governance and anti-corruption.

‘The Bank and its officer shall not interfere in the political affairs of any member; nor shall they be influenced in their decision by the political character of the members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in the article.’¹⁸¹

This position implies that the World Bank would like to be seen as promoting development more as an economic matter. As an organisation that lends billions of dollars annually to alter international and national economic patterns or to influence socio-economic conditions in development countries, in effect, it can hardly be considered to be a non-political organisation. The recipient countries sometimes require changes in local economic priorities and domestic procedure, as a condition to the World Bank’s loans, and these requirements often have a profound impact on national political conditions in borrowing countries.¹⁸²

The World Bank’s position and their refusal to acknowledge the need for human rights accountability for any negative impact of its work has earned it criticism from many CSOs, the UN Committee on Economic, Social and Cultural Rights,¹⁸³ and the Commission of Human Rights. The Commission, in its report on the Question of the Realisation of the Right to Development of 6 January 1993, proposes several recommendations with regard to the role of these international financial institutions. The Commission urges both the IMF and the World Bank to review and implement their

179 M.E. Salomon, ‘Human Rights Obligations: Obstacles and Demands of Global Justice’, in B.A. Andreassen and S.P. Marks (eds), *Development as Human right: Legal, Political, and Economic Dimensions*. (Cambridge: Harvard School of Public Health, 2006) p. 114.

180 Anja Lindross (1999) p. 89.

181 Article IV Section 10, the World Bank Article of Agreement.

182 Marc Cogen, ‘Human Rights, Prohibition of Political Activities and the Lending Policies of the World Bank and International Monetary Fund’, in Chowdhuri and de Waart, *The Right to Development in International Law*. (Dordrecht: Martinus Nijhoff Publisher, 1992) p. 389.

183 Andrea Cornwall and Celestine Nyamu-Musembi (2004) p. 1427.

original mandates¹⁸⁴ and to be further encouraged to divert their emphasis from economic growth to human development.¹⁸⁵ The Commission also insists on the World Bank gradually incorporating human rights criteria in its work at all stages, including project and policy lending, preparation of policy guidelines, and project and policy appraisal, monitoring and assessment.¹⁸⁶ The last recommendation is for the World Bank to incorporate the concept of popular participation in its planning, instead of focusing solely on the concept of governance, which only addresses authorities. In this respect, there is thus a need for greater transparency in negotiations and agreements between States and international financial aid institutions.¹⁸⁷

To certain extend the World Bank takes the pressure seriously and has been trying to incorporate the human rights discourse in their work. In their report on *Development as Human Rights, the Role of the World Bank* in 1998, for example, it is stated that:

‘The World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being – especially the poorest – at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope. And while the Bank has always taken measures to ensure that human rights are fully respected in connection with the projects it supports, it has been less forthcoming about articulating its role in promoting human rights within the countries in which it operates.’¹⁸⁸

Moreover the human rights discourse particularly that which is development related is being included. The World Bank, for instance, endorses the right to development and has begun focusing on issues of corruption, governance, and rule of law – issues that used to be considered political and therefore taboo, and which are now recognised as prerequisites for sustainable development.¹⁸⁹ Finally, the World Bank’s policy framework provides rights of participation and consultation to affected communities, thereby incorporating ‘political’ rights.

184 If the IMF were to resolve payment imbalances in an equitable and controlled manner, the burden of adjustment would not only be on the deficit countries but would be reasonably shared between surplus and deficit countries. If the World Bank took up seriously its initial task of recycling global surpluses of the rich nations to deficit nations, the poorer countries would not be obliged to borrow on the private financial markets. Both actions would greatly assist in achieving sound and sustainable development in both developed and developing nations. E/CN.4/1993/16, Question of the Realisation of the Right to Development, paragraph 48.

185 *Ibid*, paragraph 50.

186 *Ibid*, paragraph 51.

187 *Ibid*, paragraph 52.

188 The World Bank, *Development and Human Rights: The Roles of the World Bank* (Washington DC: The World Bank, 1998) p. 2. On p. 10, the report also said that: What has been missing is the recognition that the advancement of an interconnected set of human rights is impossible *without development*. Enlightened legislation and vigorous civil society are essential. But they are not enough. Human rights are in a sense both the design *and* the product of people organised through government.

189 Dana L. Clark, ‘The World Bank and Human Rights: The Need for Greater Accountability’, *Harvard Human Rights Journal*. 15 (2002) pp. 208-209.

At the practical level the situation is rather different. The impact of the World Bank's work in development, such as in eradicating poverty or combating corruption, is insufficient considering the power and possibilities of positive obligation of human rights that they are capable of doing. Their position on human rights and development is often a political strategy rather than a measure of implementation. The World Bank continues to be hesitant in implementing the human rights approach in their development programme. In many cases the World Bank has actually promoted agendas that have little to do with *de facto* respect, protection and fulfilment of human rights. The World Bank's projects are engaged the economic efficiency rather than protecting and securing the entitlements of the right-holder. Through sometimes overt and veiled conditionalities, their policies can even restrict the scope of the developing countries to redesign with regard to human rights.

One example is the privatisation of water services, which is labelled as 'rights-based water sharing'. A joint World Bank-Netherlands water partnership programme (operating in Brazil, Chile, Indonesia, Philippines and Yemen, with planned extension to India and Kenya) describes the objective of the 'water rights system' as 'stimulating the use of rights-based systems for the allocation of water in World Bank assisted projects through market mechanisms'.¹⁹⁰ Unfortunately, what is being described as a 'rights-based' system is merely a system of tradable permits in water. The emphasis on 'allowing water to move from lower to higher value uses' and therefore 'increasing efficient use' suggests a focus on profitable use rather than adequate supply for all, and the system is likely to favour large commercial users.

The essential purpose of human rights policies for the World Bank should be to acknowledge that it has responsibilities under international human rights law.¹⁹¹ Considering their close involvement to development issues and therefore makes their work related to the promotion and protection of the right to development, the World Bank is one of the vital actors to implement the right. The requirement not to facilitate violations in development that may lead to the phenomenon of hazards is the most obvious example of their obligation related to the right to development.

2.7.2 National and Local Levels of Implementation

The national and local levels of implementation are the unquestionable primary environment to the realisation of the right. In fact in relation to previous explanation on the international level of implementation, in this case the work of the World Bank, i.e. its potential to infringe the right to development, it is often the State itself that allow violations to happen. The right to development can be seriously infringed by the international agreements because the countries representatives in international organi-

190 Andrea Cornwall and Celestine Nyamu-Musembi (2004) p. 1427 .

191 Mac Darrow, The World Bank, the International Monetary Fund and International Human Rights Law. PhD Thesis, defended May 7, 2002, Utrecht University, p. 280.

sations do not consider the interests of the global poor as part of their mandates'.¹⁹² Thus, a solid implementation at the national and local levels is crucial in determining the accomplishment of realising the right to development.

Article 2(3) of the Declaration asserts this by stipulating that States have the right and duty to formulate development policies. At national and local levels of implementation, the State is obliged to enact legislation, adopt appropriate measures, engage in public actions and formulate schemes both nationally and locally. Moreover, the State is also responsible to empower the beneficiary at the grassroots level, to allocate investment and to restructure production to promote a process of equitable and sustainable development growth using the resources they have access to.¹⁹³

A number of African countries have recognised the right to development in their national constitutions. South Africa has incorporated some elements of sustainable development within its legal system. Under section 24 of their Constitution, it provides the elements of a fair distribution benefits as well as the sustainability of development.¹⁹⁴ The Constitution of Ethiopia specifically dedicates a section to the right to development. It contains the right to improved living standards, to sustainable development, and to participate in development processes.¹⁹⁵ Similarly, commitment to the right to development is also shown, for example, in Malawi¹⁹⁶ and Benin.¹⁹⁷

192 Thomas W. Pogge, *Global Justice*. (Oxford: Blackwell Pub., 2001) p. 20.

193 E/CN.4/2001/WG.18/2, The Third Report of Independent Expert to the Right to Development, on National Action, paragraphs 23-32.

194 The section 24 of the Constitution of South Africa stipulates that: Everyone has the right... (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation: (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

195 Article 43: (1) The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development. (2) Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community. (3) All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development. (4) The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.

196 Article 30 of Malawi Constitution: (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 realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure. (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.

197 Article 9 of Benin Constitution: Every human being has a right to the development and full expansion of his person in his material, temporal and intellectual dimensions, provided that he does not violate the rights of others nor infringe upon constitutional order and good manners.

At the local level, the right to development is useful to provoke a sense of outrage, mobilising people in support of a particular goal.¹⁹⁸ The right to development thus serves as a political instrument with which people are in a better position to overcome the injustices oppressing them. Once they feel a sufficient sense of injustice to an entitlement, they can say ‘we have a right to that and you cannot take it away from us’.¹⁹⁹ The second use of the right to development is to facilitate access to a range of legal norms and enforcement mechanism through which to seek the vindication, in a particular setting, of important claims that the essential legitimacy of is widely recognised.²⁰⁰

In the study of Independent Expert of the right to development in Ghana and Bangladesh, reference to national implementation of the right to development at the local levels is made with the decentralisation process. Particularly, Ghana’s decentralised approach to development has local community participation, which is the cross-cutting element of the right to development, as its central objective processes of decentralisation.²⁰¹

Nevertheless, implementation at the local level is not merely about incorporating the contents of the right to development in their local regulations but it is about enforcing the contents and creating enabling environments for the right-holders. The study criticises the characteristic of participation conducted by local communities in the Sissala and Bolgatanga districts in decision-making under Ghana’s decentralisation programme as one which does not seek to create broader views that are central to decision making, but rather, participation as it relates to providing labour (carrying bricks) to reduce government expenditure.

The study suggests the need to create and maintain dialogue of dialogical spaces in civil society and State structures in enforcing the right to development at the national and local level. In turn, this will entail vigorous tolerance for dissent on the part of individuals and groups and more importantly the State. To this end the study sees the repression of other human rights such as the rights to freedom of speech, expression and the media (prerequisites of the right to participation) as negating participatory rights at their very source.

These brief illustrations of the right to development at international, national and local levels show that attention to the right to development is primarily at an international level. At this level, unfortunately, it is regarded as a moral norm that is based on the urge for transfer of development cooperation. It is simply taken as a political recommendation which is difficult to be deductively included at lower levels of the national and local levels of the decision making process in development policies.

198 Philip Alston, ‘The Shortcoming of a ‘Garfield the Cat’, Approach to the Right to Development’, *California Western International Law Journal*. 15 (1985) pp. 512-513.

199 *Ibid*, p 512. See also Mansel and Scoott, ‘Why Bother About a Right to Development?’, *Journal of Law and Society*. 21 (1994) p. 177.

200 Mansel and Scoott (1994) p. 177.

201 See: François-Xavier Bagnoud Center for Health and Human Rights, *Final Report the Right to Development Project Country Study No. 3 Ghana*, Harvard School of Public Health, 2004.

Actually, the Committee on Economic, Social and Cultural rights has noted this problem. In their 18th session, the Committee mentions that the Declaration was not designed to be of use in an ‘operational context’. It says that

‘although the Declaration rightly emphasises the hitherto long-neglected international dimensions of human rights promotion, its great strength lies more in stating broad principles rather than identifying specific measures to be taken at the country level.’²⁰²

Notably, this implies that the Declaration has not been perceived as a human right with attached protection measures, particularly against human rights violations that usually occur in the phenomenon of development hazards. Therefore, studies, reviews, lengthy debates and annual resolutions on the right to development that are performed in the United Nations setting have had few concrete results and provide hardly any practical implications for the duty-bearers and the right-holder.

2.8 CONCLUDING REMARKS

As a human right, the right to development offers protection through the opportunity to claim against the State and other agents, in order to secure the right-holder’s entitlements in development. It is concerned with *how* these developments are carried out and encompasses a critical examination of the overall development process. In particular, the right to development focuses on the entitlements to fair distribution of benefits and participation of the individual as the right-holder, to be respected, protected and fulfilled by the State as the main duty-bearer.

After more than twenty years since the Declaration on the Right to Development of 1986 adopted by the United Nations General Assembly, the right to development has progressively gained more attention in international law and has resulted in guidelines towards enforcement at practical levels. At the United Nations’ level, the right to development enjoys a high status of consensus. Development is understood as part of human rights’ struggles and the importance of the right to development has been widely acknowledged.

Yet, current applications of the right to development at the States’ and international levels have not yet delivered substantive changes at the national and local levels. The common criticism that the right to development is a confusing compilation of ideas brings into question its progressive realisation. Consequently, the right to development merely circulates in diplomatic domains, while in practice the international institutions and agencies are still reluctant in incorporating the right to development in their work. Progress becomes slow since the states’ practices are also lacking implementation and

202 Committee on Economic, Social and Cultural Rights, ‘The incorporation of economic, social and cultural rights into the United Nations Development Assistance Framework (UNDAF) process’, comments adopted by the Committee on Economic, Social and Cultural Rights, 15 May 1998, paragraph 5.

commitment. Furthermore, the current efforts towards realisation are mostly found in the field of development cooperation, which risks the right to be translated into a state to state right. As a result the impact of the right to development as a protection of people in development processes remains rather scanty, with little effect on both development practitioners and authorities responsible for international and national policy making.

Efforts towards applicable guidelines have been discussed at the international levels but it is still difficult to assess their coercive impact. This concern becomes crucial in efforts to enforce the right to development as an instrument of protection against hazards. Stronger deployment of protective measures is essential to improve the functionality of the right to development at the international, national, and local levels. In this connection, the discussion at the international level has moved to establishing a stronger legal basis for the right to development. This progress may further facilitate the functioning of the right to development as a legal resource. A binding legal document on the right to development would not only establish a stronger legitimization of claims by people at the grassroots but it would also stimulate active enforcement by the States parties that would participate in that new instrument. Yet, to actually activate substantive protection in development processes, collective actions should continue to function as political instruments towards protection of victims of development hazards.

In this regard, it is imperative that that the debates on the right to development moved towards questions *how* and *where* the right can function in development processes. As a human rights, the right to development asserts the protection of the human dignity in development process by the the virtue of the law. Moreover, the entitlement to fair distribution of benefits and participation allow the right-holder to address human rights violations in development processes from below and can perhaps offer the basis to combat development hazards.

These entitlements equip the right-holders with protective and the transformative measures against injustices in development policies. The entitlement of fair distribution of benefits protects the right-holders to claim compensation should injuries occur. Protection against performing political actions to counter and expose development hazards is provided by the entitlement to participation. Additionally, besides these protective functions, both entitlements possess a transformational function that enables the right-holders to be empowered in perceiving and exercising their rights through their legal and political actions against development hazards. This phenomenon of development hazards will be elaborated in the next chapter.

CHAPTER 3

DEVELOPMENT AS A HAZARD: ASSESSING THE IMPACT OF DEVELOPMENT POLICIES AND PROJECT

3.1 INTRODUCTION

Based on data from the World Bank and other sources, it has been calculated that about *ten million people annually* enter the cycle of forced displacement and relocation in two ‘sectors’ alone – namely, dam construction and urban transportation.¹ This amounts to some 90 to 100 million people displaced during the 1990s, which is much more than the total number of refugees from wars and natural disasters.² Mostly, these ‘development induced displacements’ are caused by large scale projects, such as natural resource extraction, urban renewal or development programs, industrial parks, and infrastructure projects (such as highways, bridges, irrigation canals, and dams).³

This brief illustration adds to the explanation in Chapter 1, showing detrimental effects of development policies and projects. Such a situation is referred to as a development hazard, where development negatively affects the development beneficiary. Additionally, in Chapter 2, it has been concluded that the right to development, given its content, international recognition and positive status, can be employed in addressing development hazards. This chapter will follow this argumentation by clarifying the concept of development hazard. For this objective, the next section shall elaborate the phenomenon of development hazards by viewing development from different perspectives, namely the economic growth, normative, and entitlement perspectives. Thereafter, this chapter will illustrate the faces and practices of combating development hazards, focusing primarily human rights violations in the occurrences of landlessness, joblessness, degradation of health and food insecurity.⁴

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- 1 Michael Cernea ‘Understanding and Preventing Impoverishment from Displacement: Reflection on the State of Knowledge’, *Journal of Refugee Studies*. 8 (1995) p. 249.
 - 2 Michael Cernea, ‘The Risks and Reconstruction Model for Resettling Displaced Populations’, *World Development*. 24 (1997) p. 1570.
 - 3 Jason Stanley, ‘Development Induced Displacement and Resettlement’, Forced Migration Research Guidelines. January 2004.
 - 4 Cernea identifies 8 major impoverishment risks in displacement, namely, landlessness, joblessness, homelessness, marginalization, food insecurity, increase morbidity and mortality, loss access of common property and services, and social disarticulation. Michael Cernea ‘The Risks and Reconstruction Model for Resettling Displaced Populations’. *World Development*. 24 (1997) p. 19.

3.2 DEFINING DEVELOPMENT AS A HAZARD

3.2.1 *Development as Economic Growth*

A limited understanding of development is to perceive it as economic development, where evidently development is seen as a sub-discipline of economics. In this respect, economic growth is used as a way of measuring the development process. Adam Smith, the father of economic development, analyses the operation of a market economy and the process of economic development focusing on all factors that play a part in the production of goods and services.⁵ According to W.W. Rostow, economic growth means an increase of the value of production over time. This establishes development based on the scale and productivity of the working force and of capital. Included within capital are land and other natural resources, as well as scientific, technical, and organisational knowledge.⁶ The goal of achieving high economic growth follows from a high level of industrialisation, which he sees as 'take off'.⁷

Generally, development economics refers to four major strategic themes, all of which aim at productivity. They are (1) industrialisation, (2) rapid capital accumulation, (3) mobilisation of underemployed manpower and (4) planning and an economically active state.⁸ These strategic themes are respectively focused on the role of agriculture, markets, export expansion and political institutions⁹ as the factors that can contribute to significant increases in average living standards. Agriculture plays an important role because in the early stages of growth, a high concentration in the ownership of land tends to be beneficial as it provides a large surplus as a basis for investment. Market systems with their associated price incentives are powerful forces for export expansion and economic growth.¹⁰ Export expansion also appears to promote the economic growth and change.¹¹ Lastly with respect to political institutions, history has shown that only where governments have been prepared to invest in

5 Adam Smith's *Wealth of Nations* (London UK, 1776) is considered as the primary treatise of economic development. It laid out a rounded theory how a market economy operates and of how the cooperating factors of production is being rewarded. Robert Dorfman, 'Review Article: Economic Development from Beginning to Rostow', *Journal of Economic Literature*. 29 (1991) p. 575.

6 W.W. Rostow, 'The Stages of Economic Growth', *The Economic History Review*. 12 (1959) pp. 1-17.

7 Rostow argues that the period of take off is based on the ability of society to sustain an annual rate of net investment of the order of, at least, ten per cent. This familiar (but essentially tautological) way of defining the take-off should not conceal the full range of transformations required before growth becomes a built-in feature of a society's habits and institutions. *Ibid*.

8 Amartya Sen, 'Development: Which Way Now?', *The Economic Journal*. 93 (1983) p. 746.

9 Barbara Ingham, 'The Meaning of Development: Interactions between 'New' and 'Old' Ideas, *World Development*. 21 (1993) p. 1804.

10 Evidence indicates that nations grow faster where governments promote specialised market institutions, where they remove institutional barriers to factor mobility and where they help to secure private property rights. *Ibid*.

11 In this regard Ingham refers to Douglass North who argues that from the evidence of history that it is the high costs of transaction which prevent certain economies and societies from realising their economic potential in export expansion. *Ibid*, p. 1805.

public education and in agricultural extension, where they have undertaken land reform, and where they have provided improved transport, does economic growth spread significantly throughout the economy.¹²

As an anthropologist, Arturo Escobar views development as a ‘historically produced discourse’, and argues that perceiving development in terms of discourse maintains the focus of domination and explores the most pervasive effect of development.¹³ Establishing economic growth as a measurement of development is therefore historically constructed. When it comes to the development beneficiary, it practically limits its genuine meaning. There is no objection to viewing economic growth as necessary to combat poverty in developing countries and to provide greater life expectancy, healthier children, more food and clothing, ample shelter and better amenities. However, this principle of growth has forced countries, especially in the south, to accept and implicate economic growth strategies as the basis of their approach to development. Consideration of growth, rather than people, becomes the governing priority that occupies development. Development becomes the focus of processes of domination and an extremely efficient apparatus for producing knowledge about, and the exercise of power over ‘developing countries’.¹⁴

While economists generally believe that growth provides the most efficient solution to alleviate domestic problems, experience reveals that growth-oriented development cannot fully deliver sustainability of development.¹⁵ It cannot give the development beneficiary greater control over development unless this process is associated with deliberative actions to ensure inclusion of the development beneficiary. Moreover, growth-oriented development is not likely to automatically increase the quality of life of the development beneficiary. For example, agricultural growth tends to induce commercialisation through market expansion. Such commercialisation of agricultural systems permits mega-agricultural investments to enter poor peasant economies and this may lead to increased landlessness. Those without assets and skills are unable to exploit the expanding opportunities associated with the spreading of the market system. To continue this argumentation, in the next sub-section the discussion will be

12 *Ibid*, p. 1804.

13 A. Escobar, *Encountering development: the making and unmaking of the Third World*. (New Jersey: Princeton Univ. Press, 1995) pp. 5-6.

14 *Ibid*, p. 9.

15 Actually since the 1960s, many scholars have criticised the limitations of economic growth. Hoselitz, for example, said that the notion of stages and the analysis of the growth process in the fashion which Rostow proposed have appeal to many, since they appear to make a complex and vital policy problem extremely simple. This apparent simplicity is, of course, a danger; for if Rostow's analysis of the growth process is taken as a guide for policy, it may lead to disastrous results. Planners may try to meet certain levels of investment while neglecting other, more important goals, and the economic development of some new nations may either be bought at too high a price or may be diverted into channels which prove to have less beneficial results than alternative policies which would have been inaugurated if Rostow's formulas had not stood in the foreground of attention. See: Bert F. Hoselitz, ‘Book Reviews: The States of Economic Growth by W.W. Rostow’, *Journal of Modern History*. 2 (1961) p. 200.

followed by looking at some alternative ways of understanding development in order to grasp the essence of development hazards.

3.2.2 *Development as an Integral Normative Concept*

Dennis Goulet, a pioneer in the interdisciplinary study of development ethics, argues that development needs to be redefined, demystified and thrust into the arena of moral debate. He argues that:

‘The essential task of a development ethic is to render development decision actions humane. Stated differently, a development ethic is necessary to ensure that the painful changes launched under the banners of development do not result in antidevelopment which destroys cultures and individuals and exacts undue sacrifices in suffering and societal well-being – all in the name of profit, some absolutized ideology or a supposed efficiency imperative’.¹⁶

Responding to the economic growth-oriented development, Amartya Sen speaks of the deficiency of traditional development economics. As an economist himself, he does not disregard the significance of economic growth in development. However, the real limitations of economic development arise not from the choice of means to the end of economic growth, but from the insufficient recognition that economic growth is no more than a means to some other objective. Economic growth is crucial as some of the entitlements following from it can be realised only in processes of economic growth. Nevertheless, he warns of the danger of overemphasising the economic growth priority as judging advantages in terms of primary goods may lead to a partially blind morality.¹⁷ He also argues that:¹⁸

‘Development economics was born at a time when government involvement in deliberately fostering economic growth in general, and industrialization in particular, was very rare, and when the typical rates of capital accumulation were quite low. That situation has changed in many respects, and, while that may suggest the need to emphasise different issues, it does not in any way invalidate the wisdom of the strategies then suggested.’

Indeed, considering economic growth as an important part in development is unavoidable. However, as the scale of development grows bigger and the objective of growth acquires more emphasis, its negative impacts and deficiencies are more likely to reveal themselves. These tend to occur when development concentrates purely on the statistics of growth, which are represented in national product, aggregate income and

16 Dennis Goulet, ‘Tasks and methods in development ethics’, *Cross Currents*. 38 (1988) p. 162. Quotation is provided in David A. Crocker, ‘Toward Development Ethics’, *World Development*. 19 (1991) p. 458.

17 See G.A. Cohen, ‘Equality of What? On Welfare, Goods, and Capabilities’, in Martha C. Nussbaum and Amartya Sen (eds), *The Quality of Life*. (New York: Oxford Univ. Press, 1993) p. 16.

18 A. Sen (1983) p. 752.

total supply of particular goods, rather than in entitlements of people. Comparing the human development index in Saudi Arabia and Argentina may illustrate this argument. Economic data shows that Saudi Arabia and Argentina are close together in terms of gross domestic product (GDP)¹⁹ per head, but they are actually far apart in terms of basic capabilities of survival and education, such as the ability to live long, the ability to avoid mortality during infancy and childhood, the ability to read and write and the ability to benefit from sustained schooling.²⁰ This shows that the statistics do not automatically affect the quality of life of the development beneficiary.

In this regard, development is normally concerned with the capability of the development beneficiary and its emphasis is particularly placed upon the individual context of the quality of life.²¹ The capability approach, as set out by Amartya Sen and Martha Nussbaum,²² provides an alternative to crude measures of development through indicators of growth that fail to account for how such wealth may be distributed, and also fail to adequately establish the quality of life of those for whom development initiatives are most crucial. According to this approach, development is a process of expanding the capabilities for people to be able to do what they actually do with the goods.²³

For example, in the case of food policy, the main good thing that food does for people is that it nourishes them. Typically, of course, people become nourished by nourishing or feeding themselves, the ownership of food allows them to exercise the capability of nourishing themselves.²⁴ In this respect, the capability approach implies that a development policy should be connected with the development beneficiary. Capability is measured in the context of individuals and their struggles to sustain daily

19 According to *Statistic of Human Development Report 2006*, the GDP per capita of Saudi Arabia and Argentina is respectively USD 13.825 and USD 13.298. http://hdr.undp.org/hdr2006/statistics/countries/data_sheets/cty_ds_SAU.html and http://hdr.undp.org/hdr2006/statistics/countries/data_sheets/cty_ds_ARG.html, retrieved October 1, 2007 at 11.28 am.

20 In Saudi Arabia the life expectancy in 2000-05 is 71.6 years, the adult literacy rate (ages 15 and older) is 79.4% and the combined gross enrolment ratio for primary, secondary and tertiary schools is 58.6 %, while in Argentina the number is 79.3 years, 97.2% and 89.3% respectively. *Ibid*.

21 M.C. Nussbaum, *Women and Human Development*. (Cambridge: Cambridge University Press, 2000) p. 56.

22 The differences between Sen and Nussbaum's capability approach is that Sen's work on the notion of capabilities is primarily that of a real or effective opportunity, whereas Nussbaum's work pays more attention to people's skills and personality traits as aspects to capabilities. Some scholars therefore favour Nussbaum's approach over Sen's. For example, Des Gasper and Irene van Staveren argue that Nussbaum's approach has more potential to understand actions, meanings and motivations. However, because Sen's approach lies closer to economic theory, many economists find his approach more attractive, and the UNDP's (1990-2004) Human Development Reports have also been built on Sen's version. See: Ingrid Robeyns, 'The Capability Approach: a Theoretical Survey', *Journal of Human Development*. 6 (2005) p. 104.

23 A. Sen and M.C. Nussbaum, 'Capability and Well Being', *The Quality of Life*. (Oxford: Clarendon Press, 1993) p. 31.

24 *Ibid*, p. 20.

livelihoods. Ownership of food, or other goods and services, feeds the extension of individual's capability.

Such an extension of individuals' capability corresponds to what is called the 'functionings' of the development beneficiary. Functionings refers to the individual potential to do or to be.²⁵ It is achieved when an individual has an opportunity to achieve various lifestyles and as a result, the ability to live a good life. Using the same example, the ownership of food can nourish people and therefore they can be healthy. When they are healthy, they are able to realise and achieve their goals in life.

At the practical level, the capability and functionings approaches are dependent on political activities²⁶ to provide a threshold to enhance the quality of life of the development beneficiary. The goal of the political process should be to set the stage and allow people to present whatever arguments they have in favour of a given choice, but the choice is up to each individual. Nussbaum argues that, 'the fact that human beings desire something does count; it counts because we think that politics, rightly understood, comes from people and what matters to them, not from heavenly norms'.²⁷

Amartya Sen and Martha Nussbaum are amongst many scholars who have contributed to the normative clarification of the concept of development. For Sen and Nussbaum, the concept of development is inherently value-laden in that it yields criteria for what counts as good social change, and most fundamentally the achievement of a better life for human beings.²⁸ According to both, economic growth is but a means - and sometimes not a very good means - towards development that concerns human 'well-being', 'quality of life', and 'standard of living'.²⁹ Subsequently, development should be defined in relation to what humans can do and should be. Sen and Nussbaum in this respect employ the terms capability and functionings, to cover these doings and beings. They define development as the enhancement of certain human functionings and the expansion of human capabilities to so function.

Nevertheless to exercise their capabilities and expand their functions in life, one would also need access to resources based on legitimate claims. Here development is

25 Such opportunity, which represents the things that a person manages to do or be in leading a life is called functionings. Functionings are what render a life fully human in the sense that if there were no functionings of any kind in a life, we could hardly applaud it, no matter what opportunities it contained. Functionings may vary from the elementary, such as being adequately nourished and being free from avoidable disease, to complex activities or personal states, such as taking part in the life of the community and having self-respect. Capability refers to the feasible alternative combinations of these functionings. See: A. Sen, *Commodities and Capabilities*. (Amsterdam: North Holland, 1985) pp. 19-21; Sen and Nussbaum (1993) p. 31; M.C. Nussbaum, *Women and Human Development*, (Cambridge: Cambridge University Press, 2000) p. 71.

26 Nussbaum said that the basic intuitions from which the capability approach begins, in the political arena, is that certain human abilities exert a moral claim that they should be developed ... Not all actual human abilities exert a moral claim, only the ones that have been evaluated as valuable from an ethical viewpoint. *Ibid*, p. 83.

27 *Ibid*, p. 146.

28 David A. Crocker, 'Functioning and Capability: the Foundations of Sen's and Nussbaum's Development Ethic', *Political Theory*. 20 (1992) p. 585.

29 *Ibid*, p. 586.

concerned with the positions where the beneficiary is doing something, or is able to do so. Accordingly, this is where the capabilities and functionings approach to development is closely related to the idea of human rights. Especially since the language of rights entails legal protection and can be used as a base for political actions and gives important precision and supplementation to the language of capabilities.³⁰ The language of rights may provide a legal and political basis for clear motivations and goals in respect of a notion of development towards which the capability and functionings approach contributes. It has been clear that economic development might improve productivity and contribute to the allocation of resources for eradicating certain development problems; however without a corresponding human rights' measures for the right-holder, it is not necessarily relevant to the improvement of capabilities and functionings in life.

Clearly, this involves affirmative material and institutional support, not just the ability not to impede. An example for this argument is the right to political participation of women. In many nations women have a nominal right to political participation without having this right in the sense of capability. They may still be threatened with violence should they leave the home.³¹ Thus, when applying the capability and functionings approaches, it is necessary to also consider the necessary conditions that enable them to be exercised. The entitlement of political participation cannot thus simply be regarded as granted once it has been incorporated in positive law. The right-holder enjoys the concrete entitlement only if there are effective measures to get women into a position and truly capable to exercise their rights.

In this regard, one can conclude that incorporating the language of rights as an integral normative concept of development also signifies a transformative impact. The structural implementation of human rights is a necessity, and consequently there should be a corresponding system of advancing the *entitlement positions* of the development beneficiary as the right-holder. Entitlement positions concern not only the fulfilment of basic needs, but the possibility to make legitimate access to resources and legitimate claims over goods and services.³²

30 Rights have been understood in many different ways, and difficult theoretical questions are frequently obscured by the use of rights language, which can give the illusion of agreement where there is deep philosophical disagreement. People differ about what the basis of a rights claim is: rationality, sentience, and mere life have all had their defenders. The capability approach has the advantage of taking clear positions while stating clearly what the motivating concerns are and what the goal is. Martha C. Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', *Feminist Economist*. 9 (2003) p. 36-37.

31 *Ibid*, p. 38.

32 Bas de Gaay Fortman, 'Beyond income distribution: an entitlement systems approach to the acquirement problem', in J. van der Linden *et al* (eds). *The Economics of Income Distribution: Heterodox Approaches*. (Brookfield/Cheltenham: Edward Elgar, 1999) p. 42.

3.2.3 Questioning Development Interests: Advancing Entitlement Positions

The capability and functionings approaches urge the parties involved in development, particularly the development beneficiary, to ask themselves what aspect of living they consider so fundamental that they could not regard life as fully human once without them.³³ At the practical domain, these fundamental aspects of living may be regarded as development interests. Development interest is a term introduced to generally refer to the interests to which the different development actors serve and prioritise.

In the last section it has been mentioned that as a result to perceiving development from the capability and functionings approaches, development requires a corresponding system to advance entitlement positions. An entitlement position is defined as the structurally protected basis for claims as held by the right-holder. It corresponds to the possibility to make legitimate claims and in that sense is a function of both law and power. Power means opportunity or actual command.³⁴ Law, on the other hand, legitimises and hence protects in case of dispute. The right-holder can use human rights principles to justify their claims and be protected also in the case of dispute or conflict if their acts backfire against them. This sub-section shall question the connection of development interests of different parties in development processes with the idea of advancing the entitlement positions of the right-holder.

As there are more parties involved in development processes, there are also distinct interests at stake. Notably, there are at least three parties in development policies; ‘developers’, the local people and the national government. Among these different parties there have always been different development interests with a multiplicity of voices, even if some are more powerful than others.³⁵ Combination of these interests might be relevant but could also be detrimental to the advancement of the entitlement positions of the right-holder, because the relationship between voices of different parties in the development process may be established as problematic. This relationship shapes the manifestation of development interests and ultimately the direction of development policy in advancing the entitlement positions of the right-holder. Moreover, this relationship can also change, influence or transform a development policy. In this respect, one needs to initially understand the nature of development interests,

33 M. Nussbaum, ‘Commentary on Onora O’Neil: Justice, Gender and International Boundaries’, *The Quality of Life*. (Oxford: Clarendon Press, 1993) p. 325.

34 Bas de Gaay Fortman, ‘In Search of a New Paradigm: Development Interventionism from a Human Dignity Perspective’, *The Development of Religion, the Religion of Development*. (Delft: Eburon, 2004) p. 27.

35 Analogous with Hobart, Grillo and Stirrat also identify development voices of those of developers, the local people and the national government. R.D. Grillo and R.L. Stirrat, *Discourses of Development*. (New York/Oxford: Berg, 1997) pp. 21-22.

which entails studies on the effects of development policy and the relationship of development parties within their wider developmental context.³⁶

With regard to the effect of development policy, the focus is on the *outcomes* of development policy.³⁷ Assessing the outcome of a development policy is believed to represent the nature of development interests. It reflects which interests are being prioritised or neglected. A mega development which produced unanticipated geological changes, such as the Konya Dam in India for example, is unlikely to signify representative development interests. This dam project has induced a seismic effect which eventually led to a disaster factor similar to that of an accident that killed 180 people, injured 1500 others and left several thousands homeless.³⁸ Focusing on this hazardous outcome, the type of development interest the project was decided upon thus becomes questionable. Certainly the development of the dam did not aim to, nor result in, the advancement of the entitlement positions of the people living in the area. Looking at the negative impact, it also can be presumed that it was not the beneficiary's interests being prioritised in this particular project.

As to the relationship between development parties and their wider development context, development interests manifest themselves within the context of decision-making on development.³⁹ The emphasis here is on the ways in which the nature of the decisions, the *kind* of development policy, aims to advance the entitlement position of the development beneficiary or not.

In this vein, urgent questions should be asked about the objective of all parties, such as the development agencies, national governments, and the development beneficiary, in development process. For the first two parties, it should be examined whether they are effective in advancing the beneficiary's entitlement positions, particularly in factors affecting the basic needs of human beings, such as abating diseases, hunger, economic and social deprivation.⁴⁰ Quarles van Ufford, in particular with respect to that pledged by development agencies, such as donors and financial institutions as well as the national and local governments, argues that their role is increasingly regarded as ambiguous, uncertain and problematic, particularly in committing to the entitlement positions of the development beneficiary. These difficulties usually arise because of their own internal problems.⁴¹ They are becoming the

36 Quarles van Ufford uses these approaches to understand the relations between intentions and outcomes in development policy. The actions spring from the organization and the outcomes are to be found in the development context. He particularly stresses the relationship between specific organizations and their environment. See: Philip Quarles van Ufford (et.al.), *The Hidden Crisis in Development: Development Bureaucracies*. (Amsterdam: Free University Press, 1988) p. 11.

37 *Ibid.*

38 The example here is the Konya Dam collapse in Maharashtra. Paul. K. Gellert and Barbara D. Lynch, *Mega-projects as Displacements*. (UNESCO: Blackwell Publishing, 2003) p. 19.

39 See Quarles van Ufford (1988) p. 11.

40 *Ibid.*, p. 9.

41 Quarles van Ufford speaks about the hidden crises of bureaucratic problems, which were shelved and kept hidden from public scrutiny and analyses. To date development organizations were less than eager to have them studied at large. *Ibid.*, pp. 10-11.

bottlenecks themselves, creating serious problems with their own priorities in development.

Development agencies, such as the World Bank or the IMF, have different development interests. The World Bank stresses structural issues while the IMF is more concerned with macroeconomics.⁴² On the subject of the IMF, a Nobel laureate, Joseph Stiglitz warns about the priorities taken in implementing their policy.⁴³

‘It is important not only to look at what the IMF puts on its agenda, but what it leaves off. Stabilization is on the agenda; job creation is off, taxation and its adverse effects are on the agenda; land reform is off. There is money to bail out banks but not to pay for improved education and health services, let alone to bail out workers who are thrown out of their jobs as a result of the macroeconomic mismanagement.’

The relationship between the development agencies and the national government and the development beneficiary also evolves around the issue of development aid conditionality. Uvin in this respect has analysed four problems in aid conditionality, which exert a strong influence on the kind of development policies in developing countries. He considers conditionality as unethical (as a matter of principle it ought not to be employed),⁴⁴ never fully implemented (even if it were ethical, it is never really employed),⁴⁵ does not produce the result it aims for (even if it is properly employed it does not work),⁴⁶ and destroys that which it seeks to achieve (not only does it not work, but it causes more harm).⁴⁷

At the level of the national government, development interest evolves around different priorities. In a democratic society, where the political system is based on free and fair elections, ideally, the national government is required to perform in accordance with the aspirations of the constituents. Such inclusion may prevent the occur-

42 Joseph Stiglitz, *Globalisation and Its Discontents*. (London: Penguin Group 2002) p. 14.

43 *Ibid*, pp. 80-81.

44 Peter Uvin analyses the aid conditionality with human rights. He examines a situation wherein one human right is violated because of aid conditionality. Mostly because scholars have documented how the United States and the European Union, for example, avoid conditionality with politically and economically important countries, while other, often less egregious, offenders are punished or threatened. Peter Uvin, *Human Rights and Development*. (Bloomfield CT: Kumarian Press, 2004) p. 60.

45 Uvin stresses the fact that donors have found it extremely difficult to coordinate their conditionality pressures and their aid policies more generally. Competing interests, struggles for influence, unwillingness to invest in coordination. *Ibid*, p. 64.

46 Conditionality does not produce the intended result because it only attacks the symptoms but not the causes of a problem. Sanctions and conditionality only ‘scratch the surface of much deeper issues’, related to attitudes, interests, distribution of power, the nature of institutions, deficient knowledge and the like. *Ibid*, pp. 65-66.

47 In this respect, Uvin argues that heavy handed external pressure can lead to a backlash that actually undermines the desired aim. Domestic groups may become suspect if they are too cozy with foreign agencies. He also argues that while the aim of conditionality is to place limitations on the economic and political power of incumbent regimes, these same incumbent regimes are de facto in the driver’s seat to implement conditionality. Finally, conditionality destroys the very domestic accountability and social transformation it seeks to achieve. *Ibid*, pp. 67-68.

rence of development hazards. It advances the accountability of development policies as it provides the space for different development interests to collide, to be tested or compromised. As a result, the decision for development policies is more likely to be significant in improving the entitlement positions of the development beneficiary.

The situation is contradictory particularly in non-democratic countries. In these countries, development beneficiary is usually not included in the decision making policies, and therefore the macroeconomic performances may acquire a more significant priority for the continuity of the national government power. The national government therefore opts for growth-oriented projects rather than securing the entitlement positions of the development beneficiary. One of the reasons is that this option can easily represent a positive governing performance, and therefore is beneficial to acquire the support of their constituents and ensure the influx of development aid.⁴⁸

At the level of development beneficiary, development interests imply their understanding of what is considered valuable or that which they cannot live without. This is manifested in the form of their basic personal needs, such as food, health and shelter.⁴⁹ In this regard, Raz proposes the significance of social forms, which are based on shared beliefs, folklore, culture, collectively shared metaphors and similar expressions of cultural identity that pervade personal decisions and value to goods and services. Thus a person can have a comprehensive goal only if it is based on existing social forms, i.e. on forms of behaviour that are widely practiced in his society.⁵⁰ Similarly, Kymlica also argues that actions and goals 'only have meaning to us because they are identified as having significance by our culture, because they fit into some pattern of activities which can be culturally recognised as a way of leading one's

48 An example is Indonesia under the Suharto Government. During this period Indonesia was marked as one of the Asian Tigers, due to its 7%-9% economic growth in the 1990s, mainly resulting from the development of mega projects. Generally, international construction firms, private and public international financial institutions and public works bureaucracies are wielding considerable support in mega projects especially in developing countries. As a result, under the new order in Indonesia, the euphemisms 'land reclamation and urban renewal' were used to justify mass evictions of families and destruction of their homes to make way for multi-million dollar mega development projects. Unfortunately this negative impact on the development beneficiary positively contributes to the overall performance of developing countries, not only in terms of economic growth, but also in terms of praising Soeharto, nationally and internationally, as the 'Father of Development in Indonesia', which contributed significantly to his three decades of power. Gellert and Lynch (2003) p. 16; John H. McGlynn, *Indonesia in the Soeharto Years*. (Leiden: KITLV, 2005) p. 189.

49 Raz considers a person's goals of well being constitutes of those biological needs such as climate, food and so forth, goals, incorporating plans, relationships, ambitions. Quotation provided in Jonathan Ensor, 'Linking Rights and Culture-Implications for Rights-Based Approach', *Reinventing Development, Translating Rights-Based Approaches from Theory into Practices*. (London: Zedbooks, 2005) p. 258. Additionally, Nussbaum creates a list of basic capabilities which include: (1) life, (2) bodily health, (3) bodily integrity, (4) senses, imagination, thought, (5) emotions, (6) practical reason, (7) affiliation, (8) other species, (9) play, and (10) control over one's environment, both political and material. M.C. Nussbaum (2000) pp. 78-80.

50 Ensor (2005) p. 258.

life'.⁵¹ This means that development interests cannot be selected by an individual in a purely subjective matter, as the important aspects of one's life are deemed to refer to communal context or social interaction.

Yet such a definition of development interest is not sufficient in respecting entitlement positions based on human rights claims in development. In a combination of law and power, development interests of the right-holder, which is manifested in entitlement positions, is more than the occasional claim based on needs. In fact it is an object of desire,⁵² reflected in the situation where people continuously try to improve their entitlement positions. Hence, more than a given state of affairs, entitlement position is referred as a process. Advancing the development interest of the development beneficiary, therefore, does not stop when basic needs are fulfilled. On the contrary it is a continuous process in advancing the capability and functionings of the individual. The nature of human rights principles, as both legal protection and political instruments, requires efforts towards inclusion and protection the right-holder.

Therefore, development interests should be approached from the perspective of the development beneficiary or the right-holder to the right to development, which is thus defined as advancing the entitlement positions. In this respect, the outcome and the kind of development policies may represent whether or not this approach is honoured. This approach also entails development to be measured by the fulfilment of basic fundamental needs and by the availability of potential claims to the non-fulfilment of perceived entitlement positions.

Consequently, in a situation where a mega development project is being implemented, the people who are affected by the project should have the power and be protected by law to secure their entitlement positions. The resettlement procedures should at least consider the entitlements people have already acquired in the area where they live or where the development project is taking place. If the situation suggests otherwise, derived from the basis of the human rights principles – particularly considering the right to development, the people should be able to lodge their complaints, seek remedies, or claim compensation. Should their entitlement positions be degraded or if there arises a situation of acquirement failures in the context of development process; one would speak of a development hazard.

3.2.4 Identifying Development as a Hazard

At this point one can conclude that development hazards take place when a development process disturbs essential entitlement positions of those involved. It happens when development negatively affects the right-holder in terms of their legitimate access to resources and their legitimate claims over goods and resources, thus inhibiting their capabilities and functionings in life.

⁵¹ *Ibid*, p. 259.

⁵² De Gaay Fortman (1997) p. 29.

A major cause of development hazards is the perspective adopted in development policies, when material priorities, *i.e.* productivity and growth, fully dominate human conditions. From the argument in the last section, this transpires because of the dominating relationship of one development actor over another and of one development interest over another. For example, when the agenda of market stabilisation carried by the IMF to recover a country financial-economic terms might weaken the position of labourers.

Identifying the faces of development hazards requires a combined approach by the state-arranged entitlement systems, institution-based entitlement strategies, and private law (property law, contract etc.).⁵³ Here one is examining mal-functioning economy, bad government and serious socio-cultural constraints. The faces of development hazards take place when actual acquirement systems, which manifested in both activities and honoured claims in the context of the state-arranged entitlement systems, institution-based entitlement strategies, and private law, are failing to respect, protect and fulfil the entitlement positions of the right-holders.

One of the best studied faces of development hazards is displacement, which occurs because of the implementation of mega development projects, or as pointed out earlier the dams and urban transportations. Michael Cernea, a former advisor of the World Bank, points out that:⁵⁴

‘The worst consequences of forced displacement occur in domestic projects that are not guided by national or international policy norms. Our study found that impoverishment and brutal violations of basic human rights happen most frequently in programmes that are not subject to agreement on policy guidelines and to professional outside review, supervision and evaluation’.

Stated differently, in the cases of displacement, there occur failures of existing entitlement systems that arise in compensating the negatively affected entitlement positions as caused by development projects. In that respect, Cernea argues that the State appears to play a pivotal role in the whole process. Such failed projects present a dysfunctional combination of the stated arranged entitlement systems, the institutional based strategies, and the private law, all aspects that requires an active role from the State. In the phenomenon of displacement, the State fails thus in providing the adequate resettlement to prevent impoverishment, the law fails in enforcing the agreement or contract, and there is no community or association which can secure compensatory entitlement.

53 Bas de Gaay Fortman refers to such entitlement systems to explain the operationalisation of the acquirement problems. See: Bas de Gaay Fortman, ‘In Search of a New Paradigm: Development Interventionism from a Human Dignity Perspective’, *The Development of Religion, the Religion of Development*. (Delft: Eburon, 2004) pp. 19-29.

54 Michael Cernea ‘Understanding and Preventing Impoverishment from Displacement: Reflection on the State of Knowledge’, *Journal of Refugee Studies*. 8 (1995) p. 251.

Impoverishment does not merely take place in the form of displacement; it can also include the degradation of standards of living resulting from a lower income, vulnerability to morbidity, dispossession of houses and the like. Another face of development hazards manifests itself when a society, after the implementation of a development project, becomes vulnerable to social conflict.

In such situations participation is, therefore, an acute necessity and serves as a preventive or a remedy to combat development hazards. In an ideal state, of course, participation is protected by providing the channels consultation as well as the systems for remedies, compensation and proper resettlement. When hazards are occurred victims can perform combating actions through the judicial political activism based on law.

Yet, in a less than ideal state, social conflict might be the only option for directing the claims. It is no longer only the face of hazard but also is the alternative to combat. This follow-on effect usually occurs when the right-holder exercises the claims as a response to the intrusion of their entitlement positions.⁵⁵ In this regard, social conflict is visible in two different contradictory sides. The first is that it can develop into more violations of human rights, such as freedom of speech and assembly as well as torture and human degradation. The second is that it can actually work as preservation of the right-holder's interest in securing the entitlement positions and as a foundation for consensus between the opposing parties.

Opting for social conflict as a remedy for development hazards can work only if within the related development process there is a reason to assume that while conditions could be changed, they are actually not changed.⁵⁶ Firstly, this corresponds to the failure to recognise human rights aspects in development, for example in the case of displacement, where resettlement should be provided in accordance with the basic rights of the victims. Secondly, this has something to do with the perception of unjust practices or the ability of the right-holder to discern the potential to obtain justice in a hazardous situation. What the right-holder refers to as justice depends on the basic interest and entitlement positions to such an extent that they ought to be enforced by the corresponding entitlement arrangements.⁵⁷

55 This can be illustrated through various examples. The indigenous people affected by the Singrauli Thermal Project in India opposed the bulldozers which were sent to force them out of their homes. In Mexico, protests over the proposed San Juan Tetecingo project included highway blockades and a large demonstration in Mexico City. In Indonesia, the resistance of many families from the Kedung Ombo reservoir evolved from a refusal to move with court actions that went all the way to the country's Supreme Court. Cernea in this respect has affirmed that many development projects intrinsically embody or entail this kind of political and economic conflict. *Ibid.*, p. 257.

56 Hannah Arendt comments that rage is by no means an automatic reaction to misery and suffering as such; no one reacts with rage to a disease beyond the powers of medicine or to an earthquake or for than matter to social conditions which seem to be unchangeable. Quotation is provided in Bas de Gaay Fortman, 'Violence among peoples in the light of human frustration and aggression', *European Journal of Pharmacology*. 526 (2005) p. 6.

57 Here reference is made to what was earlier referred to as the state-arranged entitlement, the institution-arranged entitlement, and the private law protection.

Hence, when development hazards are occurred, in order to not only secure but also advance existing entitlement positions, the right-holder must to possess the means to combat development policies in order to preserve their interests. In this regard consensus is not the first priority for acquiring justice in the development process, rather it is an ultimate goal achieved through the exercise of participation in self regulated practice, in which a risk of social conflict might occur.⁵⁸

3.3 THE FACES AND PRACTICES OF COMBATING DEVELOPMENT HAZARDS

This section aims to analyse the faces and practices of combating development hazards from the human rights perspective, focusing particularly on the right to development. As has been discussed previously, development hazards occur when development processes disturb the entitlement positions of the right-holder to the right to development. The hazards manifest themselves in the overall impoverishment processes resulting from development policies and projects. Such processes encompass not only economic but also social and cultural impoverishment, reflecting the fact that the development beneficiary loses the capital,⁵⁹ dignity and capabilities and it negatively affects the entitlement positions.

Examples include displacement and landlessness, joblessness, degradation of livelihood and health conditions that increase morbidity, and food insecurity. Landlessness and joblessness are the most typical negative effects from a misinterpreted development.⁶⁰ The selection of degradation of health and food insecurity is in line with the idea of the Independent Expert on the Right to Development, who laid out guidelines for implementing the right step by step, by realising the right to food and the right to primary health.⁶¹

Responses to development hazards constitute combating activities of the right-holder at the domestic and at the international arenas. Domestic activities refer to, for example, the process of participation, litigation, or protest and demonstration. Interna-

58 De Gaay Fortman formulates this as the right to conflict, which might be conceived as an abstract acknowledgement of one's essential interests. Recognition and protection of fundamental interest is the key term, or in other words, human rights. Hence where basic mechanisms for the realization of human rights have not been established, people's right to combat would be activated. Bas de Gaay Fortman (2005) p. 7.

59 Cernea defines capital as natural capital, man-made capital, human capital and social capital. Michael Cernea, 'Understanding and Preventing Impoverishment from Displacement: Reflection on the State of Knowledge', *Journal of Refugee Studies*. 8 (1995) 251.

60 For further discussion on landlessness and joblessness, see: M. Q. Zaman, 'Development and Displacement in Bangladesh'. *Asean Survey*. 36 (1996), Laurie A. Brand, 'Displacement for Development: The Impact of Changing State-Society Relations'. *World Development*. 29 (2001).

61 A/55/306, Report of the Independent Expert on the Right to Development, paragraph 3.

tionally, one might think of the complaints made to the human rights bodies, particularly within the United Nations, and to the Inspection Panel of the World Bank.⁶²

3.3.1 *Combating Displacement and Landlessness*

The most pronounced face of development hazards is displacement caused by a large development project. It is frequently followed by homelessness and landlessness. Both refer to expropriation of lands and the removal of the main foundation upon which the right-holder relies for the productive system, commercial activities, and livelihood. This is the principal form of de-capitalisation and pauperisation of the right-holder, through which they lose not only their capital, but also their capabilities.

In this regard, human rights may be used as the instrument to combat displacement and landlessness, particularly when connecting them to enforcement of the right to housing.⁶³ According to the former United Nations Special Rapporteur on Housing Rights, Justice Rajindar Sachar in his final report, the housing right implies the entitlement to housing resources adequate for health, well-being and security, consistent with other human rights.⁶⁴ Additionally the right to development provides the tools to address this face of development hazards by ensuring the participation of the development victims to claim or demand the access to housing resources; should a person be homeless, inadequately housed or generally incapable of acquiring the bundle of entitlements implicitly linked with housing rights. Furthermore the right to development also equips the right-holder with the entitlement to claim or demand the State to undertake a series of measures which indicate policy and legislative recognition of each of the constituent aspects of the right in question.

Hence, in the situation where development induces displacement and homelessness, the Government bears the obligation to adopt a series of measures to protect and promote the entitlement to housing of the right-holder. The International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically compels states parties to

62 The Inspection Panel was established by the Executive Directors of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) on September 22, 1993. The primary purpose of the Inspection Panel is to address the concerns of the people who may be affected by Bank projects and to ensure that the Bank adheres to its operational policies and procedures during design, preparation and implementation phases of projects. The Inspection Panel consists of three members who are appointed by the Board for non-renewable periods of five years. Members are selected on the basis of their ability to deal thoroughly and fairly with the requests brought to them, their integrity and independence from the bank Management, and their exposure to developmental issues and living conditions in developing countries.

63 The right to adequate housing is recognised in various international instruments, including in Article 25 of the Universal Declaration of Human Rights (UDHR), Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 5 of the Convention on the Elimination of the All Forms of Racial Discrimination, Article 14 of the Convention on the Elimination of all Forms Discrimination against Women (CEDAW), and Article 21 of the Convention Relating to the Status of Refugees.

64 E/CN.4/Sub.2/1995/12, Final report submitted by the Special Rapporteur on the right to adequate housing, paragraph 12.

ensure the realisation of the right to housing in the continuous effort to improve living conditions.⁶⁵ As to the right to development, this clause can also be translated into the obligation of state parties to the entitlements to housing in development processes. Furthermore, the report of the UN Special Rapporteur explicitly emphasises the State obligation to protect the right to housing for highly disadvantaged people suffering from a man-made disaster, such as these mega-development projects.⁶⁶ In more specific recommendation, the General Framework Agreement for Peace in Bosnia and Herzegovina, particularly with regard to the protection of the right to housing for refugees and displaced persons, recognised their entitlement to be afforded with the right to freely return to their homes of origin, the right to have property restored which was deprived, and the right to compensation for any property which cannot be restored to them.⁶⁷

Although the objective of mega development projects that induce displacements is generally aiming at improving living and income conditions, specifically in irrigations and electricity generation, their resettlement processes often show that no measures are taken in accordance with the human rights requirements. Inadequate housing conditions represent that States do not take all the necessary means possible to ensure that everyone victimised by the mega-development projects had access to proper housing resources. Therefore, the claims and demands based on this right should also be made possible both at the national and international levels. In the following subsections, this argument is illustrated by two cases of displacement caused by the Sardar Sarovar Dam in India and Yacyretá Hydroelectric Project in Argentina and Paraguay.

3.3.1.1 Sardar Sarovar Dam, India

The Sardar Sarovar Dam is the terminal dam in the master plan of the Narmada Valley Development Project.⁶⁸ It was the largest dam amongst 30 other dams planned in the Narmada River. The dam project envisaged an irrigation command of 1.8 billion

65 Article 11 of ICESCR asserts that ‘the States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent’.

66 Paragraph 11 of the Final Report of the Special Rapporteur on the right to adequate housing asserts that: ‘qualifications must be made ... so that States do not misinterpret and abrogate State responsibility, particularly for highly disadvantaged groups such as the homeless, the disabled, victims of riots or ethnic strife, man-made and natural disasters and other groups unable to fulfil their housing rights on their own’.

67 Scott Leckie, ‘The right to housing’, *Economic, Social and Cultural Rights*. (Dordrecht: Martinus Nijhoff International, 2001) p. 166.

68 Ranjit Dwivedi, ‘Why Some People Resist and Others Do Not: Local Perceptions and Actions over Displacement Risks on the Sardar Sarovar’, *Working Paper Series No. 265* (The Hague: Institute of Social Science, 1997) p. 4.

hectares, installed power generation capacity of 1450 megawatt and drinking water supply to 8215 villages and 135 urban areas. Its water level was to cover 410 square kilometres of land whereas its irrigation canal was approximately 440 kilometres in length.

Landlessness was the main face of development hazards in the Sardar Sarovar Dam Project. There were about 22 million inhabitants living in the Narmada river basin, 80% of whom lived in rural areas and depend primarily on agriculture.⁶⁹ During the preparation for the project appraisals began in the early 1980s, information over the nature and the scope of displacement available to people was scant. None of the 26 villages had been given any notice about the then planned project.⁷⁰ The conditions of uncertainty prevailed despite the fact that 8 years before the project was executed the Narmada Water Disputes Tribunal had elaborately spelt out the provisions for resettlement assigning governmental liabilities and responsibilities. The victims were living like refugees and relying on water tankers to meet their daily requirement.⁷¹

On the other hand, those who were better informed fared no better; they still lost their productive agricultural land and received inadequate compensation and leaving them unable to acquire new land.⁷² Additionally, the quality of the compensated land is not as good as the land around the Narmada River.⁷³ Furthermore, the process of giving them the compensation for goods is observed by the Narmada Human Rights Observer Team as violent. The victims were forced by the authorities, namely the police, to sign the compensation list made by the authority.⁷⁴

Such uncertainty and inadequacy of compensation brought the people living in the area to action. Represented by non-governmental organisations this case was campaigned as a violation of human rights in both the national and international arenas. At the national level, action had been taken in the form of demonstrations and the judiciary procedures. Unfortunately both strategies were rather ineffective. The

69 *Ibid*, p. 5.

70 In India, Under the Land Acquisition Act 1894, the Government need to issue preliminary notification when a particular part of land is needed or may be needed for public purpose. *Ibid*, p. 6.

71 Families can be seen in clustered makeshift shanties along the road leading to New Harsud, a small hamlet which is being expanded to rehabilitate the residents of Harsud, the centuries-old town now facing submergence owing to the project. Lalit Sastri, 'The rough and the tumble of the New Harsud', the Hindu, 10 July 2004.

72 Ranjit Dwivedi (1997) p. 12.

73 One of the farmers in village Kukra Rajghat mentioned that the land they owned after the displacement was so severely water logged that the crop output was abysmal. *Ibid*, p. 12.

74 For example: Police high-handedness was evident in the way members of the Gujarat State Home Guards forced their way into the huts of the villagers ostensibly to record their possessions that might be lost in the Narmada waters, Vadgam being among the first villages to face submergence. It is located right next to the Sardar Sarovar Dam. Bachubhai Raghunath, among the 24 families that have returned from the rehabilitation site at Vadgam, put it concisely that, 'they (the police) pointed the gun at me and noted the goods in my house; then they asked me to sign under the list they had made'. Friends of River Namada, *Report of the Narmada Human Rights Visit*, <http://www.narmada.org/sardar-sarovar/hrvisit930708.html>, retrieved October 9, 2007, at 11.03.

demonstrations led to social conflicts between the people and the authority, given the presence of police camps around the resettlement residence areas.⁷⁵

The judgment of the Indian Supreme Court in 2000 was considered favourable to the dam project. The Supreme Court has laid down that ‘resettlement and rehabilitation has to be done at least six months in advance of submersion, complete in all respects’. Yet, it was recognised that this judgement was unlikely to be complied with. In his first recorded response to the Supreme Court verdict, the Chief Minister of Madhya Pradesh said: ‘One of the main clauses of the award of the Narmada Tribunal is that all project affected people should get land in lieu of land. The main problem is that we do not have any arable land to give to the oustees’.⁷⁶ This stark statement of the Government of Madhya Pradesh made it impossible for anyone to assert that compensation rehabilitation was possible in accordance with the law. Another unaccommodating response came from the Indian Supreme Court in 2007. This recent decision of the Supreme Court allowed the continuation of the construction of the Sardar Sarovar dam, even though thousands of families have not yet been rehabilitated and 35,000 more face displacement.⁷⁷ Actually, this decision violates the Court’s previous judgments of March 2005, which unambiguously stated that further construction could not happen until rehabilitation of temporarily and permanently affected families was completed.

The only response in favour of the victims found at the national level came from the Indian People’s Tribunal on Environment and Human Rights (IPT).⁷⁸ In a recent report, a panel of the IPT confirmed that the local project, state and central authorities have been severely negligent and have inflicted a great deal of human and social suffering and this is due to ‘failures of government agencies to adhere to the letter and spirit of the Narmada Water Disputes Tribunal Award, the Supreme Court judgment in 2000, to the rehabilitation policies of the three state governments, and internationally accepted norms and standards for forcibly displaced people’.⁷⁹

Internationally, besides campaigning abroad, the Operational Evaluation Department and CSOs sent report letters to the World Bank on the situation at the Sardar

75 Ranjit Dwivedi (1997) p. 15.

76 Mihir Shah, ‘Resolving the Narmada conflict’, *the Hindu*, 2 December 2002, <http://www.hindu.com/2000/12/02/stories/05022523.htm>, retrieved October 4, 2007 at 10.49.

77 Indian Supreme Court, Record of Proceeding, I.A. NOS. 18-22 IN WRIT PETITION (CIVIL) NO. 328 OF 2002, of 8 May 2006, <http://narmada.aidindia.org/content/view/49/26/>, retrieved June 11, 2007, at 11. 40.

78 Positioned as an alternative People’s Court that gives voice to the struggles of grassroots organizations and affected communities, IPT conducts investigations on issues concerning human rights and environmental justice.

79 The Indian People’s Tribunal on Environment and Human Rights, *IPT Report on the Sardar Sarovar Dam*. (New Delhi: Combat Law Publication, 2005) p. 41, http://www.narmada.org/IPT_Report.pdf, retrieved June 11, 2007, at 11.28.

Sarovar Dam.⁸⁰ Positive responses to the action came from the international community. All observed a similar concern with regard to the unjust results of the Sardar Sarovar Dam. The UN Special Rapporteurs on adequate housing, indigenous people and right to health also expressed their concern of the government decision to increase the water level of the Dam in 2005,⁸¹ which would place 3,000 families in Maharashtra and around 12,000 families in Madhya Pradesh in danger of having their homes submerged.

3.3.1.2 Yacyretá Hydroelectric Project, Argentina/Paraguay

The Yacyretá hydroelectric project,⁸² started in 1983, is a joint project between Argentina and Paraguay that involves the construction of a large 65 kilometres earth dam in the main channel of the Paraná River. The project aims to generate a hydroelectric facility with 3,100 megawatts capacities. It also includes a navigation lock, fish passage and other support facilities as well as a large program of infrastructure, relocation, population resettlement, and mitigation of environmental impacts. The dam will create a reservoir of 1065 square kilometres and affect over 12,000 families including having a major impact on the urban areas of Encarnación and Posadas.

Since it started, the project has suffered major implementation problems, including financial problems, which have led to significant delays in completion. The project has been plagued by delays, corruption, procurement disputes, political changes, and the reluctance of the Argentine government to provide its share of counterpart financing. The Banks' handling of their loans over a 17-year period display continual violations of their own policies and procedures. The delay led to rapid deteriorations and affected the population. These problems have caused this project to be carried out without having adequately implemented the required resettlements, environmental and social mitigation measures.

The Yacyreta Hydroelectric Project has inundated approximately 80,000 hectares in Paraguay and 29,000 hectares in Argentina beyond the original river bed, including 30,000 hectares of forest, large and small islands, marshes and grasslands. The project forced involuntary resettlement of over 50,000 people, mostly the urban poor, in the

80 Operation Evaluation Department Memorandum to the World Bank Executive Directors of, 29 March 1995, <http://www.narmada.org/sardar-sarovar/wboedmemo950329.html>, CSOs letter to the World Bank, 2 November 1999, <http://www.narmada.org/sardar-sarovar/wbletter.19991110.html>, CSOs call On the World Bank to assume obligation on the Sardar Sarovar Project, Letters from International River Network to the World Bank, <http://www.narmada.org/sardar-sarovar/wb.letter.nov.10.2000.html>, all retrieved June 11, 2007, at 11.23.

81 UNHCHR, Letters sent to the Prime Minister of India, 29 July 2003, <http://www.narmada.org/resources/adviasi.pdf>, retrieved, June 11, 2007 at 11.35.

82 While the Treaty establishing Yacyreta was signed by the Argentina and Paraguay in 1973, construction did not get underway until 1983. The Treaty of Yacyretá proposed to develop the hydroelectric potential of the Paraná River, improve navigation in the area, mitigate the effect of severe river floods, and promote irrigation. Alvaro Umana, *The World Bank Inspection Panel: the First Four Years (1994-1998)*. (Washington DC: The World Bank, 1998) p. 161.

two countries. Communities were forced to abandon their homelands and their livelihood sources of sustenance from the river. Many low income families had to live near the polluted stagnant water from the reservoir and frequently had their houses flooded.

The relocation procedures were conducted according to the *Entidad Binacional Yacyretá* (EYD).⁸³ It was based on those who were present in the planned flood areas when a census was taken in 1990, those entitled to land and those who worked as brick-makers. Therefore, the data of 1996 show only 25% of the total affected population had been resettled. Those who had been relocated complained about the quality of certain aspects of the houses, in terms of electricity, plumbing, etc. Additionally it also took them, in many cases, a number of years to receive their compensation for their productive infrastructure (such as the land).⁸⁴ In other areas of resettlement, the inadequate quality of the houses was also a concern. After three years of occupancy houses were showing serious signs of deterioration. Some houses were also abandoned and had been vandalised. Several people complained about the high costs of the services after moving to the new neighbourhood.

