EQUITY AND THE CRISIS OF DEVELOPMENT POLICY IN DEVELOPING COUNTRIES: A CRITICAL ANALYSIS OF THE ENVIRONMENT AND CLIMATE CHANGE REGULATORY FRAMEWORK IN MALAWI

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DECLARATION

I, Gracian Zibelu Banda, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

Signed by candidate

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Gracian Zibelu Banda

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LIST OF ACRONYMS

AU	African Union
BVC	Beach Village Committee
CBD	Convention on Biological Diversity
CBRLDP	Community Based Rural Land Development Programme
COMESA	Common Market for East and Southern Africa
CPR	Civil and Political Rights
DFID	Department for International Development
EAD	Environmental Affairs Department
EIA	Environmental Impact Assessment
EJM	Environmental Justice Movement
EMA	Environment Management Act
ESCR	Economic, Social and Cultural Rights
ESIA	Environmental and Social Impact Assessment
FISP	Fertilizer Input Subsidy Programme
FCTC	Framework Convention for Tobacco Control
HDI	Human Development Index
ICJ	International Court of Justice
IEL	International Environmental Law
IPCC	Intergovernmental Panel on Climate Change
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
IMF	International Monetary Fund
IUCN	International Union for Conservation of Nature
GHG	Greenhouse Gases
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MDGs	Millennium Development Goals
MEAs	Multilateral Environmental Agreements
MEPA	Malawi Environmental Protection Authority
MGDS	Malawi Growth and Development Strategy
MPRSP	Malawi Poverty Reduction Strategy Paper
NEAP	National Environmental Action Plan
NCCMP	National Climate Change Management Policy
NCE	National Council on Environment
OPC	Office of the President and Cabinet
PDNA	Post Disaster Needs Assessment
PRSP	Poverty Reduction Strategy Paper
RBA	Rights Based Approach
RTD	Right to Development
SD	Sustainable Development
SADC	Southern Africa Development Community
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States of America
UNCED	United Nations Conference on Environment and Development
UNFCCC	United Nations Framework Convention on Climate Change
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme

UNGA	United Nations General Assembly
USAID	United States Agency for International Development
VNRMC	Village Natural Resources Committee

ABSTRACT

This thesis examines the interface between development policy and the regulation of environment and climate change in developing countries, focusing on Malawi, its relevant policy and legislation. The central argument is that development, as adopted in Malawi and elsewhere in the developing world, carries power and knowledge asymmetries that structure risks and marginalises those on the periphery of policy discourse. As one commentator has observed, to be developed is to be enslaved by these discourses, including by the regulatory architecture that anchor these development narratives. This has negative implications for the application of equity norms despite its recognition in the Malawi Constitution as the basis for policy making.

The thesis observes that a majority of people are marginalized and immiserated by the geographies and histories of vulnerability associated with dominant development paradigms. The applicable regulatory frameworks are not able to address this inequity primarily because they serve these paradigms. The climate change phenomenon has further exposed and exacerbated the limitations of the regulatory framework to deliver equitable development. But it has also provided an opportunity to address marginalisation mainly because the climate problem threatens all sectors regardless of interests, geography or history and, consequently, requires equity to be at the centre of the policy response.

The thesis argues that in the Malawian context, a primary consideration in the design of a responsive environment and climate change regulatory framework is to understand and apply the development ethos as an empowering commitment based on the humanity and dignity of all Malawians as the Malawi Constitution mandates. Such an understanding of development essentially prioritizes the welfare and interests of the individual, the community and the state. The thesis highlights the utility of the right to development and its ethical, social justice and moral imperatives to reimagine human rights as ethical demands, rather than the current reliance on the juridical model. The thesis calls upon environmental human rights discourse to embrace equity norms and focus on those who are marginalized and vulnerable rather than the dominant juridical model of human rights jurisprudence that focuses on individual entitlements.

The thesis further argues that the climate change problem has the potential to facilitate diverse participation in environmental regulation by emphasising the development losses associated with climate change. Focussing on climate justice can infuse equity norms to facilitate responsive environment and climate change regulation. It can also give voice to environmental institutions and galvanize regulatory capacity across sectors that have been marginalised in development regulation. The thesis argues that policy and legislation must address epistemic injustices inherent in the dominant development and environmental governance paradigms by engagement and contestation with lived realities of affected communities. This requires new ways of making policy and legislation which go beyond constituency representation and harnessing living customary norms that recognize and respond to geographies and histories of marginalisation and vulnerabilities.

CHAPTER 1
INTRODUCTION AND RESEARCH CONTEXT

1.1 Introduction

Developing countries face numerous challenges in environment and climate change regulation as they pursue their development aspirations. Among the root causes is the unequal access to environmental resources resulting in skewed and inequitable development outcomes and the vicious cycle of poverty and environmental degradation. In Malawi, and elsewhere in developing countries, the poor continue to be marginalized despite existing constitutional, policy and legal provisions that address access to environmental resources. This has created a crisis of development and a crisis of nature which, as this thesis argues, is essentially a crisis of justice.[1]

The adverse impacts of climate change have increased vulnerability and exacerbated the crisis of justice with poor developing countries such as Malawi disproportionately affected. Apart from being one of the poorest countries in the world, Malawi is also one of the most vulnerable countries to climate change due mainly to its topography and the increasing frequency of droughts and flooding.[2] These erode the few resources available to the poor who entirely depend on environmental resources to cope with climate change impacts.[3] The intensity of climate change impacts and the increased vulnerability of the poor have added enormous pressure on environment and climate change regulation.

Climate change however presents an opportunity for a different approach in environment and development regulation. The environment sector which, so far has had limited influence on development policy, has a window to improve its visibility and importance. This is because, although climate change is primarily an environmental problem, [4] it is now

[1] As argued by Wolfgang Sachs, 'Sustainable Development and the Crisis of Nature: On the Political Anatomy of an Oxymoron' in Frank Fisher & Marten A Hajen (Eds) *Living with Nature: Environmental Politics as Cultural Discourse*,1999, Oxford, Oxford University Press, 23-41, at 27: '(T)he crisis of justice and the crisis of nature stand, with the received notion of development, in an inverse relationship with each other. In other words, any attempt to ease the crisis of justice, threatens the crisis of nature; and the reverse, any attempt to ease the crisis of nature, threatens to aggravate the crisis of justice'.

[2] See op cit note 42.

[3] The impacts of floods in the 2014 – 2015 rainy season demonstrated the vulnerability of rural communities in flood prone areas: See Malawi Government, *Post Disaster Needs Assessment (PDNA) Report,* (2015) Lilongwe, Department of Disaster Management.

[4] Climate change is one among many global environmental problems which include air pollution, marine plastic litter, land degradation, illegal wildlife trade, biodiversity loss and land use change and habitat loss that are vexing the planet. The climate crisis however has overshadowed the many existing environmental crisis because of its transboundary nature and the intensity and scale of its threats and harms. See UN Environment, *Global Environmental Outlook*, (2019) Cambridge, Cambridge University Press.

widely acknowledged as a development issue as it threatens and erodes development gains.[5] This provides an opportunity for environment and climate change institutions to influence a more responsive and equitable development regulatory framework than has been the case to date. As a development problem, the climate crisis affects more diverse stakeholders than the environmental crisis. The climate crisis can galvanise better and broader global cooperation and response than the environmental crisis. On the other hand, the climate crisis requires a more flexible instrument of governance to arbitrate the many divergent interests that compete in the development process.

Equity is a major building block of climate change regulation, primarily because of the recognition that inequity in the global commons is one of the major causes of climate risks. Regulating the environment and development through a climate change lens has the potential to better address the crises of nature and justice. The importance of equity in climate change regulation is highlighted in the United Nations Framework Convention on Climate Change (UNFCCC)[6] and the Rio Declaration on Environment and Development (Rio Declaration)[7] which make equity the overriding principle.[8] These provide space for developing countries to negotiate, domesticate and implement development and environmental obligations that can support equity considerations.

There are, however, major debates among academics as well as international policy makers on the limits and utility of the equity principles.[9] It has also been argued that international environmental law (IEL) has been 'complicit in causing, sustaining and exacerbating…climate injustices…, if not explicitly, then in subtle, but no less effective and disturbing ways, through its promotion of….those structural paradigms that underlie climate injustices.'[10] Although IEL plays an important role in the development of national climate change and environmental law and policy[11], the influence of equity principles has been limited mainly because of sovereignty and national interest claims.[12]

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[5] See Malawi Government, *Post Disaster Needs Assessment Report* (2019) Lilongwe, Department of Disaster Management.
[6] Accessed at https://unfccc.int/resource/docs/convkp/conveng.pdf.
[7] Accessed at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.
[8] See the Preamble to and Article 3 of the UNFCCC and Principles 3-8 of the Rio Declaration on Environment and Development.
[9] See Christopher Stone, 'Common but Differentiated Responsibilities in International Law' (2004) *The American Journal of International Law*, 78:276.
[10] Louis Kotze, Duncan French & Luis du Toit, 'Friend or Foe? International Environmental Law and its Structural Complicity in the Anthropocene Climate Injustices', 2021, *Onati Social Legal Series*, eprints.lincoln.ac.uk>eprint, at p. 9: Accessed 30 June 2020.
[11] See section 4.4 below.
[12] See op cit note 82.

The Constitution of Malawi (the Constitution) makes provision for fundamental principles as well as principles of national policy and a Bill of Rights that make equity the overriding constitutional ethos. These include the constitutional requirement to protect and promote the interests of the people of Malawi as the basis for the exercise of state power[13]; the principles of national policy that specifically make sustainable development a key policy objective[14]; and a number of rights that also highlight the equity requirement[15]. In particular, the Constitution requires that the state must achieve a sensible balance between the creation and distribution of wealth[16] and consider the quality of rural life as an indicator of the success of development policies.[17] In addition, the Bill of Rights[18] provides for a number of civil and political rights (CPR) such as the right to life,[19] equality,[20] liberty,[21] human dignity and freedom[22], access to information and freedom of assembly, expression and opinion.[23] It also provides for economic, social and cultural rights (ESCRs) such as the right to property,[24],economic activity,[25] and development which includes equality in access to basic services, education, health, food, shelter, employment and infrastructure.[26] The CPR and ESCR define entitlements for empowerment and wellbeing and attainment of material interests. In addition, the Constitution requires Government to govern in accordance with international law and comparable foreign case law,[27] an important tool for benchmarking rights protection and good governance.

These constitutional rights have important implications for incorporating equity norms in the regulation of the environment and climate change. In practice, however, the connection between access to resources for realizing these rights and environmental stewardship is less highlighted, and environmental law and policy are subservient to development policy. This is primarily because the economic growth model, which is the main yardstick

[13] Section 12 (1) of the Constitution.
[14] Section 13 (d) of the Constitution.
[15] Chapter IV of the Constitution.
[16] Section 13 (n) of the Constitution.
[17] Section 13 (e) of the Constitution.
[18] Chapter IV of the Constitution.
[19] Section 16 of the Constitution.
[20] Section 20 of the Constitution.
[21] Section 18 of the Constitution.
[22] Section 19 of the Constitution.
[23] Section 35-38 of the Constitution.
[24] Section 28 of the Constitution.
[25] Section 29 of the Constitution.
[26] Section 30 of the Constitution.
[27] Section 1, 11 (2) (c) of the Constitution.

for development outcomes, has dominated the development policy space and made environmental regulation less connected to the struggle and interests of a majority of people.[28] This disconnect undermines the constitutional provision requiring that state power should only be exercised to promote the interests of the people of Malawi[29].

This thesis examines the interface between development policy and environment and climate change regulation in order to explore the role of equity in developing a responsive environment and climate change regulation in Malawi. It investigates the significance and utility of equity considerations in environment and climate change regulation and the extent to which these have been incorporated and used in relevant policies and legislation. The thesis further explores the potential of utilising the climate crisis to galvanize diverse interest groups to focus on development equity and improve responsive environment and climate change regulation.

1.2 Background

1.2.1 Environment, Climate and Socio-economic Context

Malawi is one of the poorest countries in the world with a gross domestic product (GDP) per capita income of US$564.6 for 2019, according to the International Monetary Fund (IMF).[30] The United Nations Development Programme (UNDP) Human Development Index (HDI) of 2018 ranks the country at 171 out of 182 in the world.[31] Poverty runs deep, as about 49% of the population live below the poverty line of US$1.90 per day.[32] The poverty levels deepen in the rural areas of southern and northern Malawi, where extreme poverty and the ultra-poor[33] are mostly found. Inequality is a major concern; according to statistics, the richest 10% of the population has nine times the average per capita income of the poorest 10%.