Regardless of such detrimental resettlement approach, the project continued to receive the loan from the World Bank. Therefore, during 1992 and 1993, region and international CSOs opposed the continuation of the loan on the grounds that both the environmental mitigation and resettlement plans were dependent on an improbable financing arrangement. The Paraguayan grassroots organisation *Sobrevivencia*, in cooperation with other CSOs, brought the case of Yacyretá Hydroelectric Project before the World Bank Inspection Panel⁸⁵ and the IDB Independent Investigation Mechanism (IIM). In their report the IIM Panel detected some problems, which, amongst others, was the lack of participation of those affected in resettlement programs, failure to assess the size of the affected population, and delays in transfer of the affected population.⁸⁶

Participation is being seen as problematic in the execution of the project. The IIM Panel emphasised the need for participation by affected populations in the design and activities related to resettlement. This process has not been carried out thoroughly. Rather, there have been instances in which negotiations took place and decisions were

83 An Autonomous binational entity formed between Argentine and Paraguayan utility, having equal rights and duties, as well as full legal, financial, administrative, and technical capacity.

84 Amana Ulvaro (1998) p. 162.

85 The independent panel was created by the executive directors of the Bank-and reports only to them-to provide private citizens direct access to the Bank if they believe that they are being directly and adversely affected by a Bank-financed project. Such people can now ask the panel to investigate complaints that the Bank has failed to follow its own policies and procedures. The panel is conceptually almost unique: combining the possibility of access of individuals and private groups to rights under international law, with the opportunity to question the activities of international organizations. See: Richard E. Bissel, 'Recent Practice of the Inspection panel of the World Bank', *The American Journal of International Law*. 91 (1997) p. 741.

86 Independent Investigative Mechanism, *The Yacyretá hydroelectric project*, Report of the Review Panel, Inter-American Development Bank, 15 September 1997.

forced over the protest of various groups, as is the case with the brick makers of Nemesio Parma and El Porvenir.⁸⁷ Similarly, the review of the Inspection Panel also confirmed the lack of participation in the process of resettlement.⁸⁸ According to the Panel's observation, this situation happened because the original project document that 'was intended to be flexible and subject to on-going reviews and participation by affected groups, became rigid in some basic aspects such as resettling people according to flood levels'.⁸⁹

3.3.2 *Combating Joblessness and Degradation of Income*

Loss of employment occurs especially in urban development projects, where large development projects restructure the existing economic system, resulting in development victims among the urban population, mainly those who are already in vulnerable positions. It could also happen in rural areas, displacing landless workers and small or home businesses. Creating jobs becomes as difficult as finding new land. Unemployment is unavoidable after the physical relocation and this marginalises both the political and the economic positions of the development beneficiary.

The human right to work⁹⁰ recognises work as an entitlement. It constitutes the entitlements in the producing and servicing activities in society and it is guaranteed through freedom in work, such as to associate and to ensure the bargaining position of labour in working spaces. As to the entitlement of freedom to work,⁹¹ this compels the obligation of State's parties to assure individuals their right to freely chosen and accepted work, including the right not to be deprived of work unfairly.⁹²

In the cases of development hazards, it is usually the change of environment that stops the people from doing their original jobs and forces them to change their occupation. If the changes do not fit with their skill and culture, it unfortunately can lead to impoverishment. With regard to the right to work, this shows that the people are not free to choose or accept their occupation.⁹³ In connection with the right to development, the right to work provides the necessary tools for these victims to claim and demand compensation for the unemployment and degradation of income caused by development projects. In this sub-section, two cases are presented to illustrate the faces and practices of combating joblessness and degradation of income as development

87 *Ibid.*

88 Alvaro Umana (1998) p. 197.

89 *Ibid.*

90 The right to work is protected under Article 23 Universal Declaration of Human Rights (UDHR), Article 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 5 of the Convention on the Elimination of the All Forms of Racial Discrimination, Article 11 of the Convention on the Elimination of all Forms Discrimination against Women (CEDAW) and Article 17 of the Convention Relating to the Status of Refugees.

91 Krzysztof Dzwicki, 'The Right to Work and Rights in Work', in A. Eide *et al* (eds). *Economic, Social and Cultural Rights*, (Dordrecht: Martinus Nijhoff International, 2001) p. 233.

92 Paragraph 4, General Comments 18, the Right to Work.

93 Article 6(1), ICESCR.

hazards. These are the Pak Mun Dam Project in Thailand and the Rondônia Natural Resources Management in Brazil.

3.3.2.1 Pak Mun Dam Project, Thailand

The Pak Mun Dam Project⁹⁴ was constructed and operated by the Electricity Generating Authority of Thailand (EGAT) on the Mun River and the Mekong River in Northeast Thailand. The dam has a height of 17 metres and total length of 300 metres. The reservoir has a surface area of 60 km² at normal height. The Pak Mun Dam is presented to provide 136 megawatts hydropower, irrigation and fisheries. The fish yield is expected to be 100 kg/hectares per year to 220 kg/hectares per year.

In reality the project failed to deliver the expected benefits. The running of the river reservoir cannot sustain such high yields as they do not provide the appropriate habitat for pelagic fish species. Besides the fact that the prediction number is too high, various impacts such as river watershed, deforestation, domestic waste water discharge, agriculture intensification and development, industrial waste water discharge, saline soil and enforcement of the water quality standard and classification also contribute to the deterioration. For the people whose primary income was from fishery, the Pak Mun Dam has decreased their fish catch by 50-10%. The Dam has led to the disappearance of many fish species. In total the number of households dependent on their income from fisheries in the region around Mun River has declined from 95.6% to 66.7%.

The loss of income from fisheries became a major cause for concern for the villagers during the construction, and there were two major problems relating to compensation. The first is that the compensation left out the matter of permanent loss of income.⁹⁵ While the government acknowledged the impact on fisheries and agreed to compensate eligible households at the rate of 90000 Baht as compensation for loss of income during the three-year construction period, mitigation for the permanent loss of fisheries livelihood remained under negotiation. Yet, such a measure of compensation is considered insufficient. The villagers who once depended on fishing as their source of income are still unable to return to their lifestyle. They were forced to move to urban areas in search of wage labour in companies or factories.

94 In 1991, the Thai National Economic and Social Development Board (NESDB) approved the project that costs US\$ 264 million. Compensation and resettlement cost is around US\$ 44.24 million. Compensation for loss in fisheries, which was unanticipated in the original estimate, was accounted of US\$ 15.8 million. World Commission on Dams, *Thailand Case Study: Pak Mun Dam and Mekong/Mun River Basin*, Executive Summary, November 2000.

95 As compensation measures, EGAT paid 90000 Baht to each of the 3955 fishermen in 1995, and it approved payment of 60000 Baht each to another 2200 fishermen in March 2000. Until March 2000, 488.5 million Baht (US\$ 19.5 million) had been paid as compensation for loss of fisheries livelihood. World Commission on Dams, *Thailand Case Study: Pak Mun Dam and Mekong/Mun River Basin*. Final Report WCD, November 2000, pp. 8-9.

The second problem with compensation is the inequality in the amount of compensation. The Subcommittee on the Impacts of Fishing Occupation, an institution that was appointed by the Provincial Governor to work on the issue of compensation, set up a plan for compensation by dividing the fishing area into five zones according to the distance from the dam site. Villagers from zone 1 were eligible for compensation of up to 90000 Baht while the amount of compensation gradually decreased the further the zone was from the dam site. In effect, villagers from the furthest zone would receive a mere 15 Baht (as compensation for their losses during the construction period).⁹⁶

Unsatisfied with the compensation policies, actions were taken by the victimised people and their representative CSOs. On 25th January 1997, the villagers joined the 99-day protest in Bangkok demanding fair compensations for the permanent loss of their fishing livelihood.⁹⁷ As to the issue of inequality in compensation, the villagers staged a one-month protest at the Provincial Hall demanding a flat rate of compensation for all affected villagers, at the amount of Baht 35,000 per year for the three years of construction. In result, a flat rate of Baht 6444 was offered, but was not accepted by the villagers.⁹⁸

As financing agency of the project, The World Bank has consistently refused to take any responsibility for the project's problems, despite the fact that the Bank was repeatedly warned by local communities and CSOs prior to approval that the impacts would be severe. A World Bank Operations Evaluations Department (OED) report published in June 1998 claimed that Pak Mun was 'among the best experiences with resettlement among Bank-assisted projects.' The OED states that resettlement of families at Pak Mun was 'highly satisfactory', that families received 'exceedingly generous compensation,' and that 'there is no conclusive evidence of any impact on the fish population.'⁹⁹ Responding to the claim, in 15th March 1999, 27 Thai groups sent a letter to the World Bank states that the dam, which 'destroyed the Mun River, fisheries, and the way of life of people at Pak Mun. The World Bank is responsible for the destruction, cares only about itself and not about people, and that the Pak Mun dam is development only for the World Bank.'¹⁰⁰

In response to the actions the Thai government opened the flood gates of the dam in June 2001. This was a temporary triumph, for the people and since the opening of the gates, many fish have returned. Subsequently, based on the study by Ubon Ratchat-

96 *Ibid*, pp. 77-78.

97 *Ibid*, pp. 8-9.

98 *Ibid*, p. 77.

99 The World Bank, *Recent Experience with Involuntary Resettlement Thailand, Pak Mun Dam*, Report No: 17541, the World Bank, Operation Evaluation Department 2 June 1998, paragraph 10.1.

100 Aviva Imhof, 'Pak Mun Villagers Occupy Dam, Demand Compensation', *World Rivers Review*, 2 (1999) p. 5 and 11.

hani University,¹⁰¹ the Thai Cabinet decided to open the gates for four months each year from November 2002.

3.3.2.2 Rondônia Natural Resources Management, the Polonoroeste Project, Brazil

The Polonoroeste project's principal objective was to pave the highway of a 1,500 km stretch between the capital cities of Cuiaba (Mato Grosso) and Porto Velho (Rondônia). The basic objective of the Polonoroeste project was to promote a new model of 'sustainable development' in the State of Rondônia, through a series of initiatives for the protection and management of natural resources. During the 1980s, Polonoroeste became internationally known as a result of serious problems that accompanied its implementation, such as (i) a major increase in the flux of incoming migrants to the state, (ii) an alarming rise in deforestation rates and the expansion of cattle pasture as the predominant land use, (iii) high rates of abandonment among migrants settled in colonisation projects, and (iv) invasions of indigenous areas and other conservation units, principally by logging companies and land speculators.¹⁰²

The project induced loss of income through deforestation. Cumulative forest loss in Rondônia has been estimated to be 2 million ha. Considering an average price for wood of about US\$ 20-US\$ 25 per cubic metre, the material damage caused by deforestation is on the order of US\$ 1600-US\$ 2000 per hectare.¹⁰³ In the case of rubber industry, deforestation has caused the reduction of rubber forests and the spread of the fungus *Migrocyclus ulei*.¹⁰⁴ These factors reduce the income of the rubber tappers and the living conditions of indigenous people who live mostly in a subsistence economy in the area. Deforestation forced them to devote their time, which would otherwise be devoted to productive activities, to policing, controlling, and reporting deforestation to the authorities,¹⁰⁵ and many times with disappointing results.

As a response, domestic movements emerged in western Brazil. Groups such as rubber tappers and Indians were searching for ways to defend their fragile forest

101 The study proposed 4 alternative recommendations: (1) closing the gates of the Dam for electricity generation; (2) opening the gates during rainy season (5 months); (3) opening the gates from April to November (8 months); (4) opening the gates for year round. These recommendations are based on the comparison between the economic impact (income from fisheries) and the electricity generation. Manorum Kanokwan and Valibhotama Sisakra, 'Opening the sluice gates of the Pak Mun Dam in Thailand for four months: Questions for sustainable development of people's livelihood and ecological restoration in the mun basin', *JCAS Symposium Series*. 25 (2006) pp. 127-134.

102 Inspection Panel, *Document Presented to the Inspection Panel of the World Bank on the Rondônia Natural Resources Management Project (PLANAFLOOR)*, Request of Inspection, 13 June 1995, p. 1.

103 Alvaro Umana (1998) p. 92.

104 Brent H. Millikan, 'Tropical Deforestation, Land Degradation, and Society: Lessons from Rondonia, Brazil', *Latin American Perspectives*. 19 (1992) p. 57.

105 For example, rubber tappers interviewed by the Inspection Panel in the Rio Cautario extractive reserve claimed that they had to spend about 10 percent of their productive time in activities related to deforestation control and that this loss of time had a proportional impact on their income. Alvaro Umana (1998) p. 93.

existence ‘development’ in general.¹⁰⁶ Led by trade union leader Chico Mendes the rubber tappers’ movement became a force to be reckoned with. His testimonies have earned positive endorsements from the international community. In a 1987 speech announcing the environmental reforms, Barber Conable, the President of the World Bank, acknowledged that a development hazard occurred in the Rondônia Natural Resource Management Project.¹⁰⁷ In a similar vein, the United States (U.S.A.) authorities exerted a major pressure on the IDB to suspend the loan. The U.S.A. also took the unprecedented action of abstaining on the vote to approve the loan at the IDB board.¹⁰⁸ This abstention prompted the IDB management to withhold all disbursements on the loans until the Brazilian government agreed to and started to carry out the Environment and Indigenous Communities Protection Project (PMACI).

In 1991, the CSO Forum of the Brazilian state of Rondônia sent a letter to the President and Executive Directors of the World Bank, calling for a suspension of disbursements for the Rondônia Natural Resource Management Project. This mobilisation led to the extension of an invitation to the representatives of twelve CSOs for a meeting with the representatives of the government and the World Bank in June 1991. The outcome of that meeting is the signature of ‘Protocol of Understanding’ on June 20, 1991, between the government and 13 CSOs. This protocol aimed to establish forms of participation by CSOs.

Nevertheless, the protocol was merely a political gesture; the government remained reluctant in addressing the problems of degradation of income caused by the Rondônia Natural Resource Management Project. Thus in 1995 the CSO forum sent a request for investigation to the Inspection Panel of the World Bank. The request emphasised the problem of a lack of political commitment among government authorities, which reflected the powerful influence exercised by political and economic elites over government agencies, particularly those associated with logging and land speculation. Furthermore, the request also revealed that CSO participation in the project served mainly to legitimise an influx of financial resources into government bureaucracies, without effective social control over the use of those resources.¹⁰⁹ The request was accepted and with regard to the problem of degradation of income, the review of the Inspection Panel confirmed that the project induced the loss of sustainable income.

106 Jai Sen, A World to Win—But Whose World is it, Anyway? Civil society and the World Bank, the view from the ‘front’: case studies, *Whose World Is It Anyway?, Civil Society, the United Nations, and the multilateral future*, in John W Foster and Anita Anand (ed), (Ottawa : United Nations Association in Canada, 1999) p. 337-390.

107 Conable stated that the project represents ‘a sobering example of an environmentally-sound effort which went wrong. The Bank misread the human, institutional and physical realities of the jungle and the frontier. Protective measures to shelter fragile lands and tribal people were included; they were not, however, carefully timed or adequately monitored’, Brent H. Millikan (1992) p. 62.

108 Jai Sen (1999) p. 390.

109 Inspection Panel, Request for Inspection (1995) pp. 14-18.

3.3.3 Combating Degradation of Health, Livelihood and Morbidity

Serious health problems, such as the outbreak of relocation-related parasites or diseases are easily found in the phenomenon of development hazard. Vulnerability to illness is increased because of development projects that condone the occurrence of livelihood deterioration, such as unsafe water supply and waste systems and these tend to spread infectious diseases, diarrhoea, or dysentery.

The human right to health¹¹⁰ covers the issues of livelihood deterioration and degradation of health in their field of protection. Individual health is an important condition for one's well-being and dignity as a human being.¹¹¹ Entitlement to health in development policies, projects and programs should therefore be protected by law. This entitlement consists of two categories: one containing elements related to health care (including curative as well as preventive health care), another encompassing elements related to a number of underlying preconditions for health.¹¹² The State as the main duty-bearer to the right to health is obliged to promote social determinants of good health, such as environmental safety, education, economic development and gender equity.¹¹³ This obligation entails the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. State obligations entail ensuring all medical service and medical attention in the event of sickness.¹¹⁴

In its connection with the right to development, the right to health also includes the entitlement of the right-holder to improve and advance participation in the provision of preventive and curative health services, such as participation in the organisation of the health sector, health insurance system, and political decisions making taken at both the community and national levels. The following sub-sections will address this subject by analysing three cases where degradation of health, livelihood and morbidity occurred as the faces of development hazards. They are the National Drainage Program in Pakistan, the Manatali Dam Project in Mali, and the Petroleum Pump Project in Chad and Cameroon.

110 This right finds explicit recognition within an array of international instruments, including Article 25 Universal Declaration of Human Rights (UDHR), Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 5 of the Convention on the Elimination of the All Forms of Racial Discrimination, and Article 12 of the Convention on the Elimination of all Forms Discrimination against Women (CEDAW).

111 Brigit Toebes, 'The Right to Health', in A. Eide *et al* (eds), *Economic, Social and Cultural Rights*, (Dordrecht: Martinus Nijhoof, 2001) p. 169.

112 *Ibid*, p. 174.

113 Paragraph 16, General comments No. 14, the Right to Highest Attainable Standard of Health.

114 Paragraph 17, General comments No. 14, the Right to Highest Attainable Standard of Health.

3.3.3.1 National Drainage Program Project, Pakistan

The National Drainage Programme (NDP) Project was designed to address the problems of water logging and salinity in the Indus Basin using integrated and cohesive national level efforts to restore the sustainability of irrigated agriculture in an environmentally sound manner. It aimed to minimise the drainable surplus and evacuate the drainable surplus from the Indus Basin to the Sea.¹¹⁵

During its implementation, the project was aggravating serious harms to people and the environment linked to existing irrigation and drainage structures in the Basin.¹¹⁶ The situation worsened as the project experienced delays of implementation. In 2003, six years after its execution only 24.4% of the project's plan had been attained. It was observed by villagers that during the implementation of NDP, almost all the provincial governments remained reluctant and even Balochistan, one of the provincial areas, opted out. The slow progress of government agencies indicates that the project did not originate from the country's initiatives and was not conducted with broader consultations. Although the problem of water logging and salinity are local the World Bank borrowed the solutions and suggestions from other countries, which are neither compatible to the local institutional set up nor favourable in country context.¹¹⁷

The National Drainage Programme degraded the environmental condition of the adjoining areas. It adversely impinged on the wetlands and interconnected lakes known as *dhands*, which are the source of livelihood for forty villages of fishermen with a combined population of 12,000 to 15,000 people. It has inundated 50 villages due to the faulty disposal system, degrading the livelihood of the surrounding inhabitants. In Badin, one of the coastal areas, the main source of drinking water was affected by the dumping of waste water and mixing with drainage water. Drainage effluent was observed to be undrinkable as it was saline and contaminated over time by agricultural run-off and biocides. Similarly, in Hyderabad, Karachi and Thatta, the project caused the reduction and the contamination of water supply (by saline drainage and biocides). In total the water supply of about half a million people was deteriorated.¹¹⁸

Realising the disastrous effects of the NDP, the local organisations from the area – *Faqir Natho Lund*, *Bahadur Khan Lund* and *The Journalist Allah Bachayo Jamali* were raising the issue with Water and Power Development Authority (WAPDA) officials, consultants and visiting mission members. The local branch of Sindh

115 Inspection Panel, *the National Drainage Program Project Pakistan*, Request for Inspection, 9 September 2004, p. 6.

116 Inspection Panel, *Pakistan - the National Drainage Program Project (Credit No. 2999 PAK)*, Investigation Report, 6 July 2006, p. 8.

117 Inspection Panel, Request for Inspection (2004) p. 7.

118 Other harms caused by the project is that it damaged 1.5 million acres of farmland in Thatta and Badin, causing dislocation and extensive economic losses, saline intrusion up the Indus Delta harming agriculture of the adjacent districts, including Thatta, and damaged the mangrove ecosystem, caused reduction in fish and other aquatic resources, increased erosion of the coast, tidal influence intensifying inland, dhands and inland fisheries. Inspection Panel, Investigation Report (2006) p. 56.

Abadgar Board (an organisation of farmers) and the Sindh chamber of Agriculture officials raised concerns regarding NDP at various forums. However, both donors and government officials remained silent and practically nothing has been done to adequately respond to these concerns or to satisfactorily.¹¹⁹

Therefore, in September 2004, the affected victims filed a complaint against the NDP with the World Bank's Inspection Panel. They pointed out how the design of NDP has entirely ignored the current reality and the social and environmental problems of the existing disposal route, and never explored the alternatives. The request for inspection revealed the lack of participation in the decision making process of the project as the source of the problem. It stated that, 'local communities, and especially the affected people of coastal belt, have been kept entirely unaware about the plans of NDP and its environmental assessments. There remains a serious lack of institutionalised mechanisms for information sharing and consultation with the affected people. The project planning process remained the business of few bureaucrats and donors and project implementation remained non-transparent and hence failed to obtain informed consent since the outset. We were entirely unaware regarding NDP until the rains of 2003'.¹²⁰

In 2006, the Panel published its final report on the project. It affirmed that the project fully or partially violates the Bank's binding policies on, *inter alia*, environmental assessment. The Panel said that the NDP drainage projects were beset with technical problems and a total lack of supervision by the World Bank compounded these problems. However, the Bank management refutes these findings, by stating that 'the Bank was diligent in the application of its policies and procedures during implementation of the NDP'.¹²¹

3.3.3.2 Manantali Dam Project in Mali, Mauritania, Senegal

The Manantali Dam Project¹²² was built in the Bafing River, a tributary of the Senegal River. This project aimed to provide a 200 megawatts hydro-electric resource and a network of 1300 kilometres of irrigation lines to the capitals of Mali (Bamako), Mauritania (Nouakchott) and Senegal (Dakar). The dam is 1460 metres long and 65 metres high, by creating a reservoir with a storage capacity of 11.3 billion m³ and a surface area of 477 km². The Manantali dam was completed in 1988.

Before construction of the dams, only urinary schistosomiasis was endemic in the Senegal valley. *Schistosoma haematobium*, the causative agent of this disease, was

119 Inspection Panel, Request for Inspection (2004) pp. 22-23.

120 *Ibid.*

121 Inspection Panel, *Pakistan - the National Drainage Program Project (Credit No. 2999 PAK)*, Management Report and Recommendation in Response to Inspection Panel Report, 18 September 2006, p. 5.

122 Construction of the Manantali dam cost about \$500 million. Funding was provided by several Arab governments, the Islamic and the African Development Banks, Italy, the French CFD, the German KfW, the Canadian CIDA and the European Union.

common in the middle valley.¹²³ Since its inception, combined with the changing rainfall pattern, the Manantali Dam Project has resulted in the curtailment of annual flood and the deterioration of the environmental systems which depend on it. The elimination of salt water intrusion has led to increased incidences of health problems.¹²⁴ Water-related diseases such as malaria and schistosomiasis increased dramatically in the valley since the Manantali dam was built, and claimed 8000 lives.¹²⁵ The increase in schistosomiasis resulted from the creation of bodies of fresh water, such as irrigation canals and ponds, which bred disease-bearing snails previously controlled by seasonal fluctuations and salt inflows.

The increased risk of contagious diseases in the Nations Drainage Project and Manantali Dam Project, demonstrates the failure of countries involved in providing underlying preconditions for health, particularly to provide an adequate supply of safe water and basic sanitations. Unfortunately, the Governments are failing to provide the curative measures to stop or reduce the spread of the diseases, namely immunisation against major infectious diseases and appropriate treatment of the endemic diseases.

The actions to combat the development hazard caused by the Manantali dam were observed by the International Rivers Network (IRN) as rather difficult. The people and CSOs affected hardly had any chance to participate in the planning or implementation of the project. The USAIDs initial planning to involve the dam-affected people in the construction of the resettlement sites was abandoned,¹²⁶ as progress proved to be too slow. On the other hand, the World Bank's Staff Appraisal Report claimed that public meetings were held in 16 villages when the environmental assessment of the hydro-power project was prepared. Nevertheless, there is no accurate report on this particular meeting. One of the reasons could be that 'some sort of token consultation with carefully chosen participants' might have taken place.¹²⁷

3.3.3.3 Petroleum and Pipeline Project, Chad-Cameroon

The Chad-Cameroon Petroleum and Pipeline Project is the largest energy infrastructure in the African Continent. It involves drilling 300 oil wells in three oil fields in the Doba Region of Southern Chad and the construction of an export pipeline more than

123 J.C. Ernould *et al*, 'The impact of the local water-development programme on the abundance of the intermediate hosts of schistosomiasis in three villages of the Senegal River delta', *Annals of Tropical Medicine & Parasitology*. 93 (1999) p. 135.

124 Richard Bond *et al*, 'Integrated Impact Assessment for Sustainable Development: A Case Study Approach', *World Development*. 29 (2001) p. 1013.

125 Lori Pottinger, 'Manantali Dam Changes Will Make a Bad Situation Worse', *World Rivers Review*. 12 (1997) p. 20.

126 Peter Boshard, *A Case Study of Manantali Dam Project*, Report International Rivers Network, March 1999, <http://www.irn.org/programs/safrica/index.php?id=bosshard.study.html>, retrieved June 11, 2007, at 13.58.

127 *Ibid*.

1100 kilometres long through Cameroon to an offshore loading facility,¹²⁸ which will be built by a consortium of Exxon, Chevron and Petronas. The project estimates 917 million barrels petroleum production and could generate US\$ 3 billion in revenue for Chad over a 28 year period. The final objective of the project is to increase government expenditure on poverty eradication and to promote economic growth in Chad and Cameroon.

There is contradictory information regarding the implementation of the project. According to the operator and main sponsors, the Chad–Cameroon petroleum development and pipeline project represented the most extensive consultation effort with affected groups and local CSOs ever conducted in Africa, even before the actual implementation of the project. This was justified, for example, by the number of public consultations and the total populations reached. Between 1993 and 1999, almost 900 village-based meetings were held in the oilfield areas and along the pipeline.¹²⁹ However, others have highlighted that public consultations of affected groups were carried out in the presence of armed security forces.

The project is associated with a wide array of potential health impacts that are outlined in the EMP. This applies directly to the oilfield development areas of southern Chad, and along the entire pipeline route, including the larger surrounding regions. The people refer to the lack of transparency regarding the environmental impact of the 300 oil sampling wells drilled by the Consortium which does not conceal the great ecological danger posed by the exploitation of Chadian oil.¹³⁰ They are afraid that there would be breaks in the feeder lines and other pipelines from the oil wells because of a lack of safety measures and an environmental impact assessment.¹³¹

Moreover, there is also a negative occupational health impact on workers and contractors, particularly on accident-related injuries (resulting from construction and transportation activities), sexually transmitted diseases (STDs) (particularly HIV/AIDS among special high-risk groups, *e.g.* project truck drivers), tuberculosis and malaria among the entire workforce. It has recently been highlighted that the public health significance of tuberculosis has received insufficient attention by the project, which

128 Inspection Panel, *The Chad–Cameroon Petroleum and Pipeline Facilities*, Investigation Report, 17 July 2002, p. 2.

129 Jürg Utzinger *et al.*, ‘Assessing health impacts of the Chad–Cameroon petroleum development and pipeline project: challenges and a way forward’, *Environmental Impact Assessment Review*, 25, (2005) p. 79.

130 Inspection Panel, *The Chad–Cameroon Petroleum and Pipeline Facilities*, Request for Inspection, 15 December 2000, p. 3.

131 Oil pipelines are an environmental hazard anywhere in the world. Even with the latest state-of-the-art technology, oil leaks in pipelines can go undetected until a huge amount of damage has been done. The detection capacity of the most sophisticated technology allows leakage of 0.002% of the oil passing through. With an estimated daily volume of 9,450,000 gallons of crude oil a day (*i.e.*, the equivalent of 225,000 barrels/ day). Crude oil contains many heavy metals, and the dangers for groundwater contamination and stream pollution should not be underestimated, especially as the pipeline crosses several rivers and runs close to the Sanaga, one of West Africa’s most important river systems.

must be juxtaposed with the considerable attention paid to HIV/AIDS.¹³² Responding to this, local CSOs have been responsible for implementation of the awareness campaigns of HIV/AIDS and other STDs.¹³³

Internationally, combating action was taken by reporting the case to the World Bank Inspection Panel. In their Final Report, the Inspection Panel expressed their concerns regarding various health impacts associated with the project, including the increase in health risks such as HIV/AIDS and STDs.¹³⁴ The report also mentions the concern about oil spill and possible pollution of Lake Chad which would affect the human, biological and physical environment. Particularly at the Nya drilling location, it was observed the drilling pits still contained waste drilling fluids and mud, although the Consortium indicated that only non-toxic water biodegradable water-based drilling mud and fluids would be used.¹³⁵ The panel, in this regard, stated that the management ignored the public health issues of developing clean water and sanitation for the overall project regions. The management refused this accusation of non-compliance, due to the scope, timing and precedent setting nature of the Petroleum and Pipeline Project and its relationship with evolving economic and development context.¹³⁶

3.3.4 *Combating Food Insecurity*

Another face of development hazards is food insecurity. This occurs when the people are forced to uproot their livelihood, placing them in the vulnerable position to chronic food insecurity. Not only in terms of their economic capability or income, but also in terms of the decreased level of nutrition intake that is necessary for normal growth and work.

According to General Comments Number 12 of the Committee for the ICESCR, the right to adequate food¹³⁷ is realised when every man, woman and child, alone or in the community with others, have physical and economic access at all times to adequate food or means for its procurement.¹³⁸ The right to adequate food implies the availability of food in quantity and quality that is sufficient to the dietary needs of individuals. The food has to be free from adverse substances and acceptable within a given culture. This also means that the food has to be accessible in ways which are

132 Jürg Utzinger (2005) p. 77.

133 By the end of 2002, a total of 370 malaria education sessions had been conducted in 141 Chadian villages, reaching about 122,000 people. *Ibid*, p. 82.

134 Inspection Panel, Investigation Report (2002) p. 22.

135 *Ibid*, p. 54.

136 Inspection Panel, *The Chad-Cameroon Petroleum and Pipeline Project*, Management Report and Recommendation in Response to the Inspection Panel Report, 21 August 2002, pp. 16-17.

137 Legal protection to the right to food can be found in Article 25 Universal Declaration of Human Rights (UDHR), Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 24 and 27 of the Convention on the Right of the Child.

138 Paragraph 6, General Comment No. 12, the Right to Adequate Food.

sustainable, which implies that it has to be accessible and available for a long term.¹³⁹ Accessibility implies economic nature of the accessibility of the food, meaning that the financial costs associated with the acquisition of food should be at an attainable level. It also applies to any acquisition pattern or entitlement through which people procure their food, which includes the land where they grow food.¹⁴⁰

Additionally, the right to development equips these entitlements to adequate food with the entitlement to participate in the food policy making and to combat the non-fulfilment of the right to food. The following subsections present the faces and combating practices of food insecurity as development hazards in two case studies; the Three Gorges Dam in China and the Jamuna Bridge Project in Bangladesh.

3.3.4.1 Three Gorges Dam, China

The Three Gorges Dam¹⁴¹ on China's Yangtze River is the world's largest dam project. It is being built without funding from any international financial institutions but with major support from official export credit agencies and private banks. It plans to generate 18,200 megawatts and the construction is expected to be finished by 2010, when operators plan to fill the reservoir level to a depth of 185 metres. By official reckoning, the dam project will require the equivalent of US\$17 to US\$20 billion for capital construction and population resettlement. Up to 1.9 million people will have to be resettled before the Yangtze Valley is submerged. Around 40% of the budget is allocated for resettlement and compensation; however the situation has been difficult due to corruption.¹⁴²

Food insecurity is one of the problems raised since the beginning of the resettlement process. From 1958 to 1960, the first 170,000 people involved were reported to have 'had to eat and sleep in the open air or in makeshift shelters. Cold and starving, they ate uncooked food to fend off hunger. People collapsed with illness on the

139 A. Eide, 'The Right to an Adequate Standard of Living including the Right to Food'. In A. Eide *et al* (eds), *Economic, Social and Cultural Rights*, (Dordrecht: Martinus Nijhoff International, 2001) p. 134.

140 Paragraph 13, the General Comments No. 12: Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

141 The dam has been the dream of Chinese leaders for more than 80 years, including Sun Yat-Sen, Mao Zedong, and Deng Xiaoping. Li Peng, the chair of China's Parliament, has repeatedly called the project a 'symbol of the superiority of the socialist system'.

142 Some 473 million yuan, which is equivalent to 12 percent of total resettlement funds, in resettlement funds were embezzled, misappropriated or illegally used in 1998 alone. See: International Rivers Network, *Human Rights Dammed off at Three Gorges, An Investigation Resettlement and Human Rights Problems in the Three Gorges Dam Project*. Report, January 2003, p. 15; Sukhan Jackson and Adrian C. Sleight, 'The Political Economy and the Socio-Economic Impact of the Three Gorges Dam', *Asian Studies Review*. 25 (2001) p. 66.

roadside, and some even died; there were cases in which pregnant women gave birth prematurely during the journey.¹⁴³ A more recent study of the International River Network (IRN) also revealed a condition of food insecurity in one resettlement area, Chongming Island. In this area the result of their agricultural cultivation was reported to be unsatisfactory. The food insecurity is also manifested in terms of nutrition as the allocated people of Chongming Island have an annual income of just 3,000 yuan¹⁴⁴ but need would need 3,600 yuan to survive. In Jiangsu Province and Shanghai, the victims complained about the unfamiliar food, the high price of food and the lack of land to grow food.¹⁴⁵ Similar complaints have also been raised in Ganjing Township. Here, beside the high food prices, the victims also complain about the shortage of farming equipment and the scant amount of compensation. They were only given about 4,000 yuan from the 30,000 yuan that they were promised.¹⁴⁶

In many affected areas, people speak of a constant stream of individual protests and acts of resistance. Protests and disputes have occurred due to the disputes between the people and the local authorities over the resettlement process.¹⁴⁷ Many people who have tried to pressure the local authorities by collecting information and organising others to make joint petitions or protests have been thrown in jail. They are prohibited from contacting foreign media and those who have done so have been charged with interfering with Three Gorges resettlement. Furthermore, with a lack of legal framework, those complaining of insufficient compensation and unfair resettlement have nowhere to turn to obtain a fair hearing.¹⁴⁸

3.3.4.2 Jamuna Bridge Project, Bangladesh

The Jamuna Bridge Project is designed to connect the eastern and the western part of the country through the construction, operation, and maintenance of a bridge over the Jamuna River, thereby stimulating economic growth by facilitating cross-river transport of passengers, freight and transmission of power.¹⁴⁹ It is a joint project of International Development Assistance (IDA), United Nations for Development Program (UNDP), Government of Bangladesh, Jamuna Multipurpose Bridge Authority (JMBA), the Asian Development Bank (ADB), the Government of Japan, the UK Overseas Development Administration (ODA), and the High Commission of Canada.

143 Jun Jing, 'Rural Resettlement: Past Lessons for the Three Gorges Project', *The China Journal*. 38, (1997) pp. 74-75.

144 According the currency in 1997, the time when the article was written, 3000 yuan was US\$361.5.

145 International Rivers Network (2003) pp. 19-20.

146 *Ibid*, p. 21.

147 Duan Yuefang and Shawn Steil, 'China Three Gorges Project Resettlement: Policy, Planning, Implementation', *Journal of Refugee Studies*. 16 (2003) p. 434.

148 Li Heming and Philip Ree, 'Population Displacement in the Three Gorges Reservoir Area of the Yangtze River, Central China: Relocation Policies and Migrant Views', *International Journal of Population Geography*. 6 (2000) pp. 458-459.

149 See: M.Q. Zaman, 'Development and Displacement in Bangladesh: Toward a Resettlement Policy', *Asian Survey*. 36 (1996) p. 696.

The project constitutes a bridge, about 4.8 kilometres long and 18.5 metres wide across the Jamuna River, with a foundation to carry a railway and being capable of supporting an electric interconnector, a gas pipeline, and telecommunication activities.

The rise in the water level in the Jamuna River, due to the bridge, displaced over 70000 indigenous people who lived and derived their income from the *chars*; the mid-channel islands in the Jamuna River. Unfortunately, the indigenous people who were living in the *chars*, who are also known as the *Char* people, were not enlisted in the compensation plan of the project and the project has placed them in a vulnerable position with respect to their access to cultivate their foods.

In Dorota, one of the areas affected by the project, the displacement has caused the people to lose their cattle, plants and above all the very opportunity to cultivate. Those who received their income from being fishermen or boatmen found themselves helpless, because they lost their access to fish near the bridge site as per instructions by the Jamuna bridge authority. Furthermore, the land from where they were being expropriated was basically also their source of income. The *chars* are known to be fertile and various vegetables and grains are able to be cultivated. As the islands are submerged by the project, the *Char* people were no longer able to farm wheat, paddy, ground nut, water melon sugarcane, cheena, and sweet potatoes. The sandy land where they were being allocated does not permit them to cultivate.¹⁵⁰ This led to the food insecurity not only for the *Char* people but also for the surrounding population.¹⁵¹

The Jamuna Char Integrated Development Project, a non-governmental organisation submitted a request for inspection to the World Bank's Inspection panel, mentioning the threat of food insecurity and the extinction of the people due to being expropriated from their ancestral land and the inability to produce the agricultural products.¹⁵² In the request it was also mentioned that the closure of the water channels in order to build the bridge caused a rise in water level which would mean that houses and lands would be immersed under water. The request also alleged that the funding of the projects failed to include *Char* people in the process of planning, designing and implementing resettlement and environmental measures.

After conducting a field visit, the Inspection Panel confirmed the damage caused by the construction process and the impact on the food insecurity to the *Char* people. The Panel observed that although the projects planned to apply a resettlement and rehabilitation procedure which was designed to restore the economic and social productivity of the affected people,¹⁵³ in practice it was applied without specific reference to the *Char* people. The Panel also detected the problem of the lack of participation which was represented in the increased misinformation, which caused alarming perception about the likely effect on the *Chars* during the construction of the project. The Management rejected this assessment by stating that the extent of the

150 Inspection Panel, *Jamuna Char Integrated Program*, Request for Inspection, 18 Augustus 1996, p. 9.

151 *Ibid*, p. 11.

152 *Ibid*, p. 8.

153 Alvaro Umana (1998) p. 134.

harm experienced by the *Chars* people could not be identified until after the final location of the bridge was decided.¹⁵⁴ On participation and disclosure of information, the Management Response pointed out that ‘until a clear erosion policy was approved, the design and location of the bridge finalised, and information available about impacts, information available about impacts, consultation with large numbers of people would have caused confusion, raised unrealistic expectations, and possibly caused exaggerated or false claims for compensation.’¹⁵⁵

3.4 CONCLUDING REMARKS

In this chapter, it has been explained that development should be seen as a process of advancing the entitlement positions of the beneficiary. Its normative goal is to enhance the capability and functionings of each beneficiary to achieve a good life. Development hazards occur when the entitlement positions of the right-holder are disrupted. They are no longer able to exercise the previously protected legitimate access to resources and their legitimate claims over goods and services thereby suffering inhibition of their capabilities and functionings.

In the cases presented in this chapter, there are some lessons learned regarding the occurrence of development hazards. First of all, in certain political contexts the compelling size and nature of development projects are prone to leave the people to become victims of development. Such a negative impact particularly arises because of the lack of supporting measures from the States in preventing victimisation and providing remedies. In this type of environment, the absence of participation in the implementation of the mega development projects, both before and after the projects is observed to have contributed to the negative situation. Moreover, a broader lesson from the case studies is also apparent: national governments, international financial institutions, firms, and technical consultants can no longer impose decisions with impunity nor abandon resettled and economically vulnerable populations after the implementation of development policies, projects or programs.

In the presented cases, it can also be observed that in the situation of development hazards, the States failed to implement necessary measures to guarantee and secure the inclusion of the right-holder in development process. In other words, this failure to respect this entitlement can be considered as one of the causes of development hazards. It is obvious from the cases that rather than improving the entitlement positions, development policies when decided unilaterally by States leads to detrimental effects. The development beneficiary has been victimised because of the domination of the development interests of the states which disregard the basic entitlement positions related to people’s basic living needs. The states took their role in formulating development policies not from the view of eradicating social injustices. Therefore

154 Inspection Panel, *Jamuna Char Integrated Program*, Management Response to Inspection Panel, 20 September 1996, pp. 5-6.

155 *Ibid*, p. 8.

the victims of the presented development projects are those who were already highly disadvantaged in terms of weak economic and political status. The decisions on the mega-projects disregard the development beneficiary, particularly the economically and politically disadvantaged people, and in the following resettlement schemes there are no indications from the state to take necessary measures to protect or recover their entitlement positions.

Learning from the case studies, one can derive three domains in analysing the dialectic of hazard and right. The first is that hazard or right in the context of the outcomes, whether it benefits (certain groups) – or makes victims amongst others. The main question here is that profits are not experienced by everyone. The cost of implementing the project is not balanced with the benefits that are generated from it. This dialectic is particularly relevant in relation to the principle fair distribution stipulated in the Declaration on the Right to Development,¹⁵⁶ which signifies the entitlement of fairness in distribution of development benefits in development process.

The second dialectic is hazard or right in the context of the existing laws in a particular country that can provide access and protection for victims. In the presented cases, it has been illustrated that combating practices are taken by the victims with their representatives. Some of them have successfully gained national and international recognition for their status as victims and subsequently gained stronger positions to access their legitimate claims for compensation. In this regard, collective actions of victims are being confronted with infrastructural and political problems in honouring formal or judicial decisions.

The element of fair distribution grants entitlement for right-holder to seek compensation against development hazards. Additionally, this entitlement allows the right-holder to combat development hazards and resume their entitlement positions. The final dialectic may be generated from this context. It questions hazard or right in the context of participation, particularly confronting the (non-) participatory development with the universal right to participate. From the case studies, it can be observed that although the exercise of this entitlement does not always promise the expected results, participation could offer the solution to combat. In some of the cases (*e.g.* Sardar Sarovar Dam in India, Yacyretá Hydroelectric Project in Argentina/Paraguay, Pak Mun Dam Project in Thailand or Rondônia Natural Resources Management, the Polonoroeste Project, Brazil), victims' perspectives are actually taking precedence.

The Declaration specifies development processes to be undertaken in an appropriate manner which respects the right-holder by providing the framework to ensure that development processes are conducted in accordance with the interests of the right-holder, through the practice of participation. Employing participation as the combating tool to development hazards would enable the right-holder to legally and politically address development hazards. Therefore, the next chapter will discuss the entitlement of participation derived from the Declaration on the Right to Development in combating development hazards.

156 Article 2(3) and 8(1), Declaration on the Right to Development.

CHAPTER 4

PARTICIPATION WITHIN THE FRAMEWORK OF THE RIGHT TO DEVELOPMENT

4.1 INTRODUCTION

In the preceding chapter, development as a process¹ of advancing the entitlement positions of people at the grassroots has been conceptualised. Therefore development cannot simply be ordered or forced from outside. It has to come from within and the most effective way of ensuring that the process reaches the beneficiaries is arguably through a participatory process. Moreover, we have discussed the economic growth objective is not the only necessary condition for an advancement of the entitlement positions of the development beneficiaries. The lack of participation observed in cases of development hazards has hindered the actual objective of development. In this respect, the right to development might offer a strategy to combat development hazards by stipulating the entitlement to participation.²

Against that background this chapter elaborates the entitlement of participation from the perspective of the right to development. In particular, attention will be centred on the protection offered by participation to deal with the phenomenon of development hazards. Therefore, in the next section the definition of participation will be discussed. Subsequently, the third and fourth sections will explain the entitlement to participation, according to the human rights law and the right to development, respectively. Thereafter, in the fifth section the protective functions of participation to combat development hazards will be identified.

4.2 PARTICIPATION IN THE DEVELOPMENT CONTEXT

Issues of participation, especially in the context of development, have been discussed by many scholars and grassroots activists for decades. Enormous numbers of international documents have also pronounced the virtues of participation. Moreover, international organisations, international financial institutions and donor countries have been

1 See Arjun Sengupta, 'Implementing the Right to Development', in Nico Schrijver ed., *International Law and Sustainable Development: Principles and Practices*, (Dordrecht: Martinus Nijhoff, 2004) pp. 341-343.

2 The preamble of the *Declaration on the Right to Development* that development is a 'comprehensive economic, social, cultural and political process which aims at the constant improvement of the wellbeing of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits thereof'.

encouraging the widest possible active participation of all individuals in their development cooperation endeavours.

Nowadays, the term is generally caught in different wordings that are used similarly and interchangeably with participation, such as ‘citizen rights’, ‘citizen action’, ‘citizen participation’, ‘citizen involvement’, ‘political participation’, ‘popular participation’, ‘people’s participation’, ‘community involvement’, and ‘stakeholder participation’.³ With these various terms, anyone dealing with problems of participation in development quickly finds that the term itself is very ambiguous. By necessity, studying participation, therefore, requires a clear definition of participation in the context concerned. Many different meanings have gained considerable acceptance in recent years in the language of people’s involvement in development. They carry optimism and purpose, as well as properties that endow them with considerable normative power.

This section aims to elaborate the notion of participation in the development context. The next sub-section will clarify the meaning of the concept by explaining the definition. The following sub-sections will discuss the meaning of participation at implementation levels; the second sub-section will analyse the advantages of participation in development processes and the third sub section will describe implementation of participation in the context of development cooperation.

4.2.1 *The Definition*

Questions about the relationship between participation and social and human development have been raised since the ancient Greeks. One of the most extended considerations of the effects of participation was formulated by Aristotle. He analysed the Greek cities in order to assess what arrangements would most likely contribute to human happiness and ‘the good life’.⁴ In his view, participation as a citizen in the affairs of state is essential to the development and fulfilment of the human personality. To be excluded from politics, usually as slaves, meant that one did not fully develop the faculty of reason, a sense of responsibility for other people welfare, and a disposition toward prudent and balanced judgments.⁵

3 George Pring and Susan Y. Noé, ‘The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development’ in Donald N. Zillman *et al* (eds), *Human Rights in Natural Resources Development*. (New York: Oxford University Press, 2002) p. 15.

4 John M. Cohen and Norman T. Uphoff, ‘Participation’s Place in Rural Development: Seeking Clarity through Specificity’, *World Development*. 8 (1980) p. 214.

5 Participation in Aristotle’s time was a matter of voting, holding office, attending public meetings, paying taxes and defending the state. Those who were to get the benefits of citizenship were expected to bear the costs of maintaining the public realm and vice versa. In those days, there was little consideration of ‘development’. Rather, one hoped and worked for ‘prosperity’ through agriculture, trade and artisan manufacturing. Ideas of development have obviously changed a great deal, particularly in recent decades, owing to improvements in technological possibilities and infrastructure as well as social organisation and human aspirations. *Ibid*, p. 215.

During the last few years of 1960s the word ‘participation’ became part of the popular political vocabulary.⁶ In general, participation is referred to as a political activity and is known as political participation, a concept which has been repeatedly defined by many political scientists. Sidney Verba and Norman H. Nie define political participation as the behaviour designed to affect the choice of governmental personnel and/or policies.⁷ Alan Marsh and Max Kaase define it as all voluntary activities by individual citizens intended to influence either directly or indirectly political choices⁸ at various levels of the political system.⁹ Similarly, Samuel P. Huntington and Joan M. Nelson use participation as a definition of the action taken by private citizens that is intended to influence the actions or the composition of national and local government.¹⁰ Notably, these three definitions apply the term ‘influence’ (or ‘affect’ in the case of Verba and Nie) to clarify the concrete activity engaged in the process of participation.

Hence, participation encompasses an activity that enables those affected by a decision to exert influence on that decision. This study uses this broad understanding of participation, where influence is the key phrase, differentiating the activity of participation from other communication strategies. Moreover, participation does not refer simply to voting; rather it must entail open dialogical processes and broadly active civic engagement, which provide opportunities for people to have an effect on the decisions that are to be taken. In particular, one is said to participate in an issue or event when one is actively concerned about it and takes actions to express their interests.

Furthermore, this study refers to a participatory process as not just the process by which decisions are made in national governments, but also as the processes used at local and provincial levels.¹¹ Concretely, some of the participatory processes concern for example the generation of ideas, formulation and assessment of options, and making choices about them, as well as prioritising plans and putting selected actions into effect.¹²

The nature of participation entails the creation of an enabling environment in the political, economic and social life, in which development beneficiaries are allowed to play an active role, to be involved and consulted in public planning, management, and

6 Carole Pateman, *Participation and Democratic Theory* (New York: Cambridge University Press, 1970) p. 1.

7 Patrick J. Conge, ‘Review Article: The Concept of Political Participation: Toward a Definition’, *Comparative Politics*. 20 (1988) p. 242.

8 In particular, Marsh and Kaase include the terms of ‘directly or indirectly’, which bring the concept of political participation as the basis for voting, representative mechanisms or elections. *Ibid.*

9 *Ibid.*

10 *Ibid.*, p. 243.

11 Joseph Stiglitz, ‘Participation and Development: Perspectives from the Comprehensive Development Paradigm’, *Democracy, Market Economics and Development: An Asian Perspective*. (Washington: The World Bank Pub. 2001) p. 51.

12 Dennis Goulet, ‘Participation in Development: New Avenues’, *World Development*. 17 (1989) p. 220.

decision-making processes.¹³ Ideally, this should be made available in every stage of decision-making processes, including in the initial decisions,¹⁴ ongoing decisions¹⁵ and operational decisions.¹⁶ To achieve its ultimate purpose, participation should occur especially in the initial decision, when policies are being made. At a very minimum, even if local people do not participate in planning, they should be informed of the plans designed for their areas if at least they are expected to consent and to co-operate in program implementation.¹⁷

The Human Rights Commission (now the Human Rights Council) associates the enabling environment for participation with a democratic political and electoral system and equal and non-discriminatory access to public service.¹⁸ In this respect, decentralisation is mentioned as one of the governmental systems that corresponds to the promotion of participation because it reflects the political sensitivity of central level politicians¹⁹ to the people, and therefore has considerable promises in promoting participation. Decentralised governmental systems enable the increasing information flow between government and citizens and therefore integrate the society with the state, which is at the same time reinforcing and invigorating democracy at the national level.

At the practical level, however, the situation does not always demonstrate an ideal picture. Particularly during the designing process of a development project, a participa-

13 Peter Uvin, *Human Rights and Development*. (Bloomfield CT: Kumarian Press, 2004) p. 198.

14 Participation in the initial decision begins with the identification of local needs and how they will be approached through a particular project. Such involvement at an early stage of a project can provide vital information on the local area and prevent misunderstandings as to the nature of the problem and the strategies proposed for its resolutions. John M. Cohen and Norman T. Uphoff, 'Participation's Place in Rural Development: Seeking Clarity through Specificity', *World Development*. 8 (1980) p. 220.

15 It is possible that local people who did not participate in the initial decision may be asked to participate in the ongoing decision once the project has arrived in the locality. According to Cohen and Uphoff, there is some evidence that participation in ongoing decisions, which occur after initial decisions have been made, may be more critical to a project's success as various opportunities exist for searching out new needs and priorities that the project might respond to. *Ibid*, p. 220.

16 Cohen and Uphoff conceive operational decision as relating to specific local organisations which have been established by the project or linked to the project in an effort to involve the people. Here the focus is on voluntary associations, cooperatives, traditional associations, women's clubs and other organisations involved in the substantive activities of the projects. *Ibid*, p. 221.

17 U.J. Lele, *The Design of Rural Development: Lessons from Africa*. (Baltimore: John Hopkins Press 1975) p. 150.

18 'Full popular participation is only feasible if societies have democratic political and electoral systems which guarantee to all their citizens the possibility both to take part in the government of their country, directly or through freely chosen representatives, and to have equal access to public service, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. E/CN.4/RES/2003/35, Strengthening of Popular Participation, Equality, Social Justice and Non-Discrimination as Essential Foundations of Democracy, paragraph 8.

19 Garman, C., Haggard, S., & Willis, E. 'Fiscal Decentralization: A Political Theory with Latin American Cases'. *World Politics*. 53 (2001) pp. 205-236.

tory process may be adopted as mere a lip-service.²⁰ It is simply politically accentuated and implemented with commitment. In that situation community groups have rarely been given the power to choose *how* they should be involved. As many local development projects impinge upon wider national or even international needs²¹, the application of a participatory process becomes excessively focused on the goal to satisfy these needs. Such a blind application of participation might be observed in a situation where participation is regarded as an obligatory action, to meet the terms of aid conditionality or to seek project approval from higher authorities. It is framed as a narrow methodology that aims only to improve project performances rather than a process of advancing the entitlement positions of beneficiaries.

In this study, participation entails more than a procedural matter, meaning that it should be perceived as a means that enables people to protect their interests and promote their own well-being.²² In this respect, application of the entitlement to participation contributes to a broader goal of development, because it promotes the dignity and worth of the human person²³ as a reflection of the right-holders' entitlement positions. Thus, the entitlement to participation is considered as a methodology of genuine action and not as a methodology to succeed. By strongly focusing on the interests of the people, the activity can actually facilitate human rights implementation in the development process.

4.2.2 *The Importance of Participation in Development Processes*

From the cases presented in Chapter 3, it is apparent that the conventional way of imposing development without participation will simply increase inequalities or disparities and amplify the concentration of wealth and economic power. The lack of any involvement only impairs the entitlement positions of the development beneficiaries in development processes. It is in this connection that participation has been asserted by many international organisations as a necessary condition for development. The United Nations General Assembly, for example, has repeatedly stated in its resolutions that participation is an essential component of successful and lasting development; therefore it needs to be broadened and strengthened.²⁴ The Millennium Development Goals also declare the importance of effective participation in develop-

20 Cornwall and Brock refers this as an overemphasized of participation, see: Andrea Cornwall and Karen Brock, 'What do Buzzwords do for Development Policy? A critical look at 'participation', 'empowerment' and 'poverty reduction'', *Third World Quarterly*. 26 (2005) pp. 1043-1060.

21 A. Gilbert and P. Ward, 'Community Action by the Urban Poor: Democratic Involvement, Community Self Help or a Means of Social Control', *World Development*. 12 (1984) p. 771.

22 Celia Taylor, The right of participation in development projects, in Konrad Ginther *et al* (eds), *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers, 1995) p. 206.

23 Stephen P. Marks, The Human Rights Framework for Development: Seven Approaches, in Basu, Mushumi, Archana Negi, and Arjun K. Sengupta (eds.), *Reflections on the Right to Development*. (New Delhi: Sage Publications, 2005) p. 24.

24 See for example: A/RES/55/108, Right to Development, paragraph 4(e) and (g); A/RES/54/175, Right to Development, paragraph 3(d) and 3(e).

ment processes to overcome the difficulties resulted from uneven benefits of globalisation.²⁵

A Nobel Laureate, Joseph Stiglitz, explains how participation might improve the accountability of development policies. A government that engages in secrecy makes it impossible for people to develop informed opinions about policies that are critical to their lives and well being and this weakens the accountability of the decision making.²⁶ Moreover, when people are being taken into account and due considerations are given to public values during the decision-making processes, these also facilitate the accountability of decisions. The policies derived from that process are not only in accordance with popular interests, but also that they are having attained the accountability through a justified decision making process.

Furthermore, participation is designed to ensure that all parties concerned in the development policies are protected from any possible damage in the future. In this respect Stiglitz argues that participatory processes might demonstrate the people's acceptance development programs or projects. As is clear from the illustrations in Chapter 3, development programs or projects entail changes that are often threatening. In such a situation, people may be willing to forgo promised opportunities in favour of the status quo.²⁷ Here the preceding participatory process ensures that not only are people's concerns being heard, but they are also addressed. Changes that may be caused by development projects might be adjusted in accordance to what the beneficiaries can cope with. Protection towards their interests could be consequently enforced and this anticipates the future damages and injuries.

In the context of the development of natural resources, participation may enhance the effectiveness of development. The implementation of the activity demonstrates the commitment of actors in the development process. It was argued that if the people who make the decisions are the same as those who pay for or live by the consequences of the decision,²⁸ then development will likely be sustained.

'Recent research has begun to provide evidence at the grassroots level that participation is necessary for fully effective, society-wide development transformation. Participation in development projects has been shown to bring the project information that outside agencies

25 The goal of the MDGs is 'to ensure that globalization becomes a positive force for all the world's people' through 'policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation'. A/RES/55/2, United Nations Millennium Declaration, paragraph 5.

26 Joseph Stiglitz, 'Participation and Development: Perspectives from the Comprehensive Development Paradigm', in Farrukh Iqbal and Jong-Il You (eds), *Democracy, Market Economics and Development: An Asian Perspective*. (Washington: The World Bank Pub. 2001) p. 52.

27 *Ibid*, p. 55.

28 George Pring and Susan Y. Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development', in Donald N. Zillman *et al* (eds), *Human Rights in Natural Resources Development*. (New York: Oxford University Press, 2002) p. 64.

are unlikely to have. It also brings commitment and commitment in turn brings greater effort – the kind of effort that is required to make a project successful.²⁹

Another importance aspect of participation is that it may add to the process of empowerment of the people. It means that through participation, people can actually learn by reacting to and assessing development policies. It develops the self-reliance necessary³⁰ among rural people against damages or injuries. In particular, empowerment implies people's capacity to claim and exercise their rights effectively.³¹ In this regard, Robert Chambers, a prominent scholar on the subject of participation, once argued that:

'In practice, PRA [Participatory Rural Appraisal] has been found to empower. Those who, through a PRA process express and share what they already know, also learn through that expression and sharing. Those who investigate and observe add to their knowledge. Those who analyze become yet more aware and reach new understanding. Those who plan and then implement what they have planned take command, and further learn through the experience of action'.³²

Here it is mentioned that once people have learned and became empowered through the process, they are likely continue to do so. In many development projects it is found that when genuine participation occurred or when the population is consulted, the development beneficiaries insist on continuing to express their views.³³ An illustration is participatory development in Uganda. In 1998, the government conferred with poor people in rural and urban areas on the issue of clean water. Initially, this participatory process was designed to enable people to put forward their interests in having access to clean water. The process nevertheless continued until the problem achieved a greater weigh at the constitutional level while eventually ensuring a provision of safe water was adopted in the central budget.³⁴ This case shows how the process of participation may persist and is thus able to elevate a local development issue higher to have a broader benefit for all intended beneficiaries.

Hence from this perspective, the implementation of participation implies that people are no longer the object of development, but the subjects who are being taken

29 *Ibid*, pp. 55-56.

30 U.J. Lele (1975) p. 150.

31 Jakob Kirkemann Hansen and Hans Otto Sanno, 'The Implications and Value Addees of a Rights-Based Approach', in Bard A Andreassen and Stephen P. Marks, *Development as a Human Right, Legal, Political and Economic Dimensions*. (Cambridge: Harvard School of Public Health, 2006) p. 51.

32 Robert, Chambers, 'Participatory Rural Appraisal (PRA): challenges, potential and paradigm'. *World Development*. 22 (1994) p. 1444.

33 Dennis Goulet (1989) p. 166.

34 See K. Mugambe and C. Robb., *Linking Macro-Policy Choices to Poverty Outcomes: Case Example from Uganda*. Participatory Process in Poverty Reduction Strategy Papers, Note No. 1, World Bank: Washington DC, 2000.

into account in determining their own path of development.³⁵ Development is not being ‘brought’ to people, but the process of participation is aimed to verify that development beneficiaries are responsible for the essential conduct of the process. As a result, they are expected to be empowered by witnessing the fact that their interests are implemented and to become beneficial for a broader community. The goal is to give people the power, capacities, capabilities and access needed to change their own lives improve their own communities and influence their own destinies.³⁶ Ultimately, people no longer engage in participation primarily because they view it as valuable for their interests, but also over time, come to appreciate it as a goal.³⁷ In this connection, participation could finally serve as an instrument against damages and injuries resulting from development processes.

4.2.3 Participation and Development Cooperation

It is arguable that the growing importance of participation in the development context is promoted by the practice of development cooperation. Donor countries have been emphasising participatory development as one of most common conditionalities for their aid policies. Title IX of the US Foreign Assistance Act of 1966 for example, clearly recognised and supported the contribution of participation in development.³⁸ Other donor countries namely the Netherlands,³⁹ Norway⁴⁰ and Canada⁴¹ also applied participatory policies as a condition for aid disbursements.

Donor countries are in particular concerned with the impact of non-participatory development projects to the equal distribution of benefits among the intended beneficiaries, as without participation projects may fall subject to collusion by local elites. Moreover, by not including participation, projects might be conceived and designed

35 Brigitte I. Hamm, ‘A Human Rights Approach to Development’, *Human Rights Quarterly*, 23, (2001) p. 1019.

36 Jakob Kirkemann Hansen and Hans Otto Sanno, ‘The Implications and Value Added of a Rights-Based Approach’, in Bard A. Andreassen and Stephen P. Marks, *Development as a Human Right, Legal, Political and Economic Dimensions*. (Cambridge: Harvard School of Public Health, 2006) p. 50.

37 Dennis Goulet (1989) p. 166.

38 Section 281, Title IX, Utilisation of Democratic Institution in Development, in Legislation on Foreign Relations Through 2002, Volume 1-A of Volume 1-A and 1-B, Current Legislation and Related Executive Orders, (Washington DC: US Government Printing Office, 2003) pp. 142-143.

39 The aid policy was defined broadly to encompass the policy distribution: the whole population ought to participate in development and benefit from it. See 1975 Development Cooperation Budget, Explanatory Memorandum, The Hague, Ministry of Development Cooperation of the Kingdom of the Netherlands, 1975.

40 Norwegian aid policies emphasise policy dialogues with the recipient government which are intended to provide the means for the participation of the recipient in the design of aid. See Katarina Tomasevski, *Development Aid and Human Rights Revisited*, (London: Pinter Publishers 1993) p. 88.

41 The Canadian government requires the inclusion of ‘development partners working at the grassroots level’ as their conditionality of their foreign aid. See Canadian International Development Agency *Sharing our Future: Canadian International Development Assistance*. (Quebec: Hull, 1987) p. 31.

improperly, and therefore impeding or prohibiting their execution.⁴² The absence of participation also demotes the population's ownership of the development project, discouraging their long-term involvement and commitment to the project.

In the Kampong Improvement Programme implemented in Indonesia in the 1970s, neglecting participation led to a further deterioration of the project. It was severely criticised by the World Bank's consultants because of the top-down nature and the exclusion of the beneficiaries.

'The Kampong Improvement Program has been almost totally a top down operation. Neither the residents nor their elected neighbourhood representatives have had any appreciable say (...). No input from below was obtained in the planning stages (...) since the people were never involved or consulted from the start. They see the project as an imposed package and take a passive stance in terms of preserving its components'.⁴³

The study on the project revealed that the apathy towards beneficiaries' interests and their absence as a part of the project accounted for the failure to maintain the constructed facilities. 'One of the most striking features of the Kampong Improvement Programme is how poorly maintained the project has been. Drainage canals are filled with garbage and sewage; footpaths are collapsing around the edges; garbage is uncollected and overflowing; many water stands are broken'.⁴⁴ Notably, the neglect of local input has had an unfavourable effect on the performance of the rural development effort. Commitments to the project from the local authority or the people were unattainable. The project was therefore deteriorating and caused unnecessary damages.

Concerns on participatory development had not only been expressed by donor countries. On the side of the aid recipient countries, similar perspectives on participation were rising too. In 1990, the Arusha Conference on Popular Participation in the Recovery and Development Process in Africa issued the African Charter on Popular Participation, which reflects a strong call for participation in development processes. On this occasion, the participants of the Arusha Conference argued that the absence of democracy, which inhibits the conduct of participation, is a major cause of the underdevelopment in Africa.⁴⁵ Likewise, an analytical plea to make participatory development a central development strategy has also come from the Association of South East Asian Nation (ASEAN). In the Ministerial Understanding on ASEAN Cooperation in Rural Development and Poverty Eradication of 1997, it was agreed that active participation of rural population, particularly of the vulnerable and disadvan-

42 Celia Taylor, 'The right of participation in development projects', in Konrad Ginther *et al* (eds), *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers, 1995) p. 206.

43 *Ibid.*, p. 207.

44 *Ibid.*

45 Claude Ake, 'Unique Case of African Democracy', *International Affairs (Royal Institute of International Affairs 1944-)*. 69 (1993), p. 241.

taged groups, plays a critical role in rural development within the framework of national development strategy, structure and system of ASEAN countries.⁴⁶

These international fora of developing countries embracing participatory development are a result of an emerging awareness that they must fend for themselves or perish. In this regard, it seems likely that alongside the increasing emphasis placed by the international aid agencies and developed countries, the pressures levied by the CSOs also enhanced the awareness. For decades, CSOs have been the pioneers in promoting people's inclusion in policy making, including that pertaining to development. They have been instrumental in influencing development processes and have become key partners, by providing donors and national governments with alternative channels for mobilising development beneficiaries in the development process.⁴⁷ They function as the representatives for development beneficiaries and ensure that their views are incorporated in development processes. Their accomplishment in carrying out those roles has developed and contributed to the growing awareness of participation.

4.3 ENTITLEMENT TO PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS LAW

One of the strategies to ensure that a genuine participation is being respected and implemented in development processes is that the activity should be perceived as an entitlement based on human rights, rather than merely a civic engagement. Such perception offers a formal protection to the right-holders to claim for non-fulfilments and attaches a legal obligation to the duty-bearers to conduct development processes in accordance to the interest of the right-holders. In this respect, the entitlement to participate can be used as a legitimate tool to combat the phenomenon of development hazards. This section will explain the protection of participation in international human rights law. It aims at elaborating the existing legal protections that are relevant in perceiving participation as a human rights entitlement.

As mentioned earlier, participation frequently implies political activities and therefore corresponds to the rights that are related to democracy, such as the right of political participation, freedom of opinion and expression, freedom of association, and freedom of assembly. Yet, as a result of the development of human rights, participation has been expanded and is no longer considered as merely an entitlement in the civil and political rights, but also in the economic, social and cultural rights. Additionally, it is also associated with many contemporary issues in society, reflecting in the third generations of rights, as an entitlement in the field of environmental, information and development.

46 Paragraph 10, Considerant, ASEAN, Ministerial Understanding on ASEAN Cooperation in Rural Development and Poverty Eradication, 1997.

47 Robert A. Wabunoha, 'Popular Participation: A Precondition for Sustainable Development Planning. The Experience in Uganda, Konrad Ginther *et al* (eds), *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers, 1995) p. 236.

The legal basis for participation as an entitlement based on human rights can be found in the main United Nations' human rights documents. Article 21 of the Universal Declaration of Human Rights asserts the human right to participation by stipulating that the will of the people shall be the basis of the authority of governments.⁴⁸ In the International Covenant on Civil and Political Rights the right to participation is granted by Article 25. This Article stipulates that every citizen has the right and the opportunity to (a) take part in the conduct of public affairs, (b) to vote and to be elected at genuine periodic elections, and (c) to have access to public services in his country.⁴⁹ According to General Comment No. 25, the aim of Article 25 is to recognise and protect the right of every citizen to take part in public affairs.⁵⁰ It lies at the core of democratic government based on the consent of the people. This right emphasises a non-discriminatory principle, considering every citizen as the right-holder, regardless of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵¹

In terms of implementation, General Comment No. 25 asserts the obligation of the state parties to adopt legislative and other measures as may be necessary to ensure that the right-holders have an effective opportunity to participate.⁵² This entails measures that are implemented to overcome specific difficulties hindering participation, such as illiteracy, language barriers, poverty, or impediments to freedom of movement.⁵³ Furthermore, information and materials about voting should be available in minority languages and specific methods. Photographs and symbols, for instance, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.

In the text of the International Covenant on Economic Social Cultural Rights participation is not explicitly mentioned, but finds its specific formal basis in the ensuing general comments. General Comment 11 on the right to education recognises the importance of including participation for all sections of the civil society in the drawing up of the education plan.⁵⁴ This provision also mentions the necessities of

48 Article 21 of the UNDHR reads as follows: (1) Everyone has the right to take part in the government of his country, directly or through free chosen representatives. (2) Everyone has the right to equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

49 Article 25, ICCPR.

50 Paragraph 1, General Comment No. 25, *The right to participate in public affairs, voting rights and the right of equal access to public service*.

51 Nevertheless, according to the General Comment No. 25, the right to participation under Article 25 is related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by Article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Paragraph 2, General Comment No. 25.

52 See Paragraph 1, General Comment 25, *The Right to Participate in Public Affairs, Voting Rights, and the Right of Equal Access to Public Service*.

53 Paragraph 12, General Comment No. 25.

54 Paragraph 8, General Comment No. 11.

periodically reviewing to ensure accountability in education policies. Similarly, General Comment 12 on the right to food affirms that formulation and implementation of national strategies for the right to food require full compliance with the principles of accountability, transparency, people's participation, decentralisation, legislative capacity and the independence of judiciary.⁵⁵ Likewise, the principle of people participation is repeated under General Comment 14 on the right to health.⁵⁶

Practically, participation can be observed particularly in the reporting system of the ICESCR at the United Nations; in the form of submitting periodical reports. This reporting procedure, established under Article 16 of the Covenant, is stated as the principal instrument to implement the economic, social and cultural rights, which provides an opportunity for an international monitoring of the economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights⁵⁷ is in charge of receiving reports whose contents indicate factors and difficulties affecting the degree of fulfilment of obligations.⁵⁸ The Committee relies on reports provided not only by state⁵⁹ but also by the participation of civil society organisations. The CSOs are encouraged to participate by submitting relevant information to the Committee, taking part in the Committee's dialog with states representatives and by giving written or oral presentations at the beginning of each of the Committee's sessions.⁶⁰ This second source of reports is an important element to the reporting process, as it prom-

55 Paragraph 23, General Comment No. 12.

56 Paragraph 54, General Comment No. 14, the states: 'the formulation and implementation of national health strategy should respect, inter alia, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligation under 12. ... Effective provision of health services can only be assured if people's participation is secured by states'.

57 The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant. Previously, a nine year reporting cycle of separate reports at three years intervals on three categories of the ICESCR provision was applied, but the periodicity of State Party reports has been changed to comprehensive periodic report every five year. Allan Rosas and Martin Scheinin, 'Implementation Mechanisms and Remedies', Asbjørn Eide, et.al. (eds) *Economic, Social and Cultural Rights*. (Dordrecht, Martinus Nijhoof, 2002) p. 427.

58 Article 17(2) ICESCR.

59 The major constraints of the Committee's working practices have been derived first of all from the absence of any provision that requires any form of state cooperation beyond the submission of periodic reports. Whilst states have, in practice agreed to cooperate in a more extensive manner- such as by attending meetings of the Committee or, occasionally, agreeing to an on site fact finding mission- it seems clear that any cooperation beyond the submission of the report itself is largely dependent upon their good will. In May 1996, it was observed that there were 97 overdue reports from 88 states parties and 17 states had failed to submit a single report in 10 years. Mathew Craven, 'The Committee on Economic, Social and Cultural Rights', in *Economic, Social and Cultural Rights*, in Asbjørn Eide, et al (eds), *Economic, Social and Cultural Rights*, (Dordrecht, Martinus Nijhoof, 2002) (Dordrecht, Martinus Nijhoof, 2002) p. 461 and 464.

60 Rules of Procedure Rule 69.3; see also UN Doc. E/1994/23, paragraph 354.

ises more objective reviews on the national implementation of the economic, social and cultural rights from the non-governmental actors.

Compared with the provisions on participation granted in the ICCPR, those stipulated in the ICESCRs general comments certainly have a closer relationship with the idea of participation in the development sense. If participation in the context of ICCPR stipulates the traditional civil rights and liberties,⁶¹ such as the right to freedom of speech, freedom of assembly, freedom of press, right to share information and right to vote, within the ICESCR framework, as explained in the General Comments on the right education, right to food and right to education, participation is addressed as an instrument to be involved and taken into account in policy making of concerns related to the said rights. Proximity of participation clauses in the general comments of the ICESCR is, therefore, more relevant to development of the human being, as it deals with comparable subjects namely education, employment, health and food.

Nevertheless, the entitlement to participate in development still requires activations of both set of rights. Since the end of the Cold War there has been widespread recognition of the indispensable role played by civil and political rights in enabling and facilitating the realisation of economic, social and cultural rights.⁶² The argument has been well synthesised in the following comment made in the Human Development Report 2000:

‘An adequate conception of human development cannot ignore the importance of political liberties and democratic freedoms. Indeed, democratic freedom and civil rights can be extremely important for enhancing the capabilities of people who are poor. They can do this directly, since poor people have strong reason to resist being abused and exploited by their employers and politicians. And they can do this indirectly, since those who hold power have political incentives to respond to acute deprivations when the deprived can make use of their political freedom to protest, criticize and oppose’.⁶³

Besides the two main human rights covenants, other thematic human rights documents also embrace participation as part of their human rights entitlements. Article 7 of the Convention on Eliminating Discrimination against Woman recognises the right of women to participate in the formulation of government policy and the implementation thereof. The Convention on the Rights of the Child in Article 23(1) grants the rights to active participation in the community. Moreover, the right to participate in cultural activities is addressed in Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

61 Alan Rosas, ‘Democracy and Human Rights’, in Alan Rosas ed., *Human Rights in a Changing East and West Perspective*. (London: Pinter Publisher, 1990) p. 37.

62 Philip Alston, ‘Ship Passing in the Night, the Current State of Human Rights and Development Debate Seen through the lens of Millennium Development Goal’, *Human Rights Quarterly*, 27, (2005) p. 778.

63 United Nations Development Program, *Human Development Report 2000, Human Rights and Human Development*. (New York: UNDP, 2000) p. 20.

The entitlement to participation in the context of development has also been addressed in several human rights documents. One of the most important documents is the Vienna Declaration, which refers to participation with the question of a mutual interdependency between democracy, development and human rights.

‘Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world’.⁶⁴

This paragraph acknowledges the significance of employing the entitlement to participation as a reflection of respect for human rights in the development process. Development goals have a propensity to focus on the material conditions, presuming that they are the only conditions to improve beneficiaries’ conditions. Furthermore, this paragraph also mentions that the promotion of human rights and democracy should not be perceived as a barrier to development, instead collaborative actions are necessary to deal with the said subjects simultaneously.

In the Declaration on Social Progress and Development, participation is recognised as the requirement to achieve the common goals of development.⁶⁵ The Declaration particularly calls for a realisation of the entitlement to participation through private economic organisations such as co-operatives or trade unions, and recognises the diversity of the needs of developing and developed countries, as well as of urban and rural areas in each country.⁶⁶

The entitlement to participation is also being pronounced by international organisations and regional organisations dealing with the issue of human rights and development. The International Labour Organisation (ILO), for example, is one of the leading international organisations that since its inception in 1919, has included the protection of fundamental human rights as one of its objectives. Central to the ILOs effort to achieve this goal has been its promotion of the concept of ‘freedom of association’. The idea of freedom of association focused on the right of workers to form and join organisations of their own choosing.

With regard to the promotion of the entitlement to participation in relations with the right to work, the ILOs Rural Workers’ Organisation Convention adopted some

64 Vienna Declaration and Programme of Action, paragraph 8.

65 Article 5, para. C, Declaration on Social Progress Development, reads as follow: ‘The active participation of all elements of society, individually or through associations, in defining and in achieving the common goals of development with full respect for the fundamental freedoms embodied in the Universal Declaration of Human Rights’.

66 Articles 14-22, Declaration on Social Progress and Development.

provisions concerning the obligation of the State to provide the potential means or enabling environment to encourage participation of workers in the decision-making policy. Article 4 of the Convention asserts that the States must facilitate the establishment and growth of strong and independent organisations of rural workers as an effective means of ensuring participation in economic and social development.⁶⁷

At regional settings, the Lomé Convention IV,⁶⁸ which was established to regulate the development relationship between the European Economic Community and various African, Caribbean and Pacific states, states several explicit and detailed provisions⁶⁹ on the entitlement to participation. Article 13 particularly calls for ‘participation by the population in the design and execution of development operations’ and stresses that development policy should be administered in cooperation with ‘decentralised public authorities, rural and village groupings, cooperatives, firms, trade unions ...’. Less explicit, but still important, the same provision also asserts that the design, appraisal, execution and evaluation of each project or programme should be based on an understanding of and regard for the cultural and social features of the population affected, and recognises that information and communication, training and education are indispensable dimensions of a development concept centred on man.⁷⁰

Another regional pronouncement that stipulates the entitlement to participation in development processes is the African Charter on Popular Participation in Development and Transformation, which was unanimously approved in a conference of five hundred participants held in Arusha, Tanzania, Africa in 1990. The Charter stemmed from a recognition that the slow progress in achieving development goals did arise because of the lack of full appreciation of the role popular participation plays in the process of recovery and development.⁷¹

The Charter considers popular participation as an instrument of development that allows people to ‘establish independent organisations at various levels that are generally grassroots, voluntary, democratically administered and self reliant and that are rooted in the tradition and culture of society’.⁷² It calls for explicit mechanisms for encouraging popular participation by governments, community groups and the international community, urging, among other approaches, the inclusion of representatives from the government, trade unions, women’s groups and other interested groups in evaluations of development projects.⁷³ Additionally, the Charter also provides

67 Article 4, ILO Convention no. 141 concerning Rural Workers’ Organization Convention of 1975.

68 African, Caribbean and Pacific States - European Economic Community, Final Act, 4th ACP/EEC Convention of Lomé, made at Lomé, Togo, December 15, 1989. The Lomé Convention is renewed and revised every five years.

69 See articles 5; 20(2); 21(2); 22, Lomé Convention IV.

70 Article 13, Lomé Convention IV.

71 Paragraph 3, Preamble, African Charter on Popular Participation in Development and Transformation.

72 Article 13, African Charter on Popular Participation in Development and Transformation.

73 Article 25, African Charter on Popular Participation in Development and Transformation.

protection for the right to development in the preamble⁷⁴ and the Article 22 of the Charter.⁷⁵

Notably, the entitlement of participation has been recognised as a crucial factor in the effective enjoyment of human rights and fundamental freedoms, embracing political, economic, social and cultural rights.⁷⁶ The existing numbers of international documents⁷⁷ demonstrate how the international community has committed itself to include the entitlement to participation as a way to promote human rights in development processes. Furthermore, the line of protection coming from the internationally declared human rights standards suggests a common frame of reference to which the states have agreed upon by joining the UN or other international/regional institutions and accepted their principles. By ratifying these human rights documents, states voluntarily oblige themselves to the respected human rights standards,⁷⁸ and therefore are required to honour the entitlement to participation in development processes.

However, although there are various human rights documents and organisations addressing the interdependency of participation and development; they do not particularly associate participation to the question of the right to development or addresses it as the tool to combat the phenomenon of development hazards. As has been explained in Chapter 2, this happens in part because the commitments to the entitlement to participation in the context of the right to development stay at merely the political levels and only within the UN settings. As there is a lack of detailed operational recommendations to be applied at the practical levels, the participatory development is hitherto not being implemented corresponding to the right to development. Therefore in the next section, the entitlement to participation will be elaborated upon as the approach to implement the right to development.

4.4 PARTICIPATION AND THE IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT

Participation is a central subject to the right to development. In Article 1(1) of the Declaration, the right to development is defined as ‘an alienable right by virtue of

74 Paragraph 7, Preamble, African Charter on Human and People’s Rights (ACHPR).

75 Article 22(2), ACHPR reads as follows: ‘States shall have the duty, individually or collectively, to ensure the exercise of the right to development.’

76 A/RES/ 45/150, Enhancing the Effectiveness of the Principle of Periodic and Genuine Election, paragraph 2.

77 There are numbers of declaration that consider participation as important in development process, yet most of them usually do not consider it as a right. An example is the Global Coalition for Africa (GCA), Maastricht, July 1990, which in its final documents asserts that ‘Africa would take greater initiative in designing and implementing more effective economic and social programs, would improve governance and would foster popular participation’. The second is the Paris Declaration of Aid Effectiveness, which was declared by the Organisation for Economic Cooperation and Development in February 2005. This declaration asserts the emphasis of participatory development and more decentralisation of development administration, which relies on national actors and local CSOs.

78 Brigitte I. Hamm (2001) p. 1013.

which every human person and all peoples are entitled to participate'. Notably, the article suggests that participation is the starting point to implement the right to development.

Participation has acquired a special attention since the early days of the process of designing the right to development. The Study of the United Nations' Secretary General on Popular Participation in 1984 synthesised the various contributions to participation in its various forms as an important factor in development.⁷⁹ The study connected participation with respect for human rights and human dignity, non-discriminatory concerns and democracy.⁸⁰ The report of the study summarises several points on participation:

(b) Popular participation is an essential means of promoting development and ensuring the full exercise of human rights. It is also an end in itself, which meets a fundamental aspiration of human beings. As stated, for example, in the Cocoyoc Declaration, 'there is a deep social need to participate in shaping the basis of one's own existence and to make some contribution to the fashioning of the world future'. The satisfaction of this need is an essential aspect of human dignity.

(c) It is within the population concerned, acting in full freedom and in full knowledge of the facts, that wishes and guidelines concerning participation should be expressed (...); as for competent authorities at all levels, they are responsible for providing all necessary information and promoting the development of the participation structure, taking account of the general interest in a democratic society.

(d) The participation machinery should operate with the fullest respect for human rights, without any discrimination and giving special attention to groups which have so far been kept apart from genuine participation.'

Repeating a comparable message, the Report of the Global Consultation on the Right to Development in 1990 stated that participation may serve as an implementation tool to exercise the right to development. The Report mentioned participation as the primary mechanism for identifying appropriate goals and criteria for the development process.⁸¹

'Participation is the right through which all other rights in the Declaration on the Right to Development are exercised and protected, the forms, quality, democratic nature, and effectiveness of participatory processes, mechanisms and institutions label the central and essential indicator(s) of progress in realizing the right to development.'⁸²

79 E/CN.4/1985/10, Study of the Secretary-General on Popular Participation, paragraph 25. Quoted from Konrad Ginther, 'The Domestic Policy Function of a Right of Peoples to Development: Popular Participation a New Hope for Development and a Challenge for the Discipline, in Subrate Roy Chowdhury et al, *The Right to Development in International Law*. (Dordrecht, Martinus Nijhoff, 1992) pp. 67-68.

80 *Ibid.*

81 E/CN.4/1990/9 Rev.1, Global Consultation on The Right to Development, note 8, paragraph 164.

82 *Ibid.*, paragraph 177.

Moreover, the Report of the Global Consultation emphasises that participation as a tool to implement the right to development must be active and must involve genuine power. This entails the entitlement to make decisions collectively and to choose their own representative organisations and to have freedom of democratic action, free from interference.⁸³ Furthermore, the Global Consultation asserted that participation is ‘effective in mobilising human and natural resources and combating inequalities, discrimination, poverty and exclusion’,⁸⁴ which implies viewing participation both as a mean to an end and as an end itself.⁸⁵ The report also pointed out that effectiveness of participation had to be assessed from a subjective perspective; based on the opinion of the affected persons.⁸⁶

A rationale for participation according to the report is that development beneficiaries should not be considered as simply ‘resources’ to be made healthy, skilled, and productive. Rather they have a right not only to survival and material improvement, but also to some measure of power,⁸⁷ which includes the fair distribution of economic and political power and the genuine ownership or control of productive resources such as land, financial capital and technology. Both correspond to the two main entitlements recognised in the Declaration of the Right to Development; fair distribution of benefits and participation. With regard to the function of participation against the phenomenon of development hazards, the Report implicitly addressed this by considering participation as an effective mechanism to combat inequalities, discrimination, poverty and exclusion.

As it has been introduced in Chapter 1 and briefly explained in Chapter 2, the Declaration of the Right to Development offers two approaches in looking at the entitlement of participation. The first approach perceives participation as an entitlement that depends on the initiation of the state. The Article 2(3) of the Declaration of the Right to Development⁸⁸ stipulates that a development policy should be designed through a process of participation and that the State has the duty to provide the appropriate policies that enable people to participate. Another approach of looking at participation according to the Declaration on the Right to Development is coming from

83 *Ibid*, paragraph 147.

84 *Ibid*, paragraph 150.

85 *Ibid*, paragraph 149.

86 Rajeev Malhotra, ‘Towards Implementing the Right to Development: A Framework for Indicators and Monitoring Methods’, Bard A Andreassen and Stephen P. Marks, *Development as a Human Right, Legal, Political and Economic Dimensions*. (Cambridge: Harvard School of Public Health, 2006) p. 201.

87 R.L. Barsh, The right to development as a human right: Results of the Global Consultation. *Human Rights Quarterly*. 13 (1991) pp. 322-38.

88 Article 2(3), Declaration on the Right to Development, states that ‘States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the wellbeing of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting thereof’.

the right-holders perspectives. The term ‘popular participation’ stated in Article 8(2)⁸⁹ addresses a different approach of looking at a participatory process. The United Nations defines popular participation as ‘closest to the ideal mode of participation as it reflects voluntary and autonomous action on the part of the people to organise and deal with their problem unaided by government or other external agencies’.⁹⁰ The African Charter on Popular Participation in Development and Transformation defines the term ‘popular’ as the role of the people and their popular organisations to be fully involved, committed and must, indeed, seize the initiative in development processes.⁹¹ Notably, the term ‘popular participation’ implies the necessity of an enabling environment to facilitate initiatives from the right-holders themselves.

Both approaches on the entitlement to participate require the State to take concrete steps that ensure the existence of an enabling environment. The Declaration clarifies the obligation of the State to include eliminating human rights violations that are obstacles to the right to development⁹² and ensuring the full exercise and progressive enhancement of the right to development including the formulation, adoption and implementation of a policy, legislative and other measures.⁹³ In this respect, the Report of the Global Consultation mentions some actions that can facilitate participation, which include the representativity and accountability of decision-making bodies, the decentralisation of decision making, public access to information and responsiveness of decision makers to public opinion.⁹⁴

In her research on the right to development, Anja Lindross argues that there are still many unanswered questions with regard to participation in the context of the right to development.⁹⁵ Further work is thus needed in developing clear guiding principles for the entitlement for participation. Indeed studies on participation in the context of the right to development have been performed by the Working Group, the High level Task Force and particularly by the Independent Expert on the Right to Development. In his reports, the Independent Expert repeatedly states how development would deliver different results when based entirely on decision making with the participation of the beneficiaries.⁹⁶ Moreover, in the report of the Working Group on the Right to

89 Article 8(2), Declaration on the Right to Development states that ‘States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights’.

90 United Nations, *Popular Participation as a Strategy for Promoting Community Level Action and National Development*. (New York: UN Press, 1981) p. 8.

91 Paragraph 14, Chapter II, African Charter on Popular Participation in Development and Transformation.

92 Article 5, Declaration on the Right to Development.

93 Article 10, Declaration on the Right to Development.

94 E/CN.4/1990/9/Rev.1, Global Consultation on the Right to Development, paragraph 178.

95 Anja Lindross, *The Right to Development*. (Helsinki: Eric Castern Pub., 1999) pp. 45-47.

96 E/CN.4/1999/WG.18/6, First report of the independent expert on the right to development, paragraph 68; E/CN.4/2000/WG.18/CRP.1, Report of the Independent Expert on the Right to Development, paragraph 64; E/CN.4/2001/WG.18/2, Third report of the independent expert on the right to development, paragraph 16 and 25; E/CN.4/2002/WG.18/2, Fourth report of the independent expert on the right

development and the High Level Task Force on implementation of the right to Development in November 2005, it was also listed some countries efforts that articulate the implementation of the right to development through participation of civil society and the right-holders.⁹⁷

Nevertheless, based on the experiences of implementing participation in Ghana, Slovakia, Bangladesh and Tanzania,⁹⁸ the report concluded that ‘the question of participation was acknowledged as important but efforts made to ensure such participation in the planning, implementation and assessment of development policies were not, for the most part, studied or articulated in a systematic or consistent manner’.⁹⁹ In this respect, the High Level Task Force admitted that so far the studies on participation are not clear in defining how the right to development is involved in the processes of preparing national plans and to what degree the right-holders were part of the planning, design and the implementation of these plans. Therefore, in order to advance the entitlement to participation in the context of the right to development, the High Level Task Force emphasised the need to move from generalities to specificities and from the conceptual to the operational.¹⁰⁰

In an attempt to further clarify ways to implement the right to development, Yash Ghai analyses the importance of a constitution to provide the modalities participation. He mentions that:

‘In order to fully incorporate the right to development into the structure of the state, one should analyse obstacles to the exercise of protection of human rights (such as the centralization or abuse of power, misallocation of resources or lack of democracy and accountability) and design institutions and procedures that place primacy on human rights. New institutions may be necessary to fully implement the right to development (for example, to facilitate the participation of the people in the affairs of state) and the parameters for balancing different kinds of interests would have to be established’.¹⁰¹

to development, paragraph 30; E/CN.4/2002/WG.18/6, Fifth report of the independent expert on the right to development, paragraph 35-37.

97 E/CN.4/2005/WG.18/TF/CRP.1, ‘The Right to Development and Practical Strategies for the Implementation of the Millennium Development Goals, Particularly Goal 8’, paragraph 25.

98 *Ibid.* In Ghana, public discussion of development strategies were evidently useful in eliciting participation and debate, while in Slovakia, the question of the *future* involvement of the Roma Community in development strategies affecting their development was emphasized. In Bangladesh, an action plan was developed jointly by government, NGOs and UN agencies, while the Tanzanian report spoke of lack of community involvement and participation in planning and service deliveries.

99 *Ibid.*

100 The High Level Task Force stated that ‘it was not clear from most of the reports how the process of preparing for national plans took place, and to what degree stakeholders or rights-bearers were part of the planning, design and implementation of these plans’. *Ibid.*

101 Yash Ghai, ‘Redesigning the State for ‘Right to Development’, in Bard A Andreassen and Stephen P. Marks, *Development as a Human Right, Legal, Political and Economic Dimensions*. (Cambridge: Harvard School of Public Health, 2006) p. 143.

Obstacles to the implementation of the right to development are rooted in the reality that the constitutions of many countries are outdated and need to be reviewed to accord sufficient attention to primacy of human rights and a greater degree of democratisation and participation. This is crucial because society use constitutions to achieve objectives of legality or integrity. Constitutions provide mechanisms for human rights implementation or observance, including participation in the conduct of state affairs, formulation of state policies, and the implementation of social justice. Furthermore, generating basis through the constitution is crucial because in this way the culpability for harms can be ascertained¹⁰² and compensation can be sought for the lost entitlements.

An illustration is the integration of the principles of the right to development in the Constitution of Malawi. Section 30 of that Constitution asserts that all persons and people have the right to development and thereto the enjoyment of economic, social and cultural and political development.¹⁰³ In the same section, the Constitution also stipulates the right to participate in all facets of development.¹⁰⁴ The integration of the right to development in legislation has served to legitimate actions towards the entitlement to participate. The Malawian Government and its partners in development have embarked on a poverty alleviation programme which is based on the realisation of the right to development. The objective of the United Nations Development Assistance Framework (UNDAF) in Malawi is to help eradicate poverty by ‘creating the capacity to achieve the right to development for all Malawians’.¹⁰⁵ The Malawi Human Rights Commission (MHRC) has welcomed this action as such programmes have:

‘a role to play in empowering Malawians to fulfil their right to development by building their capacities through a right-based approach to economic and social empowerment. Active participation of the citizens and more especially the poor is key to the fight against poverty. The poor should not be seen to be on the receiving end but should be active participants in transforming their status’.¹⁰⁶

In this light, it can be construed that the incorporation of the principles of the right to development would provide the legal basis necessary for participation. Nevertheless, in reality, as mentioned in Chapter 2, only a small number of countries acknowledge the right to development in their constitutions.¹⁰⁷ Therefore, the implementation of participation to combat development hazards would often need to embark on the

102 Siddiq Osmani, ‘Globalisation and the Human Rights in Development’, in B.A. Adreassen *et al*, *Development as a Human Right: Legal, Political and Economic Dimension*, (Cambridge: Harvard School of Public Health, 2006) p. 255.

103 Constitution of Malawi, section 30, paragraph 1. Quoted in Jane Ansah, ‘The Right to Development as Applied in National Law’, in Mashood A. Baderin and Robert McCorquodale, *Economic, Social and Cultural Rights* (New York: Oxford Univ. Press, 2007) p. 425.

104 Section 30 (1) and (2), Constitution of Malawi. *Ibid*, p. 434.

105 *Ibid*, p. 431.

106 *Ibid*.

107 See: Section 2.7.2. on National and Local Levels of Implementation, Chapter 2.

political morality of human rights as a driving force in judicial activism.¹⁰⁸ This implies employing human rights as a power to aggregate actions to combat development through existing mechanisms. In this particular subject, Martin Scheinin examined some cases related to development hazards that are brought by indigenous peoples to demonstrate the collective action of people that have identified themselves against a given state.¹⁰⁹ In most cases, participation is not only manifested in the process of asserting their entitlements, but also reflected in the decision.

The finding of the African Commission on Human Rights on the case of Ogoni People vs. Nigeria of October 2001 provides an example. Under Article 24 of the African Charter, the Commission describes the provision as requiring the State ‘to take reasonable and other measures to prevent pollution and ecological degradation’.¹¹⁰ Based on this article, the Commission conclude that projects must include ordering or at least permitting independent scientific monitoring and threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

Another aspect that can enhance the implementation of participation in the context of the right to development is the civil society organisations (CSOs). CSOs have been reported as the actors that can cultivate participation and are increasingly powerful participants in the development-related decision making.¹¹¹ They have the ability to advance participation by assisting the right-holders to influence a development policy. An example of the degree of CSOs’ influence is the negotiation of the \$3.7 billion Chad-Cameroon oil pipeline project.¹¹² CSO in this case played a ‘pivotal role’ in the negotiations, pushing the World Bank to require an unprecedented transparency mechanism to ensure that the oil revenues paid to the Chad government will be used for the benefit of the people. Their demands expanded from a better compensation for property damage caused by the constructions of the pipeline and a monitoring mechanism to tract the Chadian’s government’s spending on oil revenue, to an establishment of a democratic government in Chad and an end to corruption in Cameroon.

CSOs have actually been recognised by the Commission on Human Rights essential actors for the successful implementation of the right to development.¹¹³ They are considered to be capable of translating and transforming participation. In particular,

108 Bas de Gaay Fortman, ‘Adventurous Judgements, A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law Review’, *Utrecht Law Review*. 2 (2006) p. 23.

109 Martin Scheinin, Advocating the Right to Development Through Complaint Procedure of Human Rights Treaties, in B.A. Adreassen *et al*, *Development as a Human Right: Legal, Political and Economic Dimension*, (Cambridge: Harvard School of Public Health, 2006), p. 274.

110 *Ibid*, p. 280.

111 George Pring and Susan Y. Noe (2002) p. 68.

112 *Ibid*, pp. 68-69.

113 E/CN.4/1996/24, Question on Realisation of the Right to Development, Chapter 3.

the Commission recognises the effective role of CSOs in representing vulnerable groups and their public interest arenas of local and national decision making, for example, in the state's formulation of the national budget, and in economic and social policies.

4.5 COMBATING DEVELOPMENT HAZARDS BY MEANS OF PARTICIPATION

Hitherto, it has been concluded that honouring the entitlement to participation fosters protection against marginalisation caused by non-accountable development projects or programmes. As part of universal human rights, the protection of the entitlement to participation in development strengthens the position of the right-holders both economically and politically and at the wider domain breeds sustained improvement of the well-being of the entire population.¹¹⁴ As a result, not only the continuity of the project is ensured but also the effectiveness of development projects and programmes is guaranteed. Particularly in respect of the phenomenon of development hazards, participation may deliver a remedial effect for the victims to seek compensation and retribution. Through exercising participation, right-holders are actively concerned about the adverse situation and are taking actions to reclaim their entitlement positions. Based on this perspective, the following sub-sections will elaborate the preventive and remedial functions of the entitlement to participation in combating the phenomenon of development hazards.

4.5.1 Preventive Function

The preventive function of the entitlement to participation is fulfilled when the exercise of the entitlement to participation successfully avoids development beneficiaries from becoming the victims of development policies, programmes and projects.

One of the most remarkable cases that demonstrate the potential of participation as having a preventive function is observed in case of the Philippines in the UN reporting system procedure. During the tenth session of the Committee on Economic, Social and Cultural Rights, certain CSOs drew the attention of the Committee to several matters that are related to the forced eviction of large numbers of families.¹¹⁵ In response to that call the Committee asserts the necessity 'to give rise to concern that violations are occurring and that future measures might amount to further violations of the obligations' contained in the ICESCR'.¹¹⁶

On the basis of the incoming information from the CSOs, the Committee requested the Government of the Philippines to respond to the issues, which it did in the follow-

¹¹⁴ Arjun Sengupta, 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly*, 24 (2002) p. 848.

¹¹⁵ Mathew Craven (2002) p. 466.

¹¹⁶ UN doc. E/1994/23, Report of the Committee on Economic, Social and Cultural Rights, paragraph 374.

ing year.¹¹⁷ Notably, the action has prevented a planned forced eviction of 200,000 families, which if undertaken without adequate resettlement sites being made available would be incompatible with the State's commitment to the ICESCR.¹¹⁸ The Committee also recommended that the Government should ensure that forced evictions are not carried out except in truly exceptional circumstances, following consideration of all possible alternatives and in full respect of the rights of all persons affected.¹¹⁹

The case illustrates the achievement of participation in the reporting procedure of the United Nations system. The whole process was initiated on the basis of the report received from the CSOs, which as recalled are one of the channels to exercise participation. Furthermore, it should also be recorded that the process has successfully prevented a potentially development hazard occurred in breach of the state's obligation under the ICESCR. Of more importance is that the Committee was not simply intent on making a declaration of incompatibility, but was concerned with forestalling potential future violations.¹²⁰

At the national level, another example of a case of the preventive function is also coming from the Philippines. In the case of *Oposa et al v. Fulgencio S. Factoran, Jr. et al* from the Supreme Court of the Philippines in 1993, a class action was registered seeking the cancellation and non-issuance of timber licence agreements which allegedly infringed, inter alia, the constitutional right to a balanced and healthful ecology.¹²¹

An action was filed by several minors represented by their parents against the Department of Environment and Natural Resources to cancel existing timber license agreements in the country and to stop issuance of new ones. It was claimed that the resultant deforestation and damage to the environment violated their constitutional rights to a balanced and healthful ecology and to health, regulated in the Sections 16

117 Mathew Craven (2002) p. 466.

118 The Committee has received information from a variety of sources indicating that large-scale forced evictions occur frequently and are estimated to have affected hundreds of thousands of persons since the ratification of the Covenant by the Philippines. One figure presented to the Committee asserted that some 15,000 families were forcibly evicted between June 1992 and August 1994. The scale of forced evictions and the manner in which they are carried out are of concern to the Committee. The Government itself acknowledges that planned forced evictions may affect up to 200,000 families, and that the Government has identified only 150,000 relocation sites. If these estimates are correct a very significant number of persons currently threatened with eviction will not receive adequate resettlement. Such a situation would not be compatible with respect for the right to housing. UN doc. E/C.12/1995/7, Concluding observations of the Committee on Economic, Social and Cultural Rights: Philippines, paragraph 16.

119 *Ibid*, paragraph 31.

120 Craven noted that there is nothing in the Covenant or in the ECOSOC's resolutions that specifically authorizes the introduction of such a procedure, but then again, there is nothing that prohibits it. The Committee's creative interpretation of its mandate seems constrained only by the extent to which it may potentially alienate states from the process as a whole. Mathew Craven (2002) p. 467.

121 The other claims of this class action are violations of environmental law; judicial review and the political question doctrine; inter-generational responsibility; Remedial law: cause of action and standing; directive principles; negative obligation on state. *Oposa et al. v. Fulgencio S. Factoran, Jr. et al* (G.R. No. 101083), Supreme Court of the Philippines, 30 July 1993.

and 15, Article II of the Constitution of the Philippines. The petitioners asserted that they represented others of their generation as well as generations yet unborn.

Finding for the petitioners, the Court stated that even though the right to a balanced and healthy ecology is under the Declaration of Principles and State Policies of the Constitution and not under the Bill of Rights, it does not follow that it is less important than any of the rights enumerated in the latter. The right is linked to the constitutional right to health, is 'fundamental', 'constitutionalised', 'self-executing' and 'judicially enforceable'. It imposes the correlative duty to refrain from impairing the environment.¹²²

From these two cases, it can be observed how participation, through a form of submitted reports, petitions or class actions submitted to the judiciary systems can secure the entitlement positions of the right-holders to protect them against potentially hazardous development policies. The implementation of participation in these cases is exercised from below with the aim of preventing hazardous impacts of development processes. Providentially, an enabling environment exists; legal complaint mechanisms are available to ensure that the report, class action or petition is addressed justly. Moreover, they demonstrate accountable to force the potential perpetrators, in this case the State, to enforce their decisions made therefrom.

The preventive function to the entitlement to participation in combating development hazards is not only possible to be performed in the judicial domains. In the case of a UNICEF development programme in Uganda for example, participation, implemented as a part of the UNICEF's human rights based approach program of 2003, had increased the awareness of the people to the subject, resulting in the increase of the immunisation coverage of about 80%. Children and young people were observed as active actors in claiming this entitlement.¹²³ Exercising the entitlement of participation has led to a growing awareness of the duty-bearers, which was reflected in the development of partnership, and has prevented unnecessary rise of morbidity amongst children.¹²⁴

4.5.2 Remedial Function

The remedial function of the entitlement to participation refers to a situation whereby participation is exercised with the objective to claim compensation or retribution in a situation of development hazard.

122 The court stated that the petitioners were able to file a class suit both for others of their generation and for succeeding generations as 'the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come'. *Ibid.*

123 Urban Jonsson, 'A Human Rights-Based Approach to Programming', in Paul Gready and Jonathan Ensor (eds), *Reinventing Development: Translating rights-based approaches from theory into practice* (New York: Palgrave Macmillan, 2004) p. 58.

124 The program had been noted to be successful those areas, but it had been difficult to expand the programme due to resource constraints both economic and human resources. *Ibid.*, p. 59.

At the regional level, one case to illustrate this is again the Oil Case in Nigeria at the African Commission of Human and Peoples Rights in 2001. In the communication submitted by the Social and Economic Rights Actions Centre and the Centre for Economic Social Rights, the complainants alleged that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.¹²⁵

Responding to the complaint, the Commission recalled the duty of the government to protect its citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments.¹²⁶ The Commission stated that violations occurred in the case of the right to enjoy the best attainable state of physical and mental health in Article 16(1) and the right to general satisfactory environment favourable to development in Article 16(3) of the African Charter. Therefore the Commission ruled that the Nigerian Government had to ensure adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations.¹²⁷

At the national level, the Grootboom case in South Africa demonstrates the potentiality of participation to seek remedy by means of judiciary mechanism. In the Grootboom case, a community of squatters, evicted from an informal settlement in Wallacedene had set up minimal shelters, made of plastic and other materials at a sports centre adjacent to Wallacedene community centre, which lacked basic sanitation and electricity. The group brought an action against their eviction without provision of compensatory housing under sections 26 (the right of access to adequate housing) and 28 (children's right to basic shelter) of the South African Constitution against various levels of government.

The High Court found that the respondents had taken reasonable measures within available resources to achieve the progressive realisation of the right to have access to adequate housing – as required by Article 26 of the Constitution.¹²⁸ However,

125 The Social and Economic rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, African Commission on Human Rights Communication No. 155/96, Fifteenth Activity Report 1999-2000, Annex V. In M. Sepulveda *et al*, *Universal and Regional Human Rights Protection: Cases and Commentaries*. (Costarica: University for Peace, 2004) p. 295.

126 *Ibid*, paragraph 57.

127 *Ibid*, paragraph 69.

128 The Judge ruled that that a rational housing programme has been initiated at all levels of government and that such programme has been designed to solve a pressing problem in the context of the scarce financial resources. See Grootboom case, Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000, The High Court of South Africa, Case No. 6826/99.

because the right of children to shelter in Article 28 was not subject to available resources, the High Court held that the applicants were entitled to be provided with basic shelter.

On appeal to the Constitutional Court, the Court found no violation of Article 28, and instead a violation of the right to adequate housing in Article 26. The Court held that Article 26 obliges the state to devise and implement a coherent, co-ordinated housing programme and that in failing to provide for those in most desperate need the government had failed to take reasonable measures to progressively realise the right to housing. The case ended in a mandatory court order commanding the South African government to secure alternative shelter for Irene Grootboom and the 899 other poor and vulnerable individuals they had removed from their squatter compound. The South African Human Rights Commission agreed to monitor and if necessary report on the governments' implementation of this order.

The decision had a major impact on housing policy in South Africa.¹²⁹ Most municipalities put in place a 'Grootboom allocation' in their budgets to address the needs of those in desperate need.¹³⁰ The applicants were provided with basic amenities as a result of a settlement reached prior to the hearing of the case by the Constitutional Court, but the results of the decision for the community have been disappointing. Further legal action was taken to enforce the remedy against the local government. Nevertheless, even after more than five years, this order has only been marginally implemented.¹³¹

From the two examples, it can be observed that although participation through the legal procedure can certainly help in acquiring remedies for development hazards, its implementation still depends on the good will of the duty-bearers. The human rights struggle does not stop once a remedy is ordered by the legal authority, but it should be accompanied with concrete implementation taken by the duty-bearers. Furthermore, the right-holders and other supporting actors are required to continue to exercise the entitlement to participation, by for example monitoring the execution of the court's orders in providing the compensation and retribution.

4.6 CONCLUDING REMARKS

This study uses a broad definition of participation in development processes. Participation entails process of dialog and broadly active civic engagements, which provide opportunities for people to influence the decisions that affect them. Genuine application of such entitlement of participation offers two main advantages, which are the

129 The case has also impact in the process of law making based on ethical and political principles of human rights. For further analyses on this see: Bas de Gaay Fortman (2006) p. 36.

130 Other cases where the judges also refer to the Grootboom case are Minister of Public Works & Ors. V. Kyalami Ridge Environmental Association & Ors of the Constitutional Court of South Africa of 2001 and Port Elizabeth Municipality v. Various Occupiers of the Constitutional Court of South Africa of 2004.

131 Bas de Gaay Fortman (2006) p. 38.

accountability of the development project and the empowerment of the people. These advantages ensure the continuity and effectiveness of development processes while simultaneously empowering their beneficiaries.

Many international human rights treaties and documents have acknowledged the entitlement to participation as a crucial factor in the effective enjoyment of human rights and fundamental freedoms. The Declaration on the Right to Development especially emphasises this entitlement to be honoured in development processes. One of particular interests is that this entitlement can actually serve as an instrument to identify the implementation of the right to development. In this regard, the Declaration on the Right to Development offers two approaches on looking at the entitlement of participation. The first approach is derived from Article 2(3) which entails initiatives from the State as the duty-bearers. Such a downstream approach obliges the State to provide an enabling environment to exercise the entitlement. The second approach is coming from Article 8(2), in which the notion of popular participation is introduced. This notion grants an upstream approach on looking at participation, entailing initiatives from the side of the right-holders.

These approaches allow the right to development to be employed to avoid and combat the phenomenon of development hazards, a phenomenon where development impairs rather than improves the entitlement positions of development beneficiaries. In this regard, the entitlement participation is employed as prevention to development hazards and provides remedial procedures for the victims of development. It has the preventive function because the exercise of this entitlement brings development beneficiaries to actively decide how they want to respond to development processes. When being designed from below, development would be inclined to serve people's interests and therefore would unlikely create victims of development. Additionally, the entitlement to participation is also having a remedial function, because through the course of participation beneficiaries are able to perform judicial or political activities to claim remedies and compensation against development hazards.

In summary, from the discussion on the right development, development hazards, and entitlement to participation provided in Chapter 2, 3 and 4, it can be construed the entitlement to participation as stipulated by the Declaration on the Right to Development is meant to provide the human rights protection in development processes that enable the right-holders to act against development hazards. The question is how to bring it to the people, so that it can have a positive and real effect for the right-holders. Undoubtedly, this concern has been raised by both opponents and supporters of participation. In this particular respect, Yash Ghai once warns that:

'A participatory process should avoid the perils of spontaneity and populism. It must address the issue of whether the people are sufficiently prepared, both psychologically and intellectually, to engage in the process; how to solicit views of the public and special and organized groups and how to analyse, assess, balance and incorporate these views. The engagement cannot be 'one off' but must be continuous and include fresh opportunities to comment on the draft and meaning forms of participation afterwards. Transparency and integrity through-

out the process are essential to win and sustain people's trust and confidence and to guard against the dangers of manipulation'.¹³²

In the following chapters, an empirical case will be used to illustrate the dynamics in ensuring participation as an entitlement connected with the right to development.

¹³² Yash Ghai, 'Redesigning the State for 'Right to Development'', in Bard A. Andreassen and Stephen P. Marks, *Development as a Human Right, Legal, Political and Economic Dimensions*. (Cambridge: Harvard School of Public Health, 2006) p. 146.

CHAPTER 5

DEFENSIVE INCORPORATION: HUMAN RIGHTS IN INDONESIA

5.1 INTRODUCTION

Following the proclamation of independence on 17th August 1945, Indonesia became a republic. After four years of war and intermittent negotiations, it was at the Round-Table conference in The Hague in December 1949 that The Netherlands, the former colonial power, finally recognised the Republic of Indonesia as a sovereign state. Sukarno became the first president. In 1965, the Indonesian army eliminated the ‘30 September Movement’ that involved an alleged participation of the Indonesian Communist Party (*Partai Komunis Indonesia* or PKI) in the assassination of several generals. This *coup d’état*, entailing the killing and deportation of hundreds of thousands of alleged communists, marked the end of Sukarno’s office. The People Consultative Assembly (*Majelis Perwakilan Rakyat* or MPR) then appointed Major General Suharto, the commander of Army’s strategic reserves, as acting president and in March 1968 elected him to the office of president. His rule became known as the New Order.

The New Order administration might be characterised as a repressive and effective regime that imposed both coercion and toleration.¹ The ability to secure national stability and economic progress won the regime the economic and political support from the West in the period of the Cold War. Even at the beginning of the Asian monetary crisis 1997/1998, the the World Bank was still saying that Indonesia has achieved a remarkable economic development success over the past decade and was considered to be among the best performing East Asian economies.² Nevertheless, like many other Southeast Asian countries, the Suharto regime failed to protect the Indonesian population against the contagious effects of the Asian Monetary Crisis. The prices of basic needs commodities were increasing tremendously, resulting in serious social unrest.

On 21st May 1998, triggered by the students’ rallies at the MPR Building, President Suharto stepped down from office. Thereafter, the country has been ruled by four different presidents: Bacharuddin Jusuf Habibie (21st May 1998-20th October 1999),

1 In this regard, Edward Aspinall argued that the New Order’s mixture of repression and toleration, of coercion and co-optation that the regime used to control dissent had a profound impact on the forms that opposition took. The combination produced an opposition that was very effective at performing some of the tasks necessary to achieve democratization, such as undermining the legitimacy of authoritarian rule. Edward Aspinall, *Opposing Suharto: Compromise, Resistance, and Regime Change in Indonesia* (California: Stanford University Press, 2005) p. 2.

2 Nicola Bullard, *et al.*, ‘Taming the Tigers, the IMF and the Asian Crisis’. *Third World Quarterly*. 19 (1998), p. 512.

Abdurakhman Wahid (20th October 1999-23rd July 2001), Megawati Sukarno Putri (23rd July 2001-20th October 2004) and Susilo Bambang Yudhoyono (as from 20th October 2004), who came into office through the first direct presidential election.

After the collapse of the New Order regime, the transition of government left the Indonesians with simultaneous challenges of economic, social and political transformation. *Reformasi total* or total reform was demanded along with the weakening of military control, the awakening of civil society organisations, appreciation for the rule of law and human rights and redefinition of the country's development agenda. The Indonesian government adopted new laws and regulations on human rights and development into the legal system. The Constitution was amended four times by inserting specific human rights provisions. The Habibie government established Law No. 39 of 1999 on Human Rights, while Law No. 26 of 2000 on Human Rights Courts was issued during the Wahid Presidency. In October 2005, under the government of President Yudhoyono, Indonesia adopted and ratified two important international human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³

The foregoing description buttress the reason of using Indonesia as a reference to study the dialectic between development practices and the internationally declared right to development. Ideally, the new formal commitments in human rights might provide the Indonesians with legal and political opportunities to assert their entitlements according to universal standards. In respect of development, they might offer more possibilities for the victims of development hazards to seek compensation. Moreover, Indonesia is chosen because it provides an empirical picture of a developing country experiencing a new era of governance that opens new opportunities for universal right to participation.

As mentioned in Chapter 1, the main problem of human rights realisation is that these rights have been merely proclaimed but not genuinely implemented. Too often human rights have no actual effect in protecting the right-holders. Hence, it is necessary to carefully examine processes of implementation, entailing a study of the basics as well as the actual dynamics of such processes.

In this chapter, the process of adopting human rights discourses in the Indonesian legal system will be analysed. Attention will be paid to the extent to which these rights are being used as a legal resource and/or a political instrument, as well as the extent to which they are affecting the Indonesian people's livelihoods. In this connection, the next section will be devoted to an explanation of the legal system, followed by a discussion of the human rights system in section three. Then the focus will be shifted to the realisation of human rights in Indonesia. Subsequently, section five will explain

3 The International Covenant on Civil and Political Rights is ratified and adopted by Law No. 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights. The International Covenant on Economic, Social and Cultural Rights is ratified and adopted by Law No. 11 of 2005 on the Ratification of the International Covenant on Economic, Social and Cultural Rights.

the consequences of national incorporation of human rights by studying the roles of various human rights agents and the actual controversies in respect of human rights enforcement.

5.2 THE LEGAL SYSTEM

5.2.1 *The State Ideology: Pancasila*

Pancasila is the grand norm in Indonesian positive law. It is set forth as the embodiment of basic principles of an independent Indonesian State, while not relating specifically to any particular ethnic or religious group. The purpose of *Pancasila* is to define the basic values of Indonesian society in the political culture.⁴ The word *Pancasila* is derived from two Sanskrit words, ‘panca’ meaning five, and ‘sila’ meaning principles. *Pancasila* constitutes principles of belief in one god, humanitarianism, national unity, consensual democracy, and social justice. These five principles were announced by Sukarno in a speech known as ‘The Birth of the *Pancasila*’, which he held in front of the Independence Preparatory Committee on June 1, 1945.

The first principle (or *sila*) is a belief in one Supreme Being (*Sila Ketuhanan yang Maha Esa*). During the birth of *Pancasila*, this principle was the source of considerable controversy. More orthodox Muslims favoured an explicit commitment to Islam as the state religion and felt some dissatisfaction at the general phrasing.⁵ However, the adoption of a general term of religious belief was considered necessary as it provided a compromise between many religious groups in Indonesia and was crucial to unite distinct groups with different beliefs in the country.

The second principle (*Sila Kemanusiaan yang Adil dan Beradab*) is variously described as a commitment either to internationalism or more literally to a just and civilised humanitarianism.⁶ The commitment entails a willingness to treat others, including foreigners, in a fair manner, free from suspicion, exploitation, and oppression. When viewed from the perspective of state relations, this becomes a commitment to internationalism in the sense that it rejects adherence to one of two (or more) opposing political blocs or support for an international order which is exploitative and

4 More of the history of *Pancasila*, see: Eka Darmaputera, *Pancasila and the Search for Identity and Modernity in Indonesian Society* (Leiden: Brill, 1988), Sukarno, *Pancasila*. (Jakarta: Binatjipa, 1957), Oetoyo Oesman and Alfian (ed), *Pancasila sebagai ideology: Dalam Berbagai Bidang kehidupan, Bermasyarakat, Berbangsa dan Bernegara*. (Jakarta: BP7 Pusat 1986).

5 They also resisted what they see as an attempt on the part of the government to equate mere belief or faith (*kepercayaan*) with true religion (*agama*). This objection is aimed at many of the traditional and pre-Islamic beliefs of the Javanese, which are seen as corruptions or denials of the true faith of Islam. This includes both the animistic beliefs of the rural population and the more sophisticated version (*kebathinan*) of the aristocratic *priyayi* class. See: Michael Morfit, *Pancasila: The Indonesian State Ideology According to the New Order Government*, *Asian Survey*. 21 (1981) p. 839.

6 *Ibid*, p. 840.

divisive. In the 1960s Indonesia was one of the initiators for the non-aligned movement whose members mostly came from Asian and African countries.

With respect to human rights, the second principle stipulates the commitment to human dignity and respect for human rights. In reality, this principle is interpreted in relation to the question of relativism. An example is the National Plan of Action on Human Rights of 1998-2003. Although mentioning the commitment to the indivisible and unalienable human rights, the National Plan of Action at the same time states that the promotion and protection of human rights should be inspired by Indonesian values, customs, cultures and traditions.⁷ Therefore, there should be a balance between both the idea of human rights and human responsibility. In this regard, the National Plan of Action stated:⁸

‘There should be balance and harmony ... between the rights of the individual and his responsibility to the community and nation. This is commensurate with the nature of the human being both as individual and social being. Equality and harmony between freedom and responsibility are significant factors in the promotion and protection of human rights. It is commonly acknowledged that human rights are universal and the international community has also recognised and concurred that their implementation is the duty and responsibility of states, taking fully into consideration the various value systems, history, culture, political systems, level of social and economic development, and other relevant factors.’

The third principle (*Sila Persatuan Indonesia*) asserts a commitment to the unity of Indonesia. This principle addresses the internal sovereignty of Indonesia. As a country stretching 5,000 kilometres across the sea, with more than 13,000 islands and about 350 distinct ethnic groups, an emphasis on the unity of the State is important. This principle was derived from the 1928 Indonesian Youth Pledge or what is known as the *Sumpah Pemuda*, which proclaims Indonesia as one country, one nation and one language.⁹

The fourth principle (*Sila Kerakyatan yang Dipimpin oleh Hikmat Kebijaksanaan dalam Permusyawaratan/Perwakilan*) emphasises the idea of a people-led government and policies that are derived through a process of consultation and consensus. Notably this principle is the norm to guide enforcement of the entitlement to participation in the development process. Yet, it would be a great mistake simply to translate this as a commitment to Western liberal democracy (*demokrasi ala Barat*), especially since the rejection of Western liberalism (or at least some parts of it) has been a continuing theme of Indonesian political discourse since before the birth of the nation.¹⁰ The word

7 Paragraph 2, Decree of The People's Consultative Assembly, No. 11/MPR/1998 of 25 June 1998 State General Guidelines, Seventh Five Year Development Plan, Indonesia National Plan of Action on Human Rights 1998-2003.

8 *Ibid.*

9 About the history of *Sumpah Pemuda* see: Keith Foulcher, 'Sumpah Pemuda: the Making and the Meaning of a Symbol of Indonesian Nationhood', *Asian Studies Review*. 24 (2000) pp. 377-410.

10 Michael Morfit (1981) p. 841.

musyawarah is one connoting discussion and deliberation amongst members of a society, but it does not suggest ideas such as majority rule and minority rights.¹¹

The fifth principle (*Sila Keadilan Sosial bagi Seluruh Rakyat Indonesia*) expresses a commitment to social justice for all Indonesian people. This principle constitutes the rationale for the emphasis on fairness in development.¹² It embraces the notion of the modern characteristic of distribution of benefits, but the State interprets it traditionally, in which the nation parallels an idealised village in which society is egalitarian and the economy is organised on the basis of mutual self-help. Sukarno described it as *gotong royong* which is defined as a service by all for the interest of all. *Gotong royong* is considered a shared value that has grown out of Indonesian history and culture. It is perceived as contradictory to Western individualism, which is conceived in terms of the enrichment of the individual at the expense of society.¹³

To deal with the diversity of Indonesia, Pancasila is really a ‘smart choice’.¹⁴ The principle of Pancasila is broad enough and general enough to include as many political streams (*aliran*) as possible. Moreover, Pancasila is an operational ideology that embodies the cultural values underlying Indonesian convictions.¹⁵ In this respect, Pancasila cannot be properly understood by interpreting the principles one after the other. Rather, it is necessary to understand Pancasila from the concept of unity, balance and harmony, which govern the structure of Indonesian society.¹⁶

In practice, Pancasila was broken down into point forms, called the Guide to the Realisation and Implementation of Pancasila (*Pedoman Penghayatan dan Pengamalan Pancasila* or P4).¹⁷ The Guide was intended to control the behaviour and conduct of all individuals and organisations so that these would be in line with the national ideology.

11 Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (Ithaca: Cornell University Press, 1962) pp. 35, 41-43.

12 Rizal Sukma, *The Evolution of Indonesia's Foreign Policy: An Indonesian View*, *Asian Survey*, 35, (1995) p. 312.

13 Fiona Robertson Snape, ‘Corruption, Collusion and Nepotism in Indonesia’, *Third World Quarterly*, 20 (1999) p. 599.

14 Eka Darmaputera (1988) p. 178.

15 *Ibid*, p. 191.

16 In his book, Darmaputera provides an exhaustive analysis of all stemmed cultures, religions and groups behind the evolution of Pancasila. *Ibid*, p. 191.

17 Michael Morfit (1981) p. 839. In accordance with a 1978 decision of the People's Consultative Assembly, a series of workshops or upgrading courses were organized throughout the archipelago. They are called P4 courses (a contraction of the full Indonesian name: *Pedoman Penghayatan and Pengamalan Pancasila*, which can be translated as Upgrading Course on the Directives for the Realisation and Implementation of Pancasila). All the evidence suggests that the New Order government sees P4 as providing an important ideological justification for its policies, and that it wishes the claims and prescriptions of P4 to be examined with some care. Certainly the costs involved, direct and indirect, as well as the manner of implementation of the P4 courses indicates that this is a programme strongly supported by the government at the highest levels. An examination of those responsible for drafting the P4 materials and implementing the programme confirms this view. After the resignation of Suharto, the course was abolished.

5.2.2 The Indonesian Constitution and the Hierarchy of Laws

The original version of the Indonesian Constitution, *Undang-Undang Dasar 1945*,¹⁸ was formulated by the Preparatory Committee of Indonesia's Independence on August 18, 1945, one day after the Proclamation of Independence. Hitherto, there have been four amendments of the Indonesian Constitution. The People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR)¹⁹ is the supreme state body that has the power to amend the Constitution.²⁰

In the Indonesian legal system, the Indonesian Constitution, still called 'the 1945 Constitution' or '*Undang-Undang Dasar 1945*',²¹ is considered to be the basic law that functions as the source of all laws and regulations concerning all aspects of the nation's life, ranging from government and citizens and their relations to each other, to state organs or institutions and their relation to individual lives.

In addition to its special position as the primary source of laws, the Indonesian Constitution also functions as a benchmark against which lesser forms of legislation are assessed. All legislation and regulation with regard to government and individual actions, as well as the relations of both, provisions relating to human rights implementation must therefore be regulated therein. Thus, it is necessary to observe the hierarchy of the Indonesian laws and regulations in the context of law making, because to be enforced and legally binding, a law or regulation must show conformity with the Indonesian Constitution.

According to Article 7 of Law No. 10 of 2004 on Establishment of Laws, the official hierarchy of legislation in Indonesia is as follows:²²

18 In this book, the terms of the Indonesian Constitution and 'the 1945 Constitution' are in the same meaning, therefore are used interchangeably, unless otherwise explained. The Indonesian Constitution, Fourth Amendment, consists of the preamble (*Pembukaan*), the body of the Constitution (*Batang Tubuh*) containing 37 articles, 16 sections, and 4 transitional provisions, 2 additional provisions and the elucidation of the Constitutions (*Penjelasan Resmi UUD '45*, the explanatory notes relating to each of the articles). The preamble, the body and the elucidation are regarded as one inseparable whole. Thus when one speaks of the Indonesian Constitution, one speaks of these three components.

19 The MPR currently has almost 700 members comprising all the DPR (People's Representatives Council or *Dewan Perwakilan Rakyat*) members, appointed individuals representing the provinces, and other nominees. The DPR has 500 members and consists of elected and appointed representatives. Its main function is to make legislation and hold the president and his minister accountable.

20 The first amendment of the Indonesian Constitution was made during the General Assembly 1999 (or *Sidang Umum* MPR 1999), 14th-21st October 1999. The second was made during the General Assembly 2000, 7th-18th August 2000. The third was made during the General Assembly 2001, 1st-9th November 2001. The last one, the fourth, was made during the General Assembly 2002, 1st-11th August 2002.

21 The Indonesian Constitution, Fourth Amendment, consists of the preamble (*Pembukaan*), the body of the Constitution (*Batang Tubuh*) containing 37 articles, 16 sections, and 4 transitional provisions, 2 additional provisions and the elucidation of the Constitutions (*Penjelasan Resmi UUD '45*, the explanatory notes relating to each of the articles). The preamble, the body and the elucidation are regarded as one inseparable whole. Thus when one speaks of the Indonesian Constitution, one speaks of these three components.

22 Article 7, Law No. 10 of 2004 on the Establishment of Laws.

1. Indonesian Constitution ('*Undang-Undang Dasar 1945*').
2. Laws (*Undang-Undang*) endorsed by the DPR and signed by the President. Alongside these are the Government Regulations in lieu of Laws (*Peraturan Pemerintah Pengganti Undang-Undang*).
3. Government Regulation implementing the Law (*Peraturan Pemerintah*).
4. Presidential Regulation imposed by the President (*Peraturan Presiden*).
5. Regional Regulation (*Peraturan Daerah*), which includes Provincial Regulation (*Peraturan Daerah Propinsi*), Region Regulation (*Peraturan Daerah Kabupaten/Kota*), and Village Regulation (*Peraturan Daerah Desa*).

Since November 2004, law making in Indonesia has been centralized in the National Legislation Programme (*Program Legislasi Nasional* or *Prolegnas*). Initiatives can come from the People's Representative Council, the President or the Regional People's Representative Council. After the legislation is proposed, discussions and consolidation will follow at the People's Representative Council. At this stage, there is a possibility for a hearing process to seek for elaboration and to measure the urgency of the proposed legislation. Eventually, when everything is clarified and approved in the People's Representatives Council, the draft legislation is brought to the President for official authorization.²³

5.3 HUMAN RIGHTS IN THE INDONESIAN LEGAL SYSTEM

5.3.1 *The History*

The history of incorporating human rights principles in the Indonesian legal system presents some complicated background. All illustrate that the procedure depends on the regime and the political dynamic of the given time.

During the preparatory meetings to draft the original version of '1945 Constitution' (which was held before the Proclamation of Independence) two separate views of human rights existed. Sukarno and Supomo, two of Indonesia's founding fathers, believed that duties to the State were more important than rights. They supported the concept of *kekeluargaan* (the family concept), which described the Indonesian state as a 'family'. This implied that the rights of individuals were subordinate to their duties to the community and society, and that the president was the father of the Indonesian 'family'.²⁴

23 Once promulgated, the legislation is published in the State Gazette of the Republic of Indonesia (*Lembaran Negara Republic Indonesia*). Certain types of legislation such as laws and Government Regulations are accompanied by an official explanatory memorandum called the elucidation (*penjelasan*). The elucidation is published in the Supplement to the State Gazette (*tambahan lembaran negara*) and is generally authoritative for purposes of interpretation. In addition to the State Gazette, there is a sister publication called the State Report (*berita negara*) which contains government and public notices.

24 T.M. Lubis, *In Search of Human Rights; Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: PT Gramedia, 1993), p. 4.

Sukarno viewed human rights as a manifestation of Western individualism, which was considered irrelevant when improving living conditions after colonialisation. About inserting it in ‘the 1945 Constitution’, he once said that:

‘...what is the benefit of such a *grondwet* if it cannot feed the people who are about to die of starvation... if we really want to base our nation on the family principle, mutual cooperation and social justice, let us get rid of any idea of individualism and liberalism’.²⁵

Hatta and Yamin, who were also important figures in Indonesia’s independence movement, were of the opposite opinion. They were strong proponents of human rights, and they believed that citizens of the Indonesian State should be protected from arbitrary interference by the state apparatus. In this regard, Hatta particularly said that:

‘We must be aware that the state we are establishing will not become an authoritarian state; we want to have a representative government; we want to build up a society based on mutual cooperation and goals: to reform the society. For this reason we should not grant unlimited power to the state because it might lead to an authoritarian state’.²⁶

Despite the strong warning of an authoritarian state coming from Hatta and Yamin, the majority rejected the inclusion of extensive human rights in the original version of ‘the 1945 Constitution’. It has been said that those who voted against a bill of rights were worried that its inclusion would place the individual above the good of society as a whole.²⁷

Both President Sukarno and President Suharto strongly rejected the Western model of human rights. Instead, they turned to the national ideology of *Pancasila* (five principles) and ‘the 1945 Constitution’ as the reference to human rights, which they thought were more compatible with Indonesian cultural norms.²⁸

As mentioned briefly before, the approach of using Pancasila as the guidance for human rights was fundamentally necessary. According to Eka Darmaputra, this choice has enabled Indonesian society to maintain the rich cultural traditions inherited from the past.²⁹ Pancasila has acted as a public-political response to basic problems faced by the country, including the value of community and togetherness. It has, moreover, provided the nation with the national framework within which common ideals might be pursued together.

25 *Ibid*, p. 78.

26 *Ibid*, p. 79.

27 However, the 1950 Provisional Constitution contained a wide-ranging protection of human rights: it included all provisions of the UDHR, and as the 1956 Constitution was created, it looked like it would be even more of a victory for human rights, until the parliament was dissolved by Sukarno, and the Indonesian Constitution was reinstated.

28 Philip Eldridge, ‘Human Rights in Post Suharto Indonesia’, *Brown Journal of World Affairs*. 9 (2002) p. 129.

29 Eka Darmaputra, (1988) p. 198.

The interpretation of human rights in the original version of the Indonesian Constitution, therefore, appeared in the same elusiveness as in Pancasila. The set of human rights provisions in the original version of the Constitution was laid down as guidance or an umbrella for many interpretations. As a result, government has been able to interpret it in the ways by which it could easily suppress political challenges posed by the activists. As to the activists, they tend to interpret Pancasila as a challenge to change the government.³⁰

The original version offered protection of civil and political rights in Articles 27, 28, 29,³¹ providing entitlement to equal status, freedom of association and assembly, and freedom to religion. Protection of economic, social, and cultural rights was referred to in Articles 31, 32, 33, and 34.³² Notably, the original version was rather limited with simple provisions on human rights and therefore they were open to multiple interpretations. The basic contents of a constitution, which consist the division and limitation of power, and the manifestation of a state based on the rule of law, were not sufficiently accommodated in it. These are the major weaknesses of the original version of 'the 1945 Constitution' and they led to the question whether these provisions were still sufficient for the challenge of *reformasi total*.

During the period of *reformasi total*, human rights violations perpetrated by the New Order regime were frequently discussed at the political level. In order to effectively address these violations and to provide justice for the victims including incorporation of human rights principles in the Indonesian Constitution was a vital necessity. The amendments of the Indonesian Constitution have therefore been dealing with far-reaching issues, such as limitations on the power and term of office of the president; decentralisation of authority from the central government to provincial and regional governments; and the creation of additional constitutional bodies such as Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah* or DPRD) and the Constitutional Court (*Mahkamah Konstitusi*).

In particular, through the fourth amendment to the Indonesian Constitution, the range of human rights provisions has been expanded. Article 28 of the amended Constitution is devoted solely to human rights principles. This Article guarantees the universally accepted human rights, namely the right to freedom of assembly,³³ the right to life,³⁴ the right to establish a family,³⁵ the right to personal development,³⁶ the right

30 Takeshi Kohno, *Emergence of Human Rights Activities in Authoritarian Indonesia: The Rise of Civil Society*, Doctoral Dissertation, The Ohio State University, 2003, p. 56.

31 Article 27 protects the equal status of every citizen before the law, Article 28 guarantees freedom of assembly and freedom of speech, Article 29 protects the freedom to religion.

32 Article 31 protects the right to education, Article 32 asserts the right to cultural life, Article 33 regulates the economic and national welfare life, and Article 34 asserts the obligation of the State to take care the poor and destitute children.

33 Article 28, the Indonesian Constitution, Fourth Amendment.

34 Article 28 A, the Indonesian Constitution, Fourth Amendment.

35 Article 28 B, the Indonesian Constitution, Fourth Amendment.

36 Article 28 C, the Indonesian Constitution, Fourth Amendment.

to be treated equally before the law,³⁷ the right to work and employment,³⁸ the right to religion and freedom to express opinion,³⁹ the right to information,⁴⁰ freedom from torture and inhuman and degrading treatment,⁴¹ the right to a healthy environment,⁴² and the right to be free from discriminative treatment.⁴³ Article 28 also introduces the provisions on human responsibility; paragraph J stipulates that ‘in exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society’.⁴⁴ Furthermore equality before the law is protected under Article 27. The protection of freedom of religion does not change; it remains guaranteed under Article 29. Economic, social and cultural rights are assured in Articles 31 and 32, which respectively affirm the right to education and the right to cultural life.