[28] The debates on the universality or otherwise of the right to development highlight the dominance of this development paradigm: see sections 1.22 and 3.8 below.
[29] See op cit, note 13.
[30] International Monetary Fund, *IMF Country Report Number 18/115*, 2018, Washington DC, IMF: www.imf.org.
[31] UNDP, *Human Development Report*, 2018, New York, UNDP. Accessed at www.hdr.undp.org.
[32] The international poverty line was first introduced by the World Bank in 1990 as one dollar a day: see World Bank, *World Development Report* (1990) Washington DC, World Bank. Since then, it has been adjusted to $1.25 in 2005 and to the current $1.90 per day in 2015. The poverty line measures the real cost of living based on conditions of absolute poverty in developing countries corresponding to the level of wellbeing in all countries: https://www.worldbank.org/en/news/press-release/2015/10/04/world-bank-forecasts-global-poverty-to-fall-below-10-for-first-time-major-hurdles-remain-in-goal-to-end-poverty-by-2030. The figure is however arbitrary and there is no consensus on what it means in terms of the real cost of human needs: see 6.4.1 below.
[33] These were defined as persons who are in such dire poverty that they cannot afford the minimum standard for recommended daily food requirements: See also National Statistical Office, *Integrated Household Survey 2010 – 2011*, (2012) Zomba, National Statistical Office, p.207. In the *Integrated Household Survey 2019 – 2020*, (2020) Zomba, National Statistical Office, at p.170, welfare figures show over 63% have inadequate food, 52% have inadequate housing, while 52% have inadequate healthcare. The figures are higher in rural

The southern region has more unequal income distribution than the centre and the north, while urban areas have slightly higher extent of inequality than rural areas.[34]

On the other hand, Malawi's economy is a predominantly agro-based, employing more than 80% of the population and accounting for a third of the GDP.[35] But the sector is experiencing considerable pressure. With a population of about 18 million and an area of 118, 000 square kilometres, Malawi has one of the highest population densities in Africa. Of the 11.8 million hectares only 9.4 million hectares is land, while the rest consists of lakes and rivers. The land potentially available for agriculture is 4.5 million hectares after accounting for mountainous areas, wetlands and protected areas. Smallholder farmers who constitute over 90% of the rural population cultivate about 2.4 million hectares. The rest of the available land is under commercial estates comprising only 30, 000 estate owners. Land has consequently become more fragmented over the years as population has grown exponentially; hence average landholdings dwindled from 1.5 hectares in 1968 to under 0.9 hectares in 2013.[36] This has a profound effect on land productivity due to continuous cultivation and limited inputs to improve soil fertility.

The importance of environmental resources to the national economy and local livelihoods is immense. A UNDP and United Nations Environment Programme (UNEP) study commissioned in 2011 estimated the contribution of renewable natural resources to GDP at 12.8% per annum. This figure however does not include the contribution that biomass makes to the informal energy sector.[37] The study estimated the total cost of unsustainable natural

areas compared to urban areas: thus over 66% in rural areas have inadequate food compared to about 36% in rural areas; over 54% have inadequate housing in rural areas compared to 38% in urban areas; and almost 56% in rural areas have inadequate healthcare compared to 34% in urban areas.

[34] Ibid, *Integrated Household Survey 2011-12*, Ibid, pp. 220 - 221.

[35] See World Bank, *Malawi Economic Monitor: Harnessing the Urban Economy*, 2017, accessed at: https://documents1.worldbank.org/curated/en/536051495634418308/pdf/115253-REVISED-JUNE-2-50p-Malawi-Economic-Monitor-5-final-Jun-2-2017.pdf; and World Bank, *Malawi Overview*, 2021, accessed at: https://www.worldbank.org/en/country/malawi/overview.

[36] Ibid, Integrated Household Survey 2011-12, Ibid, pp. 220 - 221. The *Integrated Household Survey 2019 – 2020,* op cit note 33*,* shows the land holding sizes range from 0.4 hectares to 0.8 hectares, at pp. 152-154. See also Karin Lindsjo, Wapulumuka Mulwafu, Agnes Andersson Djurfeldt and Miriam Kalanda Joshua, 'Generational Dynamics of Agricultural Intensification in Malawi: Challenges for the Youth and Elderly Smallholder Farmers', *International Journal of Agricultural Sustainability*, accessed at: https://www.tandfonline.com/doi/pdf/10.1080/14735903.2020.1721237?needAccess=true, a study which found that a wide variation in land holdings from between 0.36ha to 1.04ha in some villages: see p. 7.

[37] Gil Yaron, Ronald Mangani, John Mlava, Patrick Kambewa, Steve Makungwa, Austin Mthethiwa, Spy Munthali, William Mgoola & John Kazembe, *Economic Valuation of Sustainable Natural resources Use in Malawi : Economic Study* (2010) Lilongwe, UNDP/UNEP, p. iii. The study estimated GDP contributions of natural resources using published studies for forestry and tourism resources. It also undertook primary research and used existing data to estimate the economic cost of soil degradation to agriculture, hydro power generation as well as net loss of forest resources. The study further calculated the economic cost of more or less sustainable fishing practices; while the cost of poaching were extrapolated from a study of two protected areas. See p. ii of the report.

resources use to the national economy at 5.3% of GDP per annum which represented the total national budgetary allocation for education and health in 2009.[38] The report further notes that the largest cost is from loss of agriculture productivity as a result of soil and catchment degradation, land clearance for supply of firewood and charcoal, overfishing and reduced economic productivity as a result of indoor air pollution.[39]

Malawi is also one of the countries that are most vulnerable to the impacts of climate change, mainly as a result of the country's topography and high poverty levels. Research has shown that the mean temperatures over the lower Shire Valley in southern Malawi, for example, rose by 2.3%, while mean maximum temperatures increased by 2% between 1970 and 2002.[40] On the other hand, historic to future 2050 rises are projected to rise by 1.8% with the hottest months of October and November predicted to increase by 2.1% to 2.5%.[41] Further, there have been marked changes in rainfall patterns, which has become erratic resulting in changes in the growing seasons and the types of crops grown. In addition to strong winds and erratic rainfall, droughts and floods have also become more regular.[42] The 2014-2015 floods were followed in quick succession by two years of climate-induced drought in 2016 and 2017, which the IMF blamed for holding back economic growth.[43]

Vulnerability to climate change varies across the country, based on community resources, topography and history. Increasing vulnerability places significant pressure on environmental resources and requires policy and regulatory responses that uplift peoples' capacities to adapt and build resilience to climate hazards. Malawi's policy response has not addressed the drivers of vulnerability to climate impacts, such as lack of access to infrastructure, land, agriculture inputs, health and other essential services.[44] The policy response has

[38] Ibid, p. ix.
[39] Ibid.
[40] See Ibrahim Phiri & Alex Saka, 'The Impact of Changing Environmental Conditions on Vulnerable Communities of the Shire Valley, Southern Malawi' in C. Lee & T. Schaaf (Eds) *The Future of Drylands*, (2005) Paris, UNESCO, p. 545.
[41] R. Hunter, O. Crespo, K. Coldrey, K. Cronin, M New, 'Research Highlights – Climate Change and Future Crop Suitability in Malawi', University of Cape Town, South Africa, undertaken in support of *Adaptation for Smallholder Agriculture Programme* (ASAP) Phase Two, International Fund for Agriculture Development (IFAD), Rome.
[42] In the 2014 – 2015 rainy season Malawi witnessed some of the worst flooding in living memory affecting about 1.15 million people in 15 districts across the country. The floods rendered over 230, 000 people homeless, washed away infrastructure and crops and killed over 200 people. The effect of these floods had considerable implications on disaster recovery for affected individuals and households, considering that many of those who lost property and crops were already poor. See Malawi Government, *Post Disaster Needs Assessment Report* (2015) Lilongwe, Department of Disaster Management. The report further states that no less than $494 million was required for recovery and reconstruction.
[43] IMF, op cit note 30, at p. 4.
[44] Gracian Banda & Maybin Ng'ambi 'Climate Change and Rural Livelihoods: Impact and Adaptation of Small-scale Framers in Malawi' in Aksel Naerstad (Ed) *Africa Can Feed Itself* (2007) Oslo, Development Fund.

instead focused on relief and recovery after disaster with little or no attention to increasing preparedness, resilience and capacity of vulnerable communities.[45]

Environmental degradation and climate change have negative effects on agriculture production on which a majority of the population rely. Statistics show that agriculture productivity has generally declined since the 1970s mainly as a result of declining soil fertility[46] requiring the utilisation of synthetic fertilizers, which most smallholder farmers can barely afford. The loss of soil productivity has necessitated another huge cost on the national purse in the form of an expensive Fertilizer Input Subsidy Programme (FISP) to improve maize productivity and therefore ensure food security. FISP has major challenges due to its doubtful sustainability in terms of cost, failure to target the poor as intended beneficiaries and political interference.[47] FISP has also diverted resources from other equally important sectors, such as education and health on which the poor depend. There has, however, been a marked reduction of beneficiaries of the FISP from 2010 to 2013, confirming the costly nature of the programme.[48] Commentators have consequently urged that beneficiaries need to graduate into more resilient conditions such as less reliance on organic fertilizers considering its environmental impacts; be better organised to access inputs and markets; be more self-reliant so as to reduce numbers of farmers completely relying on free subsidies; and transition to more off-farm income generating activities[49].

The FISP is an attempt to equalize opportunities of access to resources mainly to promote food security. However, as in most of these development policies, the emphasis is on the immediate problem of food insecurity but the beneficiaries essentially remain vulnerable to climate and environmental shocks and change in policy choices. In addition, FISP locks small-scale farmers into growing certain types of crops such as maize and provides limited room when the vagaries of weather and climate change require diversification. The heavy reliance on state largesse limits the resilience or capabilities of vulnerable groups that the policy seeks to assist.

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[45] It is worth noting that Malawi has recently adopted a National Disaster Risk Management Policy 2015 and is drafting a Disaster Risk Management Bill to implement the policy.

[46] Gil Yaron et al, op cit note 37. World Bank data shows 4 to 11% decline in agriculture yields from 1992 as a result of soil erosion according to S Benin, *Agriculture Growth and Investment Options for Poverty Reduction in Malawi*, (2008) IFPRI Discussion Paper 00794.

[47] Ephraim Chirwa & Andrew Doward, *Agriculture Input Subsidies: The Recent Malawi Experiences* (2013) New York, Oxford University Press.

[48] Karl Pauw & James Thurlow,' Malawi's Farm Input Subsidy Program: Where Do We Go from Here?' (2014) (www.ifpgri.org).

[49] See Daimon Kambewa, 'Rethinking Agricultural Input Subsidy Programmes and the Role of Agriculture Extension: Lessons for Future Programming', MwAPATA Institute, *Policy Perspectives*, Number 1, October 2020. Accessed at: https://www.mwapata.mw/pp1.

1.2.2 The State and Development Regulation

FISP illustrates a development policy intended to mitigate harsh conditions of the economic growth paradigm that rewards a few and marginalises the majority. The programme choice and beneficiaries however are entirely at the mercy of the state and politics.[50] This limits the extent to which the policy can improve peoples' capacity to meet their development needs, as Amartya Sen has observed in his seminal works.[51] According to Sen, development should enhance the capabilities that people have, based on the functioning, the commodities at their disposal to enable them be or do what they value rather than depend on what the state provides. Sen has further argued that development should not be perceived in material terms only, contending that 'the quality of our lives should be measured not by our wealth but by our freedom'.[52] This reasoning is actually in tandem with Malawi's development and constitutional framework.

The CPR and ESCR under the Constitution provide important frameworks for enhancing human freedoms as well as the capacity to allow people to be and do what they value. The ESCR to property, economic activity, and development provide specific rights addressing socio-economic issues that have direct relevance for promoting access to resources, enhancing equity and therefore improving individual capabilities. When read together with CPR to life, liberty, human dignity and freedom, equality, and freedoms of association and expression, they provide capabilities to enable the individual, the community and the country to achieve overall development needs and aspirations.

There are however obstacles in the rights-based approach (RBA) to regulate development, environment and climate change. First, there is a tendency to perceive CPR as distinct from ESCR; a dichotomy that has been confirmed by the development of the international human rights framework. The adoption of the two international covenants, one on CPR and another on ESCR has rendered credence to the theory that the two sets of rights can and should be treated differently. Ultimately, the emancipatory potential of human rights has been stifled by the narrow definition of freedom, not only in terms of its capability enhancing

[50] Malawi had pursued a fertilizer subsidy programme until the late 1980s and the early 1990s when the subsidy was scrapped following funding constraints due to structural adjustment programmes championed by the IMF. Social protection programmes were then introduced to alleviate the severity of the impact on the very poor; these included the food for work, cash for work and the input for work funded by different donor agencies. Targeted Input Programmes and Starter Pack Programmes were introduced in 1993 and 1998 on a small scale, until the famous 2005 FISP, which won Malawi acclaim for achieving food security against the advice of the IMF. See Ephraim Chirwa and Andrew Doward op cit note 47, pp. 80 – 81.