There are also two articles especially dedicated to regulating the national economy and social welfare in the fourth amendment of the Indonesian Constitution. The ideas contained in these articles reflect a similar tone to the entitlements acknowledged in the Declaration on the Right to Development.⁴⁵ Article 33 stipulates that development shall be organised in the common endeavour based upon the principles of the family system.⁴⁶ This means that all resources shall be used to the greatest benefit of the people⁴⁷ while bearing in mind ‘the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.’⁴⁸ As to participation in the development process, this entitlement is stipulated in Article 34, which asserts the obligation of the State to develop a system of social security for all of the people and empowers the inadequate and underprivileged in society in accordance with human dignity.⁴⁹

5.3.2 *Indonesian Human Rights Law*

Following the collapse of the New Order regime, Indonesia had one of the most tumultuous years in its modern history: ethnic conflict and economic collapse spurred

37 Article 28 D(1), the Indonesian Constitution, Fourth Amendment.

38 Article 28 D(2); the right to work is also guaranteed in Article 27(2), the Indonesian Constitution, Fourth Amendment.

39 Article 28 E, the Indonesian Constitution, Fourth Amendment.

40 Article 28 F, the Indonesian Constitution, Fourth Amendment.

41 Article 28 G(2), the Indonesian Constitution, Fourth Amendment.

42 Article 28 H(1), the Indonesian Constitution, Fourth Amendment.

43 Article 28 I(2), the Indonesian Constitution, Fourth Amendment.

44 Article 28 J(2), the Indonesian Constitution, Fourth Amendment.

45 See Articles 33 and 34, the Indonesian Constitution, Fourth Amendment.

46 Article 33(1), the Indonesian Constitution, Fourth Amendment.

47 Article 33(2), the Indonesian Constitution, Fourth Amendment.

48 Article 33(3), the Indonesian Constitution, Fourth Amendment.

49 Article 34(2), the Indonesian Constitution, Fourth Amendment.

student-led demands for political reform. His successor, former Vice-president B.J. Habibie, tried to distance himself⁵⁰ from his patron by releasing political prisoners,⁵¹ lifting political controls, and more importantly building a new system of human rights. During his presidency, the development of Indonesia's legal human rights system acquired more attention than ever before. In June 1998, Habibie announced a 'National Plan of Action on Human Rights 1998-2003',⁵² which was followed by the ratification of international human rights treaties.⁵³

Discussions for establishing such a human rights law first took place at the forum of the People's Legislative Assembly in May 1998. The Decree of the People's Consultative Assembly of Republic Indonesia No. XVII/MPR/1998 concerning Human Rights was adopted on 13th November 1998. This Decree served as the basis for the development of what was established later as human rights law. On 8th February 1999, President Habibie sent the draft bill on human rights to the People's Representative Council, which aroused a controversy in public debate as to whether or not Indonesia needed such a law. One group took the view that human rights protection should be put in the amendment of the Constitution. Others took the view that the

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- 50 Habibie formed a new cabinet that dropped the most notorious cronies and political hardliners, but his efforts to include opposition figures failed; such was his association with Suharto that none agreed to serve.
- 51 Habibie released two of Indonesia's best know political prisoners, labour leader Mughtar Pakpahan and former opposition parliamentarian Sri Bintang Pamungkas. By late August more than one hundred other prisoners had been freed, with the notable exception of East Timorese leader Xanana Gusmau; Budiman Sudjatmiko, Dita Sari, and other political organizers associated with the leftist People's Democratic party (*Partai Rakyat Demokratik – PRD*); and several men linked to a coup attempt in 1965.
- 52 The action plan was designed by the Inter-Ministerial Permanent Committee on Human Rights, established in 1991, together with Komnas Ham, with the Ministry of Foreign Affairs as the focal point. Its actives focus on four main pillars, namely: (1) ratification of international instruments in the field of Human Rights; (2) dissemination and education of Human Rights; (3) the Human Rights problems which have been given priority to be solved, especially the problems relating to non-derogable rights, the violation of which could ruin the national image easily; (4) the implementation of the ratified International Human Rights Conventions.
- 53 During the Habibie administration, the government ratified the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* and also signed a Memorandum of Understanding (MOU) and Project Document concerning Technical Cooperation in the Field of Human Rights with the UN High Commissioner on Human Rights, on 13 August, 1998. In the same year Indonesia ratified ILO Convention No. 87 concerning the freedom of association and protection for rights to establish organisation; ILO Convention number 105 on Abolition of Servitude; ILO Convention number 138 on Minimum Wage; and ILO Convention number III on Abolition of Job Discrimination. Beside those ratifications, on the field of civil and political rights, Habibie, still referring to the human rights action plan also ordered the Justice Ministry to draft new laws on political parties and elections to be presented to the People's Consultative Assembly. The outcome of this effort is Law No. 3 of 1999 on General Election which replaced the previous Law No. 1 of 1985. This law allows more than 70 parties to be registered with the Home Ministry, although most of them were likely to lack the mass base necessary under this new law to compete in the general elections. This openness also applied to the print and broadcast media. Over one hundred licenses for new publications were issued by the Ministry of Information between June-August 1998.

process to amend the Constitution would not be easy.⁵⁴ However, a specific law on human rights was considered an important measure to address ethnic conflicts spreading all over the country, such as Jakarta, Kupang (West Timor), Ujung Pandang (Sulawesi), West Kalimantan, Sorong and Jayapura (Irian Jaya or West Papua), and Aceh, as well as pressure from East Timor problems.⁵⁵ On 23rd September 1999, President Habibie signed the Law No. 39 of 1999 on Human Rights.

In Law No. 39 of 1999, the definition of human rights is provided as follow:

‘... a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to protect human dignity and worth’.⁵⁶

The Human Rights Law adopts the principle of equality and non-discrimination,⁵⁷ the principle of indigenous rights,⁵⁸ but not the principle of self determination.⁵⁹ The Law also recognises the concept of human responsibilities, which is addressed in its preamble,⁶⁰ defined clearly in Article 2,⁶¹ and provided with a special elaborated chapter in the same legislation.⁶² The aim of this recognition is considered to be based on the idea of human rights itself, but rather than appointing corresponding duty-bearers it requires everyone to take responsibility.

54 See: Nadirsyah Hosen, ‘Human Rights and Freedom of Press in the Post Suharto Era’, *Asian Pacific Journal on Human Rights and Law*. 3 (2002) p. 49.

55 In Ketapang, Jakarta, the first in a series of communal riots erupted, following a rumour that security guards for a local casino – almost all of them Ambonese Christians – had burned down a local mosque. In Kupang, West Timor, Christian youths protesting about the church-burnings in Ketapang, attacked mosques, shops and homes belonging to ethnic Bugis, a Muslim immigrant group from South Sulawesi. In Ambon, Maluku, the last day of the Muslim fasting month, a fight between a Christian driver and a Muslim youngster in, weich set off a civil war that spreaded to islands far to the south. In West Kalimantan, communal violence flared up again; indigenous Dayaks had attacked Madurese immigrants. In Manokwari, Papua, the rejection of any discussion of independence by the Indonesian government was followed by the banning of political leaders of Papua from leaving Indonesia and clashes that killed civilians. In Lhok Nibong, Lhokseumawe, Pusong, the military operation in areas in Aceh, a long-simmering rebellion led by a guerrilla group called the Free Aceh Movement (Gerakan Aceh Merdeka or GAM) flared up, sparking the same kind of heavy-handed counterinsurgency operations that had led to so many abuses. With regard to East Timor, time the discussion of ‘public consultation’ to determine the status of East Timor was started nationally. Human Rights Watch, *Indonesia and East Timor*, Country Report 1999.

56 Article 1(1), Law No. 39 of 1999.

57 See Article 1(3), 2, 17, 38, 38 (3), 45, 46, and 49, Law No. 39 of 1999.

58 Article 6, Law No. 39 of 1999.

59 Nadirsyah Hosen (2002) p. 61.

60 Considerant B, Law No. 39 of 1999; whereas human rights are basic rights bestowed by God on human beings, are universal and eternal in nature, and for this reason must be protected, respected and upheld, and may not be disregarded, diminished, or appropriated by anyone whosoever.

61 Article 2, *ibid*: Human obligations mean a set of obligations which, if not undertaken, would make it impossible for human rights to be executed and upheld.

62 Chapter IV on Human Obligations, Law No. 39 of 1999.

This law protects universal rights contained in the international bill of rights, as well as the right to development. In the field of civil and political rights, the rights that are protected are equality rights,⁶³ right to life,⁶⁴ right to justice,⁶⁵ right to freedom of the individual with regards to slavery,⁶⁶ religious right,⁶⁷ political beliefs, and freedom of speech.⁶⁸ With regards to economic, social and cultural rights, a wide range of internationally recognised rights are also protected here, such as the right to property and ownership,⁶⁹ the right to work,⁷⁰ and the right to education.⁷¹

The Law allocates a special section on the right to self-development. This section covers the rights to obtain education,⁷² the right to information,⁷³ and the right to undertake social and charitable works.⁷⁴ Article 15, especially reflects the essence of the right to development, by confirming that ‘everyone has the right to develop himself by individually and collectively protecting his rights, in the interest of developing his society, nation and state’.⁷⁵ Furthermore, the Law also guarantees the entitlement to take part in government, while including fundamental freedoms such as rights of people to meet with others, organise assemblies and to speak freely. These are universal rights, and their exercise is essential in securing all other rights in the development process as well as being crucial in building a civil society.⁷⁶

5.3.3 Jurisdiction in Indonesian Human Rights Law

The Indonesian judicial system comprises several types of courts falling under the supervision of the Supreme Court (*Mahkamah Agung*). Most disputes appear before the courts of general jurisdiction, with the court of first instance being the state court (*pengadilan negeri*). There are about 250 state courts throughout Indonesia, each with its own territorial jurisdiction. Appeals from the state courts are heard before the High Court (*pengadilan tinggi*), of which there are around 20 throughout Indonesia. Appeals from the high court and in some instances from the state courts may be made to the Supreme Court located in Jakarta. The Supreme Court can hear a cassation appeal (*kasasi*) which is a final appeal from lower courts. It can also conduct a case review

63 Article 3, 4 and 5, Law No. 39 of 1999.

64 Article 9, Law No. 39 of 1999.

65 Article 17, 18, 19, Law No. 39 of 1999.

66 Article 20, Law No. 39 of 1999.

67 Article 21, Law No. 39 of 1999.

68 Article 23, 24, and 25, see also section eight: right to participate in government, Law No. 39 of 1999.

69 Article 36 and 37, Law No. 39 of 1999.

70 Article 38, Law No. 39 of 1999.

71 Article 12 and 13, Law No. 39 of 1999.

72 Article 12, Law No. 39 of 1999.

73 Article 14, Law No. 39 of 1999.

74 Article 16, Law No. 39 of 1999.

75 Article 15, Law No. 39 of 1999.

76 Nadirsyah Hosen (2002) p. 69.

(*peninjauan kembali*) if, for example, new evidence is found which justifies a rehearing.

In Law No. 39 of 1999 on Human Rights, it is stipulated that the system of claims and remedies based on human rights is the subject of the National Human Rights Courts.⁷⁷ This establishment of the tribunal is regulated by Law No. 26 of 2000 on Human Rights Courts. Issued during Wahid Presidency, the background of the establishment of this law is to specifically put those suspected of committing crimes, including crimes against humanity in East Timor in 1999, on trial.⁷⁸

Article 4 of Law No. 26 of 2000 addresses the jurisdiction of the Human Rights Courts. This law however only confirms the authority of the Human Rights Courts to hear and rule on cases of gross violations of human rights (genocide and crimes against humanity).⁷⁹ The Human Rights Courts however do not have jurisdiction over violations to other rights guaranteed in the Indonesian Constitution and Law No. 39 of 1999, such as the right to work, the right to health, and the freedom of speech. In terms of judicial procedures, Article 10 asserts that cases of gross violations of human rights will be conducted in accordance with provisions in the existing Code of Criminal Procedure (*Kitab Undang-Undang Hukum Pidana* or KUHP). Under Article 11, the Attorney General is given power of arrest,⁸⁰ and is authorised as the investigator and public prosecutor.⁸¹

Hitherto, the activities of the Human Rights Courts are mostly centred on the prosecution of previous human rights perpetrators in several ad hoc tribunals.⁸² The institution of an *ad hoc* tribunal has been deliberately assigned because the amendment of the Indonesian Constitution inserted a controversial article that inhibits the judicial process of prosecuting past human rights violations. Article 28 I(1) stipulates ‘the right not to be tried under a law with retrospective effect’.⁸³ With this provision, it would be impossible to prosecute those responsible for human rights crimes during the New

77 See Chapter IX on Human Rights Tribunal, Law No. 39 of 1999.

78 However, progress in these cases was slow. Although the Indonesian authorities completed investigations into five cases in October, no human rights court had been established by the end of 2000 to hear the cases. There were also fears that a constitutional amendment adopted in August which bans the retrospective application of legislation might be used to try to prevent suspected perpetrators of human rights violations from being brought to justice under the new legislation. See: Amnesty International, *Annual Report of Amnesty International 2000*.

79 Article 4 and 7, Law No. 26 of 2000.

80 Article 11(1), Law No. 26 of 2000.

81 ‘The Attorney General is also authorised as investigator and public prosecutor ‘...to undertake the detention or extend the detention of a suspect for the purposes of investigation and prosecution’. Article 11(2), Law No. 26 of 2000.

82 Article 43(1) Law No. 26 of 2000 states that gross violations of human rights occurring prior to the coming into force of this Law shall be heard and ruled on by an ad hoc Human Rights Court.

83 The wording of Article 28 I paragraph 1 remains the same in the Fourth Amendment of the the Indonesian Constitution.

Order.⁸⁴ Because the Indonesian Constitution is considered to be the primary law and no other laws or regulations may contravene it, the government and the People's Representative Council agreed that gross violations of human rights in the past should be put under the jurisdiction of the Human Rights Court Law, but that the settlement should be done by the establishment of an *ad hoc* Tribunal of Human Rights with consideration to the time and place of the violations.

Moreover, there are also problems with a number of provisions in the legislation that have the potential to undermine the independence and impartiality of the judiciary serving in the Human Rights Courts or in related appeals courts. *Ad hoc* judges are appointed to the Human Rights Courts and, in the case of an appeal, to the High Court by the President on the recommendation of the Supreme Court.⁸⁵ Furthermore, in the case of an appeal to the Supreme Court, *ad hoc* judges are to be appointed by the President on the recommendation of the Peoples Representative Assembly.⁸⁶ So far there have been three *ad hoc* human rights tribunals established based on Law No. 26 of 2000. They are the *ad hoc* tribunal for human rights cases in Abepura, the *ad hoc* tribunal for East Timor, and the *ad hoc* tribunal for the Tanjung Priok Massacre.

5.3.4 *The Role of International Human Rights Law in the Indonesian Legal System*

This subsection aims to explain the role of international human rights law in the Indonesian legal system. By clarifying this, it will then be possible to understand the procedures used to enforce universal human rights principles at the domestic level.

According to Law No. 37 of 1999 on Foreign Relations and Law No. 24 of 2000 on Treaties, governmental institutions, both departmental and non-departmental can plan to include international treaties in their conduct, with a prior consultation with the relevant minister.⁸⁷ Thereafter, the Government nominates a delegation to prepare the negotiation before signing and ratification. This delegation aims to analyse the issue of the treaties as viewed from the political, legal and other aspects which may affect the national interest of Indonesia and determine the position taken by Indonesia, by making some recommendations and adjustments.⁸⁸

After looking at the assessments made by that delegation, Indonesia can then decide to sign the treaties. In addition to the president and the minister,⁸⁹ the signing of a treaty can be done by any person from the government institutions authorised as

84 During its development, as experts and human rights activists strongly opposed this principle and advocated bringing the human rights violators into court. Prof. Muladi, the former Minister of Justice and Human Rights and an expert in Criminal Law said 'although non-retroactivity is a general principle of the law, it would be better not to include it in the Constitution'. See: <http://www.etan.org/et2000c/September/17-23/21ethuma.htm>, accessed June 2, 2007 at 21.11.

85 Articles 28(1) and 32(5), the Fourth Amendment of the Indonesian Constitution.

86 Article 33(4), the Fourth Amendment of the Indonesian Constitution.

87 Article 13, Law No. 37 of 1999, Article 5(1), Law No. 24 of 2000.

88 Article 5(3), Law No. 24 of 2000.

89 Article 7(2), Law No. 24 of 2000.

having the ‘full powers’.⁹⁰ Ratification of a treaty by Indonesia shall be conducted if the treaty requires it.⁹¹ This shall be conducted by way of a law in the respect of matters pertaining to politics, peace, defence, and state security, alteration to or delimitation of the national territory, sovereignty, human rights, environmental issues, law making treaty, and foreign aid.⁹²

In the field of human rights, Article 7(2) of Law No. 39 of 1999 on Human Rights offers a specific legal basis for ratified international human rights laws to be implemented in Indonesia. It states that: ‘provisions set forth in international law concerning human rights ratified by the Republic of Indonesia, are recognised under this Act as legally binding in Indonesia’.⁹³ Hitherto, the Indonesian government has ratified the following human rights instruments (the list is based on the date of ratification):

1. Convention on Political Rights of Women, ratified with Law No. 68 of 1958.
2. Convention on the Elimination of Discrimination against Women, ratified with Law No. 7 of 1984.
3. Convention on the Rights of the Child, ratified with the Presidential Decree No. 36 of 1990.
4. Convention against Torture, ratified with Law No. 5 of 1998.
5. Convention on the Elimination of Racial Discrimination, ratified by Law No. 29 of 1999.
6. The International Covenant on Economic, Social and Political Rights (ICESCR), ratified with Law No. 11 of 2005.
7. The International Covenant on Civil and Political Rights (ICCPR), without the optional protocol, ratified with Law No. 12 of 2005.

These ratifications provide protection for the right-holders to the human rights entitlements contained in each treaty. With regard to the right to development, this right is merely provided for in the form of a declaration, which demands no ratification.⁹⁴

The National Plan of Action on Human Rights 1998-2003, issued during Habibie Presidency, places a particular attention to the right to development as part of human rights protection in Indonesia. Paragraph 16 states that:

‘The effort to implement, promote and protect human rights, particularly those that are considered non-derogable rights, should be of the highest priority because their violation would be considered by the public as a gross violation and this could damage the country's image. Apart from those rights, *priority should also be given* to the protection of vulnerable groups and *to the right to development*. Thus the major activities in the Plan of Action

⁹⁰ Article 7(1), Law No. 24 of 2000.

⁹¹ Article 9(1), Law No. 24 of 2000.

⁹² Article 10, Law No. 24 of 2000. See also article 11, which explains that besides those materials stipulated in article 10, the ratification can be done by a presidential decree. Both action, by law or presidential decree is the requirement to the implementation of a treaty (article 15).

⁹³ Article 7(2), Law No. 39 of 1999.

⁹⁴ Article 9(1), Law No. 24 of 2000.

include the dissemination of international standard instruments for law enforcement officers on torture and arbitrary detention; human rights training for law enforcement officers; studies and dissemination of information on humanitarian law; a special programme for judges and prosecutors; protection for vulnerable groups including women, children, and labours; and anti-riot training'.⁹⁵ (emphasis added)

Furthermore, the Indonesian position towards the right to development can be concluded in the statements made by permanent representation of Indonesia at the Commission on Human Rights. During Wahid Presidency, on 27th March 2000, the permanent representatives of Indonesia acknowledged the great importance of this right in Indonesia and addressed the use of popular participation to implement the right to development, by saying that:

'In this regard, my government is of the strong view that the human person should be the central subject for development policies. Effective popular participation in decision making in connection with development programmes, their implementation and the benefits derived from them, is an essential component of a successful and lasting development. By the same token, my government has made participation, inclusion and empowerment of citizens, an overriding priority in its development strategy. It seeks to facilitate the transformation of democracy from electoral into participative daily democracy. We are also of the view that by empowering civil society it will help make the marginalised, the excluded and the forgotten, as well as the silent mass of citizens visible to national and local governments and to all policy makers'.⁹⁶

This statement was similar to the one made in 2001. In that year, Indonesia re-emphasised that lasting progress toward the implementation of the right to development requires effective development policies at a national level.⁹⁷ This statement represents acknowledgement and commitment of the Indonesian government to the right to development. Additionally, as explained in the Chapter 2 before, the ratification of both ICCPR and ICESCR also compels the Indonesian Government to honour human rights entitlement, including the universal right to participate, in development practices.

95 Paragraph 16, National Plan of Action on Human Rights, 1998-2003.

96 Statement by H.E. Ambassador Susanto Sutoyo, Deputy Permanent Representative of Indonesia at the 57th Session of the Commission on Human Rights, Under Agenda Item 7: Right to Development, Geneva, 27 March 2000.

97 See Statement by Indonesian Delegation to the 57th Session of the Commission on Human Rights, Under Agenda Item 7: Right to Development, Geneva, 27th March 2001.

5.4 REALISATION OF HUMAN RIGHTS IN INDONESIA

5.4.1 *Proliferation of Human Rights Discourse, Culture and the International Pressure*

In order for human rights to have effects benefitting the right-holders, the adoption of the discourse into the national context entails more than the inclusion of its principles in the legal documents or ratifications of international documents. It also requires a process of proliferation of the discourse of human rights so that they can be incorporated in all areas in society involving social, cultural and political issues. In this regard, examining the proliferation of human rights in Indonesia involves an understanding of the overall picture of how the discourse is being adopted. Particularly relevant is a contextual setting in which all areas in the society are not isolated but connected.

Many experts have studied how culture, entailing the focus on family values, patron-client relationship, respect and social harmony, dominates the political structure in Indonesia.⁹⁸ These values had been successfully operated by the New Order regime to suppress any social unrest and secure the status quo. As mentioned before, during his period the State was organised as a ‘family’, crowning the president as the head of the family, while the citizens were considered to be his ‘children’. This patron-client relationship has placed the State in the hegemonic position. It was required to respect the head of the family and any actions that could threaten the harmony were prohibited.⁹⁹ The culture also compels people to mask their real sentiments, practice conformity and pretend to positions that they do not really hold.¹⁰⁰

The Indonesian political structure strongly emphasised the absence of personal interest in political activity. It provided no room for any individual opinions or objections coming from below. For example, people could not substantially use the principle of democracy, stipulated in Article 28 of the original version of ‘the 1945 Constitution’, in relation to the freedom of expression. Articulating their opinions and objections was considered as to risk the harmonious state of the nation. Decisions that

98 Elaboration on these paternalistic and family values can be read in, for examples, Arief Budiman, ‘Student Movement in Indonesia: A Study of the Relationship between Culture and Structure’, *Asian Survey*. 18 (1978); Lucian W. Pye, ‘Civility, Social Capital, and Civil Society: Three Powerful Concept for Explaining Asia’, *Journal of Interdisciplinary History*. 29 (1999); John R. Bowen, ‘On the Political Construction of Tradition, Gotong Royong in Indonesia’, *Journal of Asian Studies*. 45, No. 3 (1986) Franz Magnis-Suseno, *Etika Jawa, Sebuah Analisa Falsafi tentang Kebijakan Hidup Jawa*, (Jakarta: Gramedia, 2001).

99 To be Javanese means to be a person who is civilized and who knows his manners and his place. The individual serves as a harmonious part of the family or group. Life in society should be characterized by *rukun* (harmonious unity). To achieve *rukun*, persons should be primarily group members; their individuality should be expressed through the group. All overt expressions of conflict should be avoided. Unlike Western culture, which regards individualism and group belonging as mutually exclusive, most Javanese consider the two intimately related. See Chapter III, Franz Magnis-Suseno, (2001), pp. 38-70.

100 Lucian W. Pye (1999) p. 774.

are made by consensus, actually meant that although the younger participant called for bold actions, and the middle-aged added their cautious for wisdom, in the end the senior figure usually declared what the ‘consensus’ was whether or not anybody every articulated.¹⁰¹

Another factor that influences the proliferation the human rights discourse in Indonesia is international pressure. In the 1970s, the Indonesian government denied the relevance of international human rights for its domestic practices.¹⁰² When Amnesty International published a report on the situation of political prisoners accusing Indonesia of gross violation of human rights, a member of an Indonesia government-sponsored think-tank replied to this accusation as if it were an illegitimate interference, while contesting its accuracy. Nonetheless, that response has opened a dialog on the situation of human rights in Indonesia. As Amnesty International countered it by exposing their sources of information, the Indonesian government reacted by clarifying the government’s version of the prisoners’ situation. Because of this disputation, Indonesia has moved from a denial to an entrapment position. By replying to the report, rather than simply ignoring it the Indonesian government had entrapped itself into a discourse about the facts on the grounds and, to some extent, on the moral justification of imprisonment for political reasons.

A similar situation occurred with regard to the human rights violation in East Timor. At first, the Indonesian government countered the accusation with the argument of ‘Asian values’, suggesting that human rights had to be seen in their social, economic, and cultural aspects. The Government could partly get away with this rhetoric because the human rights network in Indonesia proper was neither well connected with the East Timor network nor with the transnational human rights organisations.¹⁰³ Attention to the situation in East Timor was renewed after the end of the Cold War in 1991. After the massacre in Dili in November 1991, the international community became alert to the situation, as shown in the testimony of the UN Special Rapporteur on Torture. Pressures, particularly from western foreign aid donors, forced the Government to move from denial to tactical concession. At the 1992 session of the UN Human Rights Commission, the Indonesian delegate claimed that Indonesia strictly prohibited the practice of torture. He also stated that the invitation to the Special Rapporteur had been motivated by the desire ‘to learn the benefit from such a visit in order to minimise if not eradicates the practice of torture in Indonesia’.¹⁰⁴ This statement not only reflected the recognition of international human rights norms but also showed the acceptance of the allegation of torture.

101 *Ibid.*

102 Thomas Risse, ‘International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area’, *Politics and Society*. 27 (1999) p. 545.

103 *Ibid.*, p. 546.

104 Commission on Human Rights, 48th Session, Summary Record of the 25th meeting, E/CN.4/1992/SR.25, par. 53-54, quoted from Thomas Risse, (1999) p. 546.

From then onwards, the human rights discourse not only centred on East Timor. The Indonesian government started cooperating fully with the Human Rights Commission during the 1993-1997 period and acknowledged specific human rights violations. Indeed the international pressure had invited the Indonesian government to engage in the argumentative process. Subsequently, it also opened the political space in the Indonesian society and contributed to the proliferation of the human rights discourse. Human rights groups mushroomed and President Suharto was less and less in control of the domestic situation. Furthermore, after the resignation Suharto, human rights were incorporated into the Indonesian legal system. At that time President Habibie tried to dissociate himself from his predecessor and hurriedly adopted the Human Rights Law No. 39 of 1999. Thereafter, the Indonesian Constitution was amended, adopting more elaborate principles on civil and political rights, economic, social and cultural rights, and the right to development. The Government also adopted the Human Rights Courts Law and ratified the important international human rights treaties.

Against that historical background, one can argue that the proliferation of human rights involved a dialogical process of accommodating to international pressures. Therefore, the official adoption of the human rights discourse is not an outcome of a domestic process of emancipation.¹⁰⁵ Subsequently, such a process of proliferation would still have some significant effects, by translating the human right discourse into legal provisions or policies. First of all, one can observe that human rights provisions were constantly modified during the four amendments of the Indonesian Constitution. Furthermore, the Government introduced human rights along with human responsibilities.¹⁰⁶ It demands to always consider human responsibility before claiming for human rights. Furthermore, Law on No. 26 of 2000 Human Rights Courts includes only crimes against humanity, torture and genocide in its jurisdiction, and it leaves out the human rights violations related to, for example, freedom of speech, right to food, or right to health.

5.4.2 Interpretation of Human Rights

5.4.2.1 Civil and Political Rights

As for civil and political rights in Indonesia, this sub-section discusses two rights that are directly related to the entitlement to participation; which are the freedom of speech and the freedom of assembly. These rights have been noted as the basis of human

¹⁰⁵ Indeed there was a context that triggered the adoption of human rights and indicated the process of emancipation, which the student movement before the collapse of the New Order regime. The role of student movement in unseating Suharto was best exemplified by the dramatic take-over of the Building of People Consultative Assembly in May 1998. Nevertheless, it is particularly the decreasing of Suharto powers due to his inability to tackle the monetary crisis that contributes to the transition of the government. Vedi R. Hadiz, 'Retrieving the Past or the Future? Indonesia and the New Order Legacy', *South East Asian Journal of Social Science*. 28 (2000) p. 18.

¹⁰⁶ Considerant B, Law No. 39 of 1999.

rights realisation in Indonesia since the country's independence. The original version of Article 28 of the Indonesian Constitution guaranteed freedom of speech.¹⁰⁷ However, under the Suharto administration, this right was restrained. The Government imposed additional laws and regulations¹⁰⁸ that limited the freedom of speech of individuals and the media. In fact, the Government used criminal law and the law prohibiting subversion against those exercising freedom of speech against the Government.¹⁰⁹

To illustrate the situation of freedom of speech in Indonesia, the late Pramoedya Ananta Toer, one of Indonesia's leading writers, who was imprisoned by the Suharto's administration from 13th October 1965 to 20th December 1979, wrote:

'Over the years, the New Order banned almost all my books – several dozen titles. Why were they banned? The attorney general's office contended that my books had the potential 'to encourage social unrest'. The Government also accused me of promoting Marxist-Leninist ideology through my books, but that, of course, is rubbish since I have never studied Marxism or Leninism. Banning my books, any author's books, was also rubbish. In a less repressive society, I would have at least been given a chance to defend my books and myself but that is something that the Government has never allowed'.¹¹⁰

After the resignation of Suharto, freedom of speech improved significantly. The Indonesian Press and Publication Society (*Masyarakat Pers dan Penyiaran Indonesia* or MPPI) was able to initiate a draft of the Law on Freedom of Press at the People's Representative Council. On 23rd September 1999, Habibie and the People's Representative Council adopted Law No. 40 of 1999, which guarantees the freedom of press from any government interference.¹¹¹

Consequently, a growing number of new newspapers, magazines, radio, and television stations were established and they can report almost anything without any government censorship. However the improvement in freedom of speech during the Habibie administration was not merely a result of this regulation. Rather, it was because people were not afraid of voicing their concern even if that meant violating laws and regulations.¹¹² The public could express freely almost anything without any anxiety, including sensitive issues. Therefore, freedom of speech was no longer centred only on the liberalisation of press and publications.

Recently, the discourse of freedom of speech in Indonesia has been dominated by issues of pornography and obscenity in public spaces. The rising quantity and variety

107 Article 28, the Indonesian Constitution, Fourth Amendment.

108 See: Law No 11 of 1966, juncto No 4/1967, juncto No 21/1082. All aim to regulate the press and control the public opinion.

109 Hikmahanto Juwana, 'Human Rights in Indonesia', *Human Rights in Asia: A Comparative Legal Study of 12 Asian Jurisdictions, France, and the USA* (New York: Routledge, 2006) p. 371.

110 Pramoedya Ananta Toer, 'Literature and National Building', in John H. McGynn *et al*, *Indonesia in the Suharto Years: Issues, Incidents and Images*. (Leiden: KITLV, 2006) p. 174.

111 Article 15(2 f), Law No. 40/1999 of 23 September 1999.

112 Hikmahanto Juwana (2006) p. 371.

of media has induced an increased amount of publications featuring semi-pornographic pictures and stories. A strong lobby carried by a radical Muslim movement has succeeded in pressurising the People's Representative Council to respond by drafting an anti-pornography law.¹¹³ This draft of that law defines acts of pornography as actions intended to show and/or to exploit sexual, indecent, and/or erotic activities.¹¹⁴ The growing popularity of the issue of pornography occurred simultaneously with the increasing application of Shariah laws by local governments. With the application of the new Law No. 32 of 2004 on Local Government, it is now possible for the local government to impose laws that are relevant to the need of the area. In some areas this has been translated as the implementation of Shariah Law in daily life. Hitherto, this law has disproportionately affected women. In the Tangerang municipality alone (in the Province of Jakarta), at least 11 women have been arrested just because they were out at night wearing make-up.¹¹⁵ In Aceh, three women activists were arrested by the Shariah police because they were not wearing veils and talking in front of their hotel rooms after a human rights training.¹¹⁶

On 30th October 2008 the DPR passed the Anti Pornography Law; although two parties were reported to have walked out from the process.¹¹⁷ On 9th December 2009, after the authorisation from President Yudhoyono the law was enacted and became Law No. 44 of 2008 on Pornography.¹¹⁸

With respect to freedom of assembly, demonstrations now need to be organized in accordance with Law No. 9 of 1998 on freedom of speech, which regulates the time, place and manners for holding rallies in public places. The law provides penalties ranging from dispersal of the assembly to imprisonment for those responsible for the assembly, regulates the restrictions to forms of assembly such as seminars, group discussions, and academic seminars have been greatly relaxed.¹¹⁹ Permits are no longer required; the organiser only needs to inform the police of the activities.

The law was issued due to the experience that protests and demonstrations often lead to violent and destructive acts. These cause antipathy and public inconvenience. Demonstrations cause hassles in public infrastructures, such as blocking the high-

113 'Pornography to be allowed for medication, education', *the Jakarta Post*, 4 September 2003.

114 Hikmahanto Juwana, (2006) p. 374.

115 Article 4, the Tangerang Regional Regulation No. 5 of 2005 on Prostitution asserts that any women with suspicious behaviour can be arrested. This suspicious behaviour includes being in public spaces, streets, hotels, dormitories, coffee shops, cinemas etc. 'Perempuan, Perda dan Domestifikasi', *Kompas*, 4 March 2006.

116 'Perempuan, Perda dan Domestifikasi', *Kompas*, 4 March 2006.

117 The two parties are *Partai Damai Sejahtera* (a Catholic-Christian based party) and *Partai Demokrasi Indonesia Perjuangan* (one of the biggest party in Indonesia) 'Akhirnya RUU Pornografi disahkan', *Kompas*, 30 October, 2008.

118 'SBY signed porn law, protesters despair', *the Jakarta Post*, 9 December 2008.

119 Article 15 and 17, Law No. 9 of 1998.

ways¹²⁰ and creating traffic problems. Additionally, large scale demonstrations also give rise to direct confrontation with the police and military which has in the past resulted in casualties and death, such as during the demonstration for the trial of Suharto, where members of the public and university students staged continuous demonstrations.¹²¹

Moreover, the enforcement of Law No. 9 of 1998 is evident insufficient to control the dynamic of demonstration in Jakarta. In some cases, conflicts between protesters are a serious concern that inhibits people's entitlement to freedom of speech. An example is the incident happened during peaceful demonstration organized by National Alliance for the Freedom of Faith and Religion (*Aliansi Kebangsaan untuk Kebebasan Beragama dan Berkeyakinan* or AKKBB) at the National Monument Park (Monas) Jakarta, on 1st June 2008. During this event, the group of protesters was attacked by the members of Front Islamic Defender (*Forum Pembela Islam* or FPI), Laskar Mujahidin, and Brigade Hizbullah. More than 70 people were reported to be injured and hospitalized. Currently the trial to prosecute the attackers is still taken place.¹²²

To summarise, on the subject of the implementation of civil and political 'empowerment' rights, legal incorporation, which actually obliges the State to create an enabling environment for freedom of speech and freedom of assembly, still unable to bring a culture of different opinions in Indonesia. A real opposition as found in many other countries does not exist and it remains difficult to have access to policy-making. Opposition activities are unorganised and they do not take place in the existing democratic system. They are merely 'street opposition', rather than parliamentary opposition. As a result, efforts toward prosecuting the suspects of violations to this set of rights tend to be intimidating for the victims. Furthermore, issues that acquire strong political support are also limited to those 'safe subjects' as pornography, rather than more significant subjects aiming to empower the right-holders in the political system or asserting human rights entitlements.

5.4.2.2 Economic Social and Cultural Rights

Comparable to their counterpart, economic, social and cultural rights gained more attention after the resignation of Suharto. In addition to the ratification of the International Covenant of Economic, Civil and Political Rights, popularity can also be observed in the growing initiatives taken to promote this set of rights by non-governmental organisations and the media. This is a different situation when compared with

120 See: 'Gaji Terlambat, 1.500 Karyawan Texmaco Blokir Jalan Tol Karawang', *Koran Tempo*, 16 December 2003, 'Ratusan Karyawan Texmaco Blokir Jalan Tol, *Pedoman Rakyat*', 16 December 2003, '50 Truk Demo, Jalan Tol Macet Satu Jam', *Jawa Pos*, 6 August 2000.

121 'Demo Suharto Berakhir dengan Bentrok', *Kompas*, 14 April 2000.

122 See for example: 'Sidang Insiden Monas Ricuh, Aktivistis AKKBB Dipukul', *Kompas*, 22 September 2008; 'Aktivistis Perempuan AKKBB Adukan Pelecehan Seksual FPI', *Kompas*, 24 September 2008.

pre-1998 human rights activism, which mostly concentrated on the civil and political rights domains, because this set of rights was considered the most violated one. After the crisis, economic, social and cultural problems were more evident and urgent and therefore gained more attention.

The second reason for the growing awareness of economic, social and cultural rights results from the effects of the economic crisis on economic and social conditions in Indonesia. The human poverty index (HPI), developed by the United Nations Development Programme (UNDP, 1997), attempts to provide an aggregate measure of capability by combining four indicators, namely life expectancy, adult literacy rate, access to improved drinking water and proportion of underweight children below the age of five. The estimated HPI for Indonesia was about 34.7% before the crises but was down to 23.2% in 2000.¹²³ The decreasing quality of life triggered non-governmental organisations and the media to react as violations were easily observed and monitored. They especially considered the problems of hunger, unprotected migrant work and vulnerability of the most disadvantaged people to health risks as the most crucial issues in terms of economic, social and cultural rights in Indonesia.

Certain responses are usually raised by the Government when confronted with the subject of economic, social and cultural rights in Indonesia. The first is related to the question of resources. Although facts have proven that a strong economy state does not automatically deliver a good protection of economic, social and cultural rights, it is perceived that promoting economic, social and cultural rights requires allocation of resources. This set of rights is notably dependent on capabilities while being closely related to the economic situation of the State in question. With respect to Indonesia, this excuse has been repeated by the Government in an attempt to redeem its failure to carry out obligations to promote and implement economic, social and cultural rights. In fact it is often used to avoid their obligations. Lack of resources is considered to rationalise their non-fulfilment of human rights.

In this respect, the Indonesian Government relies on international activism -which means international aid- to eradicate poverty that infringes the fulfilment of economic, social and cultural rights. Such a view is reflected in the statement of the Indonesian delegation before The Fourth Session Of the Permanent Forum on Indigenous Issues on agenda item 'Eradicate Extreme Poverty and Hunger', stating that: 'poorer countries should be able to look forward to reliable international support as a means to create employment and bring about economic growth in general, in response to the challenge of poverty'.¹²⁴

Nonetheless, fulfilment of economic, social and cultural rights is not only about resources, it primarily depends on favourable adopted policies that actually aim at

123 Shafiq Dhanhani and Iyanatul Islam, 'Poverty, Vulnerability, and Social Protection in Period of Crisis', *World Development*. 30 (2002) pp. 1213-1214.

124 Statement by Mr. Dicky Komar First Secretary Before The Fourth Session Of The Permanent Forum on Indigenous Issues on Agenda Item 3 A – Goal 1 of the Millennium Development Goals: 'Eradicate Extreme Poverty and Hunger' New York, 18 May 2005.

realising entitlements based on economic, social and cultural rights. Moreover, international organisations, i.e. the place where the resources are allegedly expected, cannot be expected to alter national policies. In fact, economic, social and cultural rights depend on the identification of structural non-implementation of human rights entitlements by domestic actors, particularly non-governmental organisations, the media and right-holders. Furthermore, decision making regarding policies should involve people who have a clear position that enables them to insist on a particular allocation, which are usually the residents of the country in question.¹²⁵ These groups can at the same time act as pressure groups to seek claims and remedies following the violation of economic, social and cultural rights.

Another challenge with regard to the promotion of economic, social and cultural rights in Indonesia is the issue of mainstreaming human rights perspectives in economic, social and cultural laws and policies. Law No. 23 of 1992 on Health, for example, provides general guidance for availability of health care in Indonesia without perceiving health as a part of human dignity. Furthermore, as a human right, health care too should be able to be claimed. The absence of this important entitlement is found in other laws related to economic, social and cultural rights, such, Law No. 2 of 1989 on Education System or Law No. 7 of 1996 on Food Security. The lack of protection of people's entitlement positions in these laws is actually not surprising, because they were issued before the establishment of Law No. 39 of 1999 on Human Rights and the ratification of ICESCR. Nevertheless, hitherto the Government has not yet shown any intention to establish new laws in accordance with human rights principles.

Other concern related to the promotion of economic, social and cultural rights in Indonesia is Law No. 26 of 2000 on Human Rights Courts does not provide for the jurisdiction in respect of economic, social and cultural rights. Hence, although the Indonesian Constitution and Law No. 39 of 1999 on Human Rights guarantee protection to human rights, the implementation of these rights is practically problematic.

The Indonesian Government has been reluctant in fulfilling its obligations with regard to economic social and cultural rights. The main focus lies on generic fulfillments, measured by numbers, and not on actual empowerment results. Thus, although there are certain errant practices in, for example, the process of student enrolment or recruitment of migrant workers, the Indonesian Government tends to abstain from implementing the law by adopting policies that could prevent violation or enforce necessary sanctions for the perpetrators and provide remedies and compensation for the generated victims. Moreover, a lack of resources is claimed to limit programming activities to fulfil the right-holders' entitlement to housing, education or work. Nevertheless, there is also inadequate political will to establish and enforce laws and policies that are congruent with the entitlements addressed in the ratified International Covenant of Economic, Social and Cultural Rights.

125 Kenneth Roth, 'Defending Economic, Social, and Cultural Rights: Practical Issues Faced by International Human Rights Organisations', *Human Rights Quarterly*, Vol. 26 (2004) p. 65.

To some extent these enforcement approaches implies the lack of understanding on the economic, social and cultural rights from the side of the Government. Therefore, the Government merely stresses their efforts of fulfilling this set of rights at the number of accomplishments rather than the substantial policies that actually empower the right-holders.

5.5 CURRENT STATE OF AFFAIRS IN INDONESIAN HUMAN RIGHTS

5.5.1 *Agents in Human Rights Implementation*

5.5.1.1 The National Commission on Human Rights

As a surprising initiative to protect human rights, during the New Order era, Suharto adopted Presidential Decree No. 50 of 1993 to establish the National Commission on Human Rights (or also popularly known as *Komnas Ham*) as an institution responsible for the situation of human rights in Indonesia.¹²⁶ Requirements of external diplomacy¹²⁷ in a changing international environment were cited as prime reasons for its establishment.¹²⁸ The establishment of the Commission was aimed to prepare the Government for the International Human Rights Convention in Vienna 1993.¹²⁹

This background prompted scepticism about the Commission's likely effectiveness. Commission membership appeared to be dominated by Suharto era appointees and was insufficiently diverse in terms of gender, region, and social backgrounds.

In the Suharto era, the Presidential Decree No. 50 of 1993 regulated the Commission's mandate to be guided by *Pancasila* and the Indonesian Constitution. The Commission was assigned with four primary areas of concern: (1) spreading awareness of human rights both nationally and internationally, (2) considering United Nations human rights instruments in order to make suggestions on accession and ratification, (3) monitoring and investigating human rights practices and providing opinions and suggestions to the Government, and (4) encouraging regional and international cooperation in the promotion and realisation of human rights. The decree, however, did not empower the Commission to undertake investigations into human rights violations, request technical assistance in investigations, hear or consider complaints, subpoena

126 The History of this institution began in 1993, based on the Presidential Decree No. 50 of 1993, which was the follow up of a recommendation from the workshop in Foreign Affairs Ministry with the support of United Nations. This human rights legislation particularly addressed the matter of the National Commission on Human Rights' objectives, authority, and some practical matters regarding its board and staff.

127 The Commission was widely thought to be a response to the intense international pressure mounted on the Indonesian Government in the wake of the 1991 massacre in East Timor, where security forces shot and killed over 200 demonstrators.

128 J. Wanandi, 'Human Rights and Democracy in the ASEAN Nations: the Next 25 Years', *The Indonesian Quarterly*. 21 (1993) pp. 14-37.

129 Pratikno and Cornelius Lay, 'Komnas Ham dan Ham di Bawah Regim Otoritarian', *Journal Ilmu Sosial dan Ilmu Politik*. 2 (1999) p. 7.

witnesses or documents, visit jails or prisons, or file information with the courts. On paper, it appeared as though the National Commission on Human Rights had little power to affect change in Indonesia.

Moreover, the critics pointed to contradictions in the Commission's composition, structure, and operating style that weakened its effectiveness. One fear was that because the Commission was established by decree and was not grounded in a higher law it could notably be dissolved at any time by the President. Furthermore, the Government funded the Commission and there were no mechanisms in place to prevent the Government from restricting or influencing the Commission's activities. There were no legal safeguards to protect the Commission's integrity and independence. The twenty-one Commission members were selected by Suharto himself and many had ties to prior human rights violations by the Suharto regime. These appointments called into question the impartiality of Commission members.¹³⁰

Nevertheless, the Commission unexpectedly delivered critical reports and began to contribute significantly toward increasing public awareness and legitimacy of human rights issues. In 1995 they established an office in East Timor and conducted several inquiries into human rights abuses; this was followed by the release of unexpected findings in a few cases. For example, in March 1995, the Commission reported information that contradicted enquiries being circulated by Indonesian military (*Angkatan Bersenjata Republik Indonesia* or ABRI) regarding the deaths of six people in East Timor. ABRI claimed that these people were suspected guerrilla members of the Revolutionary Front for an Independent East Timor (Fretelin),¹³¹ but the Commission concluded that the six were actually non-combatants and they had been intimidated and tortured by the ABRI before they were killed.

After Suharto's regime, the Government upgraded the status of the Commission in promoting human rights in Indonesia. Law No. 26 of 2000 on Human Rights Courts designates the Commission as an institution with the competence to perform *pro justitia* investigations on gross violations of human rights in Indonesia. In this respect, the Commission established an *ad hoc* inquiry team for every case of alleged gross

130 A serious concern arose in 1996, when the Commission announced that only current Commission members would be nominated for the position of chairman. Students protested the proposed internal nominations, arguing that more independent, public figures should be nominated. The internal nominations became effective in October 1996, with the election of Manawir Sjadzali to the chairmanship. Although the Government did not respond specifically to the student's demands, it allotted additional staff members to facilitate the work of the Commission.

131 The Revolutionary Front for an Independent East Timor (Portuguese: *Frente Revolucionária de Timor-Leste Independente* or Fretelin) is a leftist political party in East Timor. They presently hold a plurality of seats in the National Parliament and they formed the government in East Timor from independence until 2007. The party began as a resistance movement that fought for the independence of East Timor, first from Portugal and then from Indonesia, between 1974 and 1998. It was originally called the Timorese Social Democratic Association (ASDT). After East Timor gained its independence from Indonesia, FRETILIN became one of several parties competing for power in a multi-party system.

violation of human rights.¹³² Furthermore, Law No. 39 of 1999 on Human Rights tries to promote the independency of the National Commission on Human Rights.¹³³ The Law authorises the People's Representatives Council to appoint members from the list drafted by the Commission itself.¹³⁴ Funds depend on allocations by the DPR, plus external technical and financial assistance. One concern is that provisions in Human Rights Law grant the Commission discretion in disclosing information from complainants without their consent, which appears to breach confidentiality provisions in the Paris Principles, i.e. the UN guidelines governing national human rights institutions.¹³⁵

The current criticism of the Commission's impact on the implementation of human rights after the New Order, particularly under President Megawati and President Yudhoyono, is that it has been less effective than before, particularly with regard to the inability to achieve executive and judicial outcomes.¹³⁶ Their long ago completed *pro justitia* inquiries in the cases of 'Trisakti 1998, Semanggi 1998, and Semanggi 1999', 'May Riot of 1998' as well as 'Wasior 2001-2002 and Wamena 2003', have not been receiving any significant response from the side of the Government. The Attorney-General is still reluctant to execute formal investigations on these cases.

The question of effectiveness is related to the membership problem. In the period 2002-2007, many of the members of the Commission appeared to have strong affiliations with political parties. An example is Sollahuddin Wahid, who was in charge of the investigation of the 'May Riot of 1998'. In 2004, Wahid resigned from the Commission after he had been appointed as vice-presidential candidate of General Wiranto by the Political Party *Golongan Karya*.¹³⁷ Ironically, General Wiranto was one of the suspects of the 'May Riot of 1998'.¹³⁸

5.5.1.2 Indonesian National Ombudsman Council

The National Ombudsman Council was established under Presidential Decree No. 44 of 2000.¹³⁹ It was charged with following up on reports and information received about

132 Information on the Activities of Komnas Ham carried out during the period of September 2006 and August 2007, Submitted to the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Sidney, Australia, 24th-27th September 2007, Under Agenda Item: Report of APF Members, p. 2.

133 See Chapter VII on National Commission on Human Rights, Law No. 39 of 1999 on Human Rights.

134 The DPR has recently called for a new list of thirty-six members to be submitted. T. Simanjuntak, 'Government, DPR drag their feet in supporting human rights', *The Jakarta Post*, 4 March 2002.

135 Office of High Commissioner of Human Rights, *Fact Sheet 19, National Institutions for the Promotion of Human Rights*. April 1993; General Assembly, UNGA/RES/48/134 of 4 March 1994, National Institutions for the Promotion of Human Rights, Annex, Principles Relating to the Status of National Institutions.

136 ELSAM, *Hak Asasi Manusia Tanpa Dukungan Politik: Catatan HAM Awal tahun 2008*. Report, p. 5.

137 'Sollahuddin Wahid Mundur Sebagai Anggota Komnas Ham', *Kompas*, 12 May 2004.

138 'Sollahuddin defends Wiranto's Credential', *the Jakarta Post*, 12 May 2004.

139 President Abdurrahman Wahid issued a presidential decree establishing the National Ombudsman Council on Monday, 20 March 2000. In a ceremony at the Jakarta State Palace, the President installed Mr. Antonius Sujata as Chairman, Prof. Dr. Sunaryati Hartono as Vice Chairman, and Prof. Dr. Bagir

irregularities committed by State institutions. It was founded to help the State administration and to combat corruption, collusion and nepotism, with its unique watchdog role to support citizens with the realisation of their rights in receiving public services, justice and better welfare and also to assist them when the Government agencies fail to perform their legal duties.¹⁴⁰ It has no legal power to punish errant officials or institutions, but it can receive, investigate and follow through reports from the general public concerning the realisation of their rights and the services provided by the Government.¹⁴¹ The Ombudsman is also authorised to submit a recommendation to the People's Representatives Council.

Although it does not particularly address issues of human rights, the establishment of the National Ombudsman Council is crucial for the realisation of the entitlement positions of the right-holders in development processes. One of the particular examples is that the Ombudsman provides the opportunity for participation by providing the chance to report any errant practices in development processes that are disadvantageous for the realisation and the promotion of the entitlements related to economic, social and cultural rights.¹⁴²

In practice, the human rights cases brought to the Ombudsman are frequently submitted to the National Human Rights Commission. An illustration is the planned water tariff hike which was reported to the Ombudsman in 2004. Activists of the Jakarta Water Consumers Community (*Komparta*) reported the city administration for its plan to increase the tap water tariff to the National Ombudsman Council and to the National Human Rights Commission.¹⁴³ The joint efforts of the two institutions resulted in a favourable court decision. The Central Jakarta District Court ruled in favour of the plaintiff, *Komparta*, ordering the administration to suspend a 40 percent increase in the tap water tariff it had imposed on 31st December 2003, and improve its services before it imposed any further hikes.¹⁴⁴

Furthermore, the Indonesian Ombudsman also receives complaints on development construction projects. The Local Ombudsman Council of Yogyakarta,¹⁴⁵ from June

Manan, Mr. Teten Masduki, Ms. Sri Urip Simeon, Mr. R.M. Surachman, Mr. Pradjoto M.A., and K.H. Masdar Farid Masudi M.A. as members of the commission.

¹⁴⁰ See Article 2 and 3, Presidential Decree No. 44 of 2000.

¹⁴¹ See Article 9, Presidential Decree No. 44 of 2000.

¹⁴² Article 3, the Presidential Decree No. 44 of 2000 stipulates the aim of the National Ombudsman Council as to enhance the participation of the people in eradicating corruption, collusion and nepotism.

¹⁴³ *Komparta's* executive director said the planned increase would be effective from January 2005, although a state court had ordered the administration to suspend an increase imposed in December 2003. The administration also planned to implement a tariff increase every six months to meet the demands of PT Thames PAM Jaya (TPJ) and PT PAM Lyonnaise Jaya (Palyja), the two foreign partners of the city water operator PDPAM Jaya. 'Water Consumer Seek Intervention in Planned Tariff Hike', *The Jakarta Post*, 10 November 2004.

¹⁴⁴ *Ibid.*

¹⁴⁵ The Local Ombudsman of Yogyakarta was established in 2005 as the first Local Ombudsman in Indonesia. Its introduction forms part of the democratic reforms aimed at tackling the problem of corruption within the bureaucracy.

2006-June 2007, dealt with 40 cases of irresponsible practices of the Government in the post earthquake construction project.¹⁴⁶ This number amounted to 43% of the total complaints accepted. In addition there were also complaints on political discrimination or corruption in education policies accepted by the Local Ombudsman Council Yogyakarta.

Generally, the Ombudsman receives positive public appreciation. With respect to the Local Ombudsman Council Yogyakarta, the public perceives this institution to be prompt in responding to complaints compared to the Regional People's Representatives Council, although officially they have a similar task in monitoring the Government and representing the population. The accountability of the members of the Local Ombudsman Council in Yogyakarta is very much appreciated and is based on their impartiality, non-bureaucracy and efficiency in handling the people's complaints.¹⁴⁷

Unfortunately, the Ombudsman is challenged with its feeble constitutional basis. It is established only on the basis of a Presidential Decree rather than a Law. Therefore the political status of the Ombudsman is considerably weak as it is not difficult to revoke a Presidential Decree. Such status can in practice question the independency of the Ombudsman in carrying out its obligations. Since 2001, there has been an ongoing discussion to upgrade the legal and political status of the Ombudsman. Given the significance of the Indonesian Ombudsman for the realisation of entitlements of right-holders in the development process, a law is being drafted at the People's Representative Council to regulate its authority and strengthen its institutional basis.¹⁴⁸

5.5.1.3 Civil Society Organisations

In this section two categories of civil society organisations will be investigated: national civil society organisations (national CSOs) and international civil society organisations (international CSOs).

Regarding the first category, the origins of the modern civil society organisations, popularly known in Indonesia as LSM, an abbreviation of *Lembaga Swadaya Masyarakat*, can be traced to the 1920s, when many social and modern organisations were established in conjunction with the emergence of the nationalist movement in Indonesia.¹⁴⁹ The leaders of these early CSOs¹⁵⁰ mostly came from the middle class and had modern education. The modern CSOs were characteristically urban-based

146 'Pengaduan Ombudsman Daerah DIY: 43% tertinggi kasus konstruksi', *Kedaulatan Rakyat*, 20 June 2007.

147 'Ombudsman Bekerja Cepat, DPR Gemar Berdebat', *Kompas*, 6 February 2004.

148 Based on the Decrees issued by the People's Consultative Assembly No. VIII of 2001, the People's Representatives Council is given the mandate to draft the Ombudsman Law.

149 Muhammad A.S. Hikam, 'Non-Governmental Organisation and the Empowerment of Civil Society', in R. W. Baker (ed). *Indonesia the Challenge of Change*. Singapore: Institute of Southeast Asian Studies, 1999, p. 219.

150 These early CSOs included Budi Utomo, Serikat Islam (SI), Taman Siswa, Muhammadiyah, Nahdlatul Ulama (NU) and other similar organisation.

organisations led by professionals with broad ideological bases, objectives and membership. The fact that some of these organisations eventually transformed themselves into political parties just demonstrates further their nature.¹⁵¹

CSOs are important actors in human rights activism in Indonesia. In the early 1980s, some CSOs, and especially the pro-democracy movement in Yayasan Lembaga Bantuan Hukum Indonesia (*Indonesian Legal Aid Foundation* or YLBHI), started to fight for the recognition of civil and political rights. International actors and their ideas also sensitised Indonesian CSOs in relation to the issue of human rights and democracy. Increasing ties and collaboration with international CSOs, particularly through the International CSOs Forum on Indonesian Development (INFID) raised awareness about democratic ideas amongst Indonesian CSOs.¹⁵² The 1993 UN World Conference on Human Rights and its preparatory meeting in Bangkok seemed to provide a catalyst for a significant reshaping of CSO ideology while resulting in a Joint Declaration on Human Rights by Indonesian CSOs for Democracy in the same year.¹⁵³

After the resignation of Suharto, many CSOs were instantly formed as a result of favourable political conditions and the flow of funding at that time. In the mid 1990s, 7,000 CSOs were registered with the Ministry of Home Affairs and by 2002 the number reached 13,500,¹⁵⁴ 90% of which receive funds and support from international donors.

One of the main activities of CSOs in Indonesia is advocacy. With respect to the human rights subject, YLBHI or ELSAM (*Lembaga Studi dan Advokasi Masyarakat*) are the leading organisations that concentrate their work on promoting human rights. According to an Indonesian Sociologist, Meuthia Ganie-Rochman, there are several issues that relate to politics in general and human rights in particular advocated by the CSOs. These issues are freedom of assembly, freedom of speech, free and fair elections, and the rule of law.¹⁵⁵ ELSAM, for example, is particularly busy monitoring the

151 SI and NU became political parties, while Taman Siswa and Muhammadiyah have remained social organisations which focus on education, social and religious activities.

152 International NGO Forum on Indonesian Development (INFID) was initially formed in June 1985, under the name of INGI (Inter-NGO Conference on IGGI Matters), by several Indonesian NGOs (YLBHI, WALHI and Sekretariat Bina Desa) in cooperation with a number of Dutch NGOs (NOVIB, CEBEMO, HIVOS and ICCO). INGI was (and INFID is) an open and pluralistic network of 60 NGOs based in Indonesia and 40 NGOs based in other countries mostly belong to IGGI (Inter Governmental Group for Indonesia, previously – now CGI, Consultative Group for Indonesia – a consortium of donor countries). INGI transformed into INFID in 1992, following the dismissal of IGGI by the Indonesian government and the formation of the CGI. Bob Hadiwinata, *Politics of NGOs in Indonesia, Developing Democracy, Managing a Movement* (London: Routledge, 2003) pp. 98-100.

153 Ko Nomura, 'Democratisation and Environmental Non-Governmental Organisation in Indonesia', *Journal of Contemporary Asia*, 37 (2007) p. 506.

154 This number does not include those CSOs that are not registered in the Ministry of Home Affairs, *Kompas*, 13 January 2003. Another data from the Central Statistic Bureau (*Biro Pusat Statistik*) provides the number of 10,000 CSOs in 1996 and 70,000 CSOs in 2000. 'LSM sebagai Kekuatan Sosial Baru', *Kompas*, 17 April 2004.

155 Meuthia Ganie-Rochman, *An Uphill Struggle: Advocacy NGOs under Suharto's New Order*. (Depok: Lab Sosio FISIP UI, 2002) pp. 106-121.

human rights courts in Indonesia, as well as with their work on witness protection and compensation.¹⁵⁶ Besides giving legal aid, YLBHI also publishes annual research on the human rights situation in Indonesia.

Furthermore Ganie-Rochman concludes that the advocated activism exercised by the Indonesian CSOs possesses several strategic characteristics, including choosing the court as their political arena, targeting legislative changes and seeking support from international actors.¹⁵⁷ YLBHI in this regard is involved in assisting human rights victims in the domestic courts. These strategies are taken for safety and effective reasons. For the CSOs, political advocacy through the People's Representative Council body is considered risky and ineffective, simply because it is a governmental institution. The CSOs prefer to perform their advocacy with the help of media, through public meetings and seminars and with the formulation of CSO coalitions based on specific objectives.

Due to these characteristics, the general role of CSOs in promoting human rights in Indonesia prior to 1998 was limited. In this regard, Ganie-Rochman argues that the CSOs can only deliver some political impacts, whereas the fulfilment of human rights entitlements remains a task of the Government. For example, in the case of Kedung Ombo Dam in Java, the result of their advocacy is that the State became aware of a possibility to gain a negative image from the society from misinterpreted development policies. In the case of Jelmu Sibak, the success is measured with the popularity of the issue at the national level.¹⁵⁸

With regard to the role of international civil society organisations in human rights activism in Indonesia, currently, they do not have direct impacts on human rights activists or changes to human rights policies. Their role is limitedly defined by their contribution and their relationship with the national CSOs. The situation is different in the case of providing relief for natural disasters. In the Tsunami period in Aceh for example, 193 international CSOs were able to access government relief policies.¹⁵⁹

In the field of human rights, the work of international CSOs mostly relates to human rights research or providing funding for domestic non-governmental organisations. In respect of research, TAPOL, a United Kingdom based non-governmental organisation, has specifically reported human rights violations in Indonesia for years. They are actively reporting gross human rights violations in Indonesia, in Aceh, Papua

156 ELSAM. *Kegagalan Leipzig Terulang di Jakarta, Catatan Akhir Pengadilan Ad Hoc Timor-Timor*. ELSAM Final Assessment Paper, 9 September 2003.

157 Meuthia Ganie-Rochman (2002) p. 284; WALHI, *Kasus Rakyat Jelmu Sibak Melawan Bob Hasan*, Case Report, 1995.

158 Jelmu Sibak is a name of a village in Kutai, East Kalimantan. In 1993, the people of Jelmu Sibak brought a case against the policy of *Hutan Tanaman Industri* (timber plantation) which caused a development hazard in the area. Meuthia Ganie-Rochman (2002) pp. 287-289.

159 Data gathered from the Indonesia Relief Portal, website: <http://www.indonesia-relief.org/mod.php?mod=bank&op=reliefbank&cid=1> accessed 1 June 2006, at 12.19.

and particularly East Timor before the referendum¹⁶⁰ and issues of impunity and freedom of speech and assembly.

The role of international non-governmental organisations to provide funding for domestic CSOs is depending on the policy taken by domestic CSOs. In 2002, Novib, a Dutch non-governmental organisation which had been supporting the Indonesian Legal Aid Foundation for almost three decades, decided to end their financial assistance for YLBHI. One of the reasons was the change of political orientation of YLBHI after Suharto.¹⁶¹ In this connection, Kastorius Sinaga, a political expert in Indonesia, explained that financial problems faced by many CSOs resulted from the change of political agenda after the fall of Suharto. After 1998, the attention of the CSOs shifted from the issues of strengthening civil society to the issues of good governance and strengthening governmental institutions. When examining the programmes supported by the Asia Foundation in Indonesia for instance, many are related to the projects carried out by the domestic CSOs in combating corruption, ensuring transparency, and strengthening governmental (judicial) bodies.¹⁶²

5.5.1.4 The Media

As mentioned earlier, the CSOs in Indonesia use the media to distribute their agenda and publish their activities. Furthermore, the media itself also play an important role in making human rights issues popular. For example, with the case of human rights violation in Aceh, in May 2003 one of the national newspapers, *Koran Tempo*, published a headline on the killings performed by the Indonesian military.¹⁶³ The news was also re-published by reputable international news broadcasters, such as the Associated Press, the BBC and the Guardian.¹⁶⁴ In fact, later on the BBC sent reporters to the village in question, *Bireun* in Aceh, for further coverage of the incident.

Publication of a human rights case in the media also creates political pressure for the government to act upon the human rights situation. In the case of the killings in Aceh, frequent publications from both national and international media brought the military to establish an independent commission to investigate the case. Having already said that the victims were members of the Aceh separatist group (GAM), the

160 TAPOL – which means *political prisoner* in Indonesian – is a leading English language authority on the human rights situation in Indonesia and East Timor, they produce occasional reports and briefing papers.

161 'It is also noted that one of the reasons for YLBHI's financial problems has to do with internal political problems. While the organisation was busy promoting human rights in East Timor, Dr. Adnan Buyung Nasution, a member of the organisation's board, was the defence lawyer of the military. YLBHI Siap untuk Kerja Bakti', *Kompas*, 11 December 2002, 'YLBHI terancam bangkrut', *Kompas*, 25 June 2003.

162 Facts are gathered from the list of supported projects by the Asia Foundation Indonesia. http://www.asiafoundation.org/Locations/indonesia_projects.html, accessed 1 June 2006, at 12.33.

163 'TNI menembak mati tujuh pemuda desa Bireun', *Koran Tempo*, 23 May 2003.

164 'Youths massacred in Aceh Village', *BBC News World Edition*, 23 May, 2003, 'Indonesia Army Denies Targeting Civilians', *Associated Press*, 25 May 2003.

spokesperson for the military, Syafrie Syamsudin, said that this team was designed to investigate the specific case published by *Koran Tempo* and consisted of a number of military officials.¹⁶⁵

Notably, this case shows two roles for the media, the first is to publish and monitor human rights situations and the second is to act as a pressure group to change human rights policies.

5.5.2 *Actual Controversies in Human Rights Implementation*

5.5.2.1 Ad Hoc Human Rights Courts

As mentioned before, one of past human rights violations that is being processed under Law No. 26 of 2000 on Human Rights Courts is the 1984 Tanjung Priok Massacre case. The case was undoubtedly the worst mass killing to occur in Indonesia, apart from the killings in East Timor and in West Papua during the Suharto era.¹⁶⁶

Previously it has been discussed that after the collapse of the New Order, the balance of power shifted towards the Habibie camp. Pressures from Islamic scholars, drawn mainly from the Association of Indonesian Islamic Intellectuals (ICMI) and the Council of Islamic Missionaries (DDI), were helpful in bringing the case to the attention of the public.¹⁶⁷ Moreover, voices from victims and various Islamic organisations, backed up by many political leaders and prominent figures, added to the pressures to re-investigate the case. In 1998, Sontak (the National Solidarity for the Tanjung Priok Event in 1984) together with a group of lawyers from the Association of Defenders of Islam (API) and about 30 witnesses came to the National Commission on Human Rights, handing over a report with detailed information about the killings

165 'TNI Bentuk Tim Investigasi Pemberitaan Media Massa', *Kompas*, 24 Mei 2003.

166 The massacre occurred in the wake of a series of provocations by members of the Indonesian army in and around a mosque in Tanjung Priok, the dockland district of Jakarta, a heavily populated region on the outskirts of the Indonesian capital. At the time, the Muslim community in Indonesia was deeply troubled by the Suharto government's decision which required all organisations to adopt the sole ideology of the State, the Pancasila. Preachers in Tanjung Priok had been voicing their discontent with this decision during the early days of September. On 7 September 1984, soldiers entered a local prayer-house in Tanjung Priok and ordered the removal of posters from the walls, followed by a subsequent visit to make sure the posters had not been returned to the walls. Tempers flared among congregants while local mosque officials attempted to calm things down. On 12 September 1984, several preachers spoke at an open air prayer meeting, following which a large crowd of about one thousand five hundred people marched to the local police headquarters to lodge a protest. They found themselves hemmed in on all sides as they approached their destination and gunfire was heard coming from all directions. Within minutes, there were scores of dead bodies while the less seriously injured fled the scene. According to local witnesses, at around midnight, an hour after the killings had begun, General Murdani, commander-in-chief of the armed forces, came to inspect the scene. According to several sources, he had been in the vicinity throughout the massacre, directing the operation. 'Tanjung Priok acquittals a Travesty of Justice', *TAPOL Press Release*, 14 July 2005.