[51] Amartya Sen, *Development as Freedom* (1999) Oxford, Oxford University Press.

[52] Kofi Annan, Secretary General of the United Nations (UN) in a commentary on the back cover of Amartya Sen (1999) ibid.

potential, but also its emphasis on non-discrimination and equality, as well as implication for access to resources.[53] Consequently, implementation of ESCR faces considerable obstacles due to legal traditions that have been influenced by existing development and legal norms supporting these rights. In addition, severe financial constraints on the public budget as well as limited accountability and transparency in state resource management have been used to justify limited enforcement of ESCR. There is considerable literature[54] and jurisprudence[55] on the utility of these rights in meeting equity objectives under the Constitution and international instruments to which Malawi is a party. This thesis however observes that the rights-based approach is constructed around individual entitlements. It favours individuals with capacity to enforce the rights as stipulated. The thesis therefore argues for a capability approach to regulation[56] to uplift the less privileged to benefit from these rights.

[53] Zehra F Kabasakal Arat, 'Human Rights Ideology and Dimensions of Power: A Radical Approach to State, Property, and Discrimination' (2008) *Human Rights Quarterly*. 30 (4): 906-932.

[54] There is growing literature focusing on the nature, content and controversies associated with implementation and enforcement of ESCR in the context of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights 1966 and the UNFCCC to which Malawi is a party. The Malawi Supreme Court declared in *Chihana v Republic* (MSCA No. 9 of 1992) that the Universal Declaration of Human Rights is part of customary international law and therefore directly applicable in Malawi, thereby strengthening the domestic applicability of many of the rights associated with the UDHR even though not incorporated in national legislation. Some of the key literature includes Geraldine Van Bueren, *Freedom from Poverty as a Human Right: Law's Duty to the Poor* ((2010) UNESCO Publishing, Paris; Danwood Chirwa, *Human Rights under the Malawi Constitution* (2011) Cape Town, Juta & Co; Edward Cameron, *Development, Climate Change and Human Rights: From the Margins to the Mainstream* (2011) World Bank, Washington DC; Siobhan McInerney – Lankford, *Human Rights and Climate Change: A Review of International Legal Dimensions*. (2011) Washington DC, World Bank; ICHRP *Human Rights and Climate Change: A Rough Guide* (2008) Geneva, ICHRP.

[55] In addition to scholarly jurisprudence around human rights as they interface with environment and development discourse, a few jurisdictions have expounded on the juridical nature of and interface between CPR and ESCR. The Philippines case of *The Minors Oposa v Secretary of State of the Department of Environment and Natural Resources*, 33 ILM (1994) 73 on the right to a healthful ecology and the case of *MS Shehla Zia and others v WAPDA*, in UNEP, *Compendium of Judicial Decisions on Matters Related to Environment, National Decisions*, Vol.1 (1998) p.323 on the right to a clean environment as akin to the right to life, have contributed significantly to new approaches of enforcing environmental rights. In southern Africa, the South African Constitutional Court has taken the lead in the jurisprudence of judicial enforcement of ESCR, including environmental rights. See Jan Glazewski, 'Environmental Rights and the New South African Constitution' in Alan Boyle & Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (1998) Oxford University Press, Oxford. The South African Constitutional Court cases of *Minister of Public Works and Others –vs.- Kyalami Ridge Environmental Association* (case No CCT 55/00; *Government of Republic of South Africa –vs- Grootboom* (case CCT 11/00); and *Minister of Health –vs.-Treatment Action Campaign* (case CCT 8/02), are illuminating in this regard. The Court held that access to housing and health are enforceable under the South African Constitution. The South African Constitution is much clearer and more direct than the Malawi Constitution; nevertheless, the fact that the rights of access to food and health facilities appear in the bill of rights means the reasoning in the above cases can be applied to Malawi for government to provide core minimum protection to those suffering from deprivation and health problems. For a preliminary review of Malawi's environmental rights jurisprudence see also R. Kasambara, 'Public Interest Litigation under the EMA of Malawi: Challenges and Opportunities', in *Approaches to Environmental Litigation & Advocacy in Southern Africa*, (2002) Harare, IUCN-ROSA, Handbook Series No.3, p.39 at 41.

[56] See sections 3.4 and 5.7 below.

1.3 The Constitution, Development Policy and Environment Regulation

As observed in section 1.2, the Constitution requires the state to integrate equity considerations in development outcomes. In particular, the requirement that the state must balance accumulation and distribution of wealth speaks to the need to incorporate equity in the development process. However, as pointed out by Haddard,[57] there is a continuing stand-off in international development[58] literature between the idealists who seek to promote the needs and concerns of 'the destitute and the excluded' and the 'practical-minded' who are more concerned with the costs associated with such an effort.[59]

Nowhere is the divide as sharp and poignant as when one considers the role of environment and climate change considerations in development policy. As the discourse on international development has evolved over the years, the United Nations (UN) has promoted sustainable development (SD) to address this divide. Sustainable development, which was popularized by the Brundtland Commission Report of 1987, embodies the social, the economic and the environmental impacts of development.[60] In practice, however SD has generally been associated with integrating environmental considerations into economic decision-making, with the social dimension generally the weaker pillar.[61] Yet, it is the interaction of the social and environmental pillars that poses the biggest challenge in achieving SD outcomes. The hard choices for public policy revolve around addressing social problems[62] that affect the environment and, quite often, social problems have been muted in environmental regulation. The adoption of the Sustainable Development Goals (SDGs), which built on and have replaced the Millennium Development Goals (MDGs), has now increased focus on the social pillar.[63]

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[57] See Lawrence Haddard 'Equity: Not only for Idealists in Development' (2015) *Development Policy Review* 33(1): 5-13 at p. 5.

[58] International development is a broad concept that describes the stages of development on the global scale and is responsible for the existing international classifications of development levels into developing, developed or less developed countries. The term emerged after World War II and its origin is associated with the speech by the United States (US) President Harry S Truman at his inauguration on 20 January 1949: see section 2.2.2 below. Although the term development is not defined and the controversy has raged since then, international development as a concept has generally been associated with institutions and policies that arose after World War II including the role and impact of decolonization, global financial institutions and other international development agencies on developing countries. In more recent times international development policy has spawned concepts such as basic needs, structural adjustment, human development, competitiveness, quality of life and sustainable development.

[59] Lawrence Haddard, op cit note 57.

[60] For a thorough discussion of SD and its equity implications, see section 3.7 below.

[61] Markuk Lhotenen 'The Environment-Social Interface of Sustainable Development: Capabilities, Social Capital, Institutions' (2004) *Ecological Economics,* 49:199 – 214 at p. 200.

[62] Ibid.

[63] The development of the SDGs followed the outcome of the Rio + 20 Summit outcomes in 2012, which recommended the need to develop development goals post 2015. In this regard, the introduction to the SDGs

The MDGs suffered from a narrow view of the interface between the environment and social pillars of SD and hence failed to fully integrate social issues in development policy. For example, goal number 7,[64] though providing opportunity to address vulnerability associated with climate change, was cast in a basic needs approach with no specific mechanisms to empower vulnerable communities. Thus, MDGs were criticized for facilitating a global agenda primarily aimed at mobilizing financial aid to enable poor countries to escape poverty as defined by the developed world[65].

The Constitution also requires the state to manage the environment responsibly to prevent its degradation and accord full recognition to the rights of future generations.[66] This provision cements the interaction of the social and environmental pillars in SD and highlights equity imperatives within and between generations.[67] However neither the Constitution nor the literature on the three pillars of SD sheds any further light on how to strike a balance between the creation and distribution of wealth or the trade-offs that must be addressed among the three pillars of SD. As Markuk points out in relation to SD, there is no policy guidance to arbitrate 'the conflicting objectives of economic rationality (profitability), social justice and ecological equilibrium'.[68] This lack of policy guidance permeates across all sectors of the economy and has contributed to uncertainty in environment and climate change regulation.

Malawi's environmental policy and legislation have developed considerably after the United Nations Conference on Environment and Development (UNCED) held in 1992. The reforms have addressed the impact of social and economic activities on the environment,

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specifically highlights the importance of people and therefore the social pillar. Paragraph 6 states that: 'People are at the centre of sustainable development and, in this regard, Rio+20 promised to strive for a world that is just, equitable and inclusive, and committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all': see United Nations, *The Future We Want – Outcome Document* (2012) https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf. See section 6.4 below for a discussion on SDGs.

[64] This goal is intended to ensure environmental sustainability and to halve the proportion of people without sustainable access to drinking water (target 10) and to significantly improve the life of at least 100 million slum dwellers (target 11).

[65] See Easterly, W. "How the Millennium Development Goals Are Unfair to Africa", (2009) World *Development* 37 (1): 26-35.

[66] Section 13 (n). It is significant that these provisions appear in the principles of national policy and are expressly declared as non-justiciable under section 14 of the Constitution. For a detailed discussion on their equity implications, see section 4.5 below.

[67] The Constitution was drafted and adopted in 1994 just after the UNCED and in the same year Malawi adopted its National Environmental Action Plan as required by the UNCED outcomes. Hence the framers of the Constitution had the principles of the Rio declaration and Agenda 21 in mind when drafting the Constitution. The influence of the UNCED in the Constitution is quite evident in section 13, which declares the principles of national policy. See Gracian Banda & Thoko Ngwira (2007) *An Introduction to Environmental Law in Malawi,* Lilongwe, UNEP/Department of Environmental Affairs.

[68] Markuk Lhotenen, op cit note 61, at p. 200.

highlighting the key roles played by various stakeholders and mobilizing public and community participation and responsibilities as stipulated under Agenda 21.[69] However, much of the policy and legislation is neither implemented nor enforced[70], not least as a result of a development policy that marginalises the majority who have limited options outside environmental resources. In addition, the policy and legislation has been largely command-and-control, with the ultimate objective of punishing those who harvest environmental resources such as fish, wildlife, forest and other resources without the requisite permits or licenses.[71] Hence, despite providing for public and community participation in natural resource management as well as public education and awareness programmes to enhance environmental stewardship, the overall policy thrust has been to perpetuate state control of natural resources. Access to natural resources, however, remains highly skewed, thereby fuelling asset stripping by both those who have legal access to the detriment of those who do not.[72] As population pressure has increased, so has environmental degradation and loss of livelihoods for those who have limited access to resources, thereby perpetuating the vicious cycle of poverty and environmental degradation.

The UNDP and UNEP[73] study findings support the contention of this thesis that regulation of environmental resources has not been responsive to address the needs of the present and future generations as required by the Constitution.[74] The loss of environmental resources is particularly devastating for the poor and vulnerable groups because of skewed access to these resources.

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[69]The influence of the UNCED is very clear in Malawi's environmental legislation starting with the development and adoption of the National Environmental Action Plan in 1994, which was a precursor to and a planning tool for all the environment and natural resources policies and legislation prepared thereafter. Hence the country has adopted the National Environmental Policy 1996 (replaced in 2004), the Environment Management Act 1996 (replaced in 2016), the National Forestry Policy 1996, the Forestry Act 1997, the National Water Policy 2006 and the Water Resources Act 2013 among others that specifically incorporate the sustainability principles enunciated under the Agenda 21.

[70] Gracian Banda & Thoko Ngwira, op cit note 67. There are a number of reasons for this state of affairs. For a comprehensive overview see Bright Sibale and Gracian Banda, *Law Enforcement, Illegality and the Forest dependent Poor in Malawi,* Institute of Environment and Development, London: www.iied.org.

[71] Bright Sibale & Gracian Banda, Ibid.

[72] It has been observed that natural resources asset stripping gained momentum after the country attained democratic status in 1994 ushering in new 'freedoms' many of which were misinterpreted or misrepresented for various reasons including by politicians looking for cheap votes. See in general Gracian Banda *Serving Constituents, Servicing Nature: The Role of an MP in Environment and Natural resources Management in Malawi* (2004) Blantyre, CEPA; Bright Sibale & Gracian Banda op cit note 70. While the role of politicians may explain the escalation of invasion of natural resources after introduction of democracy, there can be no doubt that low intensity invasions were ever present as the state commandeered access to resources, displacing local communities to create protected areas, land grabbing to pave way for commercial agriculture expansion among other resource claims that benefited the rich. See Dianna Cammack, *Malawi at the crossroads: resources, conflict and ingenuity in a newly democratic state* (2001) Cambridge, American Academy of Sciences, MA).

[73] See Gil Yaron et. al, op cit note 37.

[74] Section 13 (e) of the Constitution.

This thesis examines the role that equity can play to improve the responsiveness of the regulatory framework for environment and climate change. In doing this, the thesis analyses the structural pillars of development policy and their impact on regulation of environmental resources and examines the manner equity may provide possible policy alternatives.

1.4 Equity in Development Policy and Environment Regulation

1.4.1 The Discourse of Development Policy

Policy may be defined as a course of action articulated by either individuals or institutions based on certain principles in order to administer, manage or control access to resources.[75] How such individuals or institutions articulate policy, which affects households, communities, districts, the state or the international community, depends on the dominant discourse. As Escobar[76] has pointed out, development discourse can only be properly understood in the context of the evolution of the concept of development itself. Development, environment and climate change discourse reflect the interests and identities of the dominant actors.[77] This is because discourse is more than just about the use of language as a tool of communication. Discourse structures and conveys subjectivity, knowledge and power relations.[78] The language and meaning of these concepts hide considerable prejudices and interests, including risks for some, that have shaped the division of the world into underdeveloped, developing and developed countries.[79] International organisations that provide financial assistance, such as the Bretton Woods institutions, UN bodies and developed nations that sponsor them, wield considerable influence in the content and trajectory of development policy that has influenced and informed environment and climate change regulation.

The conceptualisation of equity in climate change policy has evolved in the context of this discourse. The UNFCCC requires all state parties to 'protect the climate system for the benefit of the present and future generations, on the basis of equity and their common and

[75] See Jones N, Datta A and Jones H. with Akhmadi N, Boa E, Correa N, Hang Naya Sharma Paudel N, Lucía Schumacher L and Roberto Telleria R. *Knowledge, policy and power: Six dimensions of the knowledge–development policy interface* (2009) London, ODI.
[76] Arturo Escobar, *Encountering Development: The making and unmaking of the third world* (1995) Princeton, Princeton University Press.
[77] M Pettinger, The *social construction of climate change: power, knowledge, norms, discourses* (2007) London, Ashgate Publishing Ltd.
[78] Ibid.
[79] As pointed out by Marshal Sahlins, 'The Original Affluent Society' in Majid Rahnema, *The Post-Development Reader* (1997) Cape Town, David Philips, at p.19, this explains why 'the world's most primitive people have fewer possessions but are not necessarily poor. Poverty is not a certain small amount of goods, nor is it just a relation between means and ends. Poverty is a social status. It is an invention of civilisation...'

differentiated responsibilities and respective capacities'.[80] This provision has been the subject of considerable political and academic debate.[81] The developed countries on their part, while acknowledging their historical responsibilities for the current greenhouse gas (GHG) emissions, eschew any liability for losses, harms or damage arising from such emissions.[82] They perceive their obligations and/or commitments – to provide financial support for developing countries to combat climate change – as no more than just voluntary or being charitable.[83]

On the other hand, both the mitigation and adaptation responsibilities under the UNFCCC operate on the basis that developing countries will receive financial and technical assistance from developed state parties to implement green development pathways and adapt to the impacts of climate change.[84] Almost all MEAs are replete with provisions requiring state parties to adopt policies and enact legislation to address the subject matter of these MEAs.[85]

In practice, however, international development organisations and UN bodies such as the UNDP and UNEP have provided financial and technical support to enable developing countries enact legislation.[86] The technical support usually includes a package of international (mostly developed country) expertise intended to transfer knowledge and best practices to developing countries. Invariably such technical support mirrors the knowledge, interests and therefore influences from the developed countries. On the other hand, the implementation of

[80] Article 3 of the UNFCCC and Article 7 of the Rio Declaration also entrench the principle of equity and states' common but differentiated responsibilities.
[81] Christopher Stone op cit note 9.
[82] The US, for example, has categorically refused to interpret Article 3 and 7 of the Rio Declaration and Article 3 of the UNFCCC as imposing any liability on the country for historical GHG emissions: as the United Sates State Department stated for the record at the UNCED, 'the United States understands and accepts that principle 7 of the Rio Declaration on Environment and Development highlights the special leadership role of developed countries, based on their industrial development, experience with environmental protection policies and actions, and wealth, technical expertise and capabilities. The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution of the responsibilities of developing countries under international law'. See US Department of State 'US Interpretative Statement on World Summit on Sustainable Development Declaration'. (2002) www.state.gov.
[83] See Gracian Banda & William Chadza, *Financing Adaptation to Climate Change in Malawi* (2008) Oslo, Norwegian Forum for Environment and Development & Development Fund.
[84] See Article 4 and 11 of the UNFCCC and Article 9 and 10 of the Paris Agreement on Climate Change: https://unfccc.int › process-and-meetings › the-paris-agreement.
[85] See for example Principal 11 and 26 of the Rio Declaration; Article 7, 15 and 19 of the CBD; Article 5, 6, 15 and 16 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of befits arising from their utilisation: http://www.cbd.int>abs; and Article 2 of the Vienna Convention for the Protection of the Ozone Layer: https://ozone.unep.org/treaties/vienna-convention.
[86] In Malawi the development and adoption new environment, forestry, fisheries and wildlife related policies and legislation after UNCED was funded through international assistance under a USAID financial support and UNDP/UNEP Project funded by the Netherlands Government called PADELIA: see www.unep.org/padelia.

the policies and legislation is a task left for the national government. It is assumed the recipient government has the institutional, human and financial resources to implement the legislation or that the 'best practices' incorporated into the policies and legislation will easily be implemented at local, district and national level. Invariably, the interplay of local customs, practices and poverty issues are scantily addressed by the technical assistance programmes. The national implementation of IEL, such as the Rio Declaration principles or the UNFCCC, face considerable hurdles, both in terms of the perceived objectives of these instruments and how they relate to national development policy interests and aspirations. This challenge includes how equity is defined and therefore its place in development and environment policy discourse.

1.4.2 The Definition of Equity

The meaning of equity is broad, encompassing notions of English law where equity is used to temper the rigours and rigidity of the common law.[87] Equity doctrines are founded on the basis of natural law or natural justice, especially the quest to avoid bias, favouritism or oppressive conduct[88]. Equity is not necessarily equality; it is much more related to fairness and social justice and a source of social cohesion. It is generally employed as a tool for equalising opportunities and achieving fairness, because where' the gap between income groups becomes too large, or if people feel the system is *unfair*, trust breaks down and instability ensues'.[89] Expressed in this manner, equity is a key component of SD since there can be no SD where there is unfairness or inequity or indeed where there is lack of trust. This interpretation is consistent with the fundamental principles of the Constitution.[90] These lay down the basis of state authority: legal and political authority derives from the people of Malawi and must only be used to serve and protect their interest.[91] In addition, this authority is conditional on the sustained trust of the people of Malawi.[92] In the language of the law of trusts, those exercising state authority are trustees acting for the benefit of the people of Malawi, the beneficiaries. The applicable law includes rules and principles of equity intended to facilitate the delegated authority, constrain abuse and enhance accountability.

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[87] See F W Maitland, *Equity and the Forms of Action* (1909) London, Cambridge University Press.
[88] See *Black's Law Dictionary*, Second Edition, 1910.
[89] Agung Sugiri, 'Redressing Equity in Natural Resource-rich Regions: A Theoretical Framework for Sustaining Development in East Kalimantan, Indonesia' in Estelle L Weber (Ed) *Environmental Ethics, Sustainability and Education* (2009) Oxford, Interdisciplinary Press, at p.14.
[90] Part II of the Constitution.
[91] Section 12 (1) (a) of the Constitution.
[92] Section 12 (1) and (c) of the Constitution.

In development policy and environment and climate change regulation, the interface between delegated authority and exercise of state power has been articulated in the language of SD. As defined by the Brundtland Commission, SD is development 'that meets the needs of the current generation without compromising that of future generations'.[93] Put in a different way, SD 'permits continuing improvements in the present quality of life at a lower intensity of resource use, while leaving behind for future generations enhanced stocks of assets (i.e. manufactured, natural and social capital) that will provide undiminished opportunities for improving their quality of life'.[94] This formulation encapsulates Sen's conceptualisation of development as a means of enhancing people's capabilities.[95]

Equity focuses both on the procedural and substantive fairness of decision making and is therefore an important part of sustainability.[96] It facilitates the moral integrity of the development process and outcomes, hence ensuring legitimacy and cooperation among actors thereby facilitating regulatory responsiveness. As Munasinghe further points out: '...while penalties and safeguards will play a role, decisions that are widely accepted as equitable are likely to be implemented with greater willingness and goodwill than those enforced under conditions of mistrust or coercion'.[97] The hypothesis of this research is therefore that incorporating equity in the regulatory framework for climate change and environment has the potential to facilitate internalisation and therefore support for regulation objectives on the part of the governed.

1.5 Research Questions and Objectives

1.5.1 Research Questions

The main research question in this study is: what role can equity considerations play to make environment and climate change regulation more responsive for achieving equitable development in developing economies such as Malawi?

The following are the subsidiary questions:

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[93] *Our Common Future: Report of the World Commission on Environment and Development*: accessed at https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf, at para. 27. The definition has caused considerable controversy, despite its simplicity, since what constitutes 'needs' or 'generation' or how much to keep for the next generation are not easy to determine. For a detail discussion, see section 3.7 below.

[94] Mohan Munasinghe 'Development, Equity and Sustainability in the Context of Climate Change. IPCC Expert Meeting on Development, Equity and Sustainability, (1999) Colombo, p.71. Accessed at https://www.researchgate.net/publication/292616215_Development_equity_and_sustainability-_Guidance_Paper.

[95] Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (2011) Cambridge, Harvard University Press.

[96] Mohan Munasinghe, op cit note 94, at pp. 72-73.

[97] Ibid., at p.95.

a) What is the significance of equity in environment and climate change regulation?
b) How can equity facilitate a more responsive environment and climate change regulatory framework in the context of dominant development paradigms? and
c) What role can the climate change phenomena play in enhancing equitable development and environmental regulation?

1.5.2 Research Objectives

This thesis analyses the factors that have contributed to the current structure and content of environment and climate change regulation in developing countries by focusing on Malawi's development and environment and climate change related policy and legislation. The research contextualizes these factors within the overall development policy discourse and legal theory that determine the path of environment and climate change policy and legal framework. The aim is to identify elements of legal theory that should drive environment and climate change regulation for SD. As explained by Sen, theory can either characterise a perfect regulatory framework or examine and develop policy guidelines for development and implementation of such a regulatory framework.[98] In addition theory assists in 'framing the way issues are seen, shaping perceptions of salience, and thus slanting debate toward certain policies and not others'.[99] This thesis argues for an equitable environment and climate change regulation that prioritises enhancing capabilities of the majority in the development process. It urges that, in Malawi and other developing countries, environment and climate change phenomena must be conceptualised as the basis for enhancing livelihoods and uplifting lives.

The thesis contributes to debates analysing the responsiveness of environment and climate change regulation by focusing on the role of equity in development discourse in general and environment and climate change regulation in particular as a direction in which policy development should focus. This can assist in articulating '… the world of development in new way, showing us a different picture of what our priorities should be...to address urgent human problems and unjustifiable inequalities'.[100] This thesis is premised on the understanding that procedural and substantive fairness in the development policy process can improve environment and climate change policy and legislation making and implementation.

[98] See Amartya Sen, *The Idea of Justice,* (2009) Cambridge, Massachusetts. Belknap Press, p. ix.
[99] Martha Nussbaum, op cit note 95, at p. xi.
[100] Ibid., p. xii.

1.6 The Significance of the Research

The vicious cycle of poverty and environmental degradation has a created a crisis of development policy in many developing countries including Malawi. MEAs such as the Rio Declaration, Agenda 21 or the UNFCCC have provided policy guidance for achieving SD. However, the implementation and domestication of these instruments have not adequately addressed and, in some cases, have been associated with facilitating structural inequalities promoted by dominant development paradigms that are at odds with principles of equity and marginalise the interests of vulnerable groups.

This research will contribute to the quest to balance development as economic growth and development as a process for equalizing opportunities and enhancing capabilities to achieve equity. In particular, the focus of the research in highlighting the role of development paradigms in environment and climate change regulation will amplify the role of development equity in designing a responsive environment and climate change regulatory system. This is particularly important for developing country regulatory frameworks where a majority of the population depend entirely on environmental resources. Consequently, the central argument of this thesis is that skewed access to environmental resources breeds inequity, mistrust and resistance to environmental regulation. Addressing this inequitable distribution of environmental resources provides an important entry point for promoting responsiveness in environment and climate change regulation.