167 Priyambudi Sulitiyanto, 'Politics of Justice and Reconciliation in Post-Suharto Indonesia', *Jurnal of Contemporary Asia*. 37 (2007) p. 78.

which could be used to bring the case to court. After a complicated political procedure, including an establishment of an *ad hoc* Team of Investigation on the Tanjung Priok case (*Komisi Penyelidikan Pelanggaran Hak Asasi Manusia Tanjung Priok* or KPP HAM Tanjung Priok), in April 2001, Abdurakhman Wahid issued Presidential Decree No. 53 of 2001 on the establishment of *ad hoc* Human Rights Courts on East Timor and Tanjung Priok. This decree was later revised by Presidential Decree No 96 of 2001 issued by Megawati Sukarnoputri that emphasises the location and the time factors (*locus* and *tempus delicti*) of the atrocities that occurred in Tanjung Priok on September 1984.

The *ad hoc* Human Rights Court on Tanjung Priok commenced their first hearing on 15th September 2003.¹⁶⁸ All of the defendants were indicted for crimes against humanity as stated in Law No. 26 of 2000. All of them are the low and middle military ranking officers were brought to trial, many of whom were on the ground when the killing happened.¹⁶⁹ Prominent figures such as General (retired) Try Sutrisno and former Armed Forces Commander General (retired) L.B. Murdani escaped the trial. Naturally, this has brought immediate public criticism and even cynicism, but it did not stop the Court. The overall duration of the trials took about a year, ending in August 2004.

The *ad hoc* Court came with a decision to sentence 11 defendants with two to three years in prisons. This ruling is unsatisfactory because under Law No. 26 of 2000, soldiers, if found guilty, face a minimum of 10 years in prison and a maximum sentence of death.¹⁷⁰ The *ad hoc* Court has also not granted any reparation of compensation directed to victims, regardless that the respected law asserts it otherwise and the Government Regulation No. 3 of 2002 has specifically set forth the entitlement to compensation, restitution and rehabilitation for victims of gross violations of human rights.

It appeared that serious flaws had been inhibiting the trial process. Criticisms lead to the weakness of indictments,¹⁷¹ including the negligence of the principle of command responsibility.¹⁷² Additionally, it was also observed that the prosecutors were unable to provide credible evidence to support their indictments, as much evidence was no longer available or had been destroyed. Moreover, during the course of the trials, an atmosphere of intimidation, manifesting in the mobilisation of military troops and officers attached to the Special Forces (Kopassus) to attend and to occupy the Court's seats, daunts not only the witnesses but also others including the prosecutors

168 'Kasus Tanjung Priok mulai disidangkan 15 September 2003', *Kompas*, 5 September 2003.

169 Priyambudi Sulitiyanto (2007) p. 86.

170 Article 36, Law No. 26 of 2000 on Human Rights Courts.

171 In their indictment, the prosecutors failed to include the important elements of 'systematic' and widespread in their description of the abuses perpetrated. They also did not cite the social and political setting of the time as important factors in conditioning the demonstrators to march in the streets against local military officers, leading to the killing. Priyambudi Sulitiyanto, (2007) pp. 86-87.

172 'Indictment weak: Experts', *the Jakarta Post*, August 23, 2004.

or even the judges. Some witnesses were reported to change their stories because they had made peace agreement, called the *islah*, with the military prior to the trials.¹⁷³

Trials are a useful strategy for ending the culture of human rights violations in the past. It may revive the trust of the right-holders to human rights and at the same time empower them as they witness their sufferings are being taken into account. Trials also have a deterrent effect, reducing the likelihood that similar things will happen in the future. Therefore, human rights trials need to meet their expectations; being powerful and independent in protecting victims and bringing their cases into justice. Failure to do so will bring human rights implementation to stagnation; causing disrespect and distrust to the court's jurisdiction and discouraging human rights victims to bring their cases to the court.

5.5.2.2 Corruption in the Judicial System

On 15th March 2008 the Anti-Corruption Court sentenced Irawady Joenoes to a 400 million IDR (US\$4,400) fine and eight years in prison, two years heavier than what the prosecutors' demand.¹⁷⁴ Ironically, Joenoes, who was found guilty for accepting bribes in a land procurement deal, was a former member of the Judicial Commission, an independent institution that is tasked to select Supreme Court Justices, supervise judges and monitor the judiciary's behaviour and integrity.¹⁷⁵ Presiding Judge, Masrudin Chaniago said Joenoes had been proven to violate Law No. 31 of 1999 on Corruption that authorises the Anti-Corruption Court to penalise public officials to between four years and life in prison for accepting bribes.

The case shows how corruption is affecting the promotion of the rule of law in Indonesia. In fact corruption is considered the most common focus of attention in discussions regarding the Indonesian judicial reform. This errant practice can be found in many elements of the judicial system, including the police force, the attorney general's office, and the legal profession. Indeed, it can be found from the level of the district court to that of the Supreme Court.

An efficient and honest Supreme Court is critical to ensure that human rights claims are regarded justly. The Supreme Court controls the activities of most other courts and thus determines both legal culture and the implementation of human rights. In Indonesia, unfortunately, the Supreme Court is far from effective. Its judges (with a few honourable exceptions) lack forensic skills and experience of effective adjudication. It notoriously suffers from institutionalised corruption and a widespread incompetence.¹⁷⁶

173 Priyambudi Sulitianto (2007) pp. 86-87.

174 'Judicial Watchdog Member Jailed for Accepting Bribes', *the Jakarta Post*, March 15, 2008.

175 Article 24C, the Indonesian Constitution, Fourth Amendment.

176 Tim Lindsey, 'Unraveling the New Order? Recent Developments in Indonesia Law Reform', *European Journal of Law Reform*. 3 (2001) p. 93.

In April 2000 the National Ombudsman Council recorded that 25% of 300 complaints made by flood victims are related to judicial corruption, including some involving the Supreme Court. Businessman Djohan Tanuwidjaya, for example, reported that he:¹⁷⁷

‘... lodged a complain with the Council alleging a substitute registrar at the Supreme Court in August 1999 had asked him for a 200 million IDR payoff if he wanted to win his land dispute case. Djohan claimed the registrar told him the money would be given to several justices... the female registrar gave him a time limit of one month to deliver the money...’

Corruption in the judicial system is frequently blamed on the low salaries. Judges would have little incentive to resist huge bribes. In addition to that, particularly in the lower courts, judges have no protection against powerful and violent defendants. In most cases the high-profile defendant will appeal to a higher court and be released without punishment, leaving the verdict pronounced at the lower level meaningless. An example is the corruption case involving the former central bank governor Syahril Sabirin who was detained on 22nd June 2000 by the Attorney General’s Office. On 13th March 2002, the Central Jakarta District Court sentenced Sabirin to three years in prison. A higher court later overturned the decision and six months later Sabirin was back at work at the central bank.¹⁷⁸ Notably, in this type of cases, knowing well before that the defendant’s appeal will be successful, judges avoid having to hand out any punishment and accept the bribes. They use a technicality to avoid making a ruling that could offend a powerful defendant or they issue a suspended sentence

Hitherto despite numerous reports on bribery allegedly involving judges, the Supreme Court admitted that they have yet made significant records to bring most of them to justice. According to their recent report, out of 369 complaints the Supreme Court received from the public on alleged misconduct of court officials, 43 cases were completed, with no judges punished so far. In 2005, out of 317 complaints, 40 legal staff were handed administrative sanctions and no judges faced criminal charges or were fired, while in 2006, some 505 complaints resulted in 51 staff members being sanctioned administratively.¹⁷⁹ Nevertheless, the decision of the Anti-Corruption Court on Irawady Joenoes, as described earlier, signaled a slight prospect in eradicating corruption in the judicial system. In that particular case, the Anti-Corruption Court showed its commitment of carrying its task in combating corruption in Indonesia.

5.5.2.3 Collective Actions

The transition of governments has initiated a path to a new democracy for Indonesia. It has opened up unprecedented freedom, giving the people for the first time, amongst

177 ‘Businessman reports graft in Supreme Court’, *the Jakarta Post*, 28 April 2000.

178 ‘BI Chief wanted detention deferred’, *the Jakarta Post*, 16 April 2008.

179 ‘Corrupt Legal Institutions Impede Graft Reforms’, *the Jakarta Post*, 29 January 2008.

others, a liberty to organise themselves in the way they prefer.¹⁸⁰ During the Suharto regime, people were perceived as an uncontrollable horde in order to justify the imposition of oppressive measures against them.¹⁸¹ The elites were easily intimidated by collective actions and took a defensive or paternalistic stand against the people. Collective actions organised by the people were regarded as oppositions and those who were involved became political targets.¹⁸² As a result, workers and their unions, which have been actively involved in the human rights struggle, for example, had to strategise their actions into more acceptable demands. They frequently tried to demand basic freedoms and rights to assemble and organise, but were usually forced to defend themselves and their livelihoods.¹⁸³ Thus, although actions persisted throughout the Suharto period, they never became a fundamental threat.¹⁸⁴

In the beginning and during the transitional process of governance, at first it seemed as if collective actions had increased their significance in the political system. In reality, however, people's actions are still insignificant in the political arenas. An example is found in the context of transition of government. In May 1998, collective actions that took the form of student movements, backed up by academics, CSOs, mass organisations, and political party's representatives and claimed themselves as a moral force had triggered the end of the Suharto regime. Yet, despite their popularity, their proposal on how to conduct the transition was ignored by the People's Representatives Council.¹⁸⁵ A similar phenomenon occurred in the context human rights. In an effort to refute their alleged past human rights violations, the military force accused the National Human Rights Commission of being provoked while justifying irrelevant facts during their investigations.¹⁸⁶ In the other case, strong influence of the elites also delays the judicial process concerning human rights violations. In the case of Semanggi, a human rights case involving the shooting of student activists, after 10 years on the case is still being processed by the Office of Public Prosecutor.¹⁸⁷

180 Baladas Ghoshal, 'Democratic Transition and Political Development in Post-Soeharto Indonesia', *Contemporary South East Asia*, Vol. 26, No. 3 (2004) p. 506.

181 Nursyahbani Katjasungkana, 'Exchanging Power or Changing Power? The Problem of Creating Democratic Institutions', in Chris Manning *et al*, *Indonesia in Transition: Social Aspect of Reformasi and Crisis*. (Singapore: ISEAS, 2000) p. 263.

182 In June 1996, Pusat Perjuangan Buruh Indonesia (Centre for Labour Struggle in Indonesia) and Partai Rakyat Demokrat (People Democrati Party or PRD) organised massive labour actions on two industrial sites in Surabaya, East Java. After the rallies, three activists of PRD, Dita Indah Sari, Coen Husain Pontoh, dan Soleh, were arrested and imprisoned. 'Saya Tidak Bersalah, Kenapa Harus Minta Grasi?', *Tempo Interaktif*, 17 July 1997.

183 Olle Törnquist, 'Labour and Democracy? Reflections on the Indonesian Impasse', *Journal of Contemporary Asia*. 34 (2004) p. 381.

184 Vedi R. Hadiz, 'Retrieving the Past or the Future? Indonesia and the New Order Legacy', *South East Asian Journal of Social Science*. 28 (2000) p. 15.

185 Nursyahbani Katjasungkana (2000) p. 260.

186 'Purnawirawan TNI – Polri Kecam Komnas HAMKetua Komnas HAM: Kami Bekerja Sesuai UU', *Kompas*, 25 April 2008.

187 'Penegakan Hukum 10 Tahun Berlalu, Kejaksaan Masih Pelajari Kasus Pelanggaran HAM Berat', *Kompas*, 1 April 2008.

Another issue that adds to the complexity of collective actions in Indonesia is the issue of safety of human rights defenders. For many years, Indonesian human rights defenders have been living in terrors and facing oppressions. Their activities are monitored and accused as threats to the unity of the nation. During the Suharto era, many were kidnapped or imprisoned. The charge of subversion had been used as a way of silencing critics and almost every time there was a public outcry or sign of organised dissents. Munir Said Thailib, from the Commission for Disappeared Persons and Victims of Violence (*Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan* or Kontras) was amongst many lawyers who relentlessly questioned this particular concern. Ironically, on 7th September 2004, the 38-year-old lawyer died unexpectedly on flight from Indonesia to the Netherlands to pursue his graduate studies. As a response to the incident, the Indonesian Government established a team to properly investigate and prosecute those behind.¹⁸⁸

The process has been extremely complicated so far. In 2006, the two lower courts found Pollycarpus Budihari Priyanto, a Garuda pilot, guilty and sentenced him to 14 years. But the Supreme Court reduced the sentence, making Pollycarpus eligible for release in six months' time. The judges were convinced that Pollycarpus had not been proved guilty of the murder. Only Supreme Court judge Artidjo Alkostar disagreed with the lighter sentence and offered a dissenting opinion.¹⁸⁹

On 31st December 2008, the South Jakarta District Court has cleared General (retired) Muchdi Purwoprandjono, former top Indonesian spy, of all murder-related charges. The court found that the defendant is not legally proven to have been involved in the killing of Munir. The panel of judges argued that the state prosecutor had failed to substantiate his primary and secondary allegations that Muchdi had solicited and assisted convicted murderer Pollycarpus Budihari Priyanto.¹⁹⁰ As a response, the Judicial Commission will examine the South Jakarta District Court verdict for possible breach of ethics by the presiding judges.¹⁹¹ The office of the Attorney General is planning an appeal to revisit this judgment.¹⁹²

The Munir Case has shown that the collective actions made by activists to pursue justice have been positively responded by the Attorney General Office and the Judicial Commission. Nevertheless, even with such supports, the case caught in the politics in the judiciary mechanism in Indonesia. One could suggest that the panel of judges are failed to deliver justice is brought for the murderer of Munir, but in other hand this

188 As soon as the autopsy results became known, the activist's family and the local human rights community began to push for an official fact-finding team to work in parallel with the police investigation. After President Yudhoyono met with Munir's wife and colleagues on November 24, 2004 and pledged to support an independent investigation, the Indonesian government eventually approved an independent team in late December through Presidential Decision No. 111 of 2004, and it met for the first time on January 13, 2005. See: 'Tiga Tahun Perburuan', *Tempo*, 26 August 2007, pp. 30-31.

189 See: Kontras, *Tiga Tahun Dibunuhnya Munir (2004-2007)*, Report, 6 September 2007, pp. 6-7.

190 'Court Clears Former Intelligence Official of Murder', *the Jakarta Post*, 31 December 2008.

191 'Judicial Commission to examine Muchdi verdict', *the Jakarta Post*, 3 January 2009.

192 'AGO to appeal Muchdi's acquittal', *the Jakarta Post*, 5 January 2009.

could also indicate problems from the side of the attorney general in providing forceful evidence. Particularly in relation to many unexplainable phenomena occur during the process of prosecution. It has been reported that witnesses provide confusing testimonies or claimed to forget their involvement or relations to the possible architects of the murder.¹⁹³

Another challenge in respect of advancing the collective actions in Indonesia is the establishment of disincentive laws related to legal and political reforms. The laws that regulate the openness for the people to be involved in the governance (for example, Law No. 3 of 1999 on Election and Law No. 31 of 2002 on Political Parties), only focus on procedural and institutions solutions. They have not been directed at more substantial changes that can empower the civil society. A particular restriction to collective actions is stipulated in the new Law on Expressing Opinion No. 9 of 1998. This law, which was actually proposed by the military, asserts the requirement to submit a written report to the police before holding demonstrations.

In light of the foregoing discussion, it can be construed that collective actions in Indonesia remain weak. In that regard, two prominent Indonesianist scholars, Vedi Hadiz and Richard Robinson have argued that power relations in Indonesia have simply been reorganised since Suharto's fall rather than transformed.¹⁹⁴ Suharto's regime was dominated by elites who occupy the State apparatus and involved notorious figures that had close connections to these individuals. Since then, they have been reinventing themselves through new alliances and vehicles.

Certainly, people now have more freedom to organise and engage in collective action. However their organisational capacity remains constrained. Civil society organisations that are able to represent the interests of the poor still complain about the same problems namely those related to financial and organisational capacity. A massive increase in donor-funding of CSOs has undeniably enabled some organisations representing the poor and disadvantaged groups to expand and strengthen their organisation structures and increase their lobbying activities, but many other organisations are lacking capabilities to manage funding or they have insufficient knowledge and capabilities to take full advantage of emerging opportunities to influence policies related to human rights. Additionally, with the immense growing number of CSOs, their actions are overlapping and disperse, resulting in the inefficiency in taking their actions to the policy level. Thus, although collection actions related to human rights experience different opportunities, indicated by more access to initiate actions, they still have a meagre role in influencing the human rights enforcement in Indonesia.

193 'Witness 'forgets' previous claims in Munir case', *the Jakarta Post*, 10 October 2008.

194 Andrew Rosser *et al*, 'Indonesia: the Politics of Inclusion', *Journal of Contemporary Asia*. 35 (2005) p. 53.

5.6 CONCLUDING REMARKS

Since the beginning of Indonesia's independence, human rights have been perceived as complicated issues by the Indonesian founding fathers and politicians. The discussion of the history of the Indonesian legal system highlighted that the legal resources of human rights was determined by compromises between individual protection and national values/practices. Subsequently, these compromises have not significantly advanced the actual promotion and realisation of human rights. In combination with the operating interpretation of Pancasila and 'the 1945 Constitution' even discussions on the human rights discourse were impossible.

After the New Order's collapse, human rights discourses were explicitly incorporated into the legal system, followed by ratifications of important human rights documents. These new commitments have connected the Government with legal obligations at the policy level. Human rights have become claimable. The right-holders can now use human rights to claim their entitlements using political and legal actions. Particularly as new human rights institutions and responsible actors are installed. In that respect, on paper Indonesia has at least come a long way since the days of Suharto. This chapter has examined some of these significant developments, which should be setting the foundations for the genuine promotion and realisation of human rights in Indonesia.

In reality, human rights enforcement remains a problematic subject. The national incorporation of human rights norms certainly changes the relationship between the State and the people, particularly with regard to openness of the Government of collective actions both initiated by people and civil society organisations. It also gives freedom for the media to broadcast or publish news related to errant practices in the governmental level or human rights violations. However, while the people are now more aware of their human rights entitlements and taken legal or political action, only poor standard actions have been taken by the Government to advance the actual possibilities of asserting human rights entitlements. The Government continues to adopt laws that are riddled with loopholes to set up hollow institutions administered without commitment to human rights. The quality of human rights institutions is so low, or even declined because of the increasing political competitions, therefore processes of implementation have delivered a scanty impact on changing society. Furthermore, reform of the judiciary institutions has been on the agenda for several years, but implementation has been weak and unenthusiastic. Additionally, human rights promotion revolves around rather 'safe' topics or excuses without real substantial improvement in the actual freedoms that are closely related to people. The lack of measures taken to eradicate these substantial problems makes little sense of the adoption of human rights in the Indonesian legal system. The use of human rights jargon is demonstrated to be not enough and must be translated into tangible actions.

The country's attempts to honour human rights by ratifying important human rights documents can be considered to be a mere a political strategy. Throughout the process of accepting international commitments Indonesia's primary motivation has been just

to pre-empt international action and protect national pride and sovereignty.¹⁹⁵ The series of formal ratifications of international human rights documents and the establishment of human rights implementation bodies have established a good international reputation for Indonesia. Ratifications and establishment of institutional bodies are politically motivated as these can block further pressures to actually implement. Therefore, in the case of Indonesia, the Government's approach towards human rights may be described as defensive incorporation.

¹⁹⁵ Philip Eldridge (2002) p. 135.

CHAPTER 6

DEVELOPMENT IN INDONESIA: HAZARD OR RIGHT?

6.1 INTRODUCTION

As a country stretched along more than 13,000 islands, Indonesia is not quite suited to straightforward processes of development. Distribution of progress and benefits as well as balancing between macroeconomic agendas and peoples' entitlement positions constitute the major challenges. These issues have become a pressing concern after the monetary crisis that also hit the South East Asian region in 1997/1998. Particularly since the economic accomplishments achieved by the New Order regime became meaningless. Thereafter, the macro development process has been redesigned, involving distinct actors, regulations and policies. Furthermore, as explained in the previous chapter, the political change of 1998 has been followed by national incorporation of the human rights discourses in the Indonesian legal system. This, one would think, could facilitate ways and means of addressing human rights violations in processes of development. People may, indeed, expect such processes to be more accountable in respect of people's entitlement positions that constitute the basis for their efforts to sustain daily livelihoods.

This chapter sets out to analyse the impact of processes of development in Indonesia on people's entitlement positions. In particular, it aims to examine the issue of mainstreaming human rights in development. The next section will describe some general characteristics of development in Indonesia, with analysis on pre-1998 and post-1998. Section three will explain the current system (post-1998) of development in Indonesia. Section four continues with a discussion on the human rights deficits in development, viewed here as causes for the emergence of development hazards. This is followed by the analyses of three cases of combating development hazards in section five.

6.2 GENERAL CHARACTERISTICS OF DEVELOPMENT IN INDONESIA

6.2.1 *Economic Growth as the First Priority*

Since the commencement of the New Order era in 1966,¹ ‘development’ has been measured using aggregate indicators of economic growth.² Before that time, the country had been in a state of economic collapse; nearly two decades of slow deterioration in economic conditions, followed by five years of a rapidly increasing downward spiral. By early 1966, production was at a standstill, physical infrastructure was disintegrating, and hyperinflation was rendering the nation’s currency effectively worthless. Most of the population lived in a state of severe poverty, with the rural population at near subsistence level.

Responding to these circumstances, the New Order Government implemented a strategy of national development. Stability, growth and equity, which became known as the ‘Trilogy of Development’, were to be achieved through a series of five-year development plans known as *Repelita* (*Rencana Pembangunan Lima Tahun*). In Suharto’s first decade of coming to power, he managed to stabilise inflation and guide the country to join the exclusive ranks of oil-producing states. He used the revenue gained to implement an extraordinary programme of development.³

In a very short time Indonesia had climbed from the ranks of the poorest countries to a solid position among the lower middle income countries. In the mid 1970s, more than 50 million people, or around 40 percent of the population, were living below the poverty line. In the late 1980s and early 1990s, poverty incidence has been reduced to below 30 million or less than 20% of the population. In 1996, a year before the onset of the economic crisis, the poverty level had been reduced to an estimated 22.5 million people or around 11% of the population. The New Order’s success in reducing poverty has been attributed to rapid economic growth, an average of 7% annually.⁴ This impressive achievement induced the World Bank to include Indonesia among the eight ‘high performing Asian economies’ or ‘the East Asian economic miracle’ since 1993.⁵

1 Indonesia’s New Order government, led by then General Suharto, succeeded the ‘old order’ government of the country’s founding President Sukarno in March 1966. The new regime took over after a period of political chaos and widespread violence including mass killings following the abortive communist coup of 30th September 1965.

2 Donald E. Weatherbee, ‘Indonesia in 1984: Pancasila, Politics, and Power’, *Asian Survey*. 25 (1985) p. 188.

3 Michael Vatikiotis, *Indonesian Politics under Suharto*. (London: Routledge, 1998) p. 34.

4 See: Ari A. Perdana and John Maxwell, ‘Poverty Targeting in Indonesia: Programs, Problems and Lessons Learned’, *CSIS Working Paper Series, WP 083*, pp. 1-3.

5 In the World Bank Policy Research Bulletin, August-October 1993, Vol. 4 No. 4, Indonesia was described as one of the Asian Miracles, and this could happen because of the success of growth oriented policy. Even weeks before the economic crises, in September 1997 the World Bank was still saying, ‘Indonesia has achieved a remarkable economic development success over the past decade and is considered to be among the best performing East Asian economies’. Astonishingly, this view was still on the Bank’s public website as late as March 1998 when the economic crisis had started. Nicola

This achievement also invited many compliments from first world countries and Indonesia was upheld as something of a model for Third World development.⁶

According to the World Bank Policy Research Bulletin 1993, there were several favourable economic policies contributing to these achievements. First, private domestic investment and rapidly growing human capital were the principal engines of growth. Second, high levels of domestic financial savings sustained the country's high investment levels. Third, agriculture while declining in relative importance experienced rapid growth and productivity improvement. Fourth, population growth rates declined more rapidly in the country than in other parts of the developing world.⁷ Fifth, the country disposed of a better-educated labour force and a more effective system of public administration.⁸ Fundamentally, these were the result of government intervention to create and maintain stable macroeconomic management and performance, providing the essential framework for private investment. Favourable policies were implemented with the aim of increasing investment, education and productivity.

Suharto's legacy of economic growth priority remains the prevailing target for development processes. Replacing the *Repelita* system, in March 1999, Habibie issued *Propenas* (The National Development Programme) that set out broad development policies for 2000-2004. With *Propenas* the Government aimed to speed economic recovery and then lay the groundwork for sustainable economic development. The key instruments of the Government's growth strategy are macroeconomic stability, a strong banking sector, faster progress on corporate debt restructuring, and generating market confidence with the help of free-flowing information.⁹ Indeed, *Propenas* aimed to achieve broad-based economic growth driven by market signals, based on Indonesia's comparative advantages.

President Yudhoyono replaced *Propenas* with *Rancangan Pembangunan Jangka Menengah 2004-2009* (RPJM or National Medium-term Development Plan),¹⁰ in which to increase the welfare, the Government aims at higher growth rates and the type of growth that would ensure job creation as well as environmental sustainability, complemented by an acceleration of actions and investments to achieve the Millennium Development Goals (MDGs). The macroeconomic targets in the RPJM include an average economic growth rate of 6%-7%, with open unemployment declining to 5.1%, down from 9.7%. The RPJM targets to halve the percentage of people living

Bullard, Walde Bello and Kamal Mallhorta, 'Taming the Tigers: the IMF and the Asian Crises', *Third World Quarterly*. 19 (1998) p. 512.

6 Michael Vatikiotis (1998) p. 35.

7 The rate of population growth fell from 2.4% per year in 1970s to under 1.8% in the 1990s. This was partly the result of deliberate government policy, in the form of a concerted nation-wide family planning effort.

8 The World Bank, *The Making of the East Asian Miracle*. Policy Research Bulletin. Vol. 4, August-October 1993.

9 Asian Development Bank, *Country Operational Strategy: Indonesia*. March 2001, paragraph 77.

10 Presidential Regulation No.7 of 2005 on the National Medium Term Development Plan, issued on January 19, 2005.

below the poverty line to 8.2% by 2009, including programs to improve food security, water supply and sanitation, access to basic health and education services, and shelter.¹¹

For decades, economic growth has notably been praised and put forward as a success model, but in reality it is insufficient to completely eradicate poverty in Indonesia. Millions of people remain very poor, and large numbers still live near the line of absolute poverty. In fact the Institute for Development of Economics and Finance Indonesia (Indef) predicts that the poverty rate would continue to increase. It is estimated that the total number of the poor would boost from 34.96 million or 15.42% in March 2008, to 40.4 million or 16.8% in 2009.¹² Furthermore, the gap in living standards between the rich and the poor, particularly in urban areas is more visible than in the early years of the New Order. Absolute differences in income between cities, particularly compared to the capital Jakarta, and most rural areas and regions, have multiplied too.

6.2.2 Foreign Financial Assistance

The initial flow of foreign aid began in the few years following independence. During this period there were two contradictory perspectives in the way the country looked at foreign influence. On the one hand, the flow of foreign aid was exploited to reassure the Dutch and Americans that their economic interest would be safe in an independent Indonesia.¹³ On the other hand, some anxieties also occurred as the need for aid juxtaposed with issues of dependency. The more Indonesia's leaders felt they could not cope without aid, the more they worried about losing their independence.¹⁴ Especially in the 1950s and early 1960s, aid was considered a political tool to influence Indonesia's political stance.¹⁵

11 Asian Development Bank, *Country Strategy and Program: Indonesia 2006-2009*. October 2006, paragraph 34-35.

12 'Jumlah penduduk miskin pada tahun 2009 diprediksi mengalami peningkatan yang dramatis'. *Kompas*, July 10, 2008.

13 Franklin B. Weinstein, *Indonesian Foreign Policy and the Dilemma of Dependence*. (Ithaca: Cornell, 1976) p. 206.

14 *Ibid*, p. 205.

15 During the period 1954-1965, there was a wave to attack the flow of foreign aid in Indonesia. It was because economic development was wedged, and it was blamed on foreign aid. According to Sukarno, Indonesia's failure to develop economically during the 1950s was mainly due to foreign economic and political intervention on the one hand, and the instability resulting from Indonesia's eight-year experiment with liberal democracy. He said that 'economic aid... is made a threat, a weapon, so that we will follow their desires. And if we do not follow their desires, they say economic aid will be withdrawn... If they want to withdraw aid we say OK, you may withdraw your economic aid to Indonesia. We are not going to retreat a step, because we have lots of resources.' He also warned against 'selling our souls for a plate of beans or even for a lot of aid, however much,' and declared: 'if some nation says to us, you can have aid, but you have to end confrontation, then I say "go to hell with your aid"'. *Ibid*, p. 219.

An opposing opinion on foreign aid occurred in the New Order era. Suharto, Indonesia's second president fully encouraged the flow of foreign aid to fuel his development policies.¹⁶ The country welcomed many development projects and programmes coming from the World Bank, the Asian Development Bank, the United Nations Development Programmes and donor countries. The stream of aid from donor countries was mostly coordinated by the Inter-Governmental Group on Indonesia (IGGI) founded and chaired by The Netherlands. Since 1992, after the Netherlands were expelled from the group, the organisation is known as the Consultative Group on Indonesia (CGI).

Alongside foreign aid, foreign investment has been another important fuel for development since the New Order era. Initially, the matter was specifically regulated in Foreign Investment Law No. 1 of 1967. This Law was consistent with a broader thrust of the New Order government's development planning team (the so-called 'technocrats' headed by Prof. Widjojo Nitisastro) to open the Indonesian economy.¹⁷ It was intended to increase the flow of foreign direct investment and at the same time trigger domestic investment, through joint venture activities, as well as the encouragement of independent initiatives by domestic investors.¹⁸ This investment law successfully boosted the economic performance of the country.¹⁹

On the other hand, foreign direct investment has been argued to be one of the critical factors contributing to the economic crisis in Indonesia.²⁰ Foreign direct investments led to external liabilities, problems of private sector debt problems, poor loan quality, lack of confidence in the government's ability to resolve problems, and excessive amounts of foreign investment.²¹ These weaknesses made Indonesia's economy vulnerable to an economic crisis.

As mentioned before, the Asia Monetary Crisis 1997/1998 has changed the success figured by the New Order economy.²² Indonesia ultimately suffered the worst damage from the currency crisis in the fields of unemployment, health care, and food produc-

16 In the first five-year plan of 1969-1974, approximately 73% of total financing came from foreign sources, including private investment, and close to 80% of the government's development budget for the period of the plan was to be met by foreign aid. Franklin B. Weinstein (1976) p. 205.

17 See: Didik J. Rachbini, Rachbini, D. J. 'Growth and Private Enterprise', in R. W. Baker (ed). *Indonesia the Challenge of Change*. (Singapore: ISEAS, 1999) p. 15.

18 The 1967 foreign investment law was followed a year later by passage of a corresponding new domestic investment law: Law No. 6 of 1968.

19 The approved foreign investment raised 800% from 207 million US\$ in 1967 to 160,679 million US\$ in 1997. While the approved domestic investment raised 270% from 128 million US\$ in 1968 to 34,659 million US\$ in 1997. Data processed from Investment Statistics, Badan Koordinasi Penanaman Modal, BKPM (Indonesian Investment Coordinating Board).

20 Ishak Shari, 'Globalisation and economic disparities in East and South East Asia', *Third World Quarterly*. 21 (2000) p. 9.

21 Nicola Bullard, *et al* (1998) p. 513.

22 In December 1997, the value of the currency (rupiah) plummeted to around 50% of its value from the previous six months, and in March 1998, the Rupiah depreciated even further to around 25% compared to its values in 1997. See: Tubagus Feridhanusetyawan, 'Social Impact of the Indonesian Economic Crisis', *The Indonesian Quarterly*. 26 (1998), p. 240.

tion.²³ Because of such devastating effects, in October 1997 the Government sought assistance from international financial institutions and by the end of the month an agreement was made with the International Monetary Fund (IMF).²⁴ The IMF financial package forced Indonesia to dismantle monopolies, liquidate defunct financial institutions and introduce free competition.²⁵ Negative impacts were inevitably faced by the people, for example in the field of food security. The State Logistic Agency, *Bulog (Badan Urusan Logistic)* terminated contracts with some private companies to open the possibility of acting as an agent for import and distribution to a multitude of small entrepreneurs and co-operatives, and overnight there were over 3,000 new distributors.²⁶ In effect this policy lengthened the distribution chain and raised the prices of rice. On the other hand, the subsidies for fertiliser, which were removed in December 1998 as prescribed in the IMF structural adjustment programme, led to the increase of production costs and prices.²⁷

After the New Order, the level of foreign aid and external borrowing has been declining. Official pledges at the Consultative Group for Indonesia slid from over US\$7.0 billion in 1998 to about US\$3.5 billion in 2006.²⁸ On 30th January 2007, President Susilo Bambang Yudhoyono disbanded the Consultative Group on Indonesia (CGI) because the Government prefers to have one-on-one negotiations rather than round table, multilateral ones.²⁹ By that time, the country's primary creditors were only

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- 23 About 6.6 million have lost their jobs since the onset of the crises. Prices of basic commodities, such as rice, cooking oil and sugar have increased by 20%-100% and petrol prices are due to rise by 25%. Medical supplies and equipment have become prohibitively expensive. About half of the 120-plus health clinics in one part of Greater Jakarta (*Jabotabek* – Jakarta Bogor Tangerang and Bekasi) are reported to have closed because of the rising prices and fears that patients will sue them for not providing proper services. Food production dropped by 4% in 1997 and for the first time in many years, Indonesia started to import rice. See Nicola Bullard, *et al.*, (1998) pp. 533-535.
- 24 In 2002, the total IMF loan for Indonesia was USD 12,779 billion with the interest rate of USD 1,755 billion. 'Bunga Utang RI kepada IMF Mencapai 1,755 Miliar Dollar', *Kompas*, 14 Mei 2003.
- 25 Douglas Sikorski, 'The Financial Crises in Indonesia: Explanations and Controversies', *The Indonesian Quarterly*, 26 (1998) p. 366.
- 26 ELSAM – IDEA. *Dampak Kebijakan IMF pada pemenuhan hak atas bekerja, pendidikan dan kesehatan di Indonesia*. Jakarta: ELSAM-IDEA, 1999, p. 53; World Food Programme, *FAO/WFP Crop and Food Supply Assessment Mission to Indonesia*, a special report from FAO/WFP, WFP and FAO of the UN, April 1999, p. 4.
- 27 Over the May 1997 to December 1998 period, food prices increased 136% while non-food prices only rose 72%. Between July 1997 and October 1999 the prices of rice and other essential commodities increased by up to 208%. Asep Suryahadi and Sudarno Sumator, *Update on the Impact of the Indonesian Crisis on Consumption Expenditure and Poverty Incidence: Results from the December 1998 Round of 100 Village Survey*. SMERU Working Paper, August 1999, p. 4; World Food Programme, *Protracted Relief and Recovery Operation – Indonesia 6195.00: Food Assistance for the Urban Poor Affected by the Economic Crises*, A report for the executive board of the WFP, January 2000, p. 5.
- 28 Asian Development Bank (2006) paragraph 39.
- 29 Finance Minister Sri Mulyani said the Consultative Group on Indonesia (CGI) was no longer needed as the country's primary creditors were only the World Bank, the Asian Development Bank (ADB) and Japan, and that Indonesia now preferred one-on-one negotiations rather than round table, multilateral ones. 'CGI to be dissolved, RI to hold G and G talks', *Antara News*, 25 January 2007.

the World Bank, the Asian Development Bank (ADB) and Japan. The transfer of public sector obligations to local governments has contributed to this development as the Government has been operating without an effective mechanism to channel official development assistance to local governments.³⁰ Moreover, external assistance has been directed at policy and thematic support, local governments and communities, and emergency, rehabilitation and reconstruction activities for large-scale disasters.

With regard to foreign investment, similar situation persists. The Asian Development Bank reported that the investment level after the crisis has been declining. In 2005, the investment level was at 16% of GDP, which was assessed as far from the required level to achieve economic growth of 5% and hence even too far to achieve the targeted economic growth of 7-8% a year. Just to put it in perspective, total investment in Indonesia was around 30% of GDP in the 1990s before the crisis, when economic growth was around 7-8%.³¹

The report analyses that macroeconomic instability, economic and regulatory policy uncertainty, and corruption are the most severe obstacles to foreign investment. Labour regulations are a serious concern, more so than labour skills. In particular, hiring and lay-off procedures as well as minimum wages weigh heavily on firm operations. Moreover, decentralization implemented since January 2001 has led to greater economic and regulatory uncertainty and increased corruption. Recently, the Government issued a new law to regulate the flow of foreign and domestic investment. Although it contains a new provision on corporate social responsibility,³² the Investment Law No. 25 of 2007 reaffirms the important status of foreign investment in Indonesia and grants it favourable facilities such as tax reductions, permits and immigration.³³

6.2.3 Endemic Corruption

It is inevitable to touch the topic of corruption while discussing development in Indonesia. This errant practice has become endemic since President Sukarno ruled the country. His disastrous inflationary budgets eroded civil service salaries to the point where people simply could not live on them. Subsequently, inflation had led to the virtual collapse of financial accountability, which was further worsened by the deterioration of administrative corruption.³⁴

30 Asian Development Bank (2006) paragraph 39.

31 Asian Development Bank, *Improving the Investment Climate in Indonesia*, May 2005, p. 10.

32 Article 15, Law No. 25 of 2007 on Investment.

33 Article 18, Law No. 25 of 2007 on Investment.

34 John S.T. Quah, 'Causes and Consequences of Corruption in Southeast Asia: A Comparative Analysis of Indonesia, the Philippines and Thailand'. *Asian Journal of Public Administration*. 25 (2003) p. 239. Quah also wrote that actually corruption was already a serious problem during the Dutch colonial period as the salaries of the Dutch East India Company's personnel were inadequate and they were exposed to every temptation that was offered by the combination of a weak native organization, extraordinary opportunities in trade, and an almost incomplete absence of checks from home or in Java.

Notably, corruptive practices are primarily blamed on the salary conditions of the bureaucrats. In 1969, a survey of regional civil servants in Indonesia revealed that there was not a single official who could live on government income alone as the official income amounted to approximately half of essential monthly needs. A more recent survey conducted by UNDP in 2001 on corruption in Indonesia considered 2,300 respondents (650 public officials, 1,250 households and 400 business enterprises) and found that low salaries were identified as the most important cause of corruption by 51.4% of the public officials, 36.5% of the business enterprises, and 35.5% of the households.³⁵

Although salary issues are blamed as the background for corruption, the biggest corruption practice is ironically the Suharto case.³⁶ During his regime, development projects were conducted by private companies owned by Suharto families or those who had 'special' relationships with the regime. The State Logistics Agency (*Bulog*) contracted Suharto's children for rice import orders. In the same vein the National Oil and Gas Mining companies (Pertamina) contracted tankers from Suharto children for the import and export of oil. Siti Hardiyanti Rumania, Suharto's oldest daughter, was also involved in a wide range of infrastructure projects, especially the construction of toll roads. Her company, the Citra Lamtoro Gung Group was granted the contract for developing the triple decker bus station in Manggarai, Jakarta, the expansion of the port of Tanjung Perak, Surabaya, and the installation of a telecommunication network.³⁷ These are only a select few taken from many other corruption cases involving Suharto's family.³⁸

After the New Order, fighting corruption has a prominent place in the reform agenda of the Government. A number of anticorruption laws have been enacted: Law 28 of 1999 on Creating a State that is Free of Corruption, Collusion, and Nepotism; Law 31 of 1999 on Eradicating Criminal Acts of Corruption; Law 15 of 2002 on Eradicating Money Laundering; and Law 30 of 2002 on Establishment of the Commission for Eradication of Corruption. A range of state auxiliary bodies have been established, with mandates to fight corruption. These include the Commission for

On the other hand, Mochtar Lubis wrote that corruption has been practiced since before the Dutch Colonialisation, when the kings suppressed the people to pay for 'upeti', a contribution for the lifestyle of the king. Such suppression was considered normal behaviour of those in power. See: Mochtar Lubis, *Bunga Rampai Korupsi*. (Jakarta: LP3ES, 1985), p. xvii.

35 Data of Survey 1969 conducted by T. Smith and data of UNDP survey on corruption of 2001 are provided by J.S.T. Quah (2003).

36 There are also cases of corruption in the forestry business, oil based companies, finance and banking, etc. See: 'Kasus-Kasus Korupsi di Indonesia', *Tempo Interaktif*, 25 October 2004.

37 Budjono, B. 'The First Family'. In J. H. McGlynn *Indonesia in the Soeharto Years*. (Leiden: KITLV, 2005) p. 158.

38 Soon after Suharto's resignation, Attorney General Sudjono Atmonegoro and Attorney General Andi Mohammad Galib launched investigations and uncovered one by one Suharto's wealth. Afterwards, the Suharto family returned funds totalling some USD 770 million. The assets held by Suharto that were uncovered were turned over to the State including USD 4.7 million in bank deposits and 400,000 hectares of land in Java alone. *Ibid.* pp. 162-163.

Combating Corruption, the National Ombudsman Commission, and the Commission for the Eradication of Money Laundering.³⁹

However, has corruption gotten better since the fall of the New Order? The evidence on this is far from clear. With declining levels of public investment, this errant practice may well have fallen in absolute terms, while petty corruption under weaker political management may have increased. Political competition on the other hand may be once again driving up corruption. What matters is that the statistic of corruption continues to disclose a high number.

In this context, the Indonesia Corruption Watch (ICW) Report observed that in the 125 corruption cases being heard at the Administrative Court in 1999, the perpetrators were reported to be local governments; actually mostly governors at the provincial level and regents at the regional level.⁴⁰ From this total of 125 it was noted that 40 of the defendants were released without sanction and those convicted received merely light sentences.⁴¹ The report also mentioned that indications of corruption manifest themselves in both the quality of the infrastructure and in the amount of the budget of development projects. If corruption occurs, the project abates and the budget rises significantly.⁴² According to the ICW Report in 2007, this errant practice has caused the financial loss of 10.4 trillion IDR.⁴³

Beside the bureaucratic level, the practices of corruption take place at the grass-roots level too. UNDP research on corruption in Indonesia revealed that poor people have to pay bribes to be enrolled in schools or to buy uniforms. This research also illustrated how teachers stole student scholarships provided for the poor students. In the field of electricity services, there were also cases where electricity company staff practiced corruption by selling illegal services to the poor.⁴⁴

According to the list made by Transparency International in 2006 made by, Indonesia was ranked number 130, with a Corruption Perception Index (CPI) score of 2.4 out of 10.⁴⁵ Indeed, corruption is a barrier to development processes in Indonesia.

39 A specific analysis on corruption in judicial process, particularly related to the Anti Corruption Court, is provided in Chapter 5, Section 5.5.2.2.

40 Such as the cases of corruption in the housing development project in Banten of 14 billion rupiah, the religious building project in Bengkulu of 65 billion rupiah, or the case of food security programme in Flores Timur of 10 billion rupiah. Data compiled by the Indonesian Corruption Watch in 2004. Indonesian Corruption Watch, *Daftar Kepala Daerah Yang Telah Mendapatkan Ijin Pemeriksaan Dari Presiden Dalam Kasus Korupsi*, Report 2004.

41 'Reversing Indonesia's anti corruption drive', *Asia Times*, 6 March 2007.

42 For example, in the case of development project in Jalak Perumpat sport centre in West Java, the project spending rose to 60 billion rupiah from the initial 30 billion rupiah. 'Nama tersangka terlalu cepat diumumkan', *Kompas*, 27 April 2007.

43 The ICW investigated corruption practices in 34 state companies that are not only in the public service business but also those which sell their stocks publically. 'Tren Korupsi di BUMN Meningkat', *Kompas*, 26 February 2007.

44 Ratih Hardjono and Stefanie Teggemann (eds), *The Poor Speak Up, 17 stories of corruption*, Report, The Partnership for Governance Reform in Indonesia, 2003, pp. 12-26.

45 Transparency International indicates number 1 as the best and number 145 as the worst. See: http://www.transparency.org/policy_research/surveys_indices/cpi/2006, accessed 19 June 2007, at 12.12.

It has a pervasive and troubling impact on the poor. It distorts public choices in favour of the powerful and thus risks development becoming a venture owned by the elites and the strong business privileges with the access to shape the decision making of development policies. Inevitably, corruption may also create a vicious circle that leads to a violation of human rights, because the State quickly loses its authority and ability to govern for the common good.

6.3 THE CURRENT SYSTEM OF DEVELOPMENT IN INDONESIA

According to Article 2(1) of Law No. 25 of 2004 on the National System of the Development Process, the process of development is based on the principles of togetherness, justice, sustainability and independence. Thus, development should be a process that requires not only macro involvement of all governmental functions, but also serves the unity of the country.⁴⁶ Furthermore, this law also explains development in Indonesia as a set of processes of construction and decision-making, as well as monitoring and evaluation, based on the principles of consensus and deliberation.⁴⁷

With regard to actors and their roles in the development process, Law No. 25 of 2004 specifies that at the national level the responsibility for development planning lies with the Minister of National Development Planning, who is also the head of the national Development Planning Board (*Badan Perencanaan Pembangunan Nasional* or *Bappenas*).⁴⁸ At the regional level, the Law assigns the head of the Regional Development Planning Board (*Badan Perencanaan Pembangunan Daerah* or *Bappeda*) with the mandates of preparing specific regional plans. The elaboration of the plans is done by the Deliberation of Development Planning Meeting⁴⁹ (*Musyawarah Perencanaan Pembangunan* or *Musrenbang*). Both regional institutions are also responsible for the evaluation and monitoring of development. In respect of enforcement, the President is in charge of the overall process of development at the national level, whereas the local government is responsible for organisation and implementation.

In practice, the system of development in Indonesia is also based on decentralisation or what is also popularly known in Indonesia as *otonomi daerah (otda)*, i.e. local autonomy.⁵⁰ Decentralisation gives local governments (provincial and district governments) the authority to administer development processes at the local level. Decentralisation means that local governments are in charge of managing development and the main responsible actor in the overall process of development, including management

46 Article 2(1), Law on the National System of the Development Process No. 25 of 2004.

47 Article 8, Law on the National System of the Development Process No. 25 of 2004.

48 Chapter V, Law No. 25 of 2004.

49 Musyawarah Perencanaan Pembangunan or Musrenbang is a forum in which development actors elaborate and design national and regional development policies. Its authority included designing long term, mid term and short term development policies. Article 1(22) and Chapter V, Law No. 25 of 2004.

50 In this book the terms decentralisation and local autonomy are used interchangeably.

of investment, supply of productions, and public service.⁵¹ The process involves the transfer of political, fiscal and administrative powers from the central government to lower levels in an administrative territory.⁵² Historically, both student movements that fought for democracy, as well as regional leaders who appealed for autonomy demanded decentralisation. Both prevailed, substantially supported by international donors, in particular the World Bank, which strongly advocated democracy, decentralisation and privatisation.⁵³

Indonesian politicians and policy makers saw decentralisation as a potential way to stabilise the country by making government more accountable to local populations and by addressing demands from regional leaders who wanted to control more resources.⁵⁴ Communities from resource-rich regions had long complained that the wealth generated by their natural resources had enriched politicians and their cronies in Jakarta. Many saw decentralisation as one way to return control over most of these resources to local governments. Policy makers considered that shifting authority and responsibility for numerous administrative functions to the local level would make government more accountable.

Theoretically, decentralisation or local autonomy may open access to participation for the people to articulate their concerns and interests in development directly to the local government: an entitlement implied in the Declaration on the Right to Development. As people participate in local politics, government will become more accountable to its constituents. Enhanced accountability will arguably lead to better policies and less corruption.⁵⁵

6.3.1 *Law on the Local Autonomy*

Decentralisation has been implemented in Indonesia since 2001. Soon after President Habibie adopted Law No. 22 of 1999 on Local Autonomy and Law No. 25 of 1999 on Fiscal Balance in 7th May 1999, which replaced Law No. 5 of 1974 on Regional Government. The old law, which was highly centralist and sought to restore the tight hierarchical system,⁵⁶ was considered to be no longer appropriate to the situation of

51 Bappenas, *Buku Pegangan Penyelenggaraan Pemerintah dan Pembangunan Daerah*. (Jakarta: Bappenas, 2007) p. 3.

52 Christopher R. Duncan, 'Mixed Outcome: the Impact of Regional Autonomy and Decentralization on Indigenous Ethnic Minorities in Indonesia', *Development and Change*. 38 (2007) p. 713.

53 Stein Kristiansen and Lambang Trijono, 'Authority and Law Enforcement: Local Government Reforms and Security System in Indonesia', *Contemporary Southeast Asia*. 27 (2005) p. 241.

54 Christopher R. Duncan (2007) p. 712.

55 A. Agrawal and J.C. Ribot, 'Accountability in Decentralization: Framework with South Asian and African Cases', *Journal of Developing Areas*. 33 (1999) pp. 473-502.

56 Anna Booth, 'Decentralisation and Poverty Alleviation in Indonesia', *Environment and Planning C: Government and Policy*. 21 (2003) p. 195.

development.⁵⁷ The new law calls for more emphasis on regional diversity, broad local autonomy, and local government based on democracy. The law was welcomed by many political observers in Indonesia; it particularly gained positive recognition from international development agencies working in the country. In ‘Transition to a Prospering and Democratic Indonesia’ the United States Agency for International Development (USAID) stated normative objectives of decentralisation by commenting that ‘Indonesia is moving rapidly from years of tight central control to a far more decentralised and autonomous system of local government’. More specifically on the legal framework for local autonomy in Indonesia, USAID suggests that the law is geared to help ‘create the basis for national and local democratic government’.⁵⁸

The focus of decentralisation in Law No. 22 of 1999 was at the district level, not at the provincial level. This is due to the belief during the period of its drafting (1998) that an implementation of decentralisation at the provincial level might lead to a national disintegration, while taking into account the on-going social unrest in several provinces in Indonesia.⁵⁹ As a result the Law caused many disappointments on the part of provincial governments. Moreover, after five years of experience, decentralisation of authority and responsibility at the district level has created problems. The district local government machines did not function well and there was lack of coordination among the districts and provinces, and between the districts and central government. In response, President Megawati replaced the Local Autonomy Laws with Law No. 32 of 2004 and Law No. 33 of 2004. These laws return back local autonomy from the

57 The history behind the adoption of the new local autonomy law is as follows. Ideas to give more autonomy to the regions were actually expressed at by President Suharto as his Parliamentary Speech on 16 August 1990 (See: *Pidato Kenegaraan Presiden Republik Indonesia Suharto*. Delivered at the Parliamentary Session, 16 August 1990, p. 17). However this intention was merely a political gimmick with no substantial effect on the unequal central-regional government relationship. The central government remained the main decision-maker. Since the economic collapse, Indonesia has faced a number of crises, and as the local economy was too dependent upon the central economy, such situations worsen the crisis. Furthermore local conflicts occurred during the crises, which demanded more local control. The demands include, but are not limited to, poverty, inequality, income shocks/uncertainty, unemployment and inequitable development, the effect of industrialization, decentralization, lack of clarity in land rights, regional economic disparities and natural resource management. These conflicts confirm the longstanding dissatisfaction at the provincial level with its relationship with Jakarta. The resentful feeling of being economically squeezed by the central government was also prevalent among people in the provinces rich with natural resources, such as Aceh, Riau, Kalimantan, North Sulawesi, and Irian Jaya. The flourishing primordial sentiments, originating from ethnic and religious self-identifications were perhaps also natural human responses to economic discrepancy in a climate of political uncertainty. Response to the complicated situation can be found in paragraph d, the Preamble of Law No. 22 of 1999 on Local Autonomy: ‘whereas Act Number 5 Year 1974 regarding the Principles of Local government is no longer compatible [with] the situation of development.’ A similar paragraph is also found in Law No. 32 of 2004.

58 United States Agency for International Development (USAID). *Transition to a Prospering and Democratic Indonesia*. Country Strategy Paper. 30 May 2000, p. 17.

59 Didik Suhardi, et al, *Improving Planning, Service Quality, and Community Participation in the Indonesian Decentralized Education System*. Unpublished Paper, Presented at APEID International Conference, Bangkok, December 2006, p. 3.

district to the provincial government. From the point of view of the central government, the change implied in these laws makes their task lighter, because it is easier to manage a limited number of governors than hundreds of regents and mayor.⁶⁰

One main provision Law No. 32 of 2004 is the abolition of the former clear-cut hierarchical relationship between the central Government, provinces and districts. The district (*kabupaten* or *kotamadya*) is now responsible for the implementation and daily operations of activities in education, health, culture, public works and the environment.⁶¹ Additionally, while previously local government leaders were elected by the members of local parliament, Law No. 32 of 2004 stipulates that they are now directly elected by the local community. Many other efforts related to decentralisation and local governments have been undertaken since the initial implementation period, some of which have been supported by international and bilateral donor agencies.⁶²

A major provision of Law No. 33 of 2004 is to delegate the financial responsibility of the above sectors to the district level and therefore reduce the dependency for revenue on the central level. The allocation of funds from central Government sources decreased, while increasingly, local government expenses are based on tax revenues from national resources and business activities. Between 12% to 80% of the revenue derived from natural resources is distributed to the local government that has the authority to decide on its allocation and distribution, without reporting to the central government.⁶³ Thus the local governments need to develop and create their own sources of funding. Notably, saving cost and increasing incomes become the major objectives behind decentralisation in Indonesia. A large number of local regulations, *peraturan daerah* (*perda*), have been issued by the local governments to legitimise the collection of local taxes and levies, for instance on transport, water, licences and various forms of business.⁶⁴

6.3.2 Some Consequences of the Implementation of Law No. 32 of 2004 on Local Autonomy

The new local autonomy laws grant authority (*kewenangan*) to lower levels of government, thus reducing the central government's control over the provinces and districts. This substantial devolution of political power is assumed to bring government closer

60 Vedi R. Hadiz, 'Decentralisation and Democracy in Indonesia: A Critique of Neo-Institutionalist Perspective', *Development and Change*. 35 (2004) p. 704.

61 Article 14, Law No. 32 of 2004 on Local Autonomy.

62 Wenefrida Widayanti and Asep Suryahadi, *The State, Local Government and Public Services in Decentralized Indonesia 2006: Finding for the Governance and Decentralisation Survey 2 (GDS2)*. SMERU Research Report, February 2007, p. 1.

63 Ade Cahyat, *Perubahan Perundang-Undangan Keuangan Daerah Tahun 2004, Bagaimana Pengaruhnya pada Program Penanggulangan Kemiskinan Daerah?*, Governance Brief Center for International Forestry Research -CIFOR, No. 24, December 2005, pp. 2-6.

64 Stein Kristiansen and Lambang Trijono (2005) p. 242.

to the people and thus create a more transparent environment.⁶⁵ However, the implementation of the laws in a number of localities has created unprecedented opportunities for predatory political actors.

The expansion of the authority of local governments is not necessarily positive for the people. An example is related to their authority to issue and enforce regulations related to development processes. The Monitoring Committee of Local Autonomy (*Komite Pemantauan Otonomi Daerah* or KPPOD) observed that local governments used their authority to impose local regulations that are actually detrimental. Based on their research, KPPOD discovered that there are 264 local regulations, adopted by 170 districts in Indonesia, which are potentially a hindrance for the agricultural sector.⁶⁶ Many of these disincentive regulations are triggered by the low local capacity in financing local development projects, so that local governments need to impose retributions and taxes in agricultural sectors, leaving farmers in vulnerable positions.⁶⁷ Moreover, the overlap of agreements, particularly on land procurement or land conversion deals, made between local and central governments, also contributes to decision-making with regard these regulations. Eradicating the problem requires more complicated action than just abolishing these local regulations. Although the Ministry of Home Affairs recently abolished 32 local disincentive regulations, the lack of control from the central Government to monitor has been detected as the main reason that in reality they are still operational.

Moreover, the greater authority of the local government has invited local enthusiasms that are expressed in various forms of political articulation, manifested particularly in the rising number of new provinces and districts. The discourse of establishment of new provinces is accepted at the political arenas. The lift of the political lid opens an opportunity for local political actors to become organised and promote their interests in the bigger arenas. It has been easier for them to mobilise the population and meet the administrative, technical and geographical requirements.⁶⁸ Consequently, after the enactment of the local autonomy laws the amount of provinces and districts has been augmented. As of January 2008 the number of provinces increases from 27 to 33 and the number of districts drastically climbs from 292 (before 2001) to 465.⁶⁹ This is not to include the 12 new districts and provinces currently proposed by the Local Autonomy Board.⁷⁰ Moreover, political articulation of the local elites can also be observed in the expansion of district and provincial areas.

65 H.S. Nordholt, 'Decentralisation in Indonesia: Less State, More Democracy?', in J. Harris, *et al.*, (eds), *Politicising Democracy: The New Local Politics of Democratisation*. (New York: Pargrave Macmillan, 2004) p. 37.

66 'Banyak yang Jadi Disinsentif', *Harian Seputar Indonesia*, April 30, 2008, p. 14.

67 'Perda Retribusi Bikin Harga Pangan Mahal', *Kontan*, Friday, 2 May 2008, p. 3.

68 Article 5, Law No. 32 of 2004 on Local Autonomy.

69 Data according to the *Direktorat Jenderal Pemerintahan Umum, Departemen Dalam Negeri RI*, as of January 2008.

70 'DPOD segera teliti 12 calon daerah baru', *Kompas*, 15 February 2008.

Nevertheless, their motivation to create a new province or district is varied and in many instances reflects a mixture of motives from purely personal ambition for having political and bureaucratic positions to the aspiration of developing a modern society in the region. Since the enactment of Law No. 32 of 2004, local leaders or communities that were aspiring to have their own administrative territories become more intrigued to realise their goals. At the district level particularly, the local elites see economic and political opportunities under the umbrella of regional autonomy. In realising their interests, they frequently use the argument of injustice in budgeting for development in their area, which may be resolved by acquiring more financial authority.⁷¹ Furthermore, ethnicity has provided an avenue that could be manipulated to mobilise people's support and at the same time function as a cultural legitimating medium to justify the interests of the local elites.⁷²

Against this background the establishment of new provinces and districts often proceeds problematically. An example is the border conflict between two new districts in West Papua: District Mamberamo Raya and District Tolenkara.⁷³ In addition 81 other areas in 17 provinces are reported to be struggling with the same difficulty.⁷⁴ There are also on-going complaints that the newly established provinces are incapable of managing the development process. Since West Sulawesi has been declared the 29th province of Indonesia in 2004, corruption has been allegedly perpetrated by the local elites and there is no significant improvement in the development process.⁷⁵

From the economic development perspective, the formation of new provinces and districts is also assessed to be insignificant in creating a favourable environment for investment. The research of KPPOD revealed that only 39% of the districts in Indonesia have fulfilled their obligation to implement the one-door-investment policy, as stipulated by the Minister of Home Affairs Regulation No. 46 of 2006, Government Regulation No. 41 of 2007 and Minister of Home Affairs Regulation No. 6 of 2008.

Against such unfavourable development, in April 2008 the Minister of Home Affairs announced that the Government will merge districts that are considered non-prospective and fail to indicate good governance.⁷⁶

The evidence from the Indonesian experience illustrates how decentralisation can sometimes make coordination of national policies more complex and may not always beneficial for people at the grassroots. It is no longer necessary for local governments

71 '5 Bupati Tuntut Pembentukan Propinsi Baru', *Kompas*, 20 February 2008.

72 Riwanto Tirtosudarmo, *Indonesia: Decentralization and Horizontal Inequality*, paper presented in CRISE (Center for Research on Inequality, Human Security and Ethnicity) workshop, Oxford, 29-30 June 2005, p. 13.

73 'Pemekaran Daerah di Papua Berbuntut Sengketa', *Kompas*, 3 March 2008.

74 These 17 provinces are: Jambi, Kepulauan Riau, Kalimantan Selatan, Kalimantan Tengah, Kalimantan Timur, Riau, Sumatera Utara, Sumatera Selatan, Sumatera Barat, Bengkulu, Gorontalo, Sulawesi Tengah, Sulawesi Tenggara, Sulawesi Barat, Kepulauan Bangka Belitung, Irian Jaya Barat, Maluku Utara, DKI Jakarta, dan Banten, '81 Daerah Berebut Batas Wilayah', *Koran Tempo*, 11 December 2007, p. A5.

75 'Inisiator Sulawesi Barat Kecewa Hasil Pembangunan', *Kompas*, 6 May 2008, p. 4.

76 'Daerah Otonomi yang Tidak Prospek Akan Digabung', *Kompas*, 25 April 2008, p. 24.

to report to the central government, resulting in minimisation of vertical accountability mechanisms.⁷⁷ The Indonesian autonomy laws only assign the central government key national functions such as defence, the judiciary, and foreign relations and the monetary and fiscal system, while devolving most authority directly to local government. The law provides local governments great autonomy over most of the functions that affect people most directly, namely public and basic health services, primary and secondary education, urban services, environmental management, and planning and local economic development.

The implementation of decentralisation is frequently based on political reasons, not technical reasons. The issues of capacity and capability of local leaders are undermined. Notably, without an effective central government the distribution of authority becomes a diminishment of the role of central government. Furthermore, a New Order kind of cooptation from the elite still affects the people. In fact, considering the locality of the authority, people are more vulnerable to hazardous effects coming from the newly authorised local actors. If before there was one authoritarian leader in Jakarta, now there are plenty of non-accountable leaders controlling the policies and facilities that have undeviating effects on people. The actual balance between central and regional authority is covered with competing vested interests.⁷⁸ In this regard, Ignas Kleden, an Indonesian political scientist, describes the present situation in Indonesia as ‘the politics of change without change in politics’.⁷⁹

6.3.3 Participation

Indonesians are familiar with the concept of ‘participation’. Although one might say that three decades of living under autocracy discouraged participation, it did not mean participation became an alien concept in development. In fact, Suharto had always been including participation in his development policies, albeit participation from above. In the New Order period, the implementation of participation can be illustrated in the comment made by Michael Vatiokis:

‘New Order Society lays great stress on collective participation. Fun walks, callisthenics, outings to recreation spots are all imposed on employees regularly. Non-participation invites suspicion. Even the suspicion on of non-conformity brings sanction. Those, whose mental

77 Stein Kristiansen and Lambang Trijono (2005) p. 244.

78 Regarding this phenomenon, Hadiz argued that: ‘Powerful coalitions entrenched in Jakarta retain a vested interest in maintaining some control over local resources and authority over taxes, royalties and investment policy, while attempting to balance this against aspirations for greater local autonomy. On the other hand, local elites (especially at the sub-provincial level) are intent on taking direct economic control, typically citing the injustice of past practices that allowed Jakarta to exploit Indonesia’s vast riches. In the meantime, provincial authorities are stuck in the middle, struggling to retain some power and not to fall into the oblivion of political and administrative redundancy’, Vedi R. Hadiz (2004) p. 705.

79 Ignas Kleden, ‘Politik Perubahan tanpa Perubahan Politik’, *Tempo*, 13 February 2005, pp. 56-57.

and ideological 'environment', are considered 'unclean', must attend 'refresher courses' in Pancasila ethics'.⁸⁰

Notably, uniformity and centralisation were the central principles to participatory activities. It was typical to impose participation from above.

The policy to increase productivity of rice is one example of how Indonesia translated participation in the development processes. The policy called for participation of farmers to meet the goal of increased productivity. It did dramatically increase the rice production by 50% since the 1970s and brought the country to self-sufficiency in rice in the 1980s. For many years following, the country was the world's largest rice exporter, an accomplishment that successfully stabilised the country's rice self-sufficiency. However, one should bear in mind that what has been called participation was actually a mass mobilisation to implement green revolution technologies.⁸¹ This strategy was implemented without any consideration for the impact on peasants, resulting in the diminishment of the number of landholders as well as the number of small-sized farms.

Another example of imposing participation from above is the family planning programme. This programme was launched to control the demographic feature in Indonesia as the fourth most populous country in the world. The programme was organised at all levels of the population by mobilising village level voluntary organisations,⁸² as a form of participation, to disseminate and perform the programme. The programme successfully held down the population rate. The extensive use of contraceptives has led to a sharp decline in the fertility rate, from 5.6 births per woman in 1970 to 2.78 in 1997 and 2.6 in 2003.⁸³

Yet, this programme is accused of being coercive as women are not given enough information about what is being done to them. They are not offered with any alternatives; instead they have been threatened or bribed into agreement. It is important to

80 Michael Vatikiotis, *Indonesian Politics Under Suharto, Order, Development and Pressure to Change*, (London: Routledge, 1993) p. 110.

81 Since its instigation, many authors have criticised the implementation of green revolution in Indonesia. See for example: Gary E. Hansen, 'Indonesia's Green Revolution: The Abandonment of a Non-Market Strategy toward Change', *Asian Survey*, 12 (1972) pp. 932-946; Harry M. Cleaver, Jr, 'The Contradictions of the Green Revolution', *The American Economic Review*, 62 (1972) pp. 177-186; David Pimentel and Marcia Pimentel, 'Comment: Adverse Environmental Consequences of the Green Revolution', *Population and Development Review. Supplement: Resources, Environment, and Population: Present Knowledge, Future Options*, 16, (1990) pp. 329-332.

82 The voluntary organizations are called *posyandu*, an abbreviation of *pusat pelayanan terpadu*, which provides services for family planning and (mostly children and maternal) health care. Posyandu activities are carried out monthly by cadres and midwives or nurses, which include child weighing, health and nutrition information, distribution of vitamin A for children and iron tablets for pregnant women, immunization, and family planning services.