1.7 Research Design and Methodology

1.7.1 Conceptual Framework for the Research

The study investigates how the environment and climate change regulatory framework in Malawi can be improved by infusing equity considerations in policy and legislation. The research questions posed in section 1.5 interrogate the role of equity in environment and climate change regulation in the context of dominant development paradigms. In answering these questions, the research examines existing theoretical insights that explain the role of law in development and environmental regulation. In particular, the thesis observes that the environment and climate change regulatory framework has developed mostly from international instruments that have largely been influenced by perceptions of development from the developed world. Their application in developing countries such as Malawi needs to be properly contextualized to identify the unique characteristics and experiences of developing countries in addressing development challenges.

In addition, like other former colonies, Malawi has a plural legal system with the common law dominating the legal landscape in terms of formal law. There is also a proliferation of statutory law especially in environment and climate change regulation, reflecting dominance of state policy. Yet at local level, customary norms and practices continue to play important roles as the basis upon which access to and dispute about resources are negotiated, arbitrated and resolved. As development paradigms have evolved over time, including debates about the meaning and ethos of development, the role of customary law to articulate and facilitate development outcomes that speak to and resonate with aspirations and interests of local people has not received adequate attention in the literature.[101] The regulatory gaps and conflicts arising from legal pluralism have in some cases allowed dominant interests to appropriate environmental resources to the detriment of the majority. The analysis of the plural legal system and its impact on regulatory responsiveness will contribute to law making that addresses the interests of the majority as required by the Constitution.

Further, legal theory has in general grappled with understanding and analysing the role of law in development with much less success in arriving at an all-encompassing theory. Max Weber who was preoccupied with investigating the most suitable legal norms for capitalist development considered political, cultural and economic factors as determinants of a rational legal system. Weber perceived a rational legal system as one that allows trade and investment without constraints of traditional leaders and has predictable consequences. His major preoccupation however was not focussed on legal theory to explain the relationship between law and development, but rather with triggers of capitalist economic development.[102] On the other hand, the law and development movement that gained currency in the US after World War II was intended to modernize legal systems in developing countries so that they mirror those in the western legal systems. This has been criticized as an ethnocentric project with little understanding of social change. The application of the new institutional economics in legal theory, which highlights the role of legal norms and institutions in delivering development outcomes, held much promise and influenced a number of international development agency approaches; nevertheless, the problem of defining institutions and their roles across societies remains a challenge.[103] There are new approaches such as adaptability

[101] See generally David Trubek & Alvaro Santos (Eds) *The New Law and Economic Development: A Critical Appraisal* (2008) Cambridge, Cambridge University Press.
[102] David Trubek 'Max Weber on Law and the Rise of Capitalism'. In *Wisconsin Law Review*, (1972) 3:720-53, cited in Kelvin E Davis & Mariana Mota Prado 'Law, Regulation and Development', in Bruce Carrie-Alder et. al. (Eds), *International Development: Ideas, Experience, and Prospects* (2014) London, Oxford University Press.
[103] Kelvin E Davis & Mariana Mota Prado, Ibid, pp. 6-13.

theories and experimentalism that provide further avenues for improving the role of law in delivering SD outcomes.[104]

Many of these approaches however are enmeshed in existing dominant development paradigms and systems of regulation that marginalize the poor in developing countries. The challenge continues to be what kind of regulation can address SD outcomes that empower and highlight the poor and vulnerable as agents of change. There is therefore a need to explore explanatory frameworks or characterisations that address the interface between development, environment and climate change regulation in a manner that focuses on the capabilities of those subject to regulation. This thesis argues that highlighting the role of equity as an explanatory and guiding framework for regulating SD, has potential to provide useful insights for improving environment and climate change regulation.

1.7.2 Methodology

In considering the role of equity considerations in environment and climate change regulation, this thesis draws on some of the aforementioned theoretical insights and critically examines their reach and limits as well as the role of equity in addressing some of the specific constraints highlighted in the study. The thesis largely relies on the analysis of existing literature explaining the theoretical insights including how these have found their way in the design and structure of environment and climate regulation at national, regional and international levels. In this regard, the thesis critically reviews the theoretical underpinning of development policy as it affects environmental regulation. It also examines policy, legislation and reports in Malawi to discern the main policy influences in the regulatory framework.

This is a qualitative research which is especially suited to policy and legal analysis because it recognizes that policy and regulation are social constructs emanating from certain ideals and perceptions, many of which are reflected in policy documents. The policy and legal analysis is an examination of the manner in which social problems are conceptualized, brought to government attention to address, where institutions consider options and select policy and legal solutions, which are thereafter implemented, evaluated and revised over time.[105] And 'understanding the policy process requires a knowledge of the goals and perceptions of hundreds of actors throughout the country involving possibly very technical sci-

[104] Ibid.
[105] Paul A Sabatier, 'The Need for Better Theories' in Sabatier, Paul A (ed) (2007) *Theories of the Policy Processes,* Colorado, Westview Press, p. 3.

entific and legal issues over periods of a decade or more when most of those actors are actively seeking to propagate their specific "spin" on events'.[106] However, much of the information is within the policy and legal instruments themselves, as well as background and assessment reports. This is a socio-legal research and utilises literature from various disciplines as well as policy documents to highlight underlying motivations and interests and how they found their way in policy and legislation. The aim is to put the legal instruments in social economic context and facilitate an evaluation of how and where regulatory improvement may be carried out.

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The thesis recognises that people and documents essentially provide all the information and data for policy research.[107] The study relies on relevant policy and legislation, the background information to these instruments such as consultation and technical briefing papers, parliamentary reports, print and electronic media as well as any literature reviewing policy and legislation on environmental regulation in Malawi. These have been gathered from government departments responsible for environment, climate change, land, forestry, fisheries, and economic planning and development. The thesis is limited to the extent that no filed interviews have been conducted to analyse how the policies and legislation are perceived or internalised by various stakeholders. This can be the basis of further research. Nevertheless, the document review has been strategic, focusing on the more nuanced interpretative aspects of the motivations, interests and relationships that can provide insights into policy-making and regulatory design and impact. The research has paid specific attention to the manner in which aspirations, commitments and interests have found their way in various regulatory instruments to determine the extent to which these reflect consideration of equity norms.

1.7.3 Policy and Legal Analysis

The research analyses some of the major development, environment and climate change related instruments at international, regional and national level to highlight the extent to which they incorporate equity principles into development, environment and climate change regulation. In addition, the research examines Malawi's policies, legislation and related instruments to highlight areas that can accommodate equity considerations. The analysis specifically focuses on the general principles that apply across all sectors of the environment and

[106] Ibid., p. 4.
[107] Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold path to More Effective Problem Solving* (3rd Ed.) (2009) Washington DC, CQ Press.

climate change regulation and their contribution to development equity. In this regard the research has utilized the normative and structural dimensions of policy and regulatory norms highlighted by Cooper, Fusarelli and Randall[108] for analysing the regulatory framework for environment and climate change in Malawi.

The normative dimension addresses the briefs, values and ideologies that drive societies to seek improvement and change and therefore speaks directly to perceptions of development policy and environmental regulation frameworks. This focuses on Malawi's development policy framework and its implications on responsive environment and climate change regulation. In particular, the thesis analyses the role of colonial and international development paradigms; the broad macro policy documents such as the Malawi Vision 2020[109], the Malawi Growth and Development Strategy (MGDS) as well as legal instruments such as the Constitution and legislation addressing development, environment and climate change. The focus is on the extent to which equity considerations in development policy affect the responsiveness of environment and climate change regulation. The thesis therefore examines the role of equity in the evolution of the concepts of development, environmentalism, sustainable development, the rights-based approach to development and customary law in regulation of environmental resources.

The structural dimension considers the institutional setting within which the regulatory norms are negotiated, adopted, implemented and evaluated. The research examines the challenges and opportunities facing institutional frameworks for environment and climate change regulation, focusing on the role these play in development policy discourse and implementation. The analysis highlights the institutional landscape in which risks, conflicts and limitations for regulation can be addressed. Finally, the research examines the extent to which the 'wicked problem' of climate challenge can be harnessed to infuse equity and justice considerations in the normative and institutional frameworks for environment and development.

1.8 Arrangement of Chapters

In examining the role that equity can play to make development, environment and climate change regulation more responsive to equity norms, the thesis has been divided into seven chapters. This first chapter has outlined the research motivation with a review of the socio-

[108] BS Cooper, LD Fusarelli & EV Randall *Better Policies, Better Schools: Theories and Application* (2004), Boston, MA, Allyn & Bacon.
[109] See Malawi Growth and Development Strategy (MGDS) III 2017-2022: ...https://malawi.un.org › 42159-malawi-growth-and-development-strategy

economic, policy and legal context of the research problem and has identified the research question that needs to be answered. The chapter has also outlined the research methodology providing the conceptual and analytical framework of the study.

Chapter 2 analyses the role of development policy discourse by highlighting the power and knowledge dynamics of the policy process. The chapter also examines the role of law in development as well as legal theory in the evolution of legal systems in developing countries in general and Malawi in particular and the manner in which these have structured the regulatory framework for environment and climate change.

Chapter 3 examines the role of equity facilitating a responsive environment and climate change regulatory framework. The chapter focuses on the evolution and motivation of major regulatory narratives that have significant implications for development, environment and climate change equity, including environmentalism, anthropocentrism, sustainable development and the rights-based approach to development.

Chapter 4 reviews principles of equity in national, regional and international norms regulating development, environment and climate change including trends and best practices that provide useful lessons for Malawi. The chapter further considers the extent to which national instruments and mechanisms have incorporated equity norms, focusing on the role of the Constitution and customary law in the evolution of principles of environmental regulation.

Chapter 5 examines the evolution of environmental legislation in Malawi and the extent to which equity norms have been reflected in the regulatory framework. The analytical framework is based on the normative and institutional dimensions of policy analysis, as briefly explained in section 1.6.3. The chapter focuses on the extent to which the normative and institutional framework for regulating the environment are responsive to equity considerations.

Chapter 6 analyses the opportunities and challenges posed by the climate change problem to build responsive environment and development regulation. It analyses the normative and institutional context of the climate change problem and provides insights for improving the regulation of development and environment through climate change lens.

Chapter 7 summarizes the research findings and highlights proposals for improving environment and climate change policy and regulation that can facilitate equitable development analyses outcomes.

CHAPTER 2
THE DISCOURSE OF DEVELOPMENT POLICY AND REGULATION

2.1 Introduction

This chapter analyses the role of development policy discourse in shaping environment and climate change regulation in developing countries. It specifically examines the concept and evolution of development and the implications that the knowledge and power relations associated with the term has had on development policy. The chapter argues that an important step in improving environment and climate change regulation must be to address the structural paradigms that informed the foundation of development policy.

The first section analyses the concept of development and how its evolution has shaped development policy. This part also considers the place of discourse analysis particularly the power and knowledge relations and how these shapes the generation, articulation and implementation of knowledge and power relations that inform development policy. The second part considers the role of law in shaping development policy and legislation. The focus here is to examine the manner in which law reform processes have influenced regulatory regimes in developing countries. The third part briefly examines the impact of legal theory in shaping the structure of positivist approaches to regulation that are key elements of environment and climate change regulation.

2.2 Evolution of the Development Era

2.2.1 The Concept of Development and its Dominant Narratives

The term 'development' has been defined in different ways by various authors and has acquired a notoriety for confusion and controversy. There has been so much contention around the term that some authors have gone as far as advocating its abandonment.[110] These post-development theorists ultimately argue that development has '(E)urocentric, depoliticizing and authoritarian implications'[111] and has therefore little or no utility in policy making.

It has been noted however that, as a concept, the term 'development' provides a convenient way for addressing so many different phenomena such as political, social, cultural, and economic considerations that affect society in various ways. As pointed out by Foucault, the term enables us 'to group a succession of dispersed events, to link them to one and the

[110] See for example Aram Ziai, 'The discourse of development and why the concept should be abandoned', (2013) *Development Practice,* 23:1:123-136.
[111] Ibid, p.124.

same organizing principle, to subject them to the exemplary power of life…to discover already at work in each beginning, a principle of coherence and the outline of a future unity'.[112]

Even the genesis of the term is contested and has been associated with ideological shifts over centuries. Although earlier formulations of the concept are not discounted,[113] the eighteenth-century European Enlightenment is credited with the evolution of the term as it is perceived today. In particular, development involved the use of reason in reaching decisions, rather than superstition or religion associated with primitive societies. Thus, any other way of looking at the world was considered backward and inferior and therefore not progressive or developed. The European Enlightenment approach is consistent with the modernisation theory, according to which development proceeds from traditional subsistence production to industrialisation and mass consumption with greater linkages to the international economy.[114]

The evolution of capitalist development was a subject of sustained analysis by Max Weber in his *Economy and Society* in which he highlights the pre-eminence of modern law in the course of transforming society from primitive subsistence levels to capitalist development. As pointed out earlier,[115] Weber's focus was on the capitalist development to which the law contributed to facilitate trade and investment, primarily in the European experience.[116] Karl Max and Frederick Engels, on the other hand, postulated a very different conception of capitalist development. They were the first to describe development as essentially a capitalist exploitation.[117] The work of Max and Engels is the basis of the dependency theory of development, which gained prominence in the 1970s as a direct response to disaffection with the modernisation theory in the 1960s.

The contrast between the dependency theory and the modernisation theory is striking. While the latter treats development as ahistorical and apolitical, entirely dependent on fortuitous capitalist work ethic, the latter considers development as a political minefield fraught

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[112] Michel Foucault, *The Archeology of knowledge and the Discourse on Language* (1972) New York, Pantheon Books, p. 22.

[113] Esteva has traced the roots of the term development to biology where it was first used to denote 'transformation towards perfect form': Esteva, G. 'Development' in Wolfgang Sachs, *Development Dictionary: A Guide to Knowledge as Power* (1992) New York, Zed Books, at p. 8. This evolutionary process was taken to explain historical development subject to inherent natural laws driving it; consequently, some people and places may be more developed than others.

[114] WW Rostow, 'The Stages of Economic Growth: A Non-Communist Manifesto (1990) 4-16, cited in Lan Cao, 'Law and Economic Development: A New Beginning?' (1997) T*exas International Law Journal*, 32:545.

[115] David Trubek, op cit note 101.

[116] David Trubek, op cit note 102, citing Kelvin E Davis, op cit note 102.

[117] Karl Max, Capital: A Critique of Political Economy, (1883), cited in Lon Cao, 'Law and Economic Development: A New Beginning? (2010) *Texas International Law Journal*, 32:545.

with power asymmetries. The assumption that developing countries would achieve development through capitalist accumulation, just as Europe did, is intensely challenged by the dependency theory. For dependency theorists, capital accumulation is historical, which is tied to Europe's plunder of colonial economies, including through slave trade.

In addition, while the modernisation theory characterizes the colonial expeditions and plunder as part of the development process, the dependency theory deprecates that claim by placing that historical episode into its specific context. The dependency theory contests the assumption that law is merely an instrument of capital accumulation. The neutrality of the law in the development process is similarly challenged on the basis that such characterisation of law masks intense political interests and facilitates inequalities.[118] The developed world would not have accumulated the resources it has if it had acted fairly and in the interest of colonial economies. The influence of the modernisation theory in development practice can be illustrated both in terms of the trajectory of development as espoused by developed countries as well as the influence of the colonial project and international development in the development and structure of colonial legal systems.

European colonizers used the colonies as sources of raw materials for the metropolitan state and, to date, former colonies continue to export minerals and cash crops for the manufacturing and beverage economies of developed countries. These minerals and cash crops are extracted with and grown using capital from the former colonizers, while developing countries provide the labour. In essence, capitalist accumulation relies on the capital of the coloniser to provide the means for exploiting environmental resources and labour of former colonies. The emphasis on economic growth as the chief measure of development is a direct result of this framework. For as long as the output of capital registers increase or improvement (development), the rest of the population are treated as no more than statistics who need to be improved.

A number of strategies have been employed to ensure that the bottom statistics do not cause too much trouble to those who matter in capitalist development.[119]Accordingly, there have been various permutations of the capitalist development paradigm to cover the adverse consequences of the bottom statistics. From the basic needs approach, to integrated rural development, the structural adjustment programmes (SAPs) and sustainable development (SD), a number of attempts have been made to make capitalist development embrace

[118] See Lon Cao, Ibid.
[119] Farzana Naz, 'Arturo Escobar and the Development Discourse: An Overview' (2006) *Asian Affairs*, 28 (3): 64-84.

those less fortunate or privileged in capitalist accumulation. The origins of these approaches have always been developed country initiatives either bilaterally or through multilateral institutions such as the Bretton Woods financial institutions or the UN providing technical or financial assistance related to policy and legal reform. Thus, although the dependency theory has been criticized on the basis that it fails to explain the transformation of hitherto poor economies in Asia such as South Korea, Malaysia and China, it remains a fact that the majority of former colonies are locked in this dependent colonial development paradigm.[120]

In addition, the legal systems of former colonies were designed to serve and largely remain subject to the influence of former colonizers. For Malawi, upon the declaration of the Nyasaland Protectorate in 1891, the law applicable in the protectorate was English law. According to the British Order in Council of 1902, English common law, doctrines of equity and statutes of general application in force in England as of that date applied directly to the protectorate[121]. Local (customary) law, which the modernisation theory would consider non-uniform, personal and particularistic,[122] would only apply to natives and then only if it was not repugnant to morality, justice and good conscience and was not in conflict with any written (English) law. These repugnant clauses were written in almost all colonial statutes declaring sources of law following the introduction of colonial rule and have been held responsible for the inferior status of customary law. It is also clear from these colonial statutes that the standard of validity of customary law was English morals.[123]

The introduction of colonial law contributed to and was influenced by dominant development paradigms associated with colonial policy and international development. The 'repugnant clause' provided a value judgment based on what the 'civilized' and 'developed' colonial authorities perceived would be acceptable or considered as valid law. To date, although the Constitution provides for the continuation of the application of customary law,[124]

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[120] Lon Cao, op cit note 117.
[121] Article 15 of the British Central Africa Order in Council, 1902.
[122] See Max Weber, Economy and Society, cited in Lon Cao, op cit note 117.
[123] See Antony Allot, *New Essays in African Law*, (1970) 21 – 27, cited in Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) Indiana *Journal of Global Legal Studies*, 18.1. The colonial courts were very clear that it was English morals that determined if a custom was not repugnant to morality or justice. Thus, reducing maintenance on the grounds that the wife had committed misconduct or recognizing a wife by cohabitation, were held not repugnant to justice and morality in *Matimati v Chimwala*, [1964-66] ALR. Mal, p. 34 and *Magombo v Nelson* [1964-66] ALR. Mal, p. 134 respectively. This is because English morality and justice so dictated. On the other hand, in *Attorney General of Nyasaland v Jackson,* [1923-64] 1 ALR. Mal. 488, the Federal Supreme Court of Rhodesia & Nyasaland held that a belief that the accused's life was in danger from witchcraft, leading him to kill the alleged witch, was not reasonable since the test of a reasonable man was that of an English man who does not recognise witchcraft. Later cases, however, such as *Ribeiro v Martins* [1968-70] ALR. Mal, p. 170 have held that the common law applies in Malawi subject to local conditions.
[124] Section 200 of the Constitution.

this is subject to the Constitution that has a bill of rights, reflecting the Universal Declaration of Human Rights 1948 (UDHR)[125], the International Covenant on Civil and Political Rights 1966 (ICCPR)[126] and the International Covenant on Economic Social and Cultural Rights (ICESCR)[127]. These instruments espouse 'universal' and internationally acceptable norms[128] which can subsume customary law to the 'civilizing' influence of these universal norms. It is however worth noting that a broad reading of the Constitution, taking into account provisions the fundamental principles in chapter II, the principles of national policy in chapter III and the Bill of Rights in chapter IV, can yield a supportive framework for customary law[129].

The foregoing demonstrates that development paradigms determine the path of development policy in general and the nature of the legal system in particular. It has therefore been rightly pointed out that although development as we know it today evolved after World War II, that evolution was nether scientific nor a discovery.[130] This is the period the West categorised countries as developing or underdeveloped with no regard to other forms of progress. Similarly, colonialism whose demise occurred during the same development era, entrenched western hegemonic interests. It also left the colonies with a development paradigm and legal system that is designed to exploit environmental resources in the colonies to serve the metropolitan state. An understanding of the evolution of development discourse is important to contextualize how development policy has been structured and the influence this has had on the regulatory systems in developing countries.

2.2.2 International Development

The term development as we know it today was popularized after World War II, following major political and social changes. Development was associated with the concern of countries that considered themselves rich and therefore developed, regarding the living conditions in areas they considered poor and therefore underdeveloped.[131] These countries took it upon

[125] Universal Declaration of Human Rights - the United Nations: https://www.un.org › udhrbook › pdf › udhr_booklet_en_web.
[126] International Covenant on Civil and Political Rights - United Nations ...: https://treaties.un.org › doc › unts › volume-999-i-14668-english.
[127] International Covenant on Economic Social and Cultural Rights: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.
[128] The Constitution recognise the role that international norms and comparable jurisprudence play in shaping the country's legal system: sections 10 and 11 require the courts to apply norms of public international law and comparable foreign case law.
[129] See section 4.6.2.
[130] Farzana Naz, op cit note 119.
[131] See Marshal Sahlins, op cit note 79 for the construction of poverty in modern civilization.

themselves as their responsibility to uplift the living conditions of poor countries. In an important and influential post-World War II speech delivered at his inauguration in January 1949, President Harry Truman of the US explained the task ahead in these terms:

> For the first time in history humanity possesses the knowledge and the skill to relieve the suffering of these people... I believe that we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspirations for a better life... What we envisage is a program of development based on the concepts of democratic fair dealing... Greater production is the key to prosperity and peace. And the key to greater production is a wider and more vigorous application of modern scientific and technical knowledge.[132]

This pronouncement provides an underlying ideology that explains the interventionist policies of developed countries. It follows the modernisation paradigm and highlights development intervention in almost missionary terms: to convert primitive and stagnant societies of poor countries into prosperous ones. In order to address underdevelopment and poverty, the approach was to standardize development pathways modelled on western civilisation and intellectual ethos. In this regard, developed countries have promoted a narrative of underdevelopment highlighting what needs to be done based on what is missing in developing countries. The West provides a check list of what should occur or be present for development to take place. Where developing countries lack technical knowledge, scientific advances, prosperity, progress, among others, the solutions focus on what is absent: lack of basic needs, integrated rural development, SAPs and SD.[133] If these are fixed, developing countries would get richer and look like developed countries.

In this regard, developed countries take the lead and provide the example of an acceptable development pathway into which developing countries must metamorphose and mirror the progress and growth of developed countries.[134] This explains the definition of development as postulated by Wolfgang Sachs, that it '…entails looking at other worlds in terms of what they lack, and obstruct the wealth of the indigenous alternative'.[135] As Kothari points out, planned development 'requires identification of who is developed and who can

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[132] Turner, Mark & David Hulme *Governance, Administration and Development: Making the State Work* (1997) London, Macmillan. Available online: www. re-quest.net/history/inaugurals/trumanl.
[133] Farzana Naz, op cit note 119, at p. 76.
[134] Jon Sylvester & Ruth Gordon, 'Deconstructing Development'. *Wisconsin International Law Journal*, (2004) 22(1):1 at p. 5.
[135] Wolfgang Sachs, *Development Dictionary: A Guide to Knowledge as Power* (1992) New York, Zed Books, at p. 6.

legitimately bestow ideas about modernity, progress, morality and civility'.[136] According to the Truman doctrine, the moral compass of development and regulation is that of the developed world whose development pathways have been tried and tested and can therefore be transplanted to developing countries.

It is also illuminating that Truman specifically addressed the question of the 'rights of man' as part of the process of development intervention in developing countries. Interestingly, the UDHR had just been adopted by the United Nations (UN) in 1948. The speech resonated not only with the abhorrence of the brutality of the war but also the post-war global consensus on human rights and their place in development discourse. Truman specifically highlighted the place of democracy and human rights in development intervention:[137]

> It may be our lot to experience, and in large measure to bring about, a major turning point in the long history of the human race. The first half of this century has been marked by unprecedented and brutal attacks on the rights of man, and by the two most frightful wars in history. The supreme need of our time is for men to learn to live together in peace and harmony. More than half the people of the world are living in conditions approaching misery. Their food is inadequate, they are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas.

Thus, a dose of democratic values and human rights was interwoven in development intervention early on in the problematisation of international development. This conceptualisation has continued to date, albeit with varying measures of emphasis depending on space and time of intervention. Thus, because in the Cold War era the emphasis was to keep western 'developing country friends' away from the clutches of communism,[138] democracy and human rights were muted in development discourse. This stance completely changed after the fall of the Berlin wall in 1989 when good governance and observance of human rights were highlighted in aid conditionalities[139] as well as the policy statements and literature of

[136] Uma Kothari, 'An agenda for thinking about 'race' in development' (2006) *Progress in Development Studies* 6: 9–23 at p. 13.
[137] Harry Truman speech, op cit, note 132.
[138] Jon Sylvester & Ruth Gordon, op cit note 134; and Farzana Naz op cit note 119.
[139] In Malawi the imposition of human rights, good governance and democracy as conditionalities for aid had immediate impact in changing from a one-party to a multiparty system of government. See Matembo Nzunda and Kenneth Ross, *Church, Law and Political Transition in Malawi* (1995) Harare, Mambo Press.

various international organisations, including the UNDP.[140] The emphasis on good governance, human rights, and plural politics that began in the 1990s and led to political changes and introduction of multiparty democracy in most African countries was not a new discovery. These concepts, which were inconvenient for developed countries to foist on developing countries in the Cold War era, became a major requirement for development policy and regulation after the end of the Cold War.