83 By the end of 1997, 57 % of married Indonesian women aged 15-49 years were using contraceptives, and in 2003 it had reached 60.3 %. Rina Herartri, *Family Planning Decision-Making, Case Study of West-Java, Indonesia*. Unpublished Paper, Presented at 12th Biennial Conference, Australian Population Association, 15-17 September 2004, p. 1.

note that Indonesian family planning authorities are trying to phase out methods such as the pill, which are largely under the woman's control and depend on her cooperation. The family planning agencies prefer injections and implants. The environment created by Indonesia's official fertility-reduction policy and the mass campaigns are settings in which women are not given the information they need to make an informed choice about implant use.⁸⁴

Participatory development Indonesia is presently implemented as enforcement of the decentralisation policy. The preamble of the Local Autonomy Law No. 32 of 2004 states that: 'whereas in the implementation of local government, it is deemed necessary to emphasise further the principles of democracy, community participation, equitable distribution and justice, as well as to take into account the localities potential and diversity'.⁸⁵

Law No. 32 of 2004 embraces the entitlement of participation in the process of policy making. It was necessary to establish a new local autonomy law to answer new challenges of diversity, permitting a direct local election that enables people to elect their closest responsible government, through a process that is known as *'pilkada'*, an acronym for *pemilihan kepala daerah*, which is a local head election.⁸⁶ On paper, this direct election aims to create good governance which is characterised as clean from corruption, and more responsive and accountable to people's aspirations.

Reality shows a more complicated situation. This system of election generates new elite groups that emerge from the supporting campaigning groups for local government candidates.⁸⁷ After an election, these groups act as the 'shadow governments' and play a significant role in the decision making processes. The problem is that they are even more powerful than the formal political actors in the Regional People's Representatives Council and overrule participation procedures in the formal decision making processes. This new arrangement could in fact complicate the access of people to participate.

Moreover, the increasing new elites and the wavering of support from the central governmental complicate any attempt towards successful implementation of participation. Local administrators throughout Indonesia now have considerable power to approve resource consents and permit companies to carry out various types of activities. Hence, it is of pressing concern that decisions made by perhaps inexperienced regional administrators, are not at the expense and exclusion of local people.⁸⁸ Rather, the control gained by the majority of local politicians within regions enables local

84 Jayanti Tuladhar, *et al*, 'The Introduction and Use of Norplant Implants in Indonesia', *Studies in Family Planning*. 29 (1998) p. 294.

85 The Preamble to the No. 32 of 2004 on Local Autonomy.

86 Article 56(1), Law No. 32 of 2004 on Local Autonomy.

87 'Kegamangan Otonomi Daerah', *Kompas*, 16 August 2007.

88 On the implementation of the new Local Autonomy Law see: Richard Seymor and Sarah Turner, 'Otonomi Daerah: Indonesia's Decentralisation Experiment', *New Zealand Journal of Asian Studies*. 2 (2002) p. 47.

leaders to have a propensity to satisfy their own interests at the expense of the disadvantaged minorities and vulnerable groups.

Furthermore, there are no actual deeds of enforcement that substantially change the practice of partaking in development policies. Shifting the political decisions into smaller arenas has in fact generated more problems. Regions have inherited inefficiency, inappropriate appointments, overlapping functions, and numerous officers known to be corrupt or unsympathetic and aim only for power. In addition, these people have been trained and are used to living in a 'top down' environment that has encouraged the ideology of conformity, which fosters rejection of criticisms.⁸⁹

6.4 DEVELOPMENT WITHOUT HUMAN RIGHTS: THE EMERGENCE OF HAZARDS

This section sets out to examine the human rights deficits in development policies in Indonesia, particularly those that might lead to development hazards. In line with the analysis on development hazards in Chapter 3, the examination will cover four specific areas of development policies, *viz.* housing policies, employment conditions, quality of health care and food security.

6.4.1 Housing

According to data provided by the Habitat for Humanity, Indonesia needs to provide roughly 800,000 new houses per year.⁹⁰ This number is unlikely to be met for two reasons. The first is that the housing programmes are not widely accessible or spread. The second is that the housing prices and supplies are left to the market as private companies are the important actors in this area.

With respect to the first reason, the home loan national programme, *Kredit Pemilikan Rumah* or the KPR Programme is accessible only for those living in urban areas. In rural areas, there is no assistance in terms of housing development. This programme assigns banks to provide home loans with below market interest rates. The procedure is similar to common mortgage regulations, but in Indonesia there are no further appraisals conducted on the real value of houses. Furthermore as access to this programme requires a secure employment position, those without a job have no option but to independently or illegally build their houses.

Concerning the second reason, housing arrangements in Indonesia depend on a market situation because housing development and supplies are not regarded as governmental business. They are managed by private developers associated with the Indonesia Real Estate Association (*Real Estate Indonesia* or REI). This organisation is responsible for 70% of housing supplies and the semi-government housing developer, the Perum Perumnas (*Perusahaan Umum Perumahan Nasional*). Such a domi-

⁸⁹ Michael Vatikiotis (1993) p. 110.

⁹⁰ Estimation is provided by the Habitat for Humanity Office Jakarta, <http://www.habitat.org/intl/ap/95.aspx>, accessed June 20, 2007, at 21.02.

nant role of private companies in the housing situation in Indonesia is confirmed by the statement coming from the Ministry of Settlements and Regional Infrastructure representative:

‘Development of housing carried out by the community, particularly the low-income community, is self-supportedly encouraged and developed under the quality and quantity enhancement guidance. This initiative must be carried out in groups with the support and participation of other parties’.⁹¹

‘Housing and settlement development in Indonesia has been programmed as a stakeholders’ responsibility, although the housing provision is the citizen’s responsibility which should be implemented comprehensively positioning the community as the main actor and the government role as an enabler and facilitator in the effort to empower citizens and active participation of private business’.⁹²

Another concern that needs to be addressed regarding the human rights deficit in the housing policy in Indonesia is the quality of the housing. The World Health Organisation (WHO) defines a house as being in good shape when it provides a minimum floor area of 10m² per person. As to this recommendation, the 2002 National Socioeconomic Survey reported that only around 58.2% of households (on average far above five persons) occupied floor areas of more than 50m².⁹³ The remaining, 41.8% refers to poor condition houses, such as the slums and illegal houses subject to Government eviction programmes. However, this survey ignores the number of inhabitants living in the houses.

The rather limited involvement of State in the housing policy in Indonesia leads to a meagre protection in the right to adequate shelter for the poor. The deficit in protecting this entitlement becomes observable since there is no explicit legal resource to formally guarantee people to claim or seek compensation in cases of, for example, house eviction. In fact, the State often acts as the perpetrator to get rid of slum areas without prior warning or adequate compensation schemes.

Presidential Decree No. 36 of 2005, which currently regulates legal eviction, is a testimony to non-compliance on the part of the Indonesian government in respect of the human right to housing. This Decree disregards people’s property rights to land and condones the practices of eviction as legal for public purposes. The problem is that the Decree does not elaborate on the concept of ‘public purposes’. It only defines ‘public purposes’ as the interest of majority. This is backward when comparing it with the definition provided in the previous law (Presidential Decree No. 55 of 1993), where it was defined as the public interest in terms of government activities and

91 Gembong Priyono, *Housing Industry in Indonesia*. Unpublished paper, presented in the Seminar of ASEAN Association for Planning and Housing (AAPH), Manila June 2002, p. 4.

92 *Ibid*, p. 9.

93 Indonesian Bureau for Statistical Analysis and Development (BPS). *Statistik Indonesia*. Jakarta: BPS, 2002, p. 85.

government ownership, and not commercial purposes. The regulation met protests from people who believe the regulation strengthens the government's repressive and authoritarian efforts.⁹⁴ Hence, by adopting the Decree, one may conclude that the Indonesian government is not abstaining from the violation occurring in house eviction policies.

6.4.2 Employment

In the last decades there has been a shift in Indonesia towards more export-oriented strategies. A key element of this outward looking approach has been the drive to increase Indonesia's manufactured exports.⁹⁵ The emphasis has been on labour intensive industries such as textiles, garments and footwear, taking advantage of Indonesia's cheap and abundant manpower forces. Expansion in industrial sector employment has proceeded at the same pace as the increase of real wages in the industrial sector. The rapid economic growth of the country experienced during the past decades has also benefited the workers.⁹⁶ As a result, in August 1997, the national unemployment rate was approximately 3.5%.⁹⁷

Employment rates become important, as unemployment is a delicate issue in Indonesia. The higher the unemployment rate, the more vulnerable the nation is to social unrest and labour demonstrations. This explains the employment strategy implemented during the economic crisis. Although the crisis has caused mass layoffs in several sectors of industry, especially manufacturing and construction,⁹⁸ many companies just cut down on their employees' daily working hours; in this way they did not become unemployed, but definitely earned lower wages. From 1997 to 2003 the formal unemployment rate increased from 3.5% to 10.3%.⁹⁹

Yet, this shared understanding on the importance of employment for national stability does not suggest that workers actually acquire protection of their entitlement positions. The balance of power between companies and the Government of Indonesia creates an arena of uncertainty for workers. The follow-up effect of the enactment of Manpower Law No. 13 of 2003 provides an example. The provisions of the Law that

94 See Chapter II Article 2 b, Presidential Decree No. 36 of 2005 on House Eviction

95 Mark Beeson and Vedi Hadiz, 'Labour and Politics of Structural Adjustment in Australia and Indonesia', *Journal of Contemporary Asia*, 28 (1998) pp. 298-299.

96 The economic growth was in the range of 5% to 7% per year while the salary was raising about 6% per year. *Ibid.*

97 Indonesian Bureau for Statistical Analysis and Development (BPS). *Statistik Indonesia*. Jakarta: BPS, 1998, p. 11.

98 At one point in early 1998, around 15,000 workers lost their jobs every day in Indonesia. Emanuel Skoufias and Asep Suryadi, *Growth and Crisis Impacts on Formal Sector Wages in Indonesia*, SMERU Working Paper, December 1999, p. 11.

99 Another reason, which is probably more significant, is that people cannot afford to stay unemployed for long. This meant that during the crisis those who lost their jobs in the formal sectors quickly moved to the informal sectors. 'Ekonomi Indonesia tumbuh tapi angka pengangguran naik', *Kompas*, 4 Augustus 2005.

actually benefited workers¹⁰⁰ are being contested by the Indonesian Business Association (*Asosiasi Pengusaha Indonesia* or *Apindo*). Supported by the Presidential Instruction No. 3 of 2006 on Investment issued by President Yudhoyono, this association is currently demanding a revision to abolish several favourable provisions with regard to salary standards, welfare facilities, compensation calculations and possibility for workers to conduct protests and demonstrations. Particularly, *Apindo* is proposing the transfer of the obligation of workers' protection in terms of welfare, safety and health care to the companies rather than the State as had been stipulated in Law No. 13 of 2003 on Manpower.¹⁰¹ If these obligations are borne by the companies, companies will also decide the standards. Naturally, this could negatively affect the entitlement positions of the workers because as commercial entities, companies are concerned more with profits than with workers' conditions.

Discussing the human rights deficits in employment in Indonesia would be incomplete without touching upon the issue of migrant workers. Since the 1990s, migrant workers have been considered the new economic force in Indonesia. In 2006 alone, 2.7 million migrant workers abroad sent about 2.6 million US dollars to their families living in poor villages in Indonesia. The policies and facilities meant to protect these groups, however, are considerably poor. According to the Consortium of Indonesian Migrant Workers Defender (*Konsorsium Pembela Buruh Migran Indonesia* or *Kopbumi*), in 2001 there were 2,239,566 cases of human rights violations affecting migrant workers.¹⁰²

Unfortunately, Law No. 39 of 2004 on the Protection of Indonesian Migrant Workers does not entirely protect all types of migrant workers from exploitation. As the largest category of all Indonesian workers overseas, domestic helpers are not categorised as migrant workers and therefore excluded from possible protection by the Government.¹⁰³ Furthermore, the Government is generally lacking in effective policies and combating actions to redeem the migrant workers, who are detained, scammed, neglected by their agents, or who have disappeared.

The above discussion illustrates the deficits in the implementation of human rights in Indonesia. It can be observed that there is a general perception to regard unemployment conflicts with both economic growth and political stability. As a consequence, protection of the entitlement to employment in Indonesia is interpreted limitedly so as

100 Article 156, Law No. 13 of 2003 on Manpower.

101 Article 35(3), Law No. 13 of 2003 on Manpower. Also 'Inilah Revisi UU No. 13 tahun 2003 yang Dianggap Paling Gila', *Tempo Interaktif*, 29 March 2006.

102 Of this number of people, 33 persons died, 2 persons faced the death penalty abroad, there were 107 cases of torture and rape, 4,598 persons fled from their employers, 1,101 persons were detained, 1,820 persons were scammed, 34,707 persons were neglected by their agents, 24,325 persons disappeared, there were 1,563,334 persons without documents, and 50 persons faced the Shar'ia judiciary system and so on. 'Hak Asasi Buruh Migran di Indonesia', *Tempo Interaktif*, 17 June 2007.

103 'Overseas Workers Faced Difficulties at Every Stage', *The Jakarta Post*, 15 February 2006.

to prevent a high rate of unemployment, rather than to protect the right-holders actual 'freedom to choose work and accept work'.¹⁰⁴

6.4.3 Health Care

In general, the national public health care system involves participation of various public health care facilities. These public facilities include hospitals (at district levels), sub-district health centres (*Pusat Kesehatan Masyarakat* or *Puskesmas*), auxiliary health centres (*Puskesmas Pembantu*), mobile health clinics and village maternity homes (*Polindes*). The public health centres offer primary health care support, implement a number of health programmes, such as family planning or immunisation, and may refer patients to public hospitals.

Before the economic crisis Indonesia was applauded for improving the quality of health in the country.¹⁰⁵ At the onset of the economic crisis the depreciation of the rupiah made drugs, vaccines, contraceptives and other medical supplies such as hospital equipment (which are usually imported) very expensive. A survey conducted by the World Bank indicated that prices of pharmaceuticals (including vaccines and contraceptives) increased by 200 to 300 percent between November 1997 and March 1998.¹⁰⁶ The increasing costs deterred the poor from seeking treatment from trained providers. Many people turned to self-treatment and traditional remedies. Contraceptives and immunisation coverage fell and pregnant women visited health centres less often.¹⁰⁷

The Indonesian Central Agency for Statistics (*Biro Pusat Statistik* or BPS) pointed to several indicators believed to show that the economic crisis have significantly decreased the quality of health in Indonesia. The BPS data showed that the morbidity rate¹⁰⁸ first declined during the pre-crisis period (1995-1997), but it subsequently rose

104 Under the ICESCR, the right to work is defined as the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. In this regard, the State party is obliged to achieve the full realization of this right, which thus provide technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual. Article 6 of ICESCR.

105 The data shows that in 1967 the infant mortality rate was 24 per 1000 live births, but by 1996 had dropped to 49 per 1000 live births. The life expectancy has also improved over the last 30 years. In 1967 it was 46 years, but by 1996 it was nearly 65 years. Jonathan Albert and Ivar-Andre Slengesol, *Education in Crisis: Impact and Lessons of the East Asian Financial Shock, 1997-1999*. (Washington DC: The World Bank, 2000), p. 20.

106 The World Bank, *Health and Nutrition in Indonesia*. World Bank Paper, 25 April 2000.

107 The World Bank, *Report and Recommendations of the President of the International Bank for Reconstruction and Development to the Executive Directors on a Proposed Social Safety Net Adjustment Loan in the Amount of US\$600 million to the Republic of Indonesia*. Report No. P7307-IND, The World Bank, 1999, p. 14.

108 They used the morbidity rate, instead of the infant mortality rate, as an indicator of the overall health status of the population. The morbidity rate is defined as the proportion of people who reported that they felt unwell and were unable to perform their usual activity during the specified reference period (one month).

by 10 to 20% during the crisis period (February 1997-December 1998).¹⁰⁹ A similar picture is also reported by both the Indonesian Family Life Survey and the Social Economy Survey (*Survei Sosial Ekonomi Nasional* or Susenas) survey; the crisis had a devastating effect on children's access to medical care. Their survey shows that between 1997 and 1998 there was a 7% decrease in children's access to public health service.¹¹⁰

Moreover, the economic crisis caused an increase in the number of people living in poverty; these are the most vulnerable to health hazards that result in violation of their right to health. However, although the economy has affected the quality of health care in general, there is also a problem with the State commitment. While the lack of ensuring sufficient health care is claimed to be due to deficient resources, the lack of a co-ordinated health system is more likely to be the main obstacle for the Government in its response to the need for health care, particularly with regard to some epidemic illnesses.

An example is found when analysing the response of the Government to the dengue fever epidemic that annually hits the country during the rainy season.¹¹¹ Although it is general knowledge that the dengue fever comes annually, the Government only acts after the disease has become an epidemic. There are no preventive policies or actions to maintain a healthy and clean environment. Again, when the epidemic comes, it is the vulnerable groups that bear the brunt. There are many cases reported in the media with regard to how these groups are neglected or rejected in the hospitals simply because there are not enough places for them and there is no coordination between hospitals to accommodate them.¹¹²

According to the survey conducted by *Sekretariat Keadilan dan Perdamaian* (SKP) and the Institute for Social Transformation (INSIST) in Jayapura, Papua, there are two additional problems observed with regard to the government's commitments to health care. The first is the lack of availability of proper health care services and the second is the inadequate budget allocated for health care. The research revealed that 44.9% of people living in Jayawijaya do not have access to health care. The data show that 1 *Puskesmas* has to serve 9,842 people. This is considered unreasonable coverage, especially in terms of the problems of distance and concentration of population in the area. Regarding the second problem, the research also disclosed that in 2005 health

109 Indonesian Bureau for Statistical Analysis and Development (BPS), *Crisis, Poverty and Human Development in Indonesia, 1998*. (Jakarta: BPS, 1999) pp. 97-98.

110 Iflickhar Ahmed, *Indonesia's Crisis and Recovery: the Myths and Reality* unpublished paper, presented in the discussion at the International Labour Organization, Jakarta, ILO, April 2000, p. 5.

111 The worst case of dengue fever in Indonesia happened in 2004. From 1 January to 4 April 2004 a total of 52,013, mainly hospitalised cases of dengue and 603 deaths had been registered with the Indonesian Ministry of Health., World Health Organisation, *Dengue Fever in Indonesia*, WHO Disease Outbreak News, February 26, 2004, http://www.who.int/csr/don/2004_02_26a/en/index.html, retrieved September 7, 2007, at 12.56.

112 'Rumah Sakit Cengkareng Tolak Pasien Demam Berdarah', *Tempo Interaktif*, 7 August 2005.

care occupied just 2.75% of the total Local Development Budget (APBD), which amounts to a mere 6,667,000,000 IDR.¹¹³

The entitlement to health care in Indonesia falls under the ratified ICESCR. This means that Indonesians are entitled to enjoy the highest attainable standard of physical and mental health,¹¹⁴ in which access to health care is included.¹¹⁵ The inaccessibility of health care is one of the failures of the State to meet its obligation to the right to health. In the case of Indonesia, there is also the issue of a lack of implementation of mainstream human rights principles in health policy. As mentioned before in Chapter 5, Health Law No. 23 of 1992, established during the New Order Regime but still currently applies, does not guarantee the health as a human rights entitlement, which needs to be protected, entailing the possibility for right-holders to claim against related violations. The law, nevertheless, stipulates that the government is responsible for providing medical care throughout Indonesia evenly and within the reach of the public.¹¹⁶

6.4.4 Food Security

Food policy in Indonesia is closely linked with the economic and political situation in the country. High economic growth in the 1980s and 1990s occurred simultaneously with a stable condition in terms of food. As mentioned earlier, in the 1980s domestic agricultural productivity increased dramatically in Indonesia thanks to the introduction of more efficient farming techniques. In the mid 1990s Indonesia had become a net exporter of rice, the most important Indonesian staple food. Indicators showed a degree of sufficiency in food that was high compared to other Asian countries and the growth of food production was far greater than population growth.¹¹⁷

In the same vein as its approach to employment, the State considers food policy, particularly with regard to rice, as the one most important development policies, which therefore requires a State's full control and is based entirely on government decisions. However, the situation of the food market is oligarchic, meaning that both the Government and private companies play significant roles. Well aware of the fact that high rice prices signify high inflation, the Government has an intricate system designed to keep the price of rice low. The low price of rice is also part of the Government scheme to promote industry; if rice prices are kept low for consumers they will not demand higher wages. Starting from the lowest production level the supply of rice and other basic commodities is controlled by the Logistic Agency (*Badan Urusan Logistic* or

113 HamPapua, *Sehat Itu Sa Pu Hak*, News-Report, 11 December 1006.

114 Article 11(1), ICESCR.

115 Katarina Tomasevski, 'Health Rights', in Asbjørn Eide, *et al* (eds), *Economic, Social and Cultural Rights*. (Dordrecht, Martinus Nijhoff, 2002) p. 135.

116 Article 7, Law No. 23 of 1992 on Health.

117 ELSAM – IDEA, *Dampak Kebijakan IMF pada pemenuhan hak atas bekerja, pendidikan dan kesehatan di Indonesia*. (Jakarta: ELSAM-IDEA, 1999) p. 46.

Bulog).¹¹⁸ In practice the Bulog system of purchase and distribution is carried out with the help of several private companies and is riddled with corruption.¹¹⁹

The Indonesian Government perceives food policy as a tool to stabilise the domestic political climate. This strategy is partly correct. The lack of food and particularly the rising price of rice were considered triggers of social unrest during 1998. There were reports of food riots from almost every part of Indonesia, where many looted and stole food and other valuable goods from burning shops. However, regardless of importance, food policies are not designed to correspond with the issues of entitlement positions of the people. Government strategies in eradicating food problems or facilitation of emergency food policies are employed with the motivation of satisfying macroeconomic considerations or stabilising political situations, instead of securing human rights-based entitlements. Intervention to deal a problem thus merely serves as temporary assistance, rather than as manifestation of an obligation to protect and fulfil obligations towards those who are disadvantaged and vulnerable.

Illustrative is the hunger threat that occurs annually in the Regency of Timor Tengah Utara in the Province Nusa Tenggara Timur of the Sunda Islands. In May 2007, it was reported that thousands of people in the area faced starvation because of harvest failure. In response to the lack of assistance, the people had to sell their veal, and work as construction workers or even steal.¹²⁰ Although the Government anticipated this by distributing 20kg of rice to each family in March 2007, the assistance was obviously insufficient as the harvest failure problems remained. Actually, this action had been immediately taken without considering the real problem of harvest failure and it was merely enforced as temporary assistance. In fact there is no significant policy to permanently prepare or anticipate such annual hunger threat.

The description of food policy in Indonesia shows deficiencies in adopting human rights principles that enable the right-holders to advance their entitlement position. One particular challenge is to mainstream human rights in food policies, therefore people as the right-holders have the command and the access to participate in food policy or seek remedy in food emergency situations.

¹¹⁸ In order to stabilise the price of rice, Bulog set a maximum price for the benefit of consumers and a minimum price for the benefit of producers. For the consumers, Bulog had to ensure that adequate stocks were available, which meant running stocks down when there was a surplus and increasing stocks when there was a shortage. This was done by purchasing rice, at appropriate times, from the domestic or international market. For the producers, Bulog had to maintain a price that would act as an incentive to produce more. Bulog did this by buying more rice when the price was low, thereby raising the market price and selling when the price was high. Jeremy P. Mulholland and Ken Thomas, 'The Price of Rice', *Inside Indonesia*, 58 (1999).

¹¹⁹ For example, out of the twelve rice import agents used by Bulog, four belonged to Liem Sioe Liong, a long time friend of Suharto and two belonged to two of Suharto's daughters, Siti Hutami and Siti Hedianti Hariyadi.

¹²⁰ 'Ancaman Kelaparan di Timor Tengah Utara', *Tempo Interaktif*, 18 May 2007.

6.5 COMBATING DEVELOPMENT HAZARDS IN INDONESIA

Hitherto the nature of development processes in Indonesia has been reviewed and human rights deficits have been examined with respect to how they manifest themselves during such processes. Based on the foregoing discussions it may be argued that such a way of conducting development leads to the emergence of development hazards, where development victimises rather than advances its intended beneficiaries.

In this section the process of transforming development hazards into human rights struggles will be discussed. For that purpose, three cases will be presented: the forced eviction in Karang Anyar Jakarta, the Hot Mud Tragedy in Sidoarjo East Java, and the Oil Palm Project in North Barito, Central Kalimantan. All of these cases are taken place after 1998. Particular attention will be paid to examine how the hazards affect people's entitlement positions, while at the same time analyse the process of combating development hazards by either the State as principal duty-bearer or the people as the right-holders.

6.5.1 *Enforcing a Mandatory Court Order: The Case of Forced Eviction in Karang Anyar, Jakarta*

Karang Anyar was a poor *kampung*¹²¹ that emerged after the economic crisis of 1998; it was located beneath the train fly-over of Sawah Besar Station and Mangga Besar Station, in Sawah Besar municipality, Jakarta. Approximately 265 families lived in an area of 4 ha and mostly worked as street vendors, *becak* drivers, drudges or coolies and bin collectors. This *kampung* was considered an illegal habitation because officially they occupied land owned by the State Train Company (*Perusahaan Jaringan Kereta Api* or PJKA). Housing conditions were semi-permanent, meaning that the houses were built using recycled woods and materials.¹²² Generally this type of area is common in urban cities such as Jakarta and the houses are considered transit houses built by those who are disadvantaged and cannot access proper housing, because of their lack of income. The daily income of people living in the area was 10,000-15,000 IDR, and this explains their insufficient material basis for proper housing.¹²³

The introduction of an eviction plan for Karang Anyar began on 6th September 2000, when invitations for a closed meeting were circulated to certain prominent figures living in the area. In the meeting, attended by the head of the municipality and the heads of the neighbourhood group, it was decided that the people should be cleared from the area within a period of two days, while by 9th September 2000 fences would

121 *Kampung* is another word for a village in Indonesia, in big cities such as Jakarta it also means a ghetto, where a group of poor people live in high concentration.

122 Urban Poor Consortium, *Kisah Bantaran Rel Karang Anyar*, Study Report, 4 December 2005.

123 According to The Governor Decree of Jakarta No. 302 of 2001. In 2007 according to Decree of the Governor Jakarta No. 1734 of 2006, the minimum wage in Jakarta is 900.560 IDR.

be built as the area was intended for small shop buildings.¹²⁴ On 11th November 2001, the local government evicted people from this area while the population demonstrated at the Regional People's Representatives Council.

At this time, Presidential Decree No. 55 of 1993¹²⁵ governed the procurement or acquisition of land for public interest and development projects. Based on the stipulated provisions some clear violations in the case of Karang Anyar were observed. The first concerned the issue of consent. The Decree stated that the process of land acquisition should be conducted based on the informed consent of the inhabitants,¹²⁶ meaning that they must be informed and that a process of deliberation must take place. In the case of the Karang Anyar Eviction, it became evident that there had been an insufficient introduction of the population to the eviction plan. The information was given only to a few selected representatives and this showed no intention from the Government to respect and protect the rights of the potential victims. The Government in this regard was reluctant to provide an enabling environment for the population to exercise their entitlement to participation.

The second violation of the Presidential Decree was related to the objective of the eviction plan. The Decree stated that land acquisition is legal only for the purpose of public interests, which includes public markets, roads, etc.¹²⁷ In the case of the Karang Anyar eviction the objective was actually to build business oriented shops owned by private companies, which cannot be categorised as public markets and thus did not fall under the definition of public interests. Additionally, this objective is also incongruent with Article 37 of Human Rights Law No. 39 of 1999, which stipulates that land acquisition can take place only when the objective of the action is for public interest.¹²⁸

Another problem in the case of Karang Anyar was that the compensation paid for land and other assets was less than the market value. Generally speaking, Presidential Decree No. 5 of 1993 provided a basis for a procedure of land acquisition and fairly regulated the determination of compensation. However, it lacked provisions on resettlement and restoration of the income and livelihoods of the project-affected people. It merely suggested that the payment of compensation for land varies, accord-

124 In the area, the plan was to build shops, measuring 2.5m by 5m, which would be sold for 40-50 million IDR.

125 Currently, Presidential Decree No. 55 of 1993 is replaced by Presidential Regulation 36 of 2005 which only vaguely defines the aim of eviction for public interest without precisely identifying what that means.

126 Article 4 and 5, Presidential Decree No. 55 of 1993 on House Eviction.

127 The definition of public interests includes development of roads, dams, hospitals, harbours, religious buildings, schools, markets, cemeteries, post and telecommunications infrastructures, sports facilities, radio or television stations, government and military offices. Article 5, Presidential Decree No. 55 of 1993 on Regulation of Acquisition of Land for Public Interest.

128 Article 37, Law 39 of 1999 on Human Rights: (1) The right to ownership of a property shall not be revoked in the public interest, except with the restoration of fair, proper and adequate compensation, based on prevailing legislation. (2) In the event that in the public interest a property must be destroyed or abandoned, either permanently or temporarily, compensation shall be paid in accordance with prevailing legislation, unless otherwise decreed.

ing to the tenure status and ownership rights. The legal resource that stipulates the entitlement to fair compensation can be found in Article 37 of the Human Rights Law which regulates that during land acquisition, restoration of fair, proper and adequate compensation must be implemented. In the case of Karang Anyar, the population was given 300,000 IDR per family as compensation. In this respect, one can observe a violation of the right to property as stipulated by Human Rights Law No. 39 of 1999. Of course, it can be argued that given the illegal housing status of the population, such compensation would be considered sufficient; however, one should also bear in mind that their disadvantaged status and vulnerability were also caused by their economic, political and social status in society which conditioned them to be restricted to such a standard of living.

In an attempt to assert their entitlement positions and with the assistance of civil society organisations, the Urban Poor Consortium and the Indonesian Legal Aid Foundation (*Yayasan Lembaga Bantuan Hukum Indonesia* or YLBHI), the victims of the Karang Anyar eviction lodged their case with the Regional People's Representatives Council, the Department of Infrastructure, and the Ministry of Housing. Following a series of demonstrations, 43 inhabitants of Karang Anyar submitted a class action suit to the Regional Court of Jakarta against the Governor of Jakarta, the Head of the Central Jakarta Region, the State Train Company and the Regional Police force. After 36 sessions at the Central Jakarta Regional Court, Judge Andi Samsan Nganroe ruled that the action of the Jakarta government to evict those people from their houses was a tort and hence the Government should bear the responsibility of compensating the victims. The Court ordered material compensation of 30,540,000 IDR and immaterial compensation of 20,500,000 IDR.¹²⁹ The positive decision was based on the information that the land acquisition had taken place not for the purpose of public interests but for personal and business interests, which therefore required a judiciary process of acquisition rather than a public process by using governmental powers.

In response to this decision, the Regional Government of Jakarta appealed to the High Court of Jakarta. The representative of the regional government said that this response was taken to maximise the available legal resources.¹³⁰ Currently the case is still pending; however the execution of class action and litigation showed that a remedy for development hazards is possible so as to concretely recognise hitherto unacknowledged freedoms and entitlements.

6.5.2 *Protecting the Right-holders: The Case of the Hot Mud Tragedy in Sidoarjo East Java*

The Hot Mud tragedy started on 29th May 2006 when hydrogen-sulfide gas (H₂S) was reported to be leaking from a gas exploration rig in Sidoarjo, operated by Lapindo

129 The compensation ranged from 25,000 to 3.5 million IDR; generally each person would receive 500,000IDR. 'Hakim Menangkan Gugatan Korban Penggusuran', *Koran Tempo*, 20 January 2002.

130 'Kalah Digugat Warga Korban penggusuran, Pemda DKI naik Banding', *Kompas*, 11 January 2002.

Brantas Inc (LBI). It happened during company drilling activities in search of natural gas deposits in the Banjar Panji-1 exploration site in Renokenongo village, Sidoarjo district, East Java. The gas leak spurted 10 metres high from cracks in the ground and was followed by hot mud spraying 100-150 metres high reaching as far as the residence area nearby.¹³¹

The upwelling of hot mud created a large pool of mud, rendering the neighbourhood uninhabitable and causing people to flee from their homes. In addition, the intercity turnpike to the East Java capital Surabaya had to be closed down for weeks.¹³² The explosion wrapped 4 villages in the Porong region in 6 metres of mud. From the data gathered by the Department of Health prior to 20th June 2006, the mud explosion drowned 71.7 hectares of paddy field, 16.3 hectares of industrial terrain, 7.9 hectares of housing area, and 8 hectares of public facilities. The data also recorded approximately 3,825 people evacuated to the refugee post in Pasar Baru Porong. On 27th August 2006, President Yudoyono declared the 400 hectare area affected by the mudflow in Porong, Sidoarjo district a disaster-prone area unfit for human habitation.¹³³ As of 12th April 2007, the National Development Planning Board estimated that the total loss caused by the mudflow within the period of nine months after the first eruption had reached 27.4 trillion IDR.¹³⁴

Another effect of this explosion was environmental damage and health risks suffered by the population. From the research performed by the Centre for Environmental Health Technology (*Balai Besar Teknik Kesehatan Lingkungan* or BBTKL) in Surabaya, it was observed that the quality of the air had deteriorated as it contained a high amount of manganese.¹³⁵ The mud was also observed as dangerous, since it had amalgamated with other fluids coming from industrial waste from the factories in the surrounding area.¹³⁶ The research also noted a high amount of fenol in the formation of the mud which was assumed to be generated by a decomposition of various processes with the earth. The BBTKL warned that this environmental deterioration might lead to chronic health risks for the population; they might experience haemoglobin damage or cardiac arrhythmia. Direct contact with the contaminated mud might cause skin burns or rashes.¹³⁷ As of 20th June 2006, the number of patients taken into care in

131 Badan Penelitian dan Pengembangan Departemen Kesehatan RI. *Survey Cepat Dampak Semburan Lumpur Panas di Kecamatan Porong, Kabupaen Sidoarjo Jawa Timur*. Department of Health of the Republic of Indonesia Survey Report. Jakarta (2006), p. 6.

132 WALHI, *WALHI's Position Paper PT Lapindo Brantas Mud and Gas Leak*, Report, 18 July 2006.

133 'President declares Porong region dangerous', *Antara News*, 31 August 2006.

134 This consists of 11.0 trillion IDR (909 million euro) for direct losses and 16.4 trillion IDR (1.7 billion euro) in indirect losses. Yet, by considering the long term impact of the disaster, the figure may be put as high as 44.7 trillion IDR (3.7 billion euro). See: *Loss Caused by Lapindo Mudflow Estimated at Rp. 27.4 Trillion*, *Antara News*, 12 April 2007.

135 The air in the area contained 5 times of the level of manganese recommended by Regulation Ministry of Health No. 416 of 1990.

136 The formation of the mud shows the high amount of chemical oxygen demand (COD) exceeding the number recommended by the Decree of Ministry of Health No. Kep-42/MenLH/10/1996.

137 Badan Penelitian dan Pengembangan Departemen Kesehatan RI (2006) pp. 12-13.

the medical posts and hospitals in the area numbered 4,463 patients. They suffered from, for example, gastritis, diarrhoea, cephalgia, and dermatitis.

In an attempt to deflect criticism away from its drilling activities, the representatives of the LBI pointed toward seismic activities related to the 27th May 2006, Yogyakarta earthquake¹³⁸ for setting off the disaster. Speaking at a parliamentary hearing, LBI executives told legislators that the earthquake was responsible for causing the leak to its exploration site that triggered the mud eruption at the first place.¹³⁹ On the other hand, Friends of the Earth Indonesia (*Wahana Lingkungan Hidup Indonesia* or WALHI), a leading environmental watchdog organisation in Indonesia argued that the disaster was purely the failure of the LBI's exploration team to install what is known as 'safety casing' around the exploration well to the levels required under the general standard operational procedure in natural gas extractive industries.¹⁴⁰

WALHI's allegation was supported by a letter from LBI's partner company, Medco Energy, which blamed the LBI management for not installing the protective casing in the Banjar Panji-1 well to an adequate depth of 8,500 feet as agreed in its joint operating agreement. The claim was sustained by the findings of a geologist research team from the University of Durham in the UK.¹⁴¹ The research found that the mud eruption was caused by the failure of the company's drilling team to comply with the standard safety procedure by using a steel casing to protect the well at high pressures during drilling at 2,830 metre depth.

In addition to the public denunciation of LBI regarding its efforts to avoid direct responsibility, this particular case attracted heavy criticism concerning the poor performance of the Executive Agency for Upstream Oil and Gas Activity (*Badan Pelaksana Kegiatan Hulu Minyak dan Gas Bumi* or BP MIGAS) in enforcing and monitoring the implementation of Indonesian mining regulations by a private company. As the investigation by WALHI revealed, BP MIGAS did not take any action regarding previous violations of Indonesian laws and regulations by LBI.

Of particular interest is the fact that LBI did not disseminate the information regarding their exploration activities to the nearby residents prior to commencing the drilling process on its exploration sites. This is a clear violation of Article 33(1) of Government Regulation No. 27/1999 on Environmental Impact Analysis and the Minister of Mining Circular Letter No. 1462/20/DJP/1996, in which BP MIGAS should have noticed its duty to monitor the conduct of a private company in the oil and

138 The 6.3-magnitude quake struck just before 18.00, May 27, 2006 about 15 miles south-southwest of Yogyakarta. The Indonesian Social Affairs Ministry attributed 5,782 deaths and 36,299 people injured to the quake. 'From Indonesia Lower lowers quake death toll', *CNN News*, 18 June 2006.

139 'Muckraking Java's Gas Fields', *Asia Times Online*, 14 July 2006.

140 WALHI, *Kasus Lapindo, Fakta Kegagalan Supremasi Hukum*. Case Report, 28 November 2006; 'Mismanagement 'Likely Cause' of Mudflow', *The Jakarta Post*, 24 June 2006; Richard J. Davies *et al.*, 'Birth of a Mud Volcano: East Java, 29 May 2006', *GSA Today*, 17 (2007) p. 1.

141 Richard J. Davies *et al.*, 'Birth of a Mud Volcano: East Java, 29 May 2006', *GSA Today*, 17 (2007) p. 1.

gas extractive industry.¹⁴² Beside violations by the LBI, failure to provide necessary protection was also committed by the Government. According to the study conducted by the Indonesia Centre for Environment Law (ICEL) it was revealed that both Government and private firms continue to block public access to information about environmental problems and this tends to exacerbate ecological disasters in the country. Naturally, limited public access to information on the environment made people less prepared to cope with the impacts of man-made disasters.¹⁴³

Despite overwhelming evidence of corporate negligent behaviour and the destructive impact of the disaster on the entitlement positions of the people, the overall efforts of the Government of Indonesia in addressing the problem have been entirely ineffective. In a desperate attempt to minimise the level of destruction of the mudflow, the President authorised efforts to dispose of the mud in the sea, disregarding opposition from environmentalists who argued that such a policy may instigate worse environmental disaster.¹⁴⁴ In this regard, the policy to dump the mud through the river also contravenes Article 10 of the Ministerial Decree No. 1211 K/1995 which asserts that liquid waste from mining industries should be treated carefully so as to meet environmental safety standards before dumping it into public watercourses.

6.5.3 *Combating the Growth Oriented Development Agenda: The Oil Palm Plantation Mega Project, Regency of North Barito, Central Kalimantan*

Indonesian oil palm projects cover 17 provinces of the country, employing about 2 million workers. In 2004, the total planted oil palm area amounted to 5.3 million hectares, yielding 11.4 million tonnes of Crude Palm Oil (CPO),¹⁴⁵ a record export value of US\$4.43 billion, and US\$42.3 million in government revenue.¹⁴⁶ Currently, CPO is the prime commodity in Indonesia. Only from January to August 2007, the industry has generated an income amounted of US\$5.385,7 million, which is

142 ALHI, *Lumpur, Kesengajaan atau Kelalaian?* Case Report. 28 July 2006.

143 Adianto P. Simamora, 'Information on environment blocked by government: Study', *The Jakarta Post*, 2 March 2008.

144 n taking into account the President's approval, the Sidoarjo district administration and legislative council authorised the efforts to pump untreated mudflow water into Porong River, despite earlier statements by the State Minister for the Environment, Rachmat Witoelar that the water would have to be treated before being dumped into the river. 'Team Endorses Piping Mud Water to Sea'. *The Jakarta Post*, 18 September 2006.

145 Simply put, oil palm is the most productive oil seed in the world. A single hectare of oil palm may yield 5,000 kilograms of crude oil, or nearly 6,000 litres of crude. For comparison, soybeans and corn—crops often heralded as top bio-fuel sources generate only 446 and 172 litres per hectare, respectively. Beyond bio-fuel, the crop is used for a myriad of purposes from an ingredient in food products to engine lubricants to a base for cosmetics. Palm oil is becoming an increasingly important agricultural product for tropical countries around the world, especially as crude oil prices top \$70 a barrel.

146 Friends of Earth. *The Kalimantan Border Oil Mega Project*, Report of Friends of Earth the Netherlands and the Swedish Society for Nature Conservation. April 2006.

US\$1.848,7 million more than the sum in the same period of 2006.¹⁴⁷ With this growing number of projects, Indonesia is expected to be one of the biggest producers of CPO in the future.

Regardless of such prospective statistics, negative effects have also been observed. In the Regency of North Barito in the border province of Central Kalimantan,¹⁴⁸ annual forest burning or burning for land affects the surrounding region.¹⁴⁹ In 2001, a thick dark haze occurred because of 153,560 square kilometres of burning forest, wrapping the regency of North Barito and its surroundings.¹⁵⁰ Although this situation was in part caused by the manner of farming by the indigenous people in the area, the smog was not comparable to the burning caused by the palm oil companies, which burned peat forests to clear the area for plantation. Similar hazards were also detected in August 2003,¹⁵¹ July 2005,¹⁵² and August 2007.¹⁵³ The National Board of Meteorology and Geophysics Board analysed the fact that the fires took place not only at the industrial plantation forest, but also at the palm oil plantation. Yet, according to the Sawit Watch, Indonesia has increased its palm estates to 7.3 million hectares, and is planning to expand the area under plantation by a further 20 million hectares – an area the size of England, The Netherlands and Switzerland combined.¹⁵⁴

Moreover, the industry has also notoriously been known as the cause of local conflicts. Only in January 2008, the Sawit Watch monitored 513 conflicts between communities and companies. Some of these conflicts can be traced back to earlier land disputes. Mostly these disputes cover the issue of land rights, but other disputes arise over levels of compensation, unmet promises, and over farming arrangements. The industry has also caused displacement, homelessness and morbidity. In Aceh, it was observed that 360,000 people were displaced from their homes and 70 died as a result

147 Ministry of Communication and Information Technology of Indonesia, *CPO Kontributor Devisa Terbesar di Indonesia*, News, October 8, 2007, <http://www.depkominfo.go.id/portal/?act=detail&mod=berita&view=1&id=BRT071008154201>, retrieved October 25, 2008, at 16.12.

148 Central Kalimantan lies in a strategic location, facing Java Island and it plays a role as an interconnecting transportation among provinces in Kalimantan. Therefore, this Province has good prospects and great potential for economic development in Kalimantan in the near future. To the North, Central Kalimantan borders are West Kalimantan and East Kalimantan Province, to the South border is Java Sea, to the East borders are East Kalimantan and South Kalimantan, and to the west border is West Kalimantan.

149 'Kebakaran Hutan di Kalteng Makin Hebat', *Kompas*, 6 September 2001.

150 In 2001, the National Meteorology and Geophysics Board observe 77 fire points in the area of palm oil plantation. 'Asap Membalut Kota Samarinda dan Pontianak', *Kompas*, 25 August 2001.

151 In 2003, 194 fire points were observed in Central Kalimantan which included the Regency of North Barito, 'Sampit Diselimuti Asap Tebal', *Kompas*, 8 August 2003.

152 In 2005, the haze was caused by the opening of forests for palm oil plantation. 'Kebakaran Hutan dan Lahan Merambah Kalimantan Tengah', *Tempo Interaktif*, 27 July 2005.

153 'Kalimantan Tengah Minta Helikopter', *Kompas*, 20 August 2007.

154 Friends of Earth, Life Mosaic and Sawit Watch. *Loosing Ground: The Human Rights Impact of Oil Palm Plantation Expansion in Indonesia*. Executive Summary. February 2008, p. 2.

of floods in 2006, which has been a common problem in the region since oil palm plantations arrived.¹⁵⁵

The palm oil project has become the main business commodity for the Province of Central Kalimantan. In 1984, the Provincial Government of Central Kalimantan designed a Master Plan of Plantation Development and reserved 139,500 hectares or 20% of the size of Central Kalimantan (15,356,400 hectares) to develop their agribusiness potential. Half of this allocated land was devoted to the palm oil project. In the North Barito Regency, there are two main companies investing in the palm oil business: the Antang Ganda Utama Ltd and Multi Persada Gatra Megah Ltd. From both companies, the Antang Ganda Utama Ltd owns the largest permitted plantation land, which is 54,725 hectares.¹⁵⁶

According to the 1997 investigation report of *Tempo*, a leading national magazine in Indonesia, Antang Ganda Utama Ltd was one among hundreds of companies responsible for the burning of lands and forests.¹⁵⁷ Initially, the responsible actors and local government neglected the result of this research. Instigated by complaints of thick haze from Malaysia and Brunei Darussalam it took the provincial government of Central Kalimantan until 2001, to run an investigation on Antang Ganda Utama Ltd with regard to their part in causing forest burning of open up land for palm oil exploitation.¹⁵⁸ Unfortunately a clear result of the investigation is unknown; in fact the governor of Central Kalimantan refused to be responsible for the accusations coming from Malaysia and Brunei and instead responded that the fire points existed not only in the Central Kalimantan Province but also in Serawak and Brunei Darussalam.

In 2005, instigated by the annual continuation of the burning of forests, the regency (government) of North Barito blamed and fined Antang Ganda Utama Ltd for causing the light haze blanketing in some parts of the region.¹⁵⁹ The motivation behind this action is devious. Around three weeks before the environmental fine was issued, the regency also complained about the delay of the company's tax payment of about 247.9 million IDR.¹⁶⁰ It is still unknown whether Antang Ganda Utama Ltd complied with their obligation to pay their environmental fine and governmental taxes. At the time of writing this thesis, a similar situation lingers, because Antang Ganda Utama Ltd is still obliged to pay 576 million IDR tax duties in 2007.¹⁶¹

Although economic contributions from palm oil are lucrative, its expansion has spiralled out of control. It severely damages Indonesia's environment, biodiversity and indigenous communities. Millions of hectares of tropical forests have been cleared to

155 *Ibid.*

156 Regency of Barito Utara, *Daftar Pemegang IUP tahun 2006*, Database on Palm Oil Companies 2006. <http://www.baritoutarakab.go.id/potensi-dan-komoditas-unggulan/sektor-kehutanan/>, retrieved August 30, 2007 at 12.37.

157 'Siapa Membakar Hutan?', *Tempo Interaktif*, 24 September 1997.

158 'Kebakaran Hutan di Kalteng Makin Hebat', *Kompas*, 6 September 2001.

159 'PT AGU Didenda Bakar Lahan', *Banjarmasin Post*, 30 January 2005.

160 'PBB Perkebunan Nihil', *Banjarmasin Post*, 2 January 2005.

161 'Austral Byna Tunggak Pajak 98.8 Milyard', *Kalteng Pos*, 28 July 2007.

make way for oil palm plantations. Many endangered species, such as orangutans, tigers, rhinos and elephants have been pushed to the brink of extinction while their habitat has been cleared away. Moreover, heavy agrochemical inputs and CPO production are polluting rivers and streams. Deforestation and burning for land clearing releases massive amounts of carbon dioxide into the atmosphere, aggravating global warming. Burning for land clearance in Indonesia each year causes a cross-border haze affecting the health of millions of people in Indonesia, Singapore, Malaysia and Brunei. Furthermore, to the indigenous inhabitants, oil palm plantation projects mean the final dispossession of their customary rights to land and with this loss their unique culture and indigenous knowledge is set to fade away in the annals of history.

However, there is no economic compensation allocated for these detrimental effects. Victims of the palm oil project employed channels of participation through protests and demonstrations. With the assistance of Friends of the Earth Indonesia, WALHI, in May 2005, a letter of petition was signed by the inhabitants of seven villages in Montallat Municipality, Gunung Timang Municipality and Teweh Tengah Municipality of the North Barito region. This action had its roots also in the uncompleted compensation payment for damages to their indigenous land since 1992.¹⁶² The petition demanded that the Government revoke the renewal of the working contract of Antang Ganda Utama Ltd.¹⁶³ This policy was assessed to confiscate 30,000 hectares indigenous land and worsen the environmental habitat of the area. Because there was no response from the regional government, in February 2006, the people of Montallat Municipality blockaded 25,000 hectares of the plantation area belonging to the Antang Ganda Utama Ltd.

Notably, measures taken to deal with homelessness, landlessness, degradation of health, morbidity, or social conflicts are not appropriate. Instead the Government recently adopted the Government Regulation No. 2 of 2008, which provides a broad license for companies to exploit protected forests as long as they are willing to pay annual rental fees ranging from 1.2 million IDR (US\$125) to 3 million IDR per hectare. Indeed, the law prioritizes companies over people, who are now having more vulnerability to development hazards.

6.6 CONCLUDING REMARKS

The poor patterns of actions taken by the Government of Indonesia indicate competing struggles in conceiving and proliferating human rights as both legal resources and political instruments. The discussion in this chapter provides some explanations.

¹⁶² 'Warga Blokir Perkebunan Sawit Kalteng', *Kompas*, 12 February 2006.

¹⁶³ Decree of the Regency of Barito Utara No. 188.45/447/2003 on 15 September 2003 on Permit Location for Palm Oil Plantation for PT. Antang Ganda Utama; Decree of the Regency of Barito Utara No. 188.45/411/2004, tanggal 27 Juli 2004 on Partnership Guidelines of Palm Oil Plantation; WALHI, *Masyarakat Tujuh Desa Tuntut Pencabutan Keputusan Bupati Barito Utara*, Official Letter to the Regency of Barito Utara, 16 May 2005.

The nature of development in Indonesia has been occupied with macroeconomic goals and at the same time has been challenged with erroneous practices and agendas stemming from vested interests. Particularly during the New Order regime, unity and stability are the principles carried out throughout the process of development. Apart from these principles, the nation still embraces the legacy of conformity, as one Indonesian ‘family’, in the development process. Unfortunately the principles of unity and national stability silence out the processes of development from below. They often hinder genuine participation and are not necessarily effective in promoting the necessary protection of right-holders in development.

Moreover, there is a deficiency in attributing the necessary entitlements to the right-holders to assert their rights. This deficiency is due to the different perception of the status of the right-holders in relation to their entitlements to such matters as employment, health or education in Indonesia. They are mainly perceived as an instrument for economic development. Granting fair employment benefits to workers, for example, is convicted to inhibit the process of development and to disadvantage and alarm foreign investors.

Likewise, development actors at the local levels are lacking the political will and aptitude to examine the significance of regulations and policies in terms of people’s actual needs. There are many laws and policies that disregard people’s entitlement positions and withhold the necessary protection. These discouraging laws and policies consequently continue to expose people to development hazards. In the case of Indonesia, therefore, human rights standards that have been legally adopted at the higher level of Government are not being translated into effective protection at the lower levels.

This has consequently led to the next problem, which is the significant deficit in the actual command and access for people to assert their human rights-based entitlements. Even when people have been made aware of their entitlements and have taken legal or political action against the development hazards that struck them, Government often still fails to act in respect of their entitlement positions, while honouring judicial decisions and fulfilling its obligations. Such discouraging approaches in response of human rights-based activism may eventually overturn all current efforts towards creating more favourable development environments.

Furthermore, the Indonesian Government has been reluctant to take political risks in the realisation of supremacy of human rights law in several sectors related to development because such protection might endanger political stability and economic growth. It is feared that an emphasis on the human rights-based entitlements in the development process could harm the bureaucratic machine and slow the process of macroeconomic development.

The entitlement of participation, which figures in many regulations and laws related to development, sets out a precondition for inclusive decision-making. Undeniably, there has been quite some human rights activism in processes of combating development hazards. However, the defensive character of national human rights incorporation in Indonesia, as also explained in Chapter 5, has not yet resulted in an

effective playing arena for human rights activists to pursue related entitlements in development.

The discussion in this chapter suggests that to realise development as a right takes more than incorporating the entitlement of participation and the creation of a favourable macroeconomic environment. Seen from this angle, the prospect of promoting development as a right in Indonesia seems difficult to assess, because changes have only been experienced for 10 years. The changes have indeed created new arenas of distribution of power and politics of inclusion, but it still demands attention to improvement in actual mechanisms that can guarantee people's entitlement positions in deciding upon development policies.

CHAPTER 7

PARTICIPATION FROM ABOVE: AN ILLUSTRATIVE HISTORY OF A DEVELOPMENT PROJECT IN SENDANG AGUNG VILLAGE, YOGYAKARTA, INDONESIA

7.1 INTRODUCTION

The discussion in Chapters 5 and 6 shows a considerable improvement in incorporating human rights discourses into the Indonesian legal and political systems that are also related to development. This chapter will continue the discussion by presenting an empirical case study of a development process in Indonesia. Here the participatory process in respect of the Kebon Agung Bridge construction project in Sendang Agung Village (2003) in the Province of Yogyakarta will be illustrated. An attempt will be made to examine whether the development process involving implementation of the bridge construction project embraced protection of the right-holders based on the norms stipulated in the UN Declaration on the Right to Development. In particular, a question will be asked whether development practice in the case of the Kebon Agung Bridge construction project advances the entitlement positions of the villagers.

In the next section, the phenomena of decentralisation and participation and their impact on the development process at the village level will be discussed. Subsequently, attention will be paid to the background and framework of this case study. The chapter continues by sketching the current village profile in order to give an overall understanding of the setting behind the case study. Presentation of the case study, including its chronology and the participatory process, is described afterwards. This will be followed by an analysis of the development process in the case of the Kebon Agung Bridge construction project in Sendang Agung Village. Thereafter, a comparative discussion of participatory practices in Yogyakarta is presented to uncover alternative streams of participation in the surrounding areas.

7.2 DECENTRALISATION, PARTICIPATION AND DEVELOPMENT PROCESSES AT THE VILLAGE LEVEL

During the New Order regime, the village government structure was modelled on the governance institutions of Javanese village. The structure is regulated in Law No. 5 of 1979 on Village Government. Historically, this law was issued because older regulations were deemed by the New Order regime to be inadequate for the government's plan to accelerate rural development.¹ The elucidation text of Law No. 5 of

1 Anthony Bebbington *et al*, 'Village Politics, Culture and Community Driven Development : Insights from Indonesia. *Progress in Development Studies*. 4 (2004) p. 190.

1979 specifically commented that the previous laws and regulations did not create uniformity in village government and therefore did not stimulate the community to develop.² The local communities were in various forms and structures, each area had its own characteristics and this was considered hindering intensive upgrading to succeed development. The priority for a centralistic approach had to do with the diversities between established villages which brought them beyond the reach of the central government.³ Accordingly, this type of structure was not conducive to the control and access needed by the New Order. On the issue of uniformity of village government in Indonesia, Michael Vatiokiotis once commented that:

‘On a broader scale, an attempt was made to mould Indonesian society into a more uniform shape employing Javanese cultural norms. The Law No. 5 tried to model village administration throughout the archipelago on the Javanese *desa*. Traditional Javanese village are self-contained units led by an appointed headman with wide-ranging powers’.⁴

Law No. 5 of 1979 imposed a standardized structure for villages in the whole Indonesia, called *desa*, subdivided into hamlets, called *dusun*. This law was aimed at strengthening the local communities. They had to be made ‘legible’ and simplified so that they could be used as vehicles to achieve stability and, indirectly, legitimacy.⁵ In this regard, the clarification of Law No. 5 of 1979 stated that to ‘sustain development in all sections across Indonesia and to achieve the national aspirations of Pancasila – a just and prosperous society, material as well as spiritual, for the people of Indonesia – there is a need to strengthen village government’.⁶

Therefore, with the legitimation derived from Law No. 5 of 1979, village affairs were brought firmly under the supervision and control of higher authorities. Village structures were put uniformly within the hierarchical authority of the Ministry of Home Affairs in Jakarta. The law indeed asserted that such an entity had ‘the right to manage its own affair’, but it emphasised that this ‘does not mean autonomy’.⁷ In practice, the position of village heads was controlled by the central government, the provincial government and the regional government.⁸ They were not accountable to the community but to the district head, acting on behalf of the Governor of the province.⁹

Internally, village heads obliged to be accountable for their administration to the Village Community Council (*Lembaga Musyawarah Desa* or LMD), which was

2 Paragraph 2, Elucidation of Law on Village Government No. 5 of 1979.

3 Hans Antlöv, ‘Village Government and Rural Development in Indonesia’, the New Democratic Framework’, *Bulletin of Indonesian Economic Studies*. 39 (2003) p. 196.

4 Michael Vatiokiotis, *Indonesian Politics Under Suharto, Order, Development and Pressure to Change*, (London: Routledge, 1993) p. 110.

5 *Ibid.*

6 Section 1.3, Elucidation, Law No. 5 of 1979.

7 Section 7, Elucidation, Law No. 5 of 1979.

8 Section 3, Law No. 5 of 1979.

9 Article 1b, Law No. 5 of 1979.

anyway headed by the village head. In implementing development projects, the duty to control internal accountability was mandated to the Village Community Consultative Council (*Lembaga Ketahanan Masyarakat Desa* or *LKMD*), which was also chaired by the village head. The existence of LMD and LKMD allows people to have a role in governance, but it gives the village head the final word just to make sure, and the district head (and other higher authority heads) the right to ‘veto’ everything.¹⁰

Standardisation of local communities had been effectively disallowing and destroying the traditional governance structure. The maximum organisation and control of community life had effectively advanced economic development, albeit that they had been deeply and negatively affected communities for decades by destroying community institutions and traditional social security mechanisms. Furthermore, as the village head was obliged to provide his loyalty to higher authority, this gave no room for popular aspirations to arise. Genuine participation was impossible as people were only considered to be objects of policy implementation and control from the central government.

Against these discontents, the new autonomy law was adopted to establish a new discourse in the relationship between the village and the central government, allowing opportunities for innovation and aspirations from below. Relevant to the analysis of this case study are Law No. 22 of 1999 on Local Autonomy and Government Regulation No. 76 of 2001 on Village Government.¹¹ Article 1 of this Law states that regions (provinces, districts and municipalities) will have full autonomy to ‘govern and administer the interests of the local people’, providing this takes place within the parameters of ‘the Unitary State of the Republic of Indonesia’ and Pancasila.¹² Moreover, this article declares that the village unit will now have the authority to govern and administer people based on local *adat* (indigenous tradition), replacing the unitary requirements of the *desa* system, which had been imposed by the central government.¹³

Additionally, there are some features that may support the participatory process. The first is that the law proclaims villages to no longer be under the authority of the sub district but as an autonomous level of government.¹⁴ They have the right to raise funds,¹⁵ while to pass village regulations they do not need to consult with or have approval from authorities.¹⁶ Villages even have the authority to reject projects from

10 Anthony Bebbington *et al* (2004) p. 190.

11 In this chapter the analysis of participation is made based on the provisions stipulated in Law No. 22 of 1999 on Local Autonomy issued on 7 May 1999. Because the participatory activities was taken place in the Bridge Construction Project took place in 2003. Currently, Law No. 32 of 2004 governs the local autonomy in Indonesia.

12 Article 1(i), Law No. 22 of 1999.

13 Article 1(o), Law No. 22 of 1999; Article 3, Government Regulation No. 76 of 2001.

14 Article 93(1), Law No. 22 of 1999.

15 Article 100, 107 and 108, Law No. 22 of 1999.

16 Article 99, Law No. 22 of 1999.

other levels of government if they are not accompanied by funds, personnel and infrastructure.¹⁷

The second is the introduction of the Village Representative Board (*Badan Perwakilan Desa* or the BPD).¹⁸ As an institution charged with the task to evaluate the village government, the BPD has the power to draft village legislation, to approve village budget and to monitor village government. This institution also has the right to propose to the district chair that the village head be removed.¹⁹ Furthermore, local regulations and budgets are now to be decided jointly by the BPD and village head and higher authorities need only to be informed of the decision.²⁰

The third improvement concerns the issue of accountability. The new law stipulates that the village head is to be responsible to the village population through the BPD. This entails the obligation to submit an annual accountability report, which can be contested by the BPD. Therefore the village head is not primarily oriented upwards, but is accountable to the population and is answerable to the BPD.²¹

Moreover, the clarification text of Government Regulation No. 76 of 2001 on Village Government asserts that the conduct of governance and village development must facilitate active participation which entails active involvement of people in order for them to have ownership and also be responsible for the improvement in the village.²²

In theory, the implementation of decentralisation in Indonesia could give villages the ability to not only propose development projects but also turn down large-scale projects that they consider harmful to the best interests of their constituents.²³ While prior to the local autonomy laws village heads were approved by higher administrative levels and were responsible to those officials, now they are elected by the community and must report to the representative of the people in the village structure, the BPD. This new level of accountability is assumed to provide people with a greater say in influencing policy decisions that affect them.

7.3 BACKGROUND AND FRAMEWORK OF THE CASE STUDY

There are several reasons to select the case of the bridge construction project in Sendang Agung village to illustrate the practice of participation in a development process in Indonesia. As mentioned in Chapter 3, bridge construction projects fall into the category of mega-development projects that may give rise to development

17 Article 100, Law No. 22 of 1999.

18 Article 209-219, Law No. 22 of 1999.

19 Article 103(2), Law No. 22 of 1999; Article 19(2), Government Regulation No. 76 of 2001.

20 Article 105(5), Law No. 22 of 1999; Article 18, Government Regulation No. 76 of 2001.

21 Article 102(b), Law No. 22 of 1999.

22 Section I paragraph 2, Government Regulation No. 76 of 2001.

23 Christopher R. Duncan, 'Mixed Outcomes: The Impact of Regional Autonomy and Decentralisation on Indigenous Ethnic Minorities in Indonesia', *Development and Change*. 38 (2007) p. 719.

hazards.²⁴ Often the objective of such a project merely serves macroeconomic development instead of advancing the entitlement positions of people. In the construction of a bridge, land forfeiture may occur and without fair and just compensation, it might generate development victims. Moreover, the cases presented in Chapter 3 also revealed that when poorly planned, such development projects may cause further suffering for the population in the proximate area because of the continuous inconveniences caused by the unfinished construction work.²⁵

Another reason for choosing the project as a case study is its unique location, which is embedded in traditional characteristics. The Province of Yogyakarta, located in the centre of the island of Java, holds a special status as the only province in Indonesia that acknowledges the authority of a Javanese king (*Sultan*). Sri Sultan Hamengku Buwono X is the tenth king of Yogyakarta who replaced his deceased father, Sri Sultan Hamengku Buwono IX, on 3rd March 1989. On 3rd October 1998 he was elected governor of the Province of Yogyakarta, an official political position lasting for two consecutive periods.²⁶ In 2008, the position of Sri Sultan as the governor of Yogyakarta has extended for another 3 years, as the province awaits a new regulation of its special status. Naturally such favouritism towards him as the cultural king of Yogyakarta while at the same time being elected as the official head of government confirms the strong cultural character of the area and the bond between him and the population. Moreover, it represents the dependency of the population toward a certain figure and its inclination to nurture that.

Furthermore, in the case of the bridge construction project in Sendang Agung Village, a participatory practice was observable. *Bernas*, a leading local newspaper in Yogyakarta, reported that the project had been initiated by the inhabitants of Sendang Agung village. There was a petition proposing development of the Kebon Agung Bridge to cross the Progo River.²⁷ The petition was completed in November 2000 and together with the village proposal of the Kebon Agung Bridge, it was brought to and successfully approved by the regional and provincial governments. This claim may suggest that local interests were represented and honoured after the adoption of Law No. 22 of 1999.

From the first glance, this claim hints an existence of participation from below. Nevertheless, given to the complications in implementing the universal right to participate in Indonesia explained in Chapter 5 and 6, the possibility of an 'actual' participation from below becomes worthy of note. Of course the enactment of local autonomy laws that normatively guarantee participation might contribute to this progress. But one should also be careful in making the claim given to the nature of

24 See: Section 3.1. Introduction, Chapter 3 of this book.

25 See: Section 3.3.1.2. on Yacyretá Hydroelectric Project, Argentina/Paraguay, Chapter 3 of this book.

26 As a governor, Sri Sultan Hamengku Buwono X replaced Paku Alam VIII (from *Kadipaten Pakualaman*, a culturally defined area in the South West of the Province of Yogyakarta). For the period 1998 to 2003 he governed without any assistance of a vice governor, whereas for the period 2003-2008, Paku Alam IX was appointed to assist as the vice governor.

27 'Minta dibangun Jembatan, Warga Minggir Kumpulkan Tanda Tangan', *Bernas*, 27 October 2000.

such a mega-development project and the cultural values/practices that provide a contextual setting. This particular argument motivates the third and main reason for choosing the case study to illustrate a participatory development in Indonesia, particularly after the New Order.

Based on the foregoing explanation, a hypothesis on implementing the entitlement to participation at the local level can be drawn. Improvement on local autonomy laws after 1998, stipulating the entitlement to participate and the increasing authority of village governments would imply that one could expect there could be participation from below in development projects. Given to the choice of a construction project like a bridge, such participation is, however, rather unlikely.

In previous chapters, development has been defined as a process to advance the entitlement positions of the intended beneficiaries. Thus, development should be able to bring an improvement in terms of material matters and is supposed to ensure that the intended beneficiaries can sustain their daily livelihoods. Human rights in this respect may provide the necessary mechanisms to ensure that such a process, not only protect the development beneficiaries in advancing their entitlement positions, but also secure their entitlements. It is, indeed, the incorporation of human rights standards in development that could ensure that the process has transformational values for the intended beneficiaries.

Moreover, attention has been paid to how development without human rights may cause development hazards. In those cases the Declaration on the Right to Development normatively offers a possible protection tool by requiring participation. Participation in this respect is considered not only as a remedy when there is a failure of development, but also as a mechanism to prevent that by operating as a policy's consultative, monitoring and evaluation instrument. Through the application of participatory processes, development will consequentially serve people's interests and therefore will be unlikely to create victims of development.

In the case study of the Bridge Construction Project in Sendang Agung Village, a wide range of issues; economic, social, cultural, and political will be explored. The question will be raised whether the existing institutional mechanisms work in favour of implementation of the entitlement to participation at the local level, where structures and relationships are different than those in national level. The case study aims to complement the similar analysis, but more at the national level of Indonesia, provided in Chapter 5 and 6.