These historical facts illustrate the political nature of the conceptualisation of development. As Farzana Naz points out, the last part of Truman's statement betrays the self-interest in international development policy. It is more about western interests than concern for the poor territories.[141] In addition to, and indeed as a necessary condition for the exploitation of colonial economies, there was the fear that without uplifting the standards of living in developing countries, the developed countries would themselves not be safe.[142] The dangerous classes in developing countries had to be controlled and managed as a social problem in the same manner as the poor communities in developed countries were accorded social welfare. Clearly, international aid has similar objectives as domestic welfare arrangements[143] because '(A)ssisting the poor is a means of government, a potent way of containing the most difficult sections of the population and improving all other sections'.[144]

2.3 Development Discourse and Regulation

A discourse analysis of the evolution of development provides an important entry point for environment and climate change regulation. This is because, although development is a commonly used term, its meaning and content are highly contested; hence the need to examine the narrative that characterizes its evolution and context. In this regard, the work of Michel Foucault and Arturo Escobar on development discourse, provide a prism through which international development interventions and their impact on development policy and the regulation of the environment and climate change can be examined.

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[140] The UNDP Human Development Reports published since 1990 have pioneered a development discourse based on human rights and good governance, with Amartya Sen and Mahbub ul Huq providing the intellectual framework.

[141] Farzana Naz op cit note 119.

[142] The recent spate of migration to Europe and America of people fleeing from conflict and depravation is one of the evils the international development intervention sought to address: see Jose Antonio Alonso, 'International Migration and Development: A review in the light of the crisis' (2011) CDP Background Paper No. 11, United Nations Department of Economic and Social Affairs. Accessed at https://www.un.org › desa › policy › cdp › cdp_background_papers.

[143] Farzana Naz op cit note 119.

[144] G Proccacci, 'Social Economy and the Government of Poverty', in G. Burchell et at. (Eds.). *The Foucault Effect: Studies in Governmentality*. (1991) Chicago, University of Chicago Press, at p. 151.

For Michel Foucault '… the term discourse referred both to the historically contingent sets of practices […] which limit human actions and what may be thought, and to the theoretical concept which accounts for the fact that humans actually do act and think in line with these regimes of truth'.[145] Accordingly, as explained by Arturo, '… the emergence and consolidation of the discourse and strategy of development in the early post-World War II period, is a result of the problematisation of poverty that took place during those years. It presents the major historical conditions that made such a process possible and identifies the principal mechanisms through which development has been deployed...'[146] Thus the conceptualisation of development is not a result of any scientific progress or a sudden discovery of underdeveloped countries.[147] Development is a historical construct and its problematisation was carefully planned as part of western hegemonic imperial design.

In addition, the role of knowledge and power in development discourse is quite clear in Truman's speech. According to Truman, the western world and the US in particular, would make its technological prowess and technical expertise available to developing countries to help them 'produce more food, more clothing, more materials for housing and more mechanical power to lighten their burdens'.[148] Western civilization perceives these material attainments as progress and any deviation is an aberration; its focus is to promote this version of progress as development.

Foucault's analysis of the relationship between knowledge and power has provided a powerful analytical framework for understanding the nature and trajectory of development discourse. According to Foucault, 'there is no power relation without a correlative constitution of a field of knowledge, nor any knowledge that does not presuppose or constitute at the same time power relations.'[149] As explained by Arturo Escobar:

> ... to speak development, one must adhere to certain rules of statement that go back to the basic system of categories and relations that defines the hegemonic worldview of development, a worldview that increasingly permeates and transforms the eco-

[145] Quoted in Farzana Naz, op cit 119.
[146] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World*. (1995), Princeton, Princeton University Press, pp. 17 - 18.
[147]Farzana Naz op cit note 119, at p. 77.
[148] Harry Truman, speech, op cit note 132.
[149] M Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972 – 1977* (ed. Colin Gordon) (1991) Brighton, Harvester Press, at p. 27.

nomic, social, and cultural fabric of third world cities and villages, even if the languages of development are always adapted and reworked significantly at the local level.[150]

The standardisation of development discourse is premised on the need to control and manage poor developing countries. The poor in both domestic and international context are subjects of the disciplinary power of development discourse.[151] Arturo Escobar's work, in particular, highlights the importance of discourse in exposing development as 'culturally and historically contingent'. Here the focus shifts from 'what is' to how subjects are formed within this discourse as developed and underdeveloped. The relationship between power and knowledge helps to expose the political and strategic nature of discourse previously regarded as existing independently of power relations by virtue of their presumed scientific nature, and to ask instead 'whom does discourse serve?'[152]

A similar pattern emerges when development discourse is examined in the context of colonial policy. As earlier noted,[153] the emergence of the 'development era' following the end of World War II coincided with the process of decolonisation. It is not an accident that the end of colonial rule hardly touched the substance of the relationship between the colonies and the metropolitan states. The adoption of language, legal systems and much of the cultural traits of former colonial masters demonstrate the level of influence former colonisers continue to exert. In addition, just like in international development interventions, colonial discourse is based on the inferiority of the native subjects[154] who require tutelage, thereby giving the colonisers a sense of mission to organise and govern these native societies towards universal development of mankind. The transformation of the legal system was an important intervention in the development process.

2.4 Law, Development and Regulation

The law has been considered an important instrument for ordering and organizing society towards development.[155] The rise of the law and development movement in the US starting

[150] Arturo Escobar, op cit note 146, pp. 17 - 18.
[151] G Proccacci op cit note 144, at p. 151.
[152] M Foucault, op cit note 149.
[153] Arturo Escobar, op cit note 146.
[154] Uma Kothari, op cit note 136.
[155] As pointed out in chapter 1, Max Weber, though not concerned with the role of law in development, nevertheless considered Western law with its universalist general application as crucial for economic development, compared to customary particularistic legal norms that were identified with traditional societies: see op cit notes 94, 114.

from the mid-1960s was a clear manifestation of this hegemonic project.[156] Following the modernisation theory of development, the law and development movement considered development as 'an evolutionary process of increasing social differentiation that would ultimately produce economic, political, and social institutions similar to those in the West'.[157] A few top University Law Schools at Harvard, Yale, Stanford and Wisconsin introduced law and development courses in their curriculum. In line with the theory of modernisation and the Truman doctrine alluded to earlier,[158] law and development scholars and practitioners undertook to assist developing countries to enact legal norms that were considered ideal for facilitating development.

Following Max Weber, developed country laws were considered universal to 'encourage men to engage in new forms of economic activities and guarantee that the fruits of this activity will be protected'.[159] The law could be used as a 'force that can be moulded and manipulated to alter human behaviour and achieve development'.[160] According to this school, law reform should ultimately create a free market system to facilitate economic growth, democratic institutions and the rule of law.[161] It was clear from its very inception that the law and development movement was spreading an ideal that had served western society and was firmly built on the conviction that western knowledge and values were superior to and more accommodating of development than other forms of thought and experience.

It was this very liberal conceptualisation of law that proved to be the undoing of the law and development thesis. By the 1970s the law and development movement was being abandoned by its proponents and practitioners.[162] The criticism centred on the ethnocentric nature of the movement and its disregard of the role of tribe, clan and local community in the regulatory process. The law and development movement premise of objectivity and neutrality of law was also questioned, considering that, even in western societies, the problem of elite

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[156] Elliot Burg, 'Law and Development: A Review of the Literature and Critique of Scholars in Self Estrangement'. (1997) *American Journal of Comparative Law*, 25: 495 - 497.
[157] Richard Bilder & Brian Tamanaha, 'The Lessons of the Law and Development Studies' (1995) *American Journal of International Law*, 89:470 at p. 471.
[158]Lon Cao, op cit note 117.
[159] David Trubek, 'Towards a Social Theory of Law: An Essay on the Study of Law and Development' (1972) *Yale Law Journal,* 82:1, at p. 7.
[160] Elliot Burg, op cit note 156, at 505.
[161] David Trubek, op cit note 159, at pp. 6 - 9. See also Kelvin Davis and Michael Tebilcock, 'The Relationship between Law and Development: Optimists and Skeptics'. (2008) *American Journal of Comparative Law,* 56 (4) 895 -946.
[162] The demise of the law and development movement was characterised by withdrawal of funding for law reform projects by the US Agency for International Development (USAID) and foundations such as the Ford Foundation; and the abandonment of the concept as a scholarly activity: See Richard Bilder & Brian Tamanaha, op cit note 157, at p. 47.

capture of the law and that of arbitrary government action were real.[163] Critical legal scholars, on the other hand, highlighted other shortcomings including the impotence of the law to deal with major world problems such as the debt crisis in the 1980s.[164] They argued that the law's claim to autonomy and neutrality is disingenuous considering that in the West itself the law has been used purely for national and elite interests[165] while others pointed at the law's infamy in contributing to the oppression of vulnerable groups.[166]

The demise of the law and development movement however did not lead to the abandonment of the movement's core mission. International development policy continues to focus on exporting the ideals of free markets, democracy and rule of law in various ways. In particular, institutions with strong western influence such as the World Bank, IMF, and various regional development banks have made law reform a condition of financial support or as part of the raft of reforms to be undertaken to facilitate a development activity. Western lawyers and jurists continue to be at the forefront of legal developments in developing countries. These can be in areas of development finance, constitutional development, legislative drafting or human rights.

In this regard, western development practitioners have contributed to law and development and influenced the evolution and development of legal norms in developing countries. They have used their experience and 'know how' to contribute to legal norms addressing trade and investment, banking, finance, technology transfer, dispute resolution, among others. In the specific field of environment and climate change, the proliferation of environmental impact assessment (EIA), strategic environmental impact assessment (SEIA) and risk assessment procedures and other tools have largely been promoted by these practitioners. They are usually sponsored by development finance institutions and therefore often reflect the values and interests of the sponsoring institutions.[167] In addition, the UN and its various specialized agencies have made significant contributions to legal norms in various sectors such as human rights, environment and climate change, trade and investment, intellectual property rights, among others. The evolution of Malawi's environment and climate change

[163] David Trubek and Marc Galanter, 'Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development' (1974) *Wisconsin Law Review,* 1062.
[164] Sammy Adelman & Caesar Espiritu, 'Debt Crisis, Underdevelopment and the Limits of the Law' (1993) Sammy Adelman and Abdul Paliwala, *Law and Crisis in the Third World,* London, Hans Zell.
[165] Yash Ghai, 'Constitutions and Governance in Africa'. In Sammy Adelman and Abdul Paliwala, Ibid. p. 156, at p. 27.
[166] Rajin Kothari, *Rethinking Development: In Search of Humane Alternatives* (1998) New York, New Horizons.
[167] See Amy Chua, 'Market, Democracy and Ethnicity: Towards a New Paradigm for Law and Development'. (1998) *Yale Law Journal*, 108 (1): 1 - 107, at p. 15.

policy has benefited from this process under which the National Environmental Policy 1996[168], the Environment Management Act 1996[169], the Fisheries Conservation and Management Act 1997[170] and the Forestry Act 1997[171] were enacted under a financing arrangement administered by the UNEP.[172]

2.5 Legal Theory in Development and Regulation

2.5.1 The Dominance of the Positivist Approach to Regulation

The impact of colonial law and policy and international development intervention following the end of colonial rule in the developing world has had profound influence on development policy and environmental regulation. Both colonial and international development interventions expanded the application of legal norms associated with colonial exploitation and, after independence, directed the course of development thinking in the developing world. Former colonies such as Malawi were therefore saddled not only with development theories spawned by former colonizers, but also legal theories propounded by the intellectual efforts of these countries. The role of knowledge and power relations and its influence in the structure and content of regulation is quite clear in the policies and legislation adopted by developing countries.