The perspectives on participation of both the village government and the people are key issues in an analysis of the case study. Furthermore, the study assumes that most societies are stratified, but not isolated. Hence it presupposes that there is inequality in power relations, which shape the outcomes and the kind of development policy.²⁸ This research focuses on the relationship (interaction) between the agency of different actors and the opportunity structure leading to the fulfilment of the entitlement to participation. Subsequently, the study will also analyse the time period of participatory

28 For explanation on the kind and outcomes of development policies, see section 3.2.3. of this book.

practice, whether it was conducted at initial, on-going or operational decisions²⁹; and to what extent it actually contributes to the normative idea of development.³⁰

The data for the case study have been collected qualitatively, in particular, by documentation studies, observations and conversational interviews.³¹ The qualitative methods aim to discover the unknown, the how and what behind people's movements, and to explore whether the factors are multidimensional and combined or are sequenced in certain ways.³² In adopting this approach, village government staff members, community leaders, and ordinary people who were identified as having informed opinions about the topic of the case study were interviewed. Additionally, the statistical data was collected with the assistance of village government staffs.

7.4 A PROFILE OF SENDANG AGUNG VILLAGE

The following sub-sections depict the profile of Sendang Agung village, through which it is possible to understand the context and setting of the case study. This section will take a closer look at the issues of location, population and their entitlement positions and development interests.

7.4.1 Location and Accessibility

The name of Sendang Agung literally means 'the great natural water spring'. The name reflects the location of the village which is near the Merapi volcano and therefore particularly enjoys the benefit of fertile soil conditions and enough preservation of water. Sendang Agung is located in the North of Minggir Municipality, in the regency of Sleman. The village occupies an area of 567.61 ha and shares its borders with Sendang Sari village on the West part and Sendang Mulyo village on the South part, while on the North and West parts, the biggest river in Yogyakarta, the Progo River, detaches the village from the Kali Bawang Regency. Administratively, there are 15 *dusun* or hamlets,³³ each of them headed by a *kepala dusun* or hamlet head who is responsible for village daily life and administration, such as addressing disputes between neighbours.

29 For explanation on the definition of participation, see section 4.2.1. of this book.

30 For explanation on Development as an Integral Normative Concept, see section 3.2.2. of this book.

31 The field research for this case study was conducted twice; April-July 2004 and February-May 2005. The author positioned herself as an observant of the population, the village government and the bridge construction project in the Sendang Agung village and used open-ended questions, texts and image data to narratively describe the presence phenomenon.

32 For further explanation on this type of methodology see John W. Cresswell, *Research Design Qualitative, Quantitative and Mixed Methods Approaches*. (London: Sage Publication, 2003) pp. 3-23.

33 Those *dusuns* are: Dusun Kisik, Dusun Minggir, Dusun Minggir Selatan, Dusun Babadan, Dusun Pojok,, Dusun Watu Gajah, Dusun Bontitan, Dusun Brajan, Dusun Kliran, Dusun Bekelan, Dusun Tengahan, Dusun Tengahan Selatan, Dusun Dukuhan, Dusun Nanggulan and Dusun Jomboran.

The main reason to construct a connecting bridge at Sendang Agung village is its location and accessibility. Located about 30 km to the North of the city of Yogyakarta, there are two main roads connecting this village with other villages and the city, namely the Kebon Agung Road in the Eastern part and the Sembuhan Road in the Western part. However, the Kebon Agung Road is the only one that actually crosses the village. Considering the geographical fact that this village shares one of its borders with the Progo River, which makes it a 'dead end' village or the last village before the river, the government just built the Kebon Agung road as a middle level type of road or 'municipal road', measuring 5.5m in width. This fact places the village at the end of economic activities originating in the city, making it unattractive for big companies to transport their business through or to this village, which sometimes causes logistic-distribution problems.³⁴ The business prefers to go around, across the North part, where a bridge crossing the Progo River exists into Nanggulan village.

Such a remote location affects the transportation facilities of the village. One company, *Koperasi Pemuda*, monopolises transportation through this village, managing eight small buses to the city of Yogyakarta and 10 small minibuses that travel a smaller distance, for example to the nearest big market called Godean. These buses perform their service from 8 am in the morning to 4 pm in the afternoon. On a normal day, it takes around 1 hour 40 minutes to get to the city of Yogyakarta, which is only around 30 km away. The village bus, actually the only available public transportation, stops near almost every intersection or small shop to collect passengers. There is a maximum of 1 bus every hour and they arrive very irregularly. Due to these limitations, there are privately-run motorcycle-transportations, called *ojek*, operated by the population of the Sendang Agung village and they operate almost 24 hours a day.

7.4.2 Population, Economy and Development Interests

The village statistics reveal that there are 2,279 households or 8,801 people currently residing in the Sendang Agung village.³⁵ Among them Islam is the most common religion, amounting to 70% of the total population, 25% of the population are Roman Catholic, while the remaining 5% are Protestant. With regard to educational statistics, 68% of the total population has completed the 9 years basic obligatory education and 18% enrolled in higher technical colleges or universities.³⁶ Such a low statistical performance in the field of education is mainly due to the lack of schools in this village, especially for the higher levels. As there are only 5 kindergartens and 5

34 During the field research, there was a problem with the distribution of oil. One of the respondents told that she had been going to the local shops every morning to get the oil she needs, but as the supply was very limited combined with the fact that the distributor only comes every Thursday, by noon the oil had already been sold out. Observation, author, Dusun Pojok, April 3, 2004.

35 Annex, Sendang Agung Village Regulation No. 3 of 2003.

36 Statistics Data of Sendang Agung Village, issued 1 February 1999.

elementary schools, students who want to continue their education need to travel to the high schools located in bigger villages or in the city of Yogyakarta.³⁷

From the total village population, 5,070 people are in jobs, of which 73.6% are peasants.³⁸ Most peasants inherited family properties and continue the obligation to maintain them as family assets. In reality, they typically have no other option of work than carrying out this responsibility, since many do not finish basic education.

On average, each family owns about 0.1 ha of land for paddy, *mendong*,³⁹ or vegetables. The wetland, or *sawah* for paddy plantation, is to be found all around the village, covering more than half of the village area, which is 203 hectares of the total 241 hectares of *sawah* located at the side of the Kebon Agung road.⁴⁰ Approximately 2,700 tonnes of paddies are produced annually, and from this amount they can live less than sufficiently.⁴¹ If each hectare of land can quarterly produce around 6.4 tonnes of paddy⁴² and the price of rice is around 1,300 IDR/kg, this means that on average a paddy peasant can, approximately, earn a meagre amount of 832,000 IDR or 3,328,000 IDR per year.⁴³

Besides rice, another potential agricultural product is *mendong*, which covers an area of around 38 ha. The main reason for positioning *mendong* as another important agricultural product is its high level of productivity. Each year, the peasants just need to sow it once and with that they can harvest 3 to 4 times a year. Therefore, the village government encouraged the development of the *mendong* handicraft industry to increase the peasants' income. In fact, in line with the Province of Yogyakarta's campaign of 'one village one product', in 2001 *mendong* handicrafts became the unique product of the Sendang Agung village. However, recently the income derived from a *mendong* plantation has no longer been promising. In 2004, the price of *mendong* decreased from the 2000 price of 2,500 IDR to only 500 IDR per kg.

Other less popular handicraft industries in the village are bamboo and *parut*. The bamboo industries are quite famous in producing plaited materials, such as bags or rugs. There are 5 bamboo handicraft workshops in this village; they export their

37 *Ibid.* Usually the students go to Godean, a bigger municipality city with better education facilities, or to Yogyakarta city.

38 The total number of peasants is 3,733, constituting of: wetlands owner peasants 2,385 persons, dryland owner peasants 532 persons, renting peasants 94 persons, labour peasants 345 persons, pond owner peasants 302 persons and pond renting peasants 75 persons. Annex, Sendang Agung Village Regulation No. 3 of 2003.

39 *Mendong* is a seasonal plant that looks like a grass of 1-metre height, it is a material used to make a thin rug.

40 Interview with Hadjid Badhawi, head of the Sendang Agung village, author, 30 March 2004.

41 According to the Central Statistic Bureau's data of 2002, the Province of Yogyakarta consists of 98,049 Ha wetland paddies, producing 537,955 tonne/year. *Statistik Indonesia*, BPS, Jakarta, 2002, p. 152 and 155.

42 The variety of paddy planted in Sendang Agung village is Ir64, Code, Batang Gadis dan Sintha Nur developed by Mudjisihono dan Teguh S. in 2001.

43 According to Decree of Governor of Yogyakarta No. 218 of 2005, the minimum wage in Yogyakarta 400,000 IDR per month or 4,800,000 IDR per year.

products not only to the cities of Yogyakarta and Jakarta, but also to the Netherlands, the US, and Australia. Besides bamboo, the village also produces *parut*,⁴⁴ a cooking tool to grind coconut; a home production which centralizes in the *dusun* Pojok.

The trading activities in the Sendang Agung village are centralised in the main market, located at the end of the Kebon Agung road between *Dusun Kliran* and *Dusun Pojok*, by the side of the Progo River. The market is built on village owned land (*tanah kas desa*), which is managed by the village government. This main market is the heart of the village's economy,⁴⁵ situated in front of the office of the village government; it is also where the village transportations dispatch.

In Indonesian language, the word 'development' can be translated into two different words, the first is *pembangunan* and the second is *perkembangan*. Regarding the first term, the root word of *pembangunan* is *bangun*; which is an activity of building. In this context, *pembangunan* implies the material activities of development, manifested in apparent results of the process, namely big buildings, roads, or bridges. The second term, *perkembangan* is coming from the word *kembang*, which can be translated as blossoming of flowers. *Perkembangan* signifies uncountable progress, meaning enhancement of one's own capacity; for example improvement in school curriculums. Notably, the term *perkembangan* implies a different conviction of development related to right-holders inherent needs and human dignity; or could be interpreted as development from below. The term has indeed a stronger relevance to the normative principles of development accommodated in the Declaration on the Right to Development. For both *pembangunan* and *perkembangan*, there are no translations in the Javanese language.

For the population of Sendang Agung Village, development is not an unfamiliar concept. They always use the word *pembangunan* when talking in the context of the case study. The term usually serves to introduce a new policy or project in village meetings.⁴⁶ The population perceives development as good, beneficial and important for the overall condition of the village. They correlate its meaning with the idea of having their village achieve the same facilities as in the city, particularly big roads and regular transport, as well as telephone lines. These facilities are assumed to create more business opportunities.⁴⁷ Thus, development refers to the overall situation of the village, relating it with visible improvements in terms of infrastructure facilities.

44 Parut is a tool to grind coconut or '*kambil*' which is made from Melinjo wood. The tool is shaped and measures 10cm x 30cm. It is highly demanded in Yogyakarta as it speeds up the grinding process of coconut more than the modern grinding tools made from aluminium.

45 Many of the population, especially the wives of the peasants – in order to earn extra income, sell their vegetables, or even own a permanent small shop in the market. Their small businesses actually help to sustain daily livelihoods, as the income from the crops comes only 3 times a year. The nearest alternative market is located in Godean, about 10 km from the village. This market is considered the biggest of the Minggir municipality, attracting peasants and sellers from 17 villages who come regularly to this market to sell their products.

46 Interview, author, Dusun Pojok, 5 April 2004.

47 Interview, author, Dusun Pojok, 4 March 2004.

Such a material notion of development explains the support obtained by the village government in implementing their development policies and projects. Hitherto there have been neither essential nor significant objections towards any of the projects or policies in this village. The village government tends to succeed not only in gaining political support for development projects, but they can also, without difficulty, request time and material contributions from the villagers. Such an activity is popularly known as *kerja bakti* (or *herendienst* back in the colonial times). It can be defined as an uncompensated collective work aimed at serving common interests. *Kerja bakti* was also practice during the Kebon Agung road project of 1984, where the population of this village worked and contributed materials for the finalisation of the road. This collective endeavour was portrayed as a practice of participation.

Discussing development interests with people at the grassroots level, their concerns appeared to be distinct from material notion of development. When asked what would be the most profound issue that could help improve their living conditions, the answer was usually education for their children. Education is perceived as the only bridge to social mobilisation.⁴⁸ The ultimate objective of their hard work is to be able to send their children to higher education, preferably universities. As said by a peasant with four children who graduated from universities: 'I am not smart, therefore I want my children to be smarter than me, and have a big salary, so they can have a good life and support their parents too'.⁴⁹

This statement reflects a vision on how education can add to the prosperity of the family. Many families have indeed experienced better lives since their children started living in big cities in Indonesia and were therefore able to send additional income for their parents. Thus, it is common for them to send children to study in Yogyakarta, Surabaya, Semarang or Jakarta. Moreover, parents are also considered successful if their children can find jobs in these cities. Therefore, migration of the highly-educated people to bigger cities is highly regarded. Consequently, this phenomenon causes depopulation of Sendang Agung village.

Another concern for the people is the sustainability of their income. As described above, the state of their income is far from sufficient. Unfortunately, there are no favourable local regulations that can actually tackle the stability of all aspects related to their access to sufficient income. Examples are the fluctuation of the price of rice or fertilizer and the role of *Koperasi Unit Desa* (KUD or Credit for Peasants). The KUD is a state-organised economic institution whose mandate is to give credit and to facilitate peasants to enhance their productivity. They provide logistics and distribution facilities for peasants. Ideally, the KUD should perform an intervention to secure that peasants are able to have access to reasonable prices of seeds and fertilizer. Nevertheless, in Sendang Agung village, it was observed that their assistance only slightly improves the entitlement position of peasants because the private companies and local shops can often provide easier access and competitive prices to rice seeds

48 Statistics Data of Sendang Agung Village, issued February 1, 1999.

49 Interview, author, Dusun Pojok, 15 March 2004.

and set a higher price for the agricultural products in comparison to the KUD. KUD takes up their roles not according to its ideal mandate, but often as one of private institutions with profit aims. Priorities of their economic activities relate to traders, not small peasants, and access to the rice seeds or fertilizer is through the committee members.

7.5 THE KEBON AGUNG BRIDGE CONSTRUCTION PROJECT

7.5.1 *Chronology*

The history of development of a modern transport infrastructure in the regency of Sleman started in the 1980s, when the first road to connect the city of Yogyakarta to the Northern part of the province of Yogyakarta was constructed. In 1986, the Kebon Agung road was built cutting through the village of Sendang Agung. According to the head of village, Drs. Hadjid Badhawi, the construction was instantly followed by the aspiration to build the Kebon Agung Bridge to extend the road across the Progo River. Responding to this, the provincial government did install a Kebon Agung bridge; however, instead of building the bridge in the Sendang Agung village, it was built in area called Ngapak in Sendang Arum Village, at the Southern part of the Minggir Municipality. Being named after their village road, the responsible government claimed that this bridge was built to meet Sendang Agung village's aspirations.

As previously described, being a 'dead end' village, transport infrastructure is always a popular topic while discussing the village's economy. Business activities come reluctantly, creating a jammed economy. Their low profile economy was blamed on the situation.

The change of regime in 1998 developed a new atmosphere of political freedom in villages too. Taking an opportunity of such a progress, the village head once more raised the idea of the development of Kebon Agung Bridge in village meetings. This aspiration was based on the assumption that the bridge would be beneficial for not only the Sendang Agung village, but also the Dekso Municipality, which is located across the Progo River.⁵⁰ These two villages are not only bounded by shared traditions and festivities but also by business; the Sendang Agung village contributes to the availability of agricultural products in Dekso Municipality. The bridge is expected to save around 30 minutes of travelling to Dekso Municipality via private transportation. This improvement will naturally open more economic opportunities, especially, as along with the bridge, an expansion of the Kebon Agung road was also planned to welcome more business transportations.

50 Hadjid Badhawi said: 'actually the issue of a bridge construction project has been demanded for a long time, but efforts always failed, because according to the higher authority, building a new bridge would be very expensive'. Interview with Hadjid Badhawi, head of the Sendang Agung village, author, 27 March 2004.

Therefore, after much discussion between the two villages, a joint proposal was written. A number of 1,522 signatures⁵¹ of the population of the 15 hamlets in Sendang Agung village, were attached to the proposal, confirming their support for the bridge. This request was soon sent to the Sleman Regency, Regional House of Representative, Regional Development Planning Board (*Badan Perencana Pembangunan Daerah* or Bappeda), Regional Infrastructure Office and the Governor of Yogyakarta.

Table 7.1. Number of People who Signed the Petition for the Kebon Agung Bridge

No.	Names of Hamlets (<i>Dusun</i>)	Amount of Signatures
1.	Kisik	97
2.	Minggir	114
3.	Minggir Selatan	99
4.	Babadan	97
5.	Pojok	55
6.	Kliran	114
7.	Watugajah	79
8.	Bontitan	158
9.	Brajan	105
10.	Bekelan	98
11.	Tengahan	77
12.	Tengahan Selatan	127
13.	Dukuhan	82
14.	Nanggulan	154
15.	Jomboran	71
	Total	1,522

In November 2000, the Regional House of Representative studied the possibilities for bridge construction in the area. The general report was positive, although they realised that this project would require a high financial demand. A member of the Regional House of Representatives, Drs. Susi Esanedi also made a positive reference to the participatory method used in pursuing this policy by claiming that ‘The aspiration of the people should be followed up, this is the demand from the population, we should take this seriously, if not, I am afraid that the population becomes apathetic towards development’.⁵² Furthermore, the vice chair of the Regional House of Representative,

51 The local newspaper provides a figure of 2,000 signatures (see footnote 27). According to the data provided by the Village Government Office on the list of signatures, the number is actually 1,522. See also Table 7.1.

52 ‘Minta dibangun Jembatan, Warga Minggir Kumpulkan Tanda Tangan’, *Bernas*, 27 October 2000.

M. Yazid added that this demand was prioritised as an agenda of the hearing at the Regional House of Representative.⁵³

Eventually the Regional House of Representatives made an affirmative decision to build the Kebon Agung II Bridge. The bridge would be 203.3m long and 9m wide.

Photo 7.1 Construction of Kebon Agung Bridge (Jembatan Kebon Agung II) Per 2007



In addition to the bridge, there was also a plan to renovate the Kebun Agung road, which borders *Dusun Kliran* and *Dusun Pojok* and is located in front of the village market. This road will be the main road that connecting the village to the new bridge. At first the plan was to build a merely regional class road (11 meter wide), but in April 2003 the provincial government decided to expand it into a provincial road project (14 meters wide). A better quality of road was claimed as necessary to accommodate the expected progress in transportation and business activities.

Cooperation from some of the population living nearby the river was thus requested. In relation to the first plan, voluntary acquisitions of private properties in the vicinity were taken place. The exact amount of land forfeiture depended on how close

⁵³ *Ibid.*

the property was to the road construction plan. This procedure could be enforced because the project focused on public interests and it is therefore officially permitted to request public contribution. Moreover, the objective could successfully and peacefully be achieved partly because to the intervention taken by the authorities. During the Governor's visit on 12th September 2002, Sri Sultan Hamengku Buwono X personally requested the villagers to willingly forfeit their land for the construction of the road.⁵⁴

In relation to the second plan to build a provincial road, the consequence is that people had to contribute more of the part of their land. The government requested their willingness to generously renounce on average 5.5 metres of their land, so that they only had to compensate the rest, if necessary. An offer of pay 150,000 IDR for each meter square land was proposed. This price is said to be the same as the market price.⁵⁵ In 2004, there was still one problem related to settlement with one household in *Dusun* Pojok, but the issue was successfully resolved in 2005.

In 2007, four years after the instigation of the project, the construction is still stalling due to financial problems. Only less than 50% of the construction work has been completed.⁵⁶ According to the head of the Regional Infrastructure Department, the central state authority has not been prioritizing the bridge construction.⁵⁷ In the National Budget Year of 2007, for instance, there was no budget allocated for the Kebon Agung II Bridge. So far, the project has spent 10 billion IDR, which includes the 2.7 billion IDR fund from the APBN and 9.2 billion IDR from the Regional Budget Year (APBD).⁵⁸ Because of the limitation of a state financial support, the provincial government has allocated another 10 billion IDR of their APBD 2007 to finalise this project.⁵⁹ However, if the project is still using the initial budget (24 billion IDR), 4 billion IDR need to be raised before its completion.

The impact of such delay is shown in the condition of the village market which is located near the Progo River. Being partly destroyed to build the extension of the Kebon Agung Road towards the bridge, the village's market infrastructure is deteriorating. The extension road crosses the centre of the market, therefore permanent shops and stalls in the area were demolished.

The damage to the village market naturally influences overall economic activities. Compared to the situation before the construction, many sellers are reported to have

54 *Sleman Panen Tembakau*, Press Release of the Province of Yogyakarta, 12 September 2002.

55 Interview with Hadjid Badhawi, head of the Sendang Agung village, author, 27 March 2004.

56 In May 2008, the construction of the Bridge has finally completed, but it still unusable because the construction of the connection roads in both Sendang Agung village and Dekso Municipality are far from being finalised.

57 'Jembatan Kebon Agung, Harapan yang Terbengkalai Selama Tujuh Tahun', *Kompas*, 7 April 2007.

58 If being prioritized, a bridge construction in the area would only take about 3 years. The Srandakan Bridge, which also is located in Yogyakarta, for example, only took 3 years of construction but this was accomplished because 70% of its development was funded by the Asian Development Bank.

59 The total allocation for constructions of infrastructure in Yogyakarta according to the APBN 2007 is 67.4 billion IDR, 'Pembangunan di DIY Prioritas Utama: Jembatan Kebon Agung Tersendat', *Kompas*, 5 April 2007.

stopped selling their products in this market. There are only limited activities observed in the village market and the sellers are currently using their personally constructed semi permanent shops. Such an impact on market activities in the village naturally affects access to goods and food prices were complained to be higher. Moreover, for those whose incomes depend on the market, they need to adjust or even stop their economic activities. Only the fortunate ones who have access to transport for their goods can continue economic activities in other markets, although even then it was reported to not always be easy as permission is often required.

The delay of the construction project has also negatively affected the quality of life for these people. Apart from their exposure to constant constructional works, with noise and dust around, they also have to live in a poor condition of housing. Months after the land acquisition, they renovated their houses semi-permanently in such a way that these inevitably became smaller. They complained about the slow development of the plan, as the construction for this project had not even started, yet the area was left muddy and wet. The water sanitation system, which had previously existed, was demolished together with part of their houses creating a stream of unhygienic water around the land planned for the extension road and their houses. The condition worsened as the village, with its waste products, is located in the immediate neighbourhood which of course further deteriorated the quality of water. Although this could cause health problems, complaints were merely raised on the delay of the project. At the time of this writing, it is still unknown when the construction of the bridge and the road extension will be operational, given the lingering financial problems.

7.5.2 *The Procedure of Participation*

Logically, a participatory process is related to the formal governance procedure existing in the village. The government of Sendang Agung village consists of the village head (*Kepala Desa*),⁶⁰ the Board of Villages Representative (*BPD* or *Badan Perwakilan Desa*) and the hamlet heads (*kepala dusun*). A village secretary body (*carik*) helps with the administrative and secretariat matters and a number of programme coordinators are responsible for preparation of decision-making in respect of

60 Drs. Hadjid Badhawi has been the head of Sendang Agung village (*Lurah*) for about 8 years. When Badhawi began this role in 1996 he had to quit his teaching job. He considered it a full time job that needed full concentration, although it does not come with good payment. Being a village's bureaucracy in Java, you are entitled to a piece of productive land. The measurement of such land depends on the position you have in the bureaucracy. In the case of Badhawi, the land is around 1000 metre square. Realizing that he possessed no agricultural talent, he rented the land to *Madukismo Company* (a sugar production company in the village), which therefore allows him to receive a monthly income. He was re-elected in February 2004 for another five years with 68% of the total votes. It was a favourable election for him, as based on his extensive experience with the village, the population of this village found no reason for not electing him. Badhawi's office is called *kelurahan*. It is located in the big street just across the future bridge. It is staffed by 20 people working 5 days a week from 09.00 to 13.00. Field Observation and Interview, author, Village Office, 30 March 2004.

governmental, developmental, societal, financial, and general issues. According to the regional regulations of Sleman Regency No. 4 of 2003 on the Organisation of Village Governance, the village head is authorized to, amongst others, lead the organisation of the village – with the assistance of the BPD, propose village policy and regulation, and organize a participatory development process.⁶¹

As already explained Law No. 22 of 1999 that governed the implementation of local autonomy at the time, asserts the principle of participation in local development. According to this law the decision-making process should consider the aspirations of the people and the representation of ideas. This task is delegated to the newly enacted institution, the Village representative Board, BPD, whose mandate is to represent the population in policy-makings. This institution, whose members are elected by the villagers, promises accessibility for people to participate in policy-making and have more control over the village government.

The BPD of Sendang Agung village has 14 elected members who work within several working groups that deal with social issues, governmental issues, or development issues. With respect to participation, Article 28 of the Local Regulation of Sleman Region No. 3 of 2003 charges the BPD with the responsibility of collecting details of people's expectations and desires and representing them in the formal decision-making process.⁶² Moreover the BPD is entitled to revise or initiate village regulations, a mandate which places this organisation as an important actor to promote participation in the development process.

The formal channel for participation in Sendang Agung village is through village meetings. There are several types of formal meeting: the village meeting, executive body meeting, the legislative meeting, the village government meeting (executives and legislative) and hamlet meetings. The meeting of the executive bodies (the village head and programme coordinators) and the village meeting is the highest forum in which village policies are decided. In addition, hamlet meetings organised locally are considered to be informal meetings. These meetings are the forum to introduce and socialise a plan or policy to which representatives of village government usually attend. All these types of meetings are the possible arenas where participation could take place.

In the case of the Kebon Agung Bridge construction project, an indication of a participatory process is noticeable. The process took place in the form of collecting signatures of the population in a village meeting. This petition was subsequently submitted to the higher governmental levels and received positive responses. At first glance this suggests a type of participatory development, whereby the people are included in the initial plan of a development project. However, examining it from the procedural perspective, there was a top-down setting that involved the prominent role of the village government. The collection of signatures was organised at a village meeting that was initiated by the village head who was the enthusiastic actor in favour

61 Article 6(d), Local Regulation No. 4 of 2003, Guidelines for Organisation and Governance.

62 Article 43(2), Local Regulation No. 3 of 2003, Village Board Representative.

of the project.⁶³ Given the source of the request for signatures and the usual nature of village meetings in Sendang Agung village, people had no other option but to comply with the request to draft a petition. Furthermore, the idea of building a bridge had existed for years in this village.⁶⁴

Obviously, the collection of signatures has been an effective strategy in gaining the attention of the media and the higher decision-making actors, such as the Regional House of Representatives. As recalled,⁶⁵ the members of the Regional House of Representatives value such a local initiative, therefore support from the higher authority was easier to achieve. The process of drafting the petition has been reported as an exercise to participatory development within a setting of decentralisation.⁶⁶

Connecting the acquisition of land with the aspiration shown in the number of people who signed the petition seems to be of limited relevance. As provided in Table 7.1., the list of people who signed the petition is quite varied, depending on how many inhabitants living in the areas. Although the road is constructed in the border of *Dusun Kliran* (on the West side) and *Dusun Pojok* (on the East side), it affects only the inhabitants of *Dusun Pojok*. But, provided the time context it would be simplistic to argue that the low number of signatures collected in *Dusun Pojok* is because the road plan affects this area the most. As explained before, the signatures were collected before the initial decision was taken place, specifically even before the plan of constructing a bigger road. In this context, people might have not been aware of the actual consequences of the area.

Indeed, the practice has shown a certain degree of improvement on people inclusion in development projects. However, some critical concerns may also be mentioned, particularly with regard whether this type of participation genuinely serves as the normative ideas of development. Therefore the circumstances around the reported participatory process have to be analysed. In that connection, the relationship between actors and the opportunity structure leading to the fulfillment of the entitlement to participation will be discussed in the next sections.

63 According to one of the respondents, who is also a former hamlet head of Dusun Pojok, in 2000 there was a meeting to discuss the bridge project. In that meeting, Badhawi, who was already the village head, offered the idea of building a Kebong Agung Bridge and asked the collaboration and approval from the population of Dusun Pojok by signing a petition to be attached in the proposal. Everybody who was present in that meeting signed and some signatures were collected at that time. Another respondent also said that it was an uncomplicated procedure because the idea of building a bridge had been alive already for years. The story was confirmed again by many mid-age villagers who admitted they are very familiar with this idea since they were children.

64 Another respondent also said that it was an uncomplicated procedure because the idea of building a bridge had been alive already for years. The story was confirmed again by many mid-age villagers who admitted they are very familiar with this idea since they were children.

65 See Section 7.5.1. on Chronology, of this Chapter.

66 See Section 7.2. Decentralisation, Participation and Development Processes at the Village Level, in this Chapter.

7.6 ADOPTION AND IMPLEMENTATION OF THE ENTITLEMENT TO PARTICIPATION AT THE LOCAL LEVEL

In this section, the adoption of participation as stipulated by Law No. 22 of 1999 on Local Government and Government Regulation No. 76 of 2001 on Village Government will be reviewed. The first two sub-sections examine the participatory practices in the case of the Kebon Agung Bridge Construction project from two points of view: the side of the village government as the duty-bearer, and the people as the right-holders of the entitlement to participation. Here, it will be examined a wide range of economic, social, political, and cultural issues, the relationship and interaction between actors as well as the opportunity structure leading to such a situation.

7.6.1 *Village Government and Participation*

7.6.1.1 Perception on Village Government's Roles

Both Law No. 22 of 1999 and Government Regulation No. 76 of 2001 on Village Government assert the responsibility of the village head to report to people through the BPD.⁶⁷ On empowerment, Government Regulation No. 76 of 2001 asserts the possibility of establishing people institutions as a partner of the village government in executing development.⁶⁸ These provisions reflect an appreciation of participation and the important roles of the village government in participation. In reality, the process of adopting these principles is rather complicated. It depends on the actual comprehension of the members of the village government of their roles. In reality, their perception are manifested in the interaction between the village government and its people.

In general, the members of the BPD are rather uninformed about range of authority that has been delegated to them. They have limited understanding and lack of willingness in carrying out their tasks and they are unreceptive to the actual grassroots problems. They are mostly aware of the concerns of education and sustainability of income that are pronounced amongst the population, but the BPD of the Sendang Agung village has never engaged with the population to actually discuss their aspirations or concerns. In fact these issues were also not raised during the election of members of the BPD. In that event, it is the issue of religion that may help to secure their chances to be elected.⁶⁹

As a result of top-down practice during the New Order, the members of the BPD perceive their roles as an extension of the village head. They exercise their mandate

67 Article 102(b), Law No. 22 of 1999; Article 18(2a) Government Regulation No. 76 of 2001.

68 Article 41 and 42, Government Regulation No. 76 of 2001.

69 In the case of Sendang Agung village, frictions between different religions are observed due to different groups they are accountable to. For example, the Catholic members are grouping together and so are the Muslim members. Although in everyday relationships these groupings are not visible, a coalition of working groups in the BPD also represents the groupings character.

as a way of assisting the village government. The interpretation of their main duty is to provide administrative service for the community.⁷⁰ During their monthly internal meetings or meetings with the village head, the discussion tends to revolve around villages taxes, the management of local assets or the land owned by the village,⁷¹ the work plan of the executives, the village financial budget, or the annual report from the village head. According to the secretary of the BPD, by focusing on the financial aspect of the village, the BPD aims to raise awareness towards the management of local assets. This strategy corresponds to the popularity of the campaign against corruption in Indonesia.⁷²

The village head and his staff perceive their role as an extension to higher and central government. Apart from issuing permits (to have a celebration or to build a house, etc) and licences (identification cards, family cards, etc), the office of the head of the village manages village infrastructures and basic services, such as education and health. They are also responsible of collecting taxes. In fact, collecting the land tax (*pajak bumi dan bangunan – PBB*) is the preferred task of the village decision makers, because their performances are often assessed by the higher authority based on the amount of tax money they can collect. It is the major source of funding for social and economic projects around the village; the village government controls the decisions around the use of the fund.

Due to the limited perception of their roles, people see the village government as an administrator, rather than the duty-bearer to realise their entitlements. This perception obviously creates a gap between the village community and their leaders. People are disinclined to use the existing apparatus to fulfil their aspirations, particular since they are also unfamiliar with the exact tasks and duties of the village government. For example, people identify the BPD members as staff of the village head and therefore they suppose their task is to serve the village head.⁷³ Such an understanding naturally hampers possibilities for representation or participation from below.

Furthermore, the village government associates participatory activities with attending and organising village meetings. When village meetings are organised, for instance, the village head understands the fulfilment of his obligation following from the people's entitlement to participation as merely to inform people on existing policies. Organisation of meetings and other forms of socialisation in any village gatherings are seen as sufficient types of participation. Similarly, the members of BPD of Sendang Agung village also understand their representative roles as a requirement to organize monthly internal meetings and meetings with the executive body – village

70 Such a duty principally exists as an obligation to the central government, as administrative procedures are required by state. Affirmation of this behaviour was given by the village head by saying that he will always keep the village stamp with him so that he can 'serve' the community anytime even outside working hours. Interview, author, 22 March 2004

71 This type of land is called *tanah kas desa* – usually used for public services, such as markets or sport fields.

72 Interview with Purwowidodo, Secretary of the BPD, author, 26 March 2004.

73 Interview, author, Dusun Bontitan, 23 March 2004.

head and his staffs. In this regard, participation is perceived limitedly as dissemination of information. The standards of how informed people should be in respect of village policies or programmes are very low, due to the lack of intention on the part of the village government to organise a dialogue. Furthermore, the lack of participation from below in the village meetings is also due to the type of topics discussed in meetings; these tend to be far from the actual development interests of the people, as they are centred around tax issues or administrative matters such as family registrations or the process of election.

Notably there is a lack of aptitude in perceiving the roles of the village government to manage participatory development. This mandate is perceived limitedly through the activities of dissemination of information on development policies in village meetings. The root of this incorrect perception on the roles of the village government and their relationship with the people is partly due to three decades of misinterpreted practices, which inevitably influenced the shape of the current government. For decades, village governments lost their focus and instead of representing their constituents, they aligned themselves to the central government to ensure their authoritative positions. Moreover power concentration and a centralistic approach carried out by the New Order regime gave no space for any interests other than the 'common interest'.

The long period of malpractice has infiltrated the mind-set of the policy-makers and the representative body. Duties and tasks of the actors in village governance are still performed in accordance with the old practice, which overemphasised the acceleration of economic development at the cost of the people involvement. Additionally, the village government is lacking a suitable vision, mission or strategic plan to exercise autonomy and develop the economic, social, and political aspects of village community. Furthermore, there are no village regulations that provide details or guidelines on their roles towards the people. In the village regulations of Sendang Agung village, there are no provisions that stipulate due procedures in implementing participatory development. The existing regulations contain merely provisions regarding administrative tasks of the village government, concerning taxes, the budget or village property.⁷⁴

Nevertheless, the participatory process employed in the case of the Kebon Agung Bridge construction project was rather a fresh and innovative approach initiated by the village government. It demonstrates a creative intervention by the village government in assuming their authority. To some extent this indicates progress for a democratic government at the village level where the decision-makers show willingness and openness to include the village community. It was the initiative of Badhawi as the village head to bring the idea of some years before out again, as he started a petition to help transform the aspiration into a project proposal. A significant discrepancy between the perceptions of village government towards their roles and the participa-

74 See: Village Regulation No. 1 of 2003, Village Taxes; Village Regulation No. 2 of 2003, Administration of Village's Property; Village Regulation No. 3 of 2003, Annual Program Action; Village Regulation No. 4 of 2003 on Village Budget Administration.

tory practices in the project reveals that efforts need to be taken to educate village actors concerning the normative substance of participation in development.

7.6.1.2 Access to Policy-Making

Implementation of the entitlement to participation, according to the Declaration on the Right to Development, demands an enabling environment which is manifested in the form of access to policy-making. This can be understood as an arena for the community to become involved in the policy-making process. That arena could take the form of forums, meetings, or other media, as long as they provide an open dialogue and are equally accessible to the whole community.

As mentioned above, Law No. 22 of 1999 on Local Autonomy and Government Regulation No. 76 of 2001 on Village Government contain several features that enhance the access to policy-making by recognising village autonomy and establishing a representative body, the BPD. Ideally, the autonomy status of the village would make it significantly easier for the people to be involved in the decision-making process of policies. The laws shorten the bureaucratic process and mandates village governments the authority to respond to people's aspirations without having to consult with higher authorities. It grants villages, *inter alia*, the authority to propose or reject village development projects. In respect of the Kebon Agung Bridge construction project in Sendang Agung village, that authority was exercised. During a village meeting, which is the highest existing forum, the initiative for the project was proposed and decided. In the hamlet meetings people's signatures in support of the project proposal were collected.

Originally, during the New Order regime, a village meeting was perceived as a realm of authority, where power was significantly respected because of the traditional relationship between leaders and the population. It was introduced together with the concept of village, which represented efforts to standardise the local community as an administrative domain.⁷⁵ Currently a new approach on the village authority has been adopted along with the enactment of the Local Autonomy Laws. This is assumed to create more openness in the access to policy making.

Nonetheless, in the context of Sendang Agung village, the exclusive character of the village meeting is still visible. In particular, only the village government can initiate and organise meetings and not everybody is eligible to attend. A formal village meeting is arranged annually and attended by hamlet heads, traditional or religious

75 Before this era, in Javanese villages, public meetings in a village community existed in the form of *rembug*, a word which generally means elaboration and consolidation. It was a forum that took place based on necessity and where people came to discuss and decide village policy. At the beginning of the New Order era, *rembug* was eliminated and replaced by *Musyawarah Pembangunan Desa* (Village Deliberation for Development). The replacement forum, unfortunately, did not inherit the collective values of what *rembug* used to be; rather it was merely a symbolic place where the village leaders could formally implement national agendas of development policies. Currently, the *Musyawarah Pembangunan Desa* no longer exists; village meetings are the only potential forum for dialogue.

leaders, the BPD and the village government. In a hamlet meeting, every family is invited but the eligible participants are the heads of the family.⁷⁶

As Sendang Agung village is currently being depopulated, the people present in the meetings are mostly elderly men or widows. This feature affects the participatory process in the meetings. The participants, who usually have low educational level (elementary school) and who have been used to the repressive system of the New Order Era, come to the meetings with an obedient attitude. On the issue of village meetings, one of the elderly commented that 'we are already old, just give the young and smart ones the chances to speak out at the meeting. We come (to the meetings) because it's bad not to come'.⁷⁷ Thus, not coming to a village meeting is regarded as an indecent manner. In this context, village meetings are regarded as an opportunity to express opinions and needs.

As a lower forum, the hamlet meeting is actually a potential for genuine dialogue. In reality, however, there are some significant concerns that inhibit the hamlet meeting as access to decision making policies. The organisation of the hamlet meeting is still done by the village government. The head of the village is to summon and supervise these meetings. Another problem of the hamlet meeting is the lack of interest of people, shown in low attendance. It appears to be complicated to assemble the people for a hamlet meeting. The hamlet secretary of *Dusun* Pojok confirmed this and said that the workload problem, especially for those who have to work out of town, is one of the reasons.⁷⁸

In this hamlet meeting the proposal for a Bridge Construction Project was introduced. Initiated by the village government, the meeting was specifically held to address the proposal of the Kebon Agung Bridge construction project. However, it would be too generic to argue that the organisation of such a meeting implied improvement in the access to policy-making. The participatory process practiced in this particular event was a simulated involvement of the people, with discussions limited to particular issues decided by the village government.

In this respect, what had been supposed to provide access for people to policy-making actually served as an effective arena for socialisation. As a general observation, it remains problematic to improve people's access to policy making and empower the village meetings because there is a lack of such experiences at the grassroots level.

76 Usually villages meeting start around 21.00 or 22.00. Particularly in the setting of *Dusun* Pojok, the meetings are mostly held at Drs. Sutimin's house which has a big living room that is enough to accommodate around 20 to 25 people. Besides working full time, Sutimin, a high school teacher in Godean city is also the vice coordinator of BPD Sendang Agung Village. The village head, Badhawi, is usually present in those meetings. One meeting that the author was able to attend was on the national general election preparation on March 27, 2004. The purpose of that meeting was to describe logistics issues around the general election on the 5th of April. From about 23 persons attending that meeting, 17 were people above 70 years old and they were just quite listening to what Badhawi or Sutimin had to say. The rest, were sometimes expressing their opinion although mostly it was a matter of asking explanation.

77 Interview, author, *Dusun* Pojok, April 5, 2004.

78 Interview, author, *Dusun* Pojok, April 6, 2004.

More importantly, it has been considered as normal for the village government to exclude people from important policies that involve big budgets from the higher authority.

7.6.1.3 Imposing Participation in Development

In the previous sub-sections the process of adopting participation in the development process has been examined. In particular two issues related to actual implementation have been studied, namely the perception of village government towards their roles and access to policy-making.

The founding of a new representative institution, the Village Representative Board (BPD) and the autonomy position granted to villages, do not signify an advancement of participation. In the case of Sendang Agung village, people and the members of BPD consider the BPD to be part of the executive power. The members of the BPD perceive their role limitedly on administrative issues and therefore take no proactive actions in monitoring the village government or representing people's actual development interests. Thus, the idealistic aim to secure people's representation by establishing the BPD has not yet been achieved. In this village, access to policy remains the same as during the New Order regime. As a representative institution, it is merely a new name given to an old practice. The BPD continues to carry out their obligations in a top-down manner, identifying their accountability to the village head rather than to their constituents. Consequently people also recognize the BPDs roles as such, since they have neither experience nor precise information on what roles this institution actually has to play.

Additionally, the autonomy granted to the village is perceived by the village government as a freedom from the rule of central government. It is now even possible for the Sendang Agung village to propose a mega-development project such as the Kebon Agung Bridge. The village does not have to depend on the regional or provincial development priorities in proposing the project, although it does depend on the financial assistance from higher authorities. Local autonomy is thus perceived as an external freedom, and not as internal accountability.

The success of the project proposal of Kebon Agung Bridge Construction is indebted to a 'vacuum' in local government regulations in Indonesia and a transitional period towards more openness and political reformation. At the time the idea was raised by the head of the village in 1998, the country was in the middle of formulating the local autonomy laws of 1999. When it was submitted in 2003, Law No. 22 of 1999 on Local Autonomy was being amended into Law No. 32 of 2004. This national context enabled the project proposal to obtain a swift positive approval from the higher authority.

Participation practiced in the case study delivered some advantages: approval to instigate the project from both the local population and the higher authorities. In effect as a mechanically prescribed procedure that aimed to achieve financial and political endorsements, participation was prone to become merely a strategy, rather than a

process of empowerment or an instrument to protect people in development processes. It maintained the policy-making arenas as authoritative domains.

The case study reveals that the participatory process was only executed in the initial decision prior to the project. There were no participatory activities once endorsement from the people and the higher authority had been achieved. A further involvement of the people, in the later stages of ongoing and operational decisions, entailing monitoring and evaluation activities is of nonexistence, because the execution of the project was then outside the control of the population and village government. It became more difficult, or even impossible, for the people, who directly affected from the delay, to complain about the delay in project execution or the deterioration of livelihoods in their houses.

Normatively, participation from above goes against both the protective and the transformative values underlying it. However, in the context of the case study, no one can be directly blamed for this deficiency. Particularly since for those who live outside the vicinity of the bridge and not directly affected by the planned connecting road, this development project would certainly opens more economic opportunities. Moreover, the legal recognition of the entitlement to participation is not yet equipped with practical procedures on implementation. Government Regulation No. 76 of 2001 on Village Government indeed asserts the notion of active participation,⁷⁹ but it does not assign specific forums for this purpose. Thus, what happened in the case of Sendang Agung village is a common approach to participation in Indonesia that has been exercised for years, also during the New Order era. Distributing or socialising information on policies would give practical meaning of participation. Therefore, participation should include not only introduction through direct methods such as meetings, but also indirect ways, *viz.* flyers, posters or information boards that are easily found in and around the village offices. In such a way, information on development projects might effectively reach the population.

7.6.2 *Villagers and Participation*

7.6.2.1 Marginalisation of Peasants

As noted already, in the case of Kebon Agung Bridge Construction Project in Sendang Agung village participation was not conducted in a dialogical process involving civic engagement of the population. People are disinclined to express their concerns and interests. Alongside the position of the village government, which has been analysed in the previous sub-sections, one thing that contributes to such a phenomenon is the vulnerable positions of people, which substantially affects their opportunity structure leading to the fulfilment of the entitlement to participation.

The background of the weak position of villagers lies in general in the politics of marginalisation of peasants in Indonesia. The majority of the population in Indonesia

79 Section I (2) of the Government Regulation No. 76 of 2001.

work in the agricultural sector. Peasants therefore play an important role in national life as the backbone of food security. Peasants also strongly contribute to the goals of national development which include justice and welfare for all citizens. Yet, in spite of the majority status, the issues of the livelihood of peasants are rarely discussed in Indonesian politics. Peasants have no significant position in policy-making, even in the policies that are directly related to their concerns.

Peasants have long felt and experienced a marginalisation through which they are made to feel vulnerable against government policies.⁸⁰ The implementation of the green revolution policy, known in Indonesia as ‘Mass Guidance’ (*Bimbingan Masyarakat – BIMAS*) programs in 1968,⁸¹ was amongst the policies that contributed to their vulnerable positions. This policy was uniformly implemented regardless of the local way of farming or the suitability of the land condition. It aimed to secure agriculture productivity, in which certain methods of cultivation, recommended seeds and fertilizers are obligatorily applied, by providing heavy subsidies. It regulated the method of agriculture and the price range of agricultural products.

According to scholars who examine the effects of the implementation of the policy in rural Javanese villages, a consensus seems to have been reached, namely that the benefit of the policy fell inequitably on the rural populace.⁸² Large landholders, with their easy access to credit and fertilizer distribution, doubled their income from rice cultivation by adopting labour saving mechanisms, were better able to take advantage of the green revolution than middle and small landholders and labourers. Some scholars extend this conclusion to observed changes in the structure of land tenure; the increased profit obtained by large landholders was reinvested in the agricultural sector, intensifying the polarisation process of the rural populace in terms of landholdings.⁸³

In Sendang Agung village, the green revolution policy has also changed working relations between landholders and labourers. The policy has encouraged new forms of peasants’ recruitment in harvesting. They are required to comply with the *bagi hasil* or labour intensive rice harvesting system. This system is commonly hailed as a system

80 See for example: Michael R. Dove *et al*, *Vernacular Models of Development: An Analysis of Indonesia Under the ‘New Order’*, *World Development*. 29 (2001) pp. 619-639; Michael R. Dove, ‘The practical reason of weeds in Indonesia: Peasant vs. state views of Imperata and Chromolaena’, *Human Ecology*. 14 (1986) pp. 163-190; Michael R. Dove, ‘The Agroecological Mythology of the Javanese and the Political Economy of Indonesia’, *Indonesia*. 39 (1985) pp. 1-36.

81 Implementing the green revolution policy increased the production of rice in Yogyakarta from annually 2.5 tonne to 5 tonne in the 1980s. At the macro level in 1984 Indonesia achieved their ‘rice self-sufficiency’ (*swasembada pangan*). About 2 million tonnes of rice/per year were produced. This amount was not only sufficient to feed the then 160 million population, but also enabled Indonesia to voluntarily donate 100,000 tonnes of rice to other countries. Nevertheless, it did not significantly enhance the quality of life for peasants.

82 Hyung-Jun Kim, ‘Agrarian and Social Change in a Javanese Village’, *Journal of Contemporary Asia*. (2002) p. 435.

83 *Ibid.*

of equity and a prime example of 'shared poverty' in rural Java.⁸⁴ Closer examination of this system reveals a delicate position of labourers towards the landowners. The approach of labour intensive methods in harvesting activities benefits landowner peasants, and decreases the revenue of labourers. The system leaves peasants, particularly labourers, in a position not to be able defend themselves.

Peasants are always oppressed to comply with unfair policies that consider their profession as a commodity that falls under the control of government policies. An example is the government's agricultural policy as a response to the monetary crises. The fertilizer subsidy was abolished during the crisis, making its availability the central problem in farming practices. At the same time at which the input prices rose and the government opened the market for imported rice,⁸⁵ rice prices fell as the government could no longer guarantee fixed floor prices. This policy destabilised the local price of rice and thus peasants had no option but to sell their rice at prices as low as those of the imported rice. As a response to this vicious circle the government adopted the Presidential Instruction No. 2 of 2005 on Rice Policy. The regulation authorises the government to control the price of rice in Indonesia.⁸⁶ Although it initially aimed to protect peasants from the falling price of rice that usually happens during the harvest seasons, in reality it could also deliver negative effects for peasants. It does not regulate either the floor price or the ceiling price of rice. Thus, rather than accomplishing price stabilisation, the price of rice still depends on market fluctuation.

Peasants are often undervalued and secluded from the consideration of policies that directly affect them. Introduction of disincentive regulations and policies continue to marginalise peasants, confirming their position as a commodity or an object of development. As a nation for which it is impossible to live without rice, it seems illogical that the policies adopted for the peasants seldom advance their entitlement positions. The Indonesian government takes the position of a landlord while trying to maintain the national stability and secure food supply for the whole nation. Application of the intensive system of agriculture can provide power and profit to central governments to control and exploit peasant lands and labour.⁸⁷ Thus, both national stability and food security are achieved.

84 For more explanation on shared poverty, see Ann L. Stoler, *Rice Harvesting in Kali Loro: A Study of Class and Labor Relations in Rural Java*, *American Ethnologist*. 4 (1977), pp. 678. Also Sri Hery Susilowati, 'Gejala Pergeseran Kelembagaan Upah Pada Pertanian Padi Sawah', *Forum Penelitian Agro Ekonomi*. 23 (2005) p. 50.

85 'Demi Rakyat, Import Beras Terpaksa Dilaksanakan', *Suara Karya*, 22 December 2006.

86 Paragraph 4 of Presidential Instruction No. 2 of 2005 on Rice Policy stated that: To implement policy on the purchasing price by the government by observing the following guidelines: 1. The Domestic Purchasing Price of Harvested Dry Unhusked-Rice is 1,330 IDR per kilogram in the milling site; 2. The Domestic Purchasing Price of Milled Dry Unhusked Rice is 1,765 IDR per kilogram in the storage warehouse or 1,740 IDR per kilogram in the milling site; 3. The Domestic Purchasing Price of Rice is 2,790 IDR per kilogram in the milling site; 4. Quality requirements for the purchasing price of harvested dry unhusked rice and milled unhusked dry rice.

87 Michael R. Dove, (1985) p. 1.

In the case of Sendang Agung village, assistance in solving agricultural problems is not popular amongst village governments. The marginalisation of peasants has created a mindset among members of the village government that sees policies to improve peasants' positions in policy-making as non-beneficial for their external accountability, or credibility. A mega-development project, such as Kebon Agung Bridge, would likely promote the achievement of the village government as sponsor and initiator of the project, not to mention the incoming flow of financial progress in the future.

The marginalisation of peasants in the development process certainly hinders the implementation of the entitlement to participate from below. As long as peasants are frequently challenged with disincentives policies or are treated as subjects for national stability, the implementation of participation in rural areas will not have much brighter prospects. Thus, it is comprehensible that in the participatory process prior to the execution of the Kebon Agung Bridge Construction Project they responded, not with an active dialogical approach, but with the manner that they know best, which is to comply with the idea.

7.6.2.2 Local Values

In Indonesia culture has been generally accepted to guide social relationships in society. Culture not only influences the relationship between people but also controls the interaction between people and the authority. In particular Javanese culture has been nurtured as a code of conduct in the society. The values that are particularly relevant to the implementation of participation are *hormat* (respect) and *rukun* (harmony).

The principle of *hormat* regulates the relationships between Javanese people not only within the community but also towards their leaders. This principle says that everyone, in their behaviour (which is revealed in their attitude and verbal manners), should always show respect towards others in accordance with their status and position in Javanese society.⁸⁸ *Hormat* derives from the idea that society is established in a hierarchal manner. Each member has a certain position and worth which needs to be protected through a suitable attitude.

Consciousness of social status in society manifests itself at the governance level. There is a strong awareness amongst the villagers of their inferior status, particularly during the election of the village government. The current head of village has been the head of Sendang Agung village (*Lurah*) for about 8 years. He was re-elected in February 2004 for another five years with 68% of the total votes. It was a favourable election for him, as based on his extensive experience with the village, the population of this village found no reason for not electing him. A similar consideration also applied in appointing village staffs. Besides the village head positions are available for the secretariat (*carik*), representatives of the hamlet (*dusun*), and programme coordina-

88 Frans Magnis Suseno, *Etika Jawa* (Jakarta: Gramedia Pustaka Utama, 1984) p. 60.

tors. Many of the staff members are chosen based on their familiarity or because they have been in the position for many years, which therefore makes it very difficult to dismiss them.⁸⁹

The intervention by the Governor of Yogyakarta, Sri Sultan Hamengku Buwono X constituted a further complication in effectuating genuine participation as discussed in this case study. With a strong background of feudalism lingering in the process, the 'personal request' from Sri Sultan implied a persuasive order (*perintah halus*). Rejecting the request of forfeiting their land for the project would have meant a violation of the *hormat* principle.

Another local value relevant to the implementation of participation is the *rukun* principle. This principle deals with the achievement to social stability and harmony which can be accomplished only when everybody acts according to her or his position in society. Hence, the principle forbids anyone to be ambitious. Competition is inadmissible as it will lead society away from its stability and harmony.⁹⁰ Similar to *hormat*, *rukun* also regulates the attitudes and behaviour of the members of society within the wider context. It requires harmonious social appearances. The ultimate objective of the application of the *rukun* principle is a harmonious state, which refers to a situation without any dispute or disagreement, and where members of society help each other, accept each other, and agree with each other.⁹¹ This principle has been effective in keeping the society at peace and avoiding any agitation.⁹²

The application of these two values in daily governance influence the prospect of any polarisation of ideas from below, where debate and open dialogue are welcome and considered the normal way of achieving consolidation. The *hormat* principle has ensured the people firstly look at their status and position in society before expressing their interests or concerns, whereas the *rukun* principle prevents people from expressing their interests as that might cause agitation and risk the harmonious state that society aims for. The challenge is thus how to mainstream the principles of democracy and rule of law, as asserted in universal right to participation, in these two Javanese principles. Their influence is strongly rooted in the social and political spaces. Awareness of individual social status is followed by consciousness of personal

89 An example is Duwet village in Yogyakarta. In this village, it was observed that due to the application of the *hormat* principle, it became difficult to dismiss any member of the village government. The village staff member responsible for development projects has been in his position for more than 40 years, and hence should already have retired. However, because of the *hormat* principles, being older than anyone in the village office, the village government has no choice but to employ him. A similar situation exists in Grogol village in the Province of Yogyakarta. In this village one of the key positions in the village office – village secretary – was vacant for almost two years. This happened because the old village secretary had to retire and the village head was unable to choose a replacement. The village head then confidently performed all the secretarial functions. AAGN Dwipayana and Sutoro Eko, *Membangun Good Governance di Desa*. (Yogyakarta: IRE Press, 2003), p. 39.

90 Niels Mulder, *Mysticism and Everyday Life in Contemporary Java, Cultural Persistence and Change*. (Singapore: Singapore University Press, 1978) p. 41.

91 *Ibid*, p. 39.

92 Frans Magnis Suseno (1984) p. 39.

responsibility to secure a harmonious society and these consistently occur in the decision-making process. As giving opinion also means initiating conflict, people should have a proper awareness of their status before disagreeing with the government. In fact, although at the national level freedom of expression has developed significantly, at the village level putting oneself against government policy is strongly forbidden, as people have a considerably lower status than the government.

The population of Sendang Agung village portrays *rukun* and *hormat* as the reasons why they complied with their leader's proposal of a bridge construction project. To avoid problems and realise their status as 'merely' villagers, they have to agree with what their leaders say. Especially as *rukun* also means to understand that this project is being built for the common interests, therefore it would not be appropriate to disregard the obligation to voluntarily release some of their lands for such a purpose.

7.6.2.3 Participation from Below

Many studies take a pessimistic view on the potential of actions from below to overcome problems. A number of scholars theorised that only in rare circumstances are groups of individuals likely to act collectively. Even groups of individuals with a shared interest will be unlikely do something on behalf of that interest. Members of a large group rationally seek to maximise their personal welfare; they will *not* act to advance their common group objectives unless there is coercion to force them to do so.⁹³ As there is no incentive for all to share the cost of a collective action, there will always be a 'free rider' problem. However in the case of small groups, which are not only quantitatively but also qualitatively different from large groups, the 'free rider' problem can be reduced.⁹⁴

A different group of scholars have also identified that social and economic heterogeneity, group size and the existence of non-linear relations and the mediating role played by institutions influence the prospect of participation from below. In such a society it has been argued that the relationship will be based on trust, reciprocal exchange and social networks. Nevertheless even this remains a contentious argument at the practical level. The interaction of a close and small society can also be defined by patron-client relationships. In this kind of relationship, trust and reciprocity between people and elites are vulnerable to abuse by the elite.⁹⁵

Connecting this argument with the case of Kebon Agung Bridge Construction Project, it can be confirmed that the implementation of participation is indeed achievable in a small society. As the smallest and lowest governmental level in Indonesia, a village is characterized as a society where trust and reciprocal exchanges are still evident. Therefore, participation may be organised easily. Nevertheless, the case study

93 Aniruddha Dasgupta and Victoria A. Beard, 'Community Driven Development, Collective Action and Elite Capture in Indonesia', *Development and Change*. 38 (2007) p. 233.

94 *Ibid.*

95 *Ibid.*, p. 234.

also reveals that the scale of dependency and other embedded characteristics, such as culture, fosters a patron-client relationship, which is inevitably to subsist in society of such a scale. This type of relationship resigns people to a subordinate position. As a result they have no possibility to challenge the elites and participation becomes merely compliance to the system. This context has risked the participatory process to capture by elites, who are more externally accountable.

Many villagers refer to the action of 'asking permission' during the village meetings prior to the execution of the Kebon Agung Bridge construction project. As mentioned before, that meeting had been specifically organised by the village government for the purpose of collecting signatures to support the project (see Table 7.1). Clearly the population of Sendang Agung village had no option but to agree to sign the petition. In this regard, one of the respondents said that as the project is in the public interest, she feels proud to be able to help. On the issue of acquisition of the land she continued: 'the land belongs to the government, and because we are the citizens, so when they (i.e. the government) want it back, we have to give it'.⁹⁶ The response shows the character of power relationship and the subordinate position of the people.

This situation is unlikely to change in the near future. Indication of a similar attitude is also harboured in the younger generation. Although some have a university education, a level of education that is ideally potential to carry the mediating role and to initiate a dialogical process of participation, they have no roles in village politics. They have never been invited to any village meetings; their knowledge of what happens around their village is limited. Consequently, this leads to a rather ignorant position towards village issues. The younger generations are not too keen on the idea of attending such meetings. One of the youngsters said, 'it's a parent's business; we don't know what to say or do there (in the meeting) anyway. We don't plan to stay here (in this village) after we finish our study'.⁹⁷ As previously described in the section on the village profile, the village is currently depopulating and those remaining are usually the elderly with an obedient attitude towards the authority.

7.7 ALTERNATIVE STREAMS OF PARTICIPATION

In the previous sub-sections the complications in implementing the entitlement to participation in the context of the Kebon Agung Bridge Construction Project have been discussed. It has been found that the exercise of participation does not serve as either protective or transformative instrument for the right-holders. In the following sub-sections, the particular conditions or situations where the entitlement to participation is also applied will be investigated, but they suggest a better portrayal to accomplish the protective or transformative values of participation. Exploring some alternative ways of participation initiated by different actors in other villages in the Province

⁹⁶ Interview, author, Dusun Pojok, April 6, 2004.

⁹⁷ Interview, author, Dusun Pojok, April 3, 2004.

of Yogyakarta, the analysis in this section aims to present a comparative perspective to the situation in Sendang Agung village.

7.7.1 Civil Society Organisations

There have been many indigenous institutions and organisations in local societies in Indonesia whose functions are related to development issues and they contribute to the emergence of civil society in Indonesia. An Indonesian political scientist, Muhammad A.S. Hikam identifies the traditional mutual assistance (*gotong royong*), religious charitable organisations, village cooperatives (e.g. *lumbung desa*), agricultural irrigation groups (e.g. *subak* – particularly in Bali), and some religious education institutions (e.g. *pesantren*) as the most well known form of civil society.⁹⁸ The common characteristics of these traditional institutions include their loose organisational structures, small size, local base and survival orientation.⁹⁹ In addition they are usually organized according to primary relationships such as ethnic, religious or racial groupings.

The terminology of civil society organisations (CSOs), or what are better known in Indonesia as LSM (*Lembaga Swadaya Masyarakat*), has emerged as an important social force in contemporary Indonesia. As described in Chapter V, they are expected to play an important role in strengthening and empowering civil society. Some have even gained prominence at both national and international levels through their activities in various community development projects, human rights advocacy, environmental protection programmes, etc.¹⁰⁰

In the late 1960s and early 1970s, Indonesian CSOs began to focus on specific development related issues. This was primarily stimulated by the accelerated economic development, which took place under the New Order government, and its subsequent impact on marginalisation of people. These types of CSOs are counted as issue oriented CSOs; these believe that the current strategy of development has placed too much emphasis on macro economic growth and has been biased towards the elite interest.¹⁰¹ They argue against the implementation of top-down development and support the bottom-up approaches aiming at empowering society, especially those at the grass roots level. At a minimum, the activists working for the issue oriented CSOs

98 Muhammad A.S. Hikam, 'Non-Governmental Organisation and the Empowerment of Civil Society', in Baker, Richard W. (ed), *Indonesia the Challenge of Change*. (Singapore: Institute of Southeast Asian Studies, 1999) p. 218.

99 M.M. Billah and A.H. Garuda Nusantara, 'State Constraints on NGOs in Indonesia', *Prisma*. 47 (1990) p. 59.

100 Some of the examples of some leading CSOs are LP3ES (*Lembaga Penelitian, Pendidikan, Penerangan Ekonomi dan Sosial* or the Institute for Economic and Social Research, Education and Information), Bina Desa (Village Guidance), LSP (*Lembaga Studi Pembangunan* or the Institute of Development Studies), LBH (*Lembaga Bantuan Hukum* or Legal Aid Institute), and Walhi (Wahana Lingkungan Hidup, or the Indonesian Environmental Forum).

101 Muhammad A.S. Hikam (1999) p. 219.

demand that the prevailing model should be balanced by providing more opportunities for people to get involved in the decision-making process.

Looking at their programmes of action, the issue-oriented CSOs share some basic strategies. They consist of providing assistance to the target groups, especially the poor (charitable objectives), designing and implementing programmes with the people (service objectives), promoting self help projects designed and implemented by people (participatory objectives), and empowering the people in social, economic and political affairs (empowering objectives).¹⁰² These strategies correspond to the vision of Phillip J. Eldrige, an Indonesianist, whose view on the role of the CSOs in Indonesia is to 'enhance the capacity for self-management among less advantaged groups, enabling them to deal with government agencies and other powerful forces on more equal terms', and, as a consequence, 'they are serving to strengthen civil society vis-à-vis the state.'¹⁰³

The strategy of the CSOs working in the Province of Yogyakarta is mainly to accompany and assist the community to realise their problems and actualise their interests in development issues. IDEA (Institute of Development and Economic Analysis) is one of the local CSOs in Yogyakarta that particularly emphasizes their work on this objective. IDEAs activities are centred on monitoring government economic policy and budget advocacy.¹⁰⁴ They cover the area of Plered, Kulon Progo and Bantul in Yogyakarta.

One of the activists working for IDEA confessed that to achieve the success of each project, indicated by the raised level of people's awareness to their rights, assistance for at least 5 years is required.¹⁰⁵ During that period the mapping of the local problems and trainings based on necessities is used as the initial strategy. Here, IDEA approaches the existing local organic organisations, such as '*arisan*' (gathering for saving the money) and '*pengajian*' (religious meeting) as basis for their activities. Through these organisations they try to build community awareness before moving forward to trainings which are designed according to the existing problems. After such trainings, constituents are expected to realise their problems and aspire to solve their development problems. Hitherto, IDEA has successfully assisted the community to change the irrigation policy in the area of Bantul. In Kulon Progo, the organisation

102 See David Korten, *Voluntary Organizations and the Challenge of Sustainable Development*. (Metro Manila: Institute of Development Research, 1989) p. 83-109; Yok-shiu F. Lee, *Community-based Urban Environmental Management: Local CSOs as Catalyst* (Honolulu: Program on Environment, East West Centre, 1994) pp. 30-53.

103 Phillip J. Eldrige, 'CSOs and the State of Indonesia', *Prisma*. No. 47 (1990) p. 39.

104 Interview, Dati Fatimah, Programme Development Manager, IDEA (Institute for Development and Economic Analysis), April 7, 2004.

105 Assurances in the form of awareness training programs are also stated by other prominent CSOs in Yogyakarta, namely PBHI and INSISTS, as a crucial process that can empower people to participate. Interview with Satriawan Guntur Zass, Director PBHI Yogyakarta, author, March 8, 2004, Interview with Toto Rahardjo, Program Manager INSIST, author, 10 March 2004.

assisted the establishment of a local organisation called *Forum Masyarakat Bantaran Kulon Progo*.

In some cases it could be the victims that come to CSOs for assistance. As an organisation that has successfully assisted victims in several cases with regard to public policies,¹⁰⁶ PBHI Yogyakarta (the Legal Aid Foundation in Yogyakarta) admitted that in providing their legal assistance to structural cases, namely house eviction on unfair retrenchment, it is usually the victims who initiate the process and organise themselves before they seek the assistance of the PBHI. Therefore the commitment of the victims to proceed with the case has already been acquired. This background establishes a strong basis for PBHI to finalise the case at the judiciary level. Furthermore, an alliance with other CSOs is also mentioned as one of the preconditions that can advance the leverage of a structural case.¹⁰⁷

CSOs strengths lie in their flexibility and diversity as organisations as well as their local origin. These factors enable CSOs in Indonesia to gain an autonomous status from bureaucratic control. The potential for CSOs to become alternative channels for the grassroots population is even greater when considering that in many developing countries many existing channels in society generally originate from and are dominated by the state.¹⁰⁸ The state-sponsored channels usually function less as an institution encouraging popular participation, but rather as machinery controlling the population and enriching power holders.

Another strong point of the CSOs is their ability to network with each other. An illustration is Forum LSM, a collective forum for several CSOs working in the Province of Yogyakarta. Established in 1982, Forum LSM is a network-aimed organisation that includes around 68 CSOs as its members.¹⁰⁹ The main purpose of the forum

106 However, during the time period of the field research PBHI was responsible for 14 individual cases, including the land disputes, inheritance case, or even divorce cases. As to structural cases, or the case between people and the government with regards to public policies, Satriawan Guntur Zass said that nowadays PBHI rarely handles this type of cases, but he is not sure about the reason. 'Perhaps because the government are more aware of those types of issues right now and therefore very careful in formulating their public policy which violating people's rights'. Interview, Satriawan Guntur Zass, Director PBHI Yogyakarta, author, 8 March 2004.

107 According to PBHI, the success of structural cases depends to several factors. The first one is PBHI's alliance to other CSO's. An ad hoc alliance of organisation creates raises their bargaining position towards any cases. The second factor that contributes to the success of the structural cases is commitment from the victims or beneficiaries to work on their cases. Sometimes people are easy to get bored, give up, and tired even before the case is finished. Unfortunately, up to the moment PBHI still managed to finish all the structural cases as to those people organisations still exist till the end, only a few weak ones who are giving up. *Ibid*

108 Muhammad A.S. Hikam (1999) p. 219.

109 Every two years, they conduct a needs-assessment policy to filter which CSOs are still willing to continue their membership with the Forum. Among those CSOs are: PBHI, PKBI, Bina Swadaya, LESAN, LBH, LABH, WAMA, Patria, Dian Desa, SAMIN, GIRLI, HUMANA. Damar Dwi Sasongko is the representative from PBHI. He will be replaced in October 2004, besides needs-assessment, every two year they have a reorganisation meetings. Interview with Damar Dwi Sasongko, Secretary of Forum LSM, author, 30 March 2004.

is to enhance the networks between CSOs. It also aims to advance the bargaining position of its members on their advocacy work. The strategy of their work is to establish alliances on certain issues between interested partners. In the collective nature of this organisation has been the effective channel not only for people but also for some small CSOS, for example, to address the issue of compensation in house evictions or to propose new regulations.

Despite their capacity to organise and to address significant issues in development of Forum LSM, the issue of inequality of power often inhibits the efforts of this institution to be successful in the politics of decision-making. On their alliance to propose the establishment of the Law on Local Participation in the Province of Yogyakarta,¹¹⁰ Forum LSM failed because of competition with other actors or organisations with some vested interests. Certain organisations, such as local chambers of commerce or associations of regents, usually have an established connection in the local government, either through a political party or even with a member who also holds a powerful position. Such connections enable them to cut the formal decision-making process to accomplish their interest and at the same time block the effort of the Forum LSM.

Notably, CSOs have a unique status; they acquire the capability and flexibility to be welcomed at the community level. Although in some circumstances the question of leverage persists, it can be argued that in the context of Yogyakarta the autonomous and independent positions of CSOs have enabled them to gain recognition in the formal decision-making process. Such positions also draw the community to trust the CSOs as their partner in promoting their interest or seeking solutions for their concerns.

7.7.2 *Organic Forums for Dialogue*

In the previous section on access and opportunity issues, we have seen that the formal institutions that are obliged to act as the representative actors or channels for people to claim protection in the development process, are not effective, due to their limited perception and aptitude to carry out their roles and because they have been designed

110 With regard to this participation issue, Dwi Sasongko made some interesting remarks on Forum LSM's efforts in succeeding with Local Regulations on Participation or *Peraturan Daerah Partisipasi*. Local Regulation on Participation will support the idea of a decision-making process which lies on the practice of consultation, transparency and accountability. Ideally, participation according to this future Local Regulation on Participation will open the access of participation in the policy-making process. However some obstacles will remain, as it probably will only be limited amongst the people who have the capability to access and use this method, for example, Kadin (Commercial Chamber or other professional organisation). For people who do not have a supported environment and the capability to do this, the method is not participation but socialization, let alone consultation. Dwi Sasongko makes an example from the *Peraturan Daerah tentang Pondokan* (the Local Regulation on House Renting), *Peraturan Daerah Tentang LMK RT/RW* (the Local Regulation on Hamlet Organisations), *Peraturan Daerah tentang Sampah* (the Local Regulation on Local Sanitation). Interview, Damar Dwi Sasongko, Secretary of Forum LSM, author, 30 March 2004.

and implemented centrally without considering the local needs or values. If we observe the organic forums in the Javanese villages, there are some other potential channels that can offer access and opportunity for development claims. They consist of the locally initiated informal gatherings such as *selamatan*,¹¹¹ *pengajian*,¹¹² and *selapanan*.¹¹³ *Selamatan* is held irregularly and only when there is a necessity of private celebration, while both *pengajian* and *selapanan* are organised in a more habitual manner.

All of these gathering are currently still in practice in villages in the Province of Yogyakarta. They are usually held at a *dusun* or a village level. It is a place where the village community can gather, chat about their lives and provide room for the population to congregate, and therefore it has to be arranged regularly. Different from village meetings, which always have a certain agenda from the village bureaucracy, these organic events merely have an agenda based on the necessity at the moment, which could be a celebration of birth or pray during the fasting month.

In Kali Bawang, a village located in the Province of Yogyakarta, the forum of ‘*pengajian*’ was actually where the exercise of participation in the development process was born. On an organisational basis, the forum is the perfect place where the population of this village can generate and formulate their interest. With the assistance of IDEA, training and raising awareness programmes were conducted and they included not only the villagers but also the village government. The choice of using *pengajian* is because this forum is considered a powerful institution to start with as it has a clear structure and more importantly its members are committed.

The case of participatory practice that occurred in the Kali Bawang village is related to the struggle against poverty by solving their irrigation problems. During their *pengajian* meetings, discussion about this concern was raised. Eventually their real problem was unravelled and they managed to come up with a realistic solution. They constructed their own proposal containing how to change the local irrigation policy with a method they independently designed. At first the Local Municipality Office underestimated and ignored the proposal. However, as the Local Autonomy

111 *Selamatan* is a ritual meal in which members of a group participate to sustain, maintain or instil order. There are many kinds of *Selamatan*. One kind may be held during the building of a new home, after the recovery from a sickness or to mark any important event in a person’s life. At this level the meal usually consists of *Nasi Tumpeng*, a rice cone. For larger endeavours, such as the dedication of the office block, a more elaborate ceremony involving the sacrifice of live animals may be required. *Selamatan* are also performed whenever a need is felt by the members of a group. Should an office or company experience a string of bad luck, some members of the staff may suggest that a *Selamatan* be held to re-instil the harmony of the office.

112 *Pengajian* is a Muslim religious ritual where a group of participants exercise their religious belief by gathering and reading the Quran together. Yet it is sometimes used as potential forum to disseminate information or political agenda. A Muslim political party in Indonesia, Partai Kesejahteraan Sosial is reported to use *pengajian* as a form to establish their political profile. ‘Fraksi PKS Diingatkan Tak Paksakan Ideologi Partai’, *Kompas*, 18 December 2006.

113 *Selapanan* is a typical gathering held after 35 days after birth or death, according to the Javanese calendar.

Law No. 22 of 1999, the one that was implemented at that time, stipulated the wide authority of the regional government, the Kali Bawang's population brought the proposal directly to the Regional Government office. Impressed with the clarity and the simple solution offered in the proposal, it took six months for the regional government to grant the support.¹¹⁴

This description shows how *pengajian* can be employed as an effective forum for open dialogue and can therefore positively improve people's awareness of their entitlement positions in development projects, providing independent solutions and preventing development hazards. Familiarity of an organic institution created on the basis of norms commonly shared in a community provides security for the related community to freely express themselves and work on their interests.

The inclination to establish centralistic and uniform institutions with regard to development processes hinders the practice of participatory processes. Objectives and substance of such institutions are designed from above without a discerning awareness to the situation below, which therefore provides no security for people to use them. The intention to submit their interest is discouraged and the obedience towards uniform principles is appreciated. As a result, participatory activities conducting in this setting have no transformational values.

In the case of Sendang Agung village, the absence of effective people oriented institutions creates a complicated distance between the village government and their people. A different situation occurred in the case of Kali Bawang village, where the villagers recognised their needs and designed their own development projects. Notably, this was possible not only because of that organic institution *pengajian*, which served as their consolidation basis, but also as a result of their openness in connecting not only to the inner potential but also to the wider context. The Kali Bawang village went through a long process of awareness training programmes conducted with the assistance of a non-governmental organisation, IDEA.

7.7.3 *On Possibilities of Alternative Actors*

Civil society organisations have been regarded as actors that fill the space of moral and disintegrated-power. They act in a realm of collective, public action between the people and the state.¹¹⁵ In relation to human rights, CSOs have been representing hope

114 The person who was responsible for this project, who is actually the member of the BPD of Kali Bawang Village, was very pleased with the result. He said the success has built community confidence that they can actually solve their problems and have a bargaining position towards the government. Moreover, this success story has influenced other villages which more or less encounter the same problems to also organize themselves. Even now, the persons who were involved in that irrigation proposal of the Kali Bawang village are invited to help the training process in Dekso Municipality. Interview, Dati Fatimah, Programme Development Manager, IDEA (Institute for Development and Economic Analysis), 7 April 2004.

115 Emma Porio, 'Civil Society and Democratization in Asia: Prospects and Challenges in the new Millennium', in H. Schulte Nordholt *et al.*, (2002) pp. 110-111.

and building blocks for a system of global governance that will enforce human rights more effectively.¹¹⁶ They and their network have the ability to work across culture and borders, strengthening freedom of assembly and expression in a way that open up spaces for people to participate.

The discussion on how both the civil society organisation and the organic organisation function in development reveals that these organisations can actually empower people to use them as a channel to express their opinions and to get organized in achieving a common goal. As a result, development was conducted as a result of a transformation process of the people to become more aware and confident to struggle for the fulfilment of their entitlements.

The changing of the political and economic context, manifested in the form of local autonomy and polarisation of human rights discourses after the New Order, also plays a role in the success of the intervention of the CSOs. Before, it would have been hard to imagine that CSOs would have open access to organic groups in the smallest and lowest communities such as villages. Efforts to empower villagers from alternative actors would not be possible as villages fell under the control of central government. Only with *reformasi* and the economic crisis did villages gain somewhat more power, because of the declining of government capacities. The absence of some higher government authorities brought villages to seek for compensating forces and this brings opportunity of access for CSOs.

Nevertheless, CSOs do not have free access to each and every small community. In the context of Sendang Agung village, there is no access for alternative actors. While compared to the access of CSOs in the Kali Bawang village, IDEA mentioned that a personal connection between one of their staff members and the member of BPD in Kali Bawang village existed.¹¹⁷ Apart from such privileged relationships, it has been discovered that using organic institutions, such as *pengajian*, is effective in ensuring everyone's involvement and commitment to participation.

Indeed, the employment of these organic institutions redefines the meanings given to the political arrangement in the rural areas. It is a simple recognition that there are links between government, culture and power and that the potential significance of these links often reaches far beyond the local level is valuable in and of itself. Furthermore, combined with an enhanced knowledge of how such relationship works in practice, in the case of IDEAs work in Kali Bawang village, this helps to identify process of transformation through the exercise of participation. In this light, the next question that needs to be asked concerning participation from below is whether these actors and organic forums constitute an effective way to bypass the protection of the people in development processes.

116 Peter van Tuijl, 'NGO and Human Rights: Sources of Justice and Democracy', *Journal of International Affairs*, 52 (1999) p. 511.

117 Interview, Dati Fatimah, Programme Development Manager, IDEA (Institute for Development and Economic Analysis), 7 April 2004.

7.8 CONCLUDING REMARKS

In the case study of the Kebon Agung Bridge construction project in Sendang Agung village, the absence of genuine implementation of the entitlement to participation was noticeable. The project was initiated from above, endorsed by participation of the villagers. Participation was imposed by the village government, entailing an active intervention in its conduct. The intervention was necessary in order to acquire the involvement of the people in the process. The strategy of the village government may be considered as a tribute to the people's voice and roles in village politics. In fact, when comparing to the possibility of similar practice in the New Order Era, it is actually a significant improvement.

Nevertheless, while looking into the chronological details of the procedures as well as into the setting in which the action was taken place, it becomes questionable whether the substance of participatory practice in the Sendang Agung village is actually in line with the entitlement to participation in the context of the right to development.

Decentralisation imposed in Indonesia allows village governments to exercise their autonomy. This includes the possibility to propose development projects which they prioritise. To a certain extent it indicates a degree of openness and accountability. The lower the level of government where policies can be decided, the more opportunity for people to exercise participation and the harm that is caused by development more anticipated. Development policies could be decided upon the interest of people. Indeed, the decentralisation process in Indonesia assumes a linear progression towards an active role by the people.

The case of the Bridge Construction Project in Sendang Agung village illustrates the caveats of the application of decentralisation at the village level. In the context of the role of village government in the project, it can be concluded that the advancement of authority means more for formal actors to enjoy the benefits of the decision making processes. It can be perceived as an opportunity to expand externally, rather than improving that agency's internal accountability. For the people, substantial changes would require more than merely advancement of the legal status of the village authority.

In this regard, unawareness of their formal roles and the local value settings show that the village government and the population of Sendang Agung village need to be prepared before assuming new authority and new political roles. One particular concern is that the local values still nurture the undemocratic structure of the society. Therefore proliferation of the entitlement to participation will take more than political formalities. In Sendang Agung village, it is rather crucial that the establishment of new institutions is followed by an advancement of their aptitude to function as effective institutions. Changes, including the installation of the Village Representation Board should not only be implemented at the surface, but they should actually create a new structural opportunity for representation and improvement of the informal arrangements between actors.

Notably, the well-established top-down culture of development in the country and the nature of the big construction projects such as bridges also contribute to the quality of participation in the case study. Yet, it was observed that establishment of new laws and new institutions based on democratic values, geared towards empowering effects at the grassroots, are not of limited usefulness. Participation, albeit of the discussed discontents, did exist. Therefore, if in the case of such a construction project meant for the development of a particular region, participation was conducted; this can be seen as an indication that the adhered new decentralisation laws, in line with the norm of the internationally declared right of development, are already implemented, albeit still far from perfect. Regardless the top-down nature of the process, this could indicate a way forward in pursuing development as a right. In the further comparative analysis, the small case studies, such as the one of Kali Bawang, with the involvement of non-state actors could provide even stronger evidence of a more positive assessment of the present development as a human right in Indonesia.

CHAPTER 8 CONCLUSION

8.1 DEVELOPMENT WITHOUT PROTECTION

Development has the general connotation of a structural improvement of people's well-being. In practice, however, it often affects the entitlement positions of those who have to sustain their daily livelihoods in a negative way. This happens particularly when decisions on development are taken by governments without any prior consultation, let alone participation of stakeholders. Thus, powerful vested interests impose policies on people at the grassroots level. The point is that such policies are decided not with the aim of eradicating social injustices or improving the living conditions of people, but solely on the basis of macro priorities, *viz.* economic growth and productivity or macroeconomic and political stability. As a result they are likely to exert detrimental effects on people. Hence, instead of being the beneficiaries, people at the grassroots level actually become victims. It is in such contexts that development is considered as being a hazard.

Development hazards usually occur in mega-development projects, such as natural resource extraction, urban renewal programmes, industrial parks and infrastructure projects. Hazards manifest themselves in the form of displacement of inhabitants, landlessness, joblessness and degradation of income, degradation of health and livelihood or food insecurity. Hitherto, development projects such as dam constructions and urban infrastructures have actually victimised more people than those fallen victim to wars and natural disasters.

Considering that development could be victimising, a primary concern should be how to protect people in development processes. For that purpose the damages caused by development should be anticipated and combated.

Here, the right to development might offer a possible protection. This right grants holders the entitlements to a 'fair distribution of benefits' and to 'participation'. The entitlement to a fair distribution of benefits would seem to imply that a violation occurs when development does not deliver benefits for those affected or, perversely, harms the right-holders. The entitlement to participation entails that the process of development requires the involvement of the stakeholders. The United Nations General Assembly Declaration on the Right to Development proposes two distinct options: firstly, by stipulating a participatory environment process that is stimulated by the State, and secondly, by asserting actions from below, emphasising a participatory activity that is, first and foremost, at the initiative of the right-holders themselves.

In this study, regard has been had of the entitlement to participate as a twofold weapon in combating development hazards. Firstly, by exercising participation, the

right-holders might be able to prevent the occurrence of development hazards. The prospect of participation also decreases the likelihood of elite capture during the development process. It implies accountability in the process which is usually absent when development hazards occur. Secondly, the entitlement to participation can legitimate the collective action of people. In particular, this means using participation as a tool to seek remedies and claims for compensation in case of non-fulfilment. In respect of development hazards, states are often unable or unwilling to take the necessary measures to eradicate harmful consequences. Therefore, it requires action from below to put pressure on the duty-holders and reinstate the development process according to its normative goals.

8.2 TWO ASSUMPTIONS REGARDING THE RIGHT TO DEVELOPMENT

The problem with human rights is that they tend to be merely declared without any direct impact on the actual freedoms and entitlement positions of the right-holders. The apparent lack of protective measures and the ongoing human rights violations are indications that human rights often remain isolated in statements, conferences, or agreements. Declaring human rights habitually acts as a general euphoria, disguising a harmful reality.

In order for human rights to have effects for right-holders living in adverse institutional environments, the right to development has to be seen as not merely protective but also transformative. Moreover, from an instrumental perspective it has to be operationalised as both a legal resource and a political instrument. As a legal resource, the right to development provides the necessary legitimacy to create more than just the acceptance of the right but also its actual implementation. The question of legitimacy is, indeed, crucial in securing a coercive impact of human rights. The right to development as a political instrument signifies its use as leverage for individual or collective actions, implying that it can be used as a political language to protest against non-fulfilments in development.

As mentioned in Chapter 1, in respect of the right to development two assumptions are implicit. The first assumption is that this right after having been declared by states at the international level would be officially endorsed by states at the national and local level. This means that there would be a proliferation of the discourse of the right to development into the national domain. In fact, such a proliferation would imply a process of conception of the moral ideas behind this right into the national and local moral universe. The process can be manifested in a course of adaptation, transformation, modification or even rejection. Subsequently, the type of conception would mould to the character of implementation.

The second assumption is that codifying the moral ideas behind the right to development will lead to implementation at the national and local levels. In order for the right to development to have a direct impact for the right-holders, it requires activation by states or other actors, namely juridical institutions, civil society organisations, or media. Hence, in practice, such a process of implementation would entail

changes of perspectives, roles and internal and external relations of all actors in promoting the right to development. Moreover, it would involve the making and execution of development policies, programmes and projects in respect for people's entitlements following from the right to development.

8.3 DEVELOPMENT DYNAMICS AT THE INTERNATIONAL, THE NATIONAL AND THE LOCAL LEVELS

As has been explained in this study the emergence of the right to development benefited from discussions at the international level. Development was an international popular discourse of the 1960s. Newly independent countries, comprising mostly decolonialised territories, were facing an enormous challenge to develop. Their recovery required reconstruction of economic, social and political infrastructures. Being reliant on the colonial power for decades or even centuries had established an ambiguous position in respect of financing the recovery and development processes. They undoubtedly needed external assistance but also felt somewhat reluctant to accept that. They were concerned that such assistance would establish another form of colonialism. Moreover, there was also a common ambition to demonstrate their ability to develop. These backgrounds placed them in a defensive position with regard to development.

Furthermore, human rights were gaining more international attention. The adoption of two international human rights' covenants in 1966, which stipulated specific human rights provisions, created a new opportunity for new emerging human rights to arise. The newly independent countries used this opportunity to propose development as a basis for improving entitlement positions, demanding development assistances not to be an act of charity. A concept of 'the right to development' was considered to be an appropriate tool to accomplish this objective.

The historical background behind the emerging process on the right to development added to both determination and anxieties. The strong collective demand influenced the swiftness of the discourse of the right to development to be accepted by the international community. Nevertheless the background motivations and the result intended by its proponents created some concerns, too. Many developed countries became anxious that establishing development as a human right would oblige them to provide financial assistance. They are particularly concerned with the challenges of nation-building and creating a strong state. In that connection granting development assistance as a fixed entitlement could mean encouraging errant practices or feeding predatory interests. Hence, the legal form of a declaration was the choice that suited the on-going concerns and circumstances. It signified the possibility for an open interpretation of future implementations and non-binding commitments on the part of all actors, but at the same time it indicated an endorsement of the moral ideas behind the right to development.

There are some consequences arising from such a historical background. The first is related to the general moral proposition on development contained in the Declara-

tion. Due to the different ways on looking at development cooperation from donor countries with newly independent countries, it was considered strategic to acknowledge such a general moral proposition. Consequently, states can limit their commitment and the extent of their obligations. Moreover, general moral propositions could gain more states' support than clauses on implementation. The less detailed the document, the easier it could be accepted by states.

The second consequence relates to the legal subjects of the Declaration on the Right to Development. The Declaration grants rights to peoples, states and individuals. These three categories of right-holders raised confusion and criticisms, particularly centred on the risks of abuses by states claiming development assistance but disregarding their own domestic human rights violations. Therefore, experts on the right to development, such as Arjun Sengupta, Yash Ghai and Stephen Marks have argued the necessity of establishing the individual as the real right-holder, since only with respect to the individual can the right deliver direct effects.

A similar situation occurs in determining the position of the duty-bearer. Unlike most of the more established human rights, the right to development assigns not only the state as duty-bearer but also other states and the international community. Arguably, this third consequence corresponds to the nature of development in general, which entails an integral process constituting many actors with many different characteristics. In practice, with an 'imperfect obligation', the enforcement of the right to development is not clear-cut. Duty-bearers may not be easily identifiable and claims for conforming actions cannot always be legally submitted.

The fourth consequence is related to the legal implication of a *declaration*. States have, indeed, taken wide and varying positions in respect of the right to development. Positions range from a rejection, such as in the case of the United States, to incorporation in regional human rights documents or national legislation, namely in South Africa, Ethiopia, Malawi and Benin. Different positions on the right to development taken at national levels subsequently affect the efforts to further implement this right at the international level. In particular, in the United Nations attempts to clarify the right with implementation clauses depend on political consensus. The United Nations recommendations and resolutions on the right to development are not very strong in putting pressure on actual implementation. Therefore, advocating the right to development needs to include other human rights based systems of claims, which means establishing it as a part of the concerns of minority rights, indigenous people's rights, or family rights.¹

The Indonesian position on the right to development is manifested in official statements pronounced at the international level. Notably, however, official statements

1 Martin Scheinin has done extensive research on human rights claims related to the right to development in the African Court of Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights. See: M. Scheinin, 'Advocating the Right to Development Through Complaint Procedure of Human Rights Treaties', in B.A. Adreassen et al, *Development as a Human Right: Legal, Political and Economic Dimension*. (Cambridge: Harvard School of Public Health, 2006) pp. 141-283.

on this right have little impact on the position of the right-holders. If the right to development is violated during processes of actual development, people cannot claim compensation for lost entitlements.

Since the birth of the Indonesian nation-state the idea of individualism – where human rights are considered to find their source – is regarded as an obstacle for the country's development process as that should be based on the family and communal principles. In the beginning this argument was proposed because of the urgent need to eradicate collective starvation and hardship. Subsequently, development was reduced to macroeconomic goals, promoting growth of production at the national level. In fact during the Suharto era this macro ideology helped to secure the government's hegemonic power at the grassroot level. Consequently, people living in vulnerable conditions became increasingly exposed to the perverse effects of development processes. In this context, human rights would have to function as a weapon against major development actors such as the government or private companies that embarked upon this top-down ideology of development.

A top-down approach to the implementation of the ideology of development made human rights based claims against violations in development processes useless and even tricky. During the period of the New Order people's struggles were confined to a particular domain, isolated between civil society organisations and the victims themselves. The accepted ideology of development ensured that at the national level human rights violations were concealed and undisclosed. People were aware that their relationship with the government made any denouncement of actions by the state and other major development actors a dangerous matter. The loss of their voice was to pave the way for financial investments that were supposed to lead to employment and economic growth. Only after the monetary crisis which led to the fall of the New Order regime in 1998 could this political constraint be overcome and a human rights discourse from below was possible. As more people shared the hardships arising from unemployment, food insecurity and lack of access to health care, including the middle classes who had more leverage in society, the government's inability to eradicate the adverse conditions came clearly to the fore. This enhanced the national constituency for the promotion of human rights in development processes. Thus, their incorporation into the legal system was widely demanded along with decentralisation of government power. In less than five years, the government adopted Law No. 39 of 1999 on Human Rights, Law No. 26 of 2000 on the Human Rights Courts and Law No. 22 of 1999 on Local Autonomy, which was later amended Law No. 32 of 2004. In October 2005, the state of Indonesia ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Thus, Indonesia experienced a complicated struggle towards the mainstreaming of human rights in development. The monetary crisis combined with social unrest and demands for political transformation were conducive to the regime change necessary for the incorporation of human rights. However, besides the hurry with which the integration into the Indonesian legal system was performed, there were also political struggles that entailed certain consequences as to procedural implementation.

Law No. 39 of 1999 Human Rights stipulates protection of a wide range of entitlements, including those contained in civil and political rights, economic, social and cultural rights, and the right to development. Law No. 26 of 2000 on Human Rights Courts however, merely asserts the jurisdiction of the *ad hoc* Human Rights Court to hear cases of gross violation of human rights, i.e. genocide and crimes against humanity. This discrepancy creates disappointments for people who claim protection against human rights violations in development processes through the court system. Moreover, the exclusion of most human rights principles in the human rights court system in Indonesia illustrates mere acknowledgement of human rights rather than an effort towards implementation. Hence, human rights are still a long way from being honoured and respected in development processes. On the contrary, the Indonesian government continues to issue and implement laws and orders that oppose the protection of human dignity, such as the law that enables legal eviction² and the law which grants broad licences to companies to exploit even protected forests as long as they are willing to pay a small amount of annual rental fees.³

Another consequence relates to the quality of the legal process. Firstly, the lack of commitment becomes apparent in the stagnation of various proceedings on domestic human rights cases. There is a long list of unresolved cases in the *ad hoc* human rights court on the Tanjung Priok, Abepura, Trisakti and Semanggi cases. Secondly, serious flaws are observed during the course of proceedings on human rights cases. The disappointing judgment of the *ad hoc* human rights court on Tanjung Priok reveals the tendency towards impunity for powerful perpetrators, confirming that courts in Indonesia are not yet independent and incapable of rendering justice in cases of human rights atrocities. Thirdly, restorative justice is still aloft in the country. The judgments of human rights courts in Indonesia fail to include effective compensation to victims. Unless effective restoration is secured, Indonesian enforcement of human rights will remain meaningless.

In the context of human rights violations in development processes, procedural realisation of human rights entitlements is below any reasonable standard or even non-existent. Development hazards are not categorised as being liable to human rights based claims; moreover, demands for compensation to victims tend to be blocked by acts of corruption. Behind these errant practices is facilitation of the interests of development actors such as investors in palm oil plantations and mining sectors, who expand their businesses unreservedly. Recently, with the installation of the National Ombudsman Council and the Corruption Eradication Commission, the problems are slowly being tackled. Yet, Indonesian development processes are still far from being free from corruption. One has to bear in mind that corruption builds on a strong legacy in Indonesia, while benefiting elites during a long time already.

2 Presidential Decree No 36 of 2005 on Eviction.

3 According to Government Regulation No. 2 of 2008, the annual rental fees range from only 1.2 million IDR to 3 million IDR per hectare.

The local level of human rights implementation in development processes falls under the Local Autonomy Laws⁴, which stipulates entitlements to fair development benefits and participation in development processes. The law authorises local governments to design and manage development policies. As a response to the monetary crisis and the local demands for change, the law was established on idealistic goals, presuming that the stipulated distribution of power would create an enabling environment for people's participation and empowerment of local governments.

Since local governments can now propose, manage or even reject development policies, they have gained more formal power and improved bargaining positions. They are no longer accountable to the central government but to the people living in their area of authority. In an ideal world this kind of progress would empower local government to become more responsive to the people. In the case of Indonesia, however, this has simply just reduces the authority of the central government to monitor and secure the local responses to deficiencies in meeting basic needs. Consequently, it is now a pressing concern that the increased authority of local government in development processes is being captured by predatory elite interests. In many cases, it appears that people become even more vulnerable. Decentralisation in Indonesia has evolved as a framework for re-organising privileged access to resources for elites rather than guaranteeing protection in development process.

As to participation the ensuing situation is two-fold. As a compelling moral idea, closely connected to democracy as such, not only do the civil society organisations (CSOs) welcome participation, village governments are also interested to apply participation in the decision-making process. In the case of Kebon Agung Bridge Construction Project in Yogyakarta, the village government employed a form of petition prior to the project. Nevertheless, the substance of the participatory process reveals a lack of additional value in the protection of the right-holders. Comparable to the situation before decentralisation, the whole process was organised from above, initiated to execute the agenda of the village government. The legal acknowledgement of the entitlement to participate legitimised the village government to mobilise people signing their petition.

Apparently, realisation of the decentralisation process at the local level is bound to engage with dominating local values and practices. Proliferation of the moral ideas behind participation easily enters into the local domains, but whether their ideas actually influence people's lives are highly dubious. There are persistent patronage relationships as well as the old legacy on macro determined development priorities, as perceived by local government. These two difficult social constraints persist for three reasons. The first is that although the decentralisation process integrates the principles of participatory development, it excludes a transitional process of implementation that would entail deconstruction of paternalistic relationships through people's empowerment. Secondly, the law of local autonomy does not coerce local government to fulfil their obligations to protect people in development processes. The

4 Law No. 22 of 1999, which is replaced by President Megawati with Law No. 32 of 2004.

distribution of power is implemented without checks and balances between local governments and the central government. The representative actor at the village level (the Village Representative Council or BPD) is installed without sufficient expertise and willingness to counter the expanding power of the local government officials. Thirdly, the adoption of participatory development as a moral idea does not imply that there would be a change in development priorities. Following the years establishing a huge legacy in upholding macroeconomic priorities at the cost of micro interests, local government councils are now using their power to promote mega-development agendas without having to wait for the initiative of the central government.

The consequence of adopting human rights in general and the entitlement to participation in particular create an arena of uncertainty. With regard to the rights that have been acknowledged and integrated into the human rights legal system, assertion of rights still meets with disappointing results. In respect of entitlements relevant in development and legally acknowledged within the framework of decentralisation, protection reaches merely the surface level of administration, without substantial changes in development processes. With such procedural deficits, the integration of the discourse of human rights into the legal system fails to acquire a coercive function. The legitimisation is not conducive to the implementation and enforcement of human rights. In following-up rules and regulations aimed to protect people, there is no compliant behaviour on the part of the Indonesian state. Hence, in Indonesia integrating human rights in the legal system did not create genuine legal resources. Moreover, these fallacies influence the implementation of human rights as political instruments. Although collective actions are now tolerated, human rights serve as a political language of the government while violations are not seriously tackled. The constellations of influential actors and the political arrangements are tuned towards just maintaining the status quo. Consequently, although political struggles for the realisation of human rights appear not to be as tricky as before, they are still meaningless in terms of delivering effective protection to potential and actual victims.

The adoption of human rights discourse in Indonesia has been motivated by political considerations. The legal system is structured on the basis of political compromise while processes of implementation are twisted by dominating powers that manifest themselves both in imposing values and in actual practices. The opening of new spaces for human rights promotion is not usually followed by substantial engagement between duty-bearers and right-holders. At the international level the official acceptance of the human rights discourse has helped to create a good image for the Indonesian government. The country has been praised and added to the list of nation-states committed to upholding human rights. Indonesia was re-elected as a member of the UN Human Rights Council for the period 2007-2010, receiving the second highest number of votes. In terms of international human rights diplomacy, this was certainly a confirmation of success for the government. At the local level, there is a similar inclination. The strategy of participation exercised in the Sendang Agung village received many political endorsements from higher authorities, highlighting that the Kebon Agung Bridge Construction Project is fully supported by the people. However,

these activities of accepting and integrating human rights-based actions do not mean that human dignity is actually being protected. In practice, the human rights discourses are accepted and integrated in the legal system, in order for the government would not have to allocate means and resources to implement human rights. Indeed, in Indonesia, official endorsement for the human rights discourse is a political manoeuvre to gain absolution for non-compliant actions.

8.4 THE DIALECTICS OF HAZARD AND RIGHT

Development dynamics at the international, national and local levels reveal to what extent the right to development suffers from lack of enforceability and hence fails to effectively serve as an instrument to combat development hazards. At the international level, the crisis is caused by the political compromises embodied in the contents of the Declaration and the legal documents following it, while theoretically at least these should have enabled enforcement. Moreover, at the national and local levels, implementation must engage with dominant values and practices that shape the characteristics of enforcement. In this light the two assumptions that were made regarding the proliferation and the implementation of the right to development at the international, national, local levels (see above, section 8.2) do not hold.

In actual practice these assumptions do not hold true because the right to development had been formulated in a specific international context, quite distinct from the context of actual implementation. Given the international background what was codified in the General Assembly Declaration on the Right to Development consisted of moral ideas of a general nature without specific clauses translating these into normative rights and duties. There was, in fact, nothing on implementation. Thus, political consensus between actors could be achieved regardless of the stratified relationships and bargaining power positions. Behind this lies the view that in order legal resources to be 'linear', in the sense that one straight line from the international to the national to the local is consistent. Consistency would lead to the legal certainty that provides legitimacy for coercive actions. However in order to be consistent, legal documents may only contain general moral ideas, while not being specific in their implementation clauses. With this objective, political activities between actors are synergised. Moreover, the consensus excludes the phenomenon of the development hazard as that would lead to disagreement.

Furthermore, the international moral ideas on development, participation and fair distribution are not the same as the established values and practices existing at the national and local levels. To assume, therefore, that the proliferation of the right to development would be unproblematic proved to be highly unrealistic. In each level of analysis, an accepted ideology usually exists to which the right to development must be adapted. In the context of Indonesia, Pancasila is the existing moral space that is assumed to guide daily social and political practices. Notably, at this lower level of analysis values and practices cannot be easily changed as these are not conceived overnight, having come into being through a process of political bargaining, entailing

struggles between multiple actors. Indeed, proliferation of the discourse of the right to development is entirely dependent on susceptibility at the national and local levels. Adaptation and transformation of human rights discourses in national and local domains in practice require that freedoms and entitlements relating to the right in question are interpreted and translated into locally acceptable modes. Such interpretations, however, may well erode the legal substance of a right. The experience in Indonesia, where the entitlement to participation has been incorporated in the process of decentralisation rather than serving as a basis for human rights claims, illustrates this.

As opposed to conceptualisation, implementation activities constitute a different dynamic. Efforts towards implementation entail a struggle between all stakeholders. None of them are isolated while their leverage tends to be stratified and unequal. This inequality in power relations is reflected in the political and social institutions that are responsible for policy decision-making. Moreover, there are competing power positions manifested in values and practices accepted in people's daily lives that function as the basis of the asserted actions to combat hazards. In that respect, the official endorsement of the right to development may imply not just a first step towards implementation but rather towards obstruction. Hence, in order for the right to development to actually operate as a legal resource as well as a political instrument against hazards, all development actors should seek to be *effective* before aspiring to be successful and comprehensive in their efforts.

Moreover, at each level of the dynamics spectra of reconciliation between values and practices are observable. In fact the process of reinterpretation and bargaining towards policies and regulations could well be fruitful. In this study it has been revealed that a linear approach towards implementation without consideration of internal dynamics at the grassroots level could create a burden for those for whom the right to development was meant. Plain implementation of participation from above could in fact abuse this entitlement. Lack of a digestion process for the people and government alike, the integration of the entitlement to participate in the legal and political arenas has served to blur rather than clarify the line between the duty and the right. In practice, therefore, the process of implementation demands a substantial change in the way in which all stakeholders perceive development as a right, entailing not only a re-conceptualisation but also a deconstruction of the roles of all actors at international, national and local levels, including their institutional arrangements.

The final reason why the two assumptions regarding the right to development do not hold is timing. Undoubtedly, a process of proliferation would take a different time frame than a process of implementation. The right to development was officially declared twenty years after the idea had first been introduced. Then the implementation process stagnated until the Independent Expert on the Right to Development (from 1998 to 2004) performed a series of significant researches proposing practical operationalisations of the right to development. In the context of Indonesia, the discourse of human rights was incorporated in the legal system in 1999, right after the collapse of the New Order regime.

International as well as national development policies tend to relate to a moral-political discourse that sees development as structural improvement of people's daily livelihoods effectuated by policies from above. However, reality reflects not so much development as an ideal but rather as domination and resistance in institutional and structural contexts governed by existing power relations. In this context, controversies may rise in three particular domains; the outcomes of development policies, the access and protection of right-holders, and the implementation of participation. It is in such dialectics that development can manifest itself in two distinctive appearances: as both a hazard and a right.

8.5 FINAL REMARKS

What overall conclusions can be drawn with regard to the immense problem of lack of substantial people's protection in development? To begin with, the assumptions that the official and international consensus on the discourse of protection in development would lead to the proliferation and implementation at the grassroots level must be abandoned. Sound analyses should not start by excluding the need for a conception and harmonisation of relevant values and practices at the national and local levels with the international discourse. It has been argued that the lack of enforceability particularly occurs when one forces a positivist form of implementation upon the right to development, while hazards take place especially when development is executed from a determinist perspective. The lack of enforceability of the right to development, then, relates to the problems of:

1. understanding the different power struggles and political compromises;
2. identifying susceptibility to the right to development of the dominating power, manifested in values and practices at the national and local levels; and
3. considering the different elements of a timely transitional process that may occur in diffusing and implementing the international discourse of the right to development at the national and local levels.

Solving this enforceability crisis would entail a broader examination, designed to counter the fallacies of the mainstream assessment of the implementation of the right to development. In this respect the challenge is to generate enforcement as a deliberation process in the conception and assimilation of moral ideas into daily practices. Firstly, a process of conception is augmented when there is a common reaction and interaction to a certain phenomenon that is shared by everyone so that moral ideas can arise. In the context of Indonesia, the shared suffering experience on monetary crises triggered collaboration between actors, values and practices on the issue of human rights. The experience touched the same consciousness for everyone, confirming that the expected values and practices are not always competing but can sometimes be similar and complementary. Secondly, a process of assimilation of moral ideas entails encouraging people's experiments in practicing participation. Repeating the participation experience might enhance learning and empowering processes. This could entail

a range of actions, depending on the susceptibility of the context and actors at that time, but it does not mean that there would be a chaotic spectrum of implementation. It rather implies an explorative perspective, entailing possibility, opportunity and curiosity in the implementation of the entitlements connected to the right to development. This could involve, for example, advocating the right to development through the mechanism of the Inspection Panel of the World Bank, by using judgements on minority and indigenous rights to advocate claims against development hazards or in holding the law on torts at the local levels.

Furthermore, as hazards destroy the entitlement of people living in the adverse arrangements; this indicates a need for institutional interventions. Participation is obviously not a new concept. It has been acknowledged and practiced for years, but the main question is how to ensure that 'good practice' is applied, entailing a genuine process in which human dignity of the people is the main concern of protection. In the case of Indonesia, a largely defunct political representation of people's major ideas and interests in development is observed. People's own ideas have often been neglected in public discourse, including that among international development organisations. Moreover, the popular capacity and competency of actors that are responsible for protection are also below standard. The pursuit of protection in development processes through judicial practices, civil society organisations, and loose networks, reflects failures to develop an operational human rights culture to aggregate issues and interests in development and generate effective actions to combat development hazards. Notably, in the case of Indonesia, engineering new institutions are the first necessary phase, but it is not sufficient to address these limitations. The old legacies of wrong-practices in tandem with the ingrained ideology suggest that the new and old values and practices co-exist and comparable arrangements continue to place people in hostile situations. Substantial protection to development presupposes, therefore, that the strategic tools of human rights are re-appropriated. This calls for an absolute improvement of protective measures, particularly humanising the mechanisms to take victims' perspectives in executing their authority. It is in the performance of protective mechanisms that people can identify and establish a culture of human rights, generating substantiation of their entitlement positions in development processes. Finally, to make up for the enforceability crisis of effective protection in development it is as much about procedural protection as about common material entitlements.

In this study, a different perspective towards the right to development has been examined, positioning this right as an instrument against development hazards. Given the severe impact of development hazards that generate illegitimate damage to people, identifying how the right to development could provide protection in development practices is only one of many puzzles. In reality, the official endorsement of the right to development by states does not always imply implementation of the right as an effective protection against hazards. The normative principles contained in the UN General Assembly Declaration on the Right to Development need much more concrete elaboration in effective freedoms and entitlements. To combat hazards, one must move from *moral* ends of development to a genuine *right* to development. In the ensuing

processes of operationalisation, painful political and economic compromises will have to be made against macro development priorities and vested interests in order to firstly advance and subsequently ensure protection of the intended beneficiaries, in this study regarded as *right-holders*.

SAMENVATTING

Ontwikkeling leidt niet altijd tot structurele verbetering van de levensstandaard van mensen aan de basis. Integendeel, in de praktijk kunnen hun rechtsposities juist worden aangetast. Schadelijke effecten van ontwikkelingsbeleid doen zich vooral voor wanneer beslissingen inzake ontwikkelingsbeleid worden genomen zonder raadpleging vooraf, en al helemaal wanneer zulks geschiedt buiten de belanghebbenden om. Mensen op het plaatselijke niveau (de ‘grassroots’) worden dan slachtoffers van ontwikkeling in plaats van ‘begunstigden’ (*beneficiaries*), zoals ze genoemd worden in het ontwikkelingsjargon. In een dergelijke situatie kan men spreken van een *hazard* in de zin van een ontwikkelingsramp.

Op dit punt zou het internationaal erkende recht op ontwikkeling wellicht bescherming kunnen bieden. Dat recht op ontwikkeling verschaft de rechthebbenden immers aanspraak op een ‘eerlijke verdeling van de baten’ en op ‘participatie’. Het recht op een eerlijke verdeling van de baten lijkt te impliceren dat er een schending van dit recht optreedt zodra ontwikkeling geen voordeel oplevert voor de rechthebbenden of, erger nog, die mensen juist schaadt. De met het recht op ontwikkeling verbonden structurele aanspraak op participatie brengt mee dat alle belanghebbenden bij het ontwikkelingsproces betrokken dienen te zijn. De VN Verklaring inzake het Recht op Ontwikkeling biedt hiervoor tweeeërlei basis: Artikel 2 (3) stipuleert een participierend proces gestimuleerd door de staat, en Artikel 8 (2) vereist dat de staat een gunstig klimaat scheidt voor het ondernemen van activiteiten van onderop. Het legt daarbij de nadruk op participerende activiteiten door de rechthebbenden zelf, waarbij de staat verantwoordelijk blijft voor het scheppen van een faciliterende omgeving voor zulke ontwikkelingsactiviteiten van onderop.

De onderhavige studie richt zich op het complexe grensgebied tussen twee verschillende invalshoeken: enerzijds de rechten van de mens, zoals onder meer belichaamd in het internationaal uitgevaardigde en erkende recht op ontwikkeling en anderzijds ontwikkeling in de praktijk. De empirische focus ligt op Indonesië, met een ‘case study’ in midden Java.

Hoofdstuk 1 schetst het doel van de studie, de methodologische verantwoording inzake mensenrechten en ontwikkeling, alsmede de structuur van de dissertatie. Aandacht wordt besteed aan verscheidene knelpunten bij de verwezenlijking van mensenrechten, met name in hun effecten op de concrete rechtsposities van de rechthebbenden. Ook onderzoekt dit hoofdstuk twee verschillende wijzen waarop mensenrechten zich manifesteren in processen van ontwikkeling: als rechtsmiddel en als maatstaf voor legitiem politiek handelen.

Als rechtsmiddel zou het recht op ontwikkeling met zich mee moeten brengen dat concrete aanspraken worden gehonoreerd. Rechten, opgevat als belangen beschermd door middel van het recht, houden altijd verband met daarmee gepaard gaande plichten. Dit betekent dat staten moeten zorg dragen voor de noodzakelijke wetgeving alsmede voorzieningen voor de handhaving daarvan. Middels uitvoerbare en naleefbare bepalingen en verordeningen en indien nodig met behulp van sancties moeten staten conformerend gedrag waarborgen. Hierin ligt de basis voor juridische procedures in geval van schending van het recht op ontwikkeling zoals tot uiting komend in ontwikkelingsrampen. Opgevat als maatstaf voor legitiem politiek handelen functioneert het recht op ontwikkeling als een instrument ter bemiddeling en onderhandeling bij claims. De primaire actoren zijn derhalve de rechthebbenden die handelen en claims indienen op basis van hun veronderstelde rechten. Hun juridische en politieke acties kunnen de verwezenlijking van het recht bij ontwikkelingsplannen en projecten bevorderen.

Hoofdstuk 2 richt zich op het recht op ontwikkeling in het volkenrecht. Het behandelt de geschiedenis van ontwikkeling als een mensenrecht, de juridische status en betekenis van het recht op ontwikkeling en de huidige praktijk van verwezenlijking van het recht op ontwikkeling op nationaal en internationaal niveau.

Thans, meer dan twintig jaar nadat de Verklaring inzake het Recht op Ontwikkeling werd aangenomen door de Algemene Vergadering van de Verenigde Naties (1986), krijgt het recht op ontwikkeling in toenemende mate aandacht in het internationaal recht en worden in verscheidene landen nationale maatregelen genomen ter handhaving op lokaal niveau. Inspanningen gericht op het invoeren van het recht op ontwikkeling als een effectief rechtsmiddel tegen ontwikkelingsrampen, zijn evenwel nog steeds schaars en van beperkte invloed.

Hoofdstuk 3 richt zich nader op dat verschijnsel van ontwikkeling als *hazard* (de ontwikkelingsramp). De structuur van dit hoofdstuk kent twee delen. Het eerste deel beschouwt de ontwikkelingsramp vanuit het perspectief van economische groei, vanuit een normatief perspectief en vanuit het perspectief van de rechtsposities van mensen aan de basis. Met gebruikmaking van de capabiliteitsbenadering van Martha Nussbaum en Amartya Sen wordt een definitie gegeven die uitgaat van ontwikkeling als een proces van versterking van de rechtsposities van de beoogde begunstigden (*beneficiaries*).

Het tweede deel van hoofdstuk 3 illustreert de vele gezichten en praktijken van de ontwikkelingsramp. Het Sardar Sarovar Dam project in India en het Yacyretá Hydroelectric project in Argentinië/Paraguay krijgen aandacht vanuit het perspectief van gebrek aan toegang tot land en werkloosheid. Negatieve effecten bij het bestrijden van werkloosheid en daling van inkomen worden onderzocht aan de hand van het Pak Mun Dam project in Thailand en het Rondônia Natural Resources Management in Brazilië. Het Nationale Drainage Programma project in Pakistan, het Damproject in Mali, Mauritanië en Senegal en het Petroleum en Pijplijn project in Tsjaad-Kameroen werden geselecteerd om situaties te illustreren waarin ontwikkeling leidt tot verslechter-

ring van de volksgezondheid. De meeste van deze gevallen leidden tot klachten bij het Inspectie Panel van de Wereldbank.

Hoofdstuk 4 verheldert het begrip participatie binnen de context van het recht op ontwikkeling. De analyse richt zich in eerste instantie op de daadwerkelijke betekenis van participatie binnen de ontwikkelingscontext. Vanuit bestudering van de relevante literatuur wordt participatie in deze dissertatie gedefinieerd als een activiteit die bestaat uit *dialogische* processen die mensen de mogelijkheden verschaffen invloed uit te oefenen op de beslissingen die hen raken. De conclusie is dat het recht op ontwikkeling als individueel mensenrecht en als groepsrecht moet worden toegespitst op concrete structureel beschermde aanspraken op participatie in processen van ontwikkeling.

Hoofdstuk 5 analyseert het Indonesische rechtsstelsel en de procedurele voorzieningen die gericht zijn op het verwezenlijken van de rechten van de mens. Getracht wordt de rol van de mensenrechten in Indonesië te karakteriseren, met als conclusie dat de regering aldaar nauwelijks nog feitelijke mogelijkheden heeft geschapen die de beschermende en emancipatoire doelstellingen van de mensenrechten kunnen verwezenlijken. Bovendien kunnen de pogingen van het land om de mensenrechten te respecteren, worden opgevat als niet meer dan een *defensieve* politieke strategie. De ratificatie van verdragen en de institutionele maatregelen die daarop volgden dienen ter ondervanging van onwelkome internationale druk om tot daadwerkelijke handhaving te komen.

Hoofdstuk 6 geeft een analyse van de uitwerking van ontwikkelingsprocessen in Indonesië op de rechtsposities van mensen. Tot uiting komt het tekort van de mensenrechten bij ontwikkeling als bron van *rampen* in de Indonesische context. Het hoofdstuk belicht niet alleen die negatieve kant maar gaat ook in op mogelijke strategieën ter voorkoming van ontwikkelingsrampen.

Ontwikkelingsrampen in Indonesië worden geïllustreerd aan de hand van gedwongen uitzettingen in Karang Anyar te Jakarta, de Hete Modder tragedie in Sidoarjo op Oost Java en het onheil voortvloeiende uit het Palmolieplantage project in de regio Noord Barito op Centraal Kalimantan. De genoemde voorbeelden zijn gekozen om de verschillende vormen van ontwikkelingsrampen in Indonesië te karakteriseren en om tevens aan te geven hoezeer activiteiten ter bestrijding daarvan kunnen worden ondernomen. De grootste knelpunten blijken te liggen bij bepaalde overheidsinstellingen die blijven falen in het beschermen van de rechtsposities van mensen, het negeren van positief recht en het niet nakomen van verplichtingen. Dergelijke ontmoedigende reacties op mensenrechtenactivisme kunnen uiteindelijk leiden tot het ongedaan maken van alle inspanningen ter wille van een gunstiger ontwikkelingscontext.

De contextuele analyses van mensenrechten en ontwikkeling in Indonesië in de hoofdstukken 5 en 6 vormen de achtergrond voor de in hoofdstuk 7 beschreven en geanalyseerde empirische case study over de ontwikkelingspraktijk in Indonesië. Dit hoofdstuk brengt de in de voorafgaande hoofdstukken gevoerde discussie naar het lokale niveau. Het heeft tot doel de feitelijke invloed van het recht op ontwikkeling op de lokale ontwikkelingspraktijk te onderzoeken. Het Kebon Agung brugconstructie-

project in het dorp Sendang Agung, Yogyakarta, Indonesië is gekozen omdat er aanwijzingen waren dat er bij dit project sprake was van participerende activiteiten. De analyses van het dorpsprofiel, inclusief het belang van de Kebon Agungbrug en van het participatieproces bij dit project, zijn uitgevoerd met gegevens die met kwalitatieve methoden zijn verkregen, te weten: documentatiestudies, veldobservaties en mondelinge interviews. Nagegaan wordt in hoeverre participatie hier een reële betekenis had in de zin van daadwerkelijke invloed van onderop.

De resultaten van deze case study laten zien dat in het dorp Sendang Agung nieuwe instituties en regelingen op het gebied van participatie niet leiden tot een daadwerkelijke rol van mensen aan de basis van het ontwikkelingsproces. Zo bleek het dorpsbestuur niet in staat als effectief operationeel orgaan te functioneren. Bovendien stuit het recht op participatie op een weinig bevorderlijke lokale cultuur. Uit een vergelijking van deze case study met participatie in andere delen van Indonesië blijkt dat het recht op participatie alleen dan betekenis kan hebben wanneer ook aandacht wordt besteed aan de bestaande institutionele kaders en aan de verscheidenheid aan morele ideeën achter participatie.

In hoofdstuk 8 wordt tenslotte een samenvattend beeld geschetst van het complexe grensgebied tussen de praktijk van ontwikkeling enerzijds en het recht op ontwikkeling anderzijds. De analyse van de dynamiek van ontwikkeling op internationaal, nationaal en lokaal niveau, heeft aangetoond dat het recht op ontwikkeling te lijden heeft onder een gebrek aan handhavingmogelijkheden en daardoor ook faalt als middel ter bestrijding van ontwikkelingsrampen. Op het internationale niveau wordt deze tekortkoming veroorzaakt door de politieke compromissen die in de inhoud van de Verklaring zijn vervat en in de juridische en politieke documenten die daaruit zijn voortgekomen. Op de nationale en lokale niveaus zou implementatie verbonden moeten zijn aan heersende waarden en politieke praktijken gericht op daadwerkelijke handhaving. In dat opzicht is er nog een zeer lange weg te gaan.

Geconcludeerd kan worden dat via op internationaal niveau uitgevaardigde en door staten officieel bekrachtigde mensenrechten de moreelpolitieke doelstellingen daarachter niet automatisch worden verwezenlijkt op de nationale en lokale niveaus. Om de ontwikkelingspraktijk daadwerkelijk te kunnen veranderen zal het recht op ontwikkeling vooral stevig verankerd moeten raken in de dagelijkse politiek-economische en sociaal-culturele praktijk.

RINGKASAN

Pembangunan tidaklah selalu mendatangkan kemajuan struktural atas taraf hidup masyarakat. Pada kenyataannya, ia juga dapat mengganggu posisi pemilikan hak mereka yang harus mempertahankan kelangsungan hidup sehari-hari. Kebijakan-kebijakan pembangunan dapat juga menimbulkan kerugian. Ini terjadi terutama bila keputusan-keputusan pembangunan dibuat oleh pemerintah tanpa melalui konsultasi terlebih dahulu, apalagi partisipasi dari semua unsur yang terlibat. Dengan demikian, bukannya memperoleh keuntungan dari proses pembangunan, masyarakat di akar rumput justru menjadi korban. Kondisi sedemikian rupa dikenal dengan sebutan *bahaya pembangunan*.

Disini, hak atas pembangunan, yang sudah secara internasional dideklarasikan, mungkin memberikan solusi. Hak atas pembangunan memberi pemegang hak, posisi pemilikan hak atas 'distribusi adil dari keuntungan', dan 'partisipasi'. Pemilikan hak atas distribusi adil dari keuntungan melihat adanya pelanggaran apabila pembangunan tidak mendatangkan keuntungan atau merugikan masyarakat. Pemilikan hak atas partisipasi mensyaratkan keterlibatan masyarakat dalam proses pembangunan. Deklarasi Hak atas Pembangunan mengatur persoalan partisipasi dalam dua artikel. Artikel 2(3) mengatur peran aktif negara dalam mendorong proses partisipasi, sementara Artike 8(2) mendahulukan aktifitas partisipasi yang datang dari bawah, dengan memberi penekanan bahwa partisipasi tersebut harus dimulai dari pemegang hak itu sendiri.

Penelitian ini terpusat pada rumitnya hubungan antara hak asasi manusia, yang dalam hal ini diwakili oleh hak atas pembangunan, dan pelaksanaan pembangunan. Fokus empirik dalam penelitian ini adalah situasi di Indonesia, dengan merujuk secara khusus kepada studi kasus di Jawa. Penulisan buku ini dibagi menjadi delapan bab. Bab pendahuluan diikuti dengan tiga bab teoritis dan dua bab berisi pembahasan kontekstual, satu bab studi kasus dan bab kesimpulan.

Bab 1 memberikan pengantar dengan menjelaskan latar belakang, tujuan, kerangka pemikiran, serta struktur penulisan disertasi ini. Pada kerangka pemikiran dijelaskan beberapa kekurangan dalam penegakan hak asasi manusia, yang membuat hak-hak tersebut tidak berdampak bagi pemegang hak. Oleh karena itu, hak asasi manusia harus dilihat sebagai sumber hukum dan instrumen politik. Hak atas pembangunan sebagai sumber hukum berarti bahwa ia memiliki kekuatan untuk memaksa. Yang dimaksud disini adalah kemampuan hak ini untuk memberikan kewenangan bagi negara dalam usaha-usaha penegakan. Disini negara berkewajiban untuk menjamin pelaksanaan hukum berkaitan. Dengan demikian negara dapat melakukan proses-proses litigasi dalam menangani kasus-kasus pelanggaran hak atas

pembangunan. Selanjutnya, sebagai sebuah instrumen politik, hak atas pembangunan dapat dipergunakan sebagai rujukan mediasi atau negosiasi atas tuntutan-tuntutan yang berkaitan.

Bab 2 menganalisa hak atas pembangunan dari sudut hukum internasional. Hal ini dilakukan dengan mengkaji proses penetapan pembangunan sebagai bagian dari hak asasi manusia, sejarah, status hukum dan isi dari hak atas pembangunan, serta praktek-praktek terkini yang berkaitan dengan penerapan di tingkat internasional dan nasional. Dari pengamatan fakta yang ada, dapat disimpulkan bahwa hak atas pembangunan telah memperoleh perhatian yang cukup besar dalam lingkup hukum internasional. Berbagai petunjuk yang potensial dalam yang berguna bagi penerapan hak atas pembangunan di dunia juga telah disepakati. Dalam lingkup Perserikatan Bangsa-Bangsa (PBB), bisa dikatakan bahwa hak atas pembangunan ditanggapi secara positif. Akan tetapi, apabila dilihat secara seksama, terutama dengan memperhitungkan proses penerapan yang sudah ada, kesepakatan ini cuma terjadi dalam lingkup politik belaka. Usaha-usaha yang bertujuan untuk memperlakukan hak atas pembangunan sebagai perlindungan atas pemegang hak dalam situasi bahaya pembangunan masih terbatas.

Bab 3 ditulis dengan tujuan menjelaskan gejala bahaya pembangunan. Hal ini dilakukan dengan, pertama-tama, menganalisa konsep pembangunan dari berbagai sudut. Selanjutnya dibahas bahaya pembangunan dari sudut pandang pertumbuhan ekonomi, normatif, dan posisi pemilikan hak. Dengan menggunakan teori kapabilitas dan fungsionalitas milik Martha Nussbaum dan Amartya Sen, pembangunan didefinisikan sebagai proses memajukan posisi pemilikan hak para ahli waris pembangunan. Analisa dari teori-teori ini kemudian digunakan sebagai dasar bagi pendefinisian gejala bahaya pembangunan. Gejala bahaya pembangunan merujuk kepada suatu situasi dimana pembangunan memberi dampak buruk bagi posisi pemilikan hak manusia.

Kemudian Bab 3 juga membahas bentuk-bentuk dan praktek-praktek yang telah dilakukan dalam usaha memerangi bahaya pembangunan. Beberapa kasus disajikan guna mempermudah pembahasan. Terutama kasus-kasus bahaya pembangunan yang telah diajukan ke Panel Inspeksi Bank Dunia. Kasus Sardar Sarovar Dam (India) dan Proyek Hidro-elektrik Yacyretá (Argentina/Paraguay) ditampilkan guna membahas persoalan hilangnya tanah dan pemindahan paksa. Kasus Dam Pak Mun (Thailand) dan Pengaturan Suaka Alam Rondônia (Brasil) dipaparkan untuk menjelaskan persoalan hilangnya mata pencaharian. Proyek Pengairan Nasional (Pakistan), Manantali Dam (Mali, Mauritania, Senegal) and Proyek Petroleum (Chad, Kamerun) dipilih untuk menggambarkan situasi dimana pembangunan mengakibatkan penurunan tingkat kesehatan. Selanjutnya untuk menjelaskan mengenai bahaya pembangunan yang berhubungan dengan ketidakamanan pangan dipilih kasus Dam Three Gorges (Cina) dan Proyek Jembatan Jamuna (Banglades). Melalui pengamatan dari kasus-kasus tersebut terlihat bahwa pembangunan seringkali berakibat buruk apabila kebijakan-kebijakan yang berkaitan diputuskan secara sepihak oleh negara. Kasus-kasus ini juga memperlihatkan aktifitas yang berasal dari pihak masyarakat dalam usaha memerangi bahaya pembangunan.

Bab 4 menjelaskan konsep partisipasi dalam lingkup hak atas pembangunan. Pertama-tama, pembahasan ditarik dari sudut pandang yang bersifat umum. Setelah itu, bagaimana hukum hak asasi internasional dan hak atas pembangunan melihat konsep partisipasi juga dipaparkan. Dari hasil resensi literatur, partisipasi didefinisikan sebagai aktifitas yang berkaitan dengan proses-proses dialogis, dimana mereka yang terlibat dapat mempengaruhi kebijakan pembangunan yang berkaitan dengan kehidupan mereka sehari-hari. Bab ini ditutup dengan menjelaskan dua fungsi penting partisipasi dalam usaha memerangi bahaya pembangunan. Kedua fungsi tersebut adalah fungsi pencegahan dan fungsi pemulihan.

Bab 5 merupakan bagian pertama dari pembahasan kontekstual mengenai Indonesia. Penjelasan dilakukan dengan mempelajari sistem hukum di Indonesia dan bagaimana hak asasi ditempatkan didalamnya. Selanjutnya proses perwujudan hak asasi manusia juga diketengahkan dengan mendiskusikan peran budaya dan tekanan internasional yang berkaitan, serta penafsiran hak sipil dan politik dan hak ekonomi, sosial dan budaya di Indonesia. Bagian lain dari Bab 5 menguraikan keadaan-keadaan terkini dari pemenuhan hak asasi manusia di Indonesia, dimana karakter dari proses penegakan hak asasi manusia dipaparkan.

Dari pembedaan fakta-fakta yang ada dapat disimpulkan bahwa masih banyak kekurangan dari pihak pemerintah Indonesia dalam usaha-usahanya memenuhi hak asasi manusia. Dengan demikian hak asasi manusia yang sudah termuat dan terjamin secara resmi belum memberikan dampak yang berarti. Setelah diamati, usaha dari pemerintah Indonesia dengan cara mengakui prinsip-prinsip hak asasi manusia secara formal dalam sistem hukum Indonesia ternyata merupakan strategi politik yang manjur. Ratifikasi dan pembentukan lembaga-lembaga baru guna memperjuangkan hak asasi manusia terbukti mampu menghalangi tekanan-tekanan yang berhubungan dengan pelaksanaan yang sesungguhnya, baik yang datang dari luar maupun dari dalam. Dengan demikian proses penegakan hak asasi manusia di Indonesia bisa digambarkan sebagai sebuah bagian dari usaha pertahanan negara.

Bab 6 memaparkan pembahasan kontekstual atas pengaruh pembangunan terhadap posisi pemilikan hak di Indonesia. Bab ini menjelaskan karakter-karakter utama dari proses pembangunan, sistem pembangunan dan beberapa kekurangan berkaitan dengan penegakan hak asasi manusia dalam pembangunan. Di dalam bab ini, beberapa kasus bahaya pembangunan juga dibahas. Disini dijelaskan bagaimana usaha-usaha yang datang baik dari pihak masyarakat maupun pemerintah dalam memerangi bahaya pembangunan yang terjadi di kasus penggusuran di pemukiman Karang Anyar Jakarta, tragedi lumpur panas di Sidoarjo, Jawa Timur dan perkebunan minyak sawit di Barito Utara, Kalimantan Tengah. Beberapa masalah yang berkaitan dengan kegagalan lembaga-lembaga pemerintah menghormati hak asasi manusia, melaksanakan keputusan-keputusan pengadilan, dan memenuhi kewajiban negara ditemukan sebagai hambatan dalam penegakan hak asasi manusia dalam pembangunan. Pada akhirnya berbagai hambatan ini diduga mampu mematahkan semangat penegakan hak asasi manusia di Indonesia.

Pembahasan kontekstual di Bab 5 dan Bab 6 memberikan latar belakang untuk studi kasus empirik tentang praktek pembangunan yang disajikan di Bab 7. Mengangkat diskusi ke tingkat lokal, Bab 7 menaruh perhatian secara khusus kepada pengaruh hak atas pembangunan terhadap partisipasi masyarakat di tingkat pedesaan. Proyek Pembangunan Jembatan Kebon Agung di Desa Sendang Agung, Yogyakarta dipilih sebagai studi kasus, karena adanya indikasi proses partisipatoris. Penjelasan mengenai profil desa, arti penting Jembatan Kebon Agung dan proses partisipasi yang ada, dilakukan dengan menggunakan data-data yang dikumpulkan melalui studi dokumen, observasi dan wawancara bebas. Setelah itu dianalisa proses pengambilan dan penerapan partisipasi.

Berdasarkan studi kasus yang ada terlihat bahwa pada tingkat desa pembentukan lembaga-lembaga atau peraturan-peraturan baru yang mengatur partisipasi tidak dengan serta merta memajukan keterlibatan masyarakat. Ini terjadi karena, pertama, hal tersebut tidak disertai dengan peningkatan kemampuan dan kesiapan para birokrat desa. Dalam kesehariannya, penyelenggaraan pemerintahan desa masih memberlakukan cara-cara lama. Sehingga perubahan hanya terlibat di tingkat permukaan saja. Kedua, penyebaran pemilikan hak atas partisipasi juga tersandung atas adanya hambatan budaya lokal. Diskusi kemudian dilanjutkan dengan membandingkan praktek-praktek partisipasi di tempat lain, yang dilaporkan terjadi karena adanya keterlibatan aktor non negara, seperti lembaga swadaya masyarakat dan lembaga-lembaga kemasyarakatan lokal. Dari perbandingan ini, terlihat bahwa partisipasi memiliki dampak bagi masyarakat jika pembauran ide-ide partisipasi dengan nilai-nilai yang sudah ada diperhitungkan.

Bab 8 berisi tentang melihat kembali kerumitan hubungan antara hak asasi manusia dan pelaksanaan pembangunan. Dari pembahasan dinamika pembangunan di tingkat internasional, nasional dan lokal dapat ditarik kesimpulan adanya krisis dalam usaha menerapkan hak atas pembangunan, terutama dalam hal penegakan hukum. Dengan demikian hak ini masih tidak efektif sebagai instrumen untuk memerangi bahaya pembangunan. Pada tingkat internasional krisis terjadi karena proses pembentukan hak atas pembangunan dan aturan-aturan susulan yang ada, diwarnai oleh kompromi-kompromi politik. Pada tingkat nasional dan lokal, penyebaran hak ini dipengaruhi oleh nilai-nilai dan praktek-praktek yang ada, yang pada akhirnya membentuk pola penegakan hak atas pembangunan itu sendiri.

Dengan demikian dapat dikatakan, pertama, asumsi bahwa hak asasi manusia setelah dideklarasikan secara formal di tingkat internasional akan didukung oleh aparat negara di tingkat nasional dan lokal tidak berlaku. Kedua, asumsi bahwa kodifikasi ide-ide moral hak atas pembangunan akan berlanjut kepada penerapan ditingkat nasional dan lokal juga tidaklah mutlak. Oleh karena itu, analisa mengenai hubungan antara hak asasi manusia dan pembangunan mengharuskan pengujian yang luas, yang ditujukan guna menjawab kekeliruan-kekeliruan dari penerapan hak atas pembangunan yang sudah ada selama ini. Dapat disimpulkan, penerapan hak atas pembangunan sebagai sumber hukum maupun instrumen politik haruslah mengakar di tingkat masyarakat.

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