According to Slater,[173] there is an obvious international division of intellectual labour in the development of legal theory with few indigenous voices in legal philosophy in developing countries. Colonial law was transplanted onto colonial territories without much thought on how such transplants interacted with and their impact on local legal systems.[174] The universality and uniformity of western legal systems[175] justified the direct applicability of colonial law and policy in the former territories. In the post-colonial context, international development policy continues to promote western legal thought in the regulatory frameworks of developing countries seeking development support from or through former colonizers and their allies. The application of western legal thought in developing societies has however not been smooth and in most cases has limited the utility of formal law to where the state has

[168] See http://www.sdnp.org.mw/environment/policy/NEP1.htm.
[169] See https://malawilii.org/mw/legislation/act/1996/6.
[170] See https://www.ecolex.org/details/legislation/fisheries-conservation-and-management-act-1997-cap-6605-lex-faoc018341/.
[171] See http://extwprlegs1.fao.org/docs/pdf/mlw10025.pdf.
[172] See op cit note 86.
[173] David Slater, *Contesting Occidental Visions of the Global: The Geopolitics of Theory and North South Relations*, (1994) at p. 113, cited in Dan Kuwali, 'Decoding Afrocentrism: Decolonizing Legal Theory' In Oche Onanzi (ed) (2014) *African Legal Theory and Contemporary Problems*. Netherlands, Springer.
[174] Dan Kuwali, Ibid. at p. 2.
[175] See Max Weber, op cit, note 122.

influence. Much of rural societies in the developing world continues to be governed by informal customary law. The gulf between western legal thought reflected in formal law and African customary norms has not been filled to date. The application of formal law therefore remains limited to 'westernized' communities, rendering implementation of the regulatory machinery ineffective in most contexts.

In particular, western legal theory is dominated by the positivist approach to regulation which is based on the primacy of the state acting as law maker, implementing as well as enforcement agency. This approach has also permeated modern international law-making in contrast with early development of international law which was premised on the order of nature and justice as the basis of global consensus. However, the rise of the nation state has promoted a positivist interpretation of international law that has eclipsed the role of natural law. Consequently, 'it became evident to international lawyers as it had to others that states that made and applied law were not governed by morality or natural reason'; they acted for reasons of power and interest.

Law is therefore primarily ascertained or determined through the actual methods used by states to give effect to their 'political wills'.[176] Developing countries' legal scholarship has similarly been structured on the basis of colonial and western legal thought. Thus, the framework for legal reasoning is built on the edifice of western intellectual ethos, which in itself is informed by cultural, social, political and economic experiences of the western world. Thus, the positivist instrumentalist approaches of Austin,[177] Hart,[178] and others have dominated the law-making process. Not only does the sovereign direct and decide which law should be promulgated, it also takes control of the implementation process.

Thus, in developing the law, developing countries have continued to promote the primacy of the state and therefore statute dominates the regulatory framework for environment and climate change. There is little or no emphasis on the role of natural justice as basis for regulation. These characteristics determine the extent to which a people can identify with and adapt to legal norms and therefore have implications on the implementation and enforcement of such legal norms. This has implications on how responsive the regulatory system is and the extent to which local communities, especially those adjacent to and who experience day-to-day interaction with environmental resources, can identify with or internalize the application of regulatory norms over those resources. This approach, as we point out in chapter

[176] O Schachter, *International Law in Theory and Practice*. (1991) Dordrecht, Martinus Nijhoff, p. 36.
[177] John Austin, *The Province of Jurisprudence Determined.* (1832) London, John Murray.
[178] H L A Hart, *The Concept of Law* (1961) Oxford, Clarendon Press.

3, has influenced the development of environment and climate change regulation, which is essentially positivist in nature and consequently problematized the use of that law in protecting environmental resources for the benefit of those most in need.

2.5.2 The African Communitarian Approach to Regulation

The contrast between African legal theory or jurisprudence as it existed before the advent of colonialism and the positivist approach provide a prism through which the state of regulation in the developing world can be evaluated. Commentators point out that while colonial legal theory is mostly based on positive law, 'African' legal theory[179] is premised on natural law. Positive law is associated with man-made consensual law, while natural law is based on the order of nature. 'The hallmark of African legal theory is that it subscribes to natural law as opposed to positivism. In contrast to positive law, natural law is universal, binding all people and all States. It is therefore non-consensual law based on the notion of prevalence of right and justice'.[180]

African jurisprudence as manifested in customary law is dominated by a communitarian view of society. It has been said that a person in African conception is defined not by his or her physical or psychological attributes as an individual, rather by reference to his or her community[181], or as summed up by Professor John Mbiti, 'I am because we are, and since we are, therefore I am'.[182] There are controversies however on the definition of personhood and its implications on the relationship between the individual and his or her community.[183] Nevertheless there are a number of defining characteristics of African society conception of humanity or personhood that point to the core values of communitarianism which are prominent in the customary law approach to regulation. These are what defines African jurisprudence and characterise customary norms in African society. In this respect, it has been observed that[184]:

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[179] There are as many customary norms across Africa as there are African countries, traditions, cultures or ethnic groups. Hence talking about African legal theory, African customary law or African law is clearly problematic. See Olufemi Taiwo, 'Legal Positivism and the African Legal Tradition in Contemporary Currents: A Reply', (1985) *International Philosophical Quarterly*, 25(2).

[180] Dan Kuwali, op cit note 173, at p. 2.

[181] Ifeanyi Menkiti, 'Person and Community in African Traditional Thought'. In R A Wright (ed), *African Philosophy: An Introduction*, Lanham: University Press of America, 171-81, at 171.

[182] John Mbiti, *African Religions and Philosophy*, 1970, New York: Doubleday & Company, p. 141.

[183] See Didier Kaphagawani, 'Some African Conceptions of Person: A Critique'. In I. Karp and D. A. Masolo, (eds.) *Afric*an Philosophy as Cultural Identity, Bllomington: Indiana University Press, pp 66-79; and Bernard Matolino, 'The (Mal) Function of "it" in Ifeanyi Menkiti's Normative Account of Person', *African Studies Quarterly*, 2011: 23-37.

[184] R Berkowitz, *The Gift of Science*, IX cited in John Murungi, (2006) 'African Jurisprudence: Hermeneutic Reflection' in K Wiredu (Ed) *A Companion to Africa Philosophy*, London, Blackwell p. 525.

> Each path of jurisprudence represents an attempt by human beings to tell a story about being human. Unless one discounts the humanity of others, one must admit that one has something in common with all other human beings. To discount what one has in common with other human being, is to discount oneself as a human being. What is essential to law is that it serves human beings in their being. The pursuit and preservation of what is being human and what is implicated by being human are what, in a particular understanding, is signified by African jurisprudence. Being African is a sign of...being human. African jurisprudence is a signature. In this signature lies not only what is essential about African jurisprudence but also what is essential about the Africanness of African jurisprudence. To learn how to decipher it, which in essence implies learning how to decipher oneself, paves way to genuine understanding.

An important attribute of the communitarian ethos in African philosophy is the idea that one's place in society is defined by their contribution to the overall welfare of the community rather individual achievement. Some commentators have even gone further to argue that one cannot attain personhood unless they have attained moral arrival, a process of ontological progression that establishes a person in relation to his or her community.[185] The *ubuntu* conception of personhood and humanity derives from this communitarian, solidarity, human dignity and ethical approach to regulation which have found space in some constitutional texts in Africa, including that of Malawi.[186] They hold promise for reimagining regulation of the development process, especially with regard to access to environmental resources and the threats climate change poses to livelihoods, community and general wellbeing. It is also worth highlighting that focussing on human solidarity and dignity has an empowering advantage and can enhance the capability approach as espoused by Sen[187] and Nussbaum[188] and championed by the UNHDR.[189] An examination of the manner the capability approach has been addressed in development policy can provide useful insights into how customary law can be developed to take advantage of its communitarian approach to regulation.

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[185] See Ifeanyi Menkiti, op cit, note 181, at p. 173. This claim has been heavily criticized by some scholars, including Kaphagawani and Matolino, op cit, note 181 who find the claim that moral arrival is the qualification for personhood too radical. Nevertheless, it is generally agreed that morality or ethical conduct as an expression of right or wrong, just or fair in human relations remains an important ethos of African jurisprudence.

[186] Section 12 (2) of the Constitution; see also the dictum of Justice Mokgoro in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) in relation to the constitution of South Africa; and J. Y. Mokgoro 'Ubuntu and the Law in South Africa' (1998) (1) *Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*. For a discussion on the role of customary law in regulation, see section 4.6 below.

[187] Op cit, note 51.

[188] Op cit, note 95.

[189] See section 3.4 below.

2.6 Conclusions

This chapter has analysed the evolution and role of the discourse of development in addressing social, economic and cultural issues shaping development policy. It has been observed that development as a term carries certain discourse trajectories associated with the power and knowledge relations that have defined 'developed' and 'developing' areas. This in turn has had a profound influence on development policy especially as it relates to the evolution of the regulatory system. This influence is so pervasive that developing country legal systems have often uncritically repeated the regulatory path of developed areas without regard to the local regulatory systems to which a majority of their people relate and are attached to.

The overall picture that emerges therefore is that the structure and content of development policy and regulation is heavily laden with knowledge and power asymmetries of development discourse. The dominance of statist and positivist law-making reflects the power, hegemony and interest of developed countries. Even human rights have these preconceptions in that rights are what the state grants. On the other hand, the role of natural law, including the moral and ethical and in particular equity considerations are considered vague and not applicable. This chapter has noted that ethical principles and communitarian values are the hallmark of African jurisprudence as reflected in customary law. The subservience of customary law is therefore a direct result of the statist approach to regulation.

In the context of the foregoing observations, a number of questions remain for consideration in evaluating the regulatory architecture for environment and climate change. They include: how has the environment and climate change regulatory framework been structured and what has influenced its content? How has equity or social justice been addressed and what are the limits and opportunities of a human rights approach to environmental regulation? These are questions to which the next chapter turns.

CHAPTER 3
ENVIRONMENTALISM, EQUITY AND SUSTAINABLE DEVELOPMENT

3.1 Introduction

In Malawi, as elsewhere in developing countries, the environment is the basis for survival. A majority of the population live in rural areas where agriculture is the main livelihood and environmental degradation and climate change have much more devastating impacts on rural communities. While low-income groups in developed countries can rely on the state to provide financial support, there is hardly any state support for rural communities in most developing economies. These conditions have a bearing on the manner developed and developing country communities perceive and relate to the environment and its regulation.

Modern environmentalism[190] in the developed world can be traced to the post-materialist era that was characterized by the quest for quality of life rather than day-to-day survival. Both the wilderness or 'return to the land' movement that began in the 1930s and the public environmental consciousness, associated with the quest for better living and working environment in the 1960s and 1970s, have roots in the desire to protect the environment in and for itself and as a means for a better life rather than survival. This movement has been influenced by interest groups seeking to further their desires one way or another.

On the other hand, there has been a long-standing school of thought that developing countries have no environmental consciousness. According to this thesis, poor people in developing countries focus on day-to-day survival rather than protect the environment. As one scholar puts it, the conclusion was so self-evident there was hardly need for evidence.[191] In essence, it is the task of the developed world to demonstrate environmental concern and provide guidance for developing countries to follow. This has been the approach of the West since colonial rule and through international development interventions[192].

This chapter analyses the role of environmentalism and social justice in the development of the regulatory framework for environment and climate change in developing countries. It examines the various interests and motivations that have influenced environmental

[190] The term refers to environmental ideologies or philosophies of social or political movements many of whom, as demonstrated below, have had considerable influence in the articulation of environment and climate change policy and legislation in various parts of the globe: see A Davis, *International Encyclopedia of Human Geography*, (2009), pp. 565 – 570. In this thesis the term is employed to demonstrate the motivations and interests behind environment and climate change regulation.
[191] Brechin and Willet Kempton, 'Global Environmentalism: A Challenge to the Post-Materialism Thesis? (1994) Social *Science Quarterly*, 75(1):245-269.
[192] See section 5.2 below.

regulation and the role that equity and social justice considerations have played in this process.

3.2 Environmentalism and Regulation

Concerns for environmental quality and stewardship has a long history and can be traced as far back as biblical times when God commanded the first person to take control of and rule over the earth.[193] Some have accordingly placed blame on the Judeo-Christian[194] tradition with the ecological crisis based on this scripture. The Bible however teaches good stewardship over nature.[195] Thus, Thomas Aquinas argued that the mandate to exercise dominion over nature necessarily implies the obligation to manage the world's resources in the interests of all, including future generations.[196] There are similar obligations requiring the protection, conservation and management of natural resources in Buddhism as well as religious beliefs and practices of indigenous groups across the globe who emphasise the spiritual nature of their relationship with the land[197] and hence their reverence for nature. In the African context, there is clear reverence for nature and its place in the past, present and future generations. In particular, it has been argued that most African societies have strong ancestral ties and consider stewardship over land resources for future generations one of their most important responsibilities.[198]

Modern environmental consciousness in the developed world has been traced as a direct response to impacts of the industrial revolution in Europe between 1730 and 1850 that sparked an unparalleled wave of natural resource exploitation leading to pollution and environmental degradation.[199] The ensuing environmental crisis attracted concerned thinkers,

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[193] The command to rule over and subdue the earth (Genesis 1:28) seems to place humans as masters of the environment.

[194] White, L., Jr. 'The Historical Roots of Our Ecologic Crisis' (1967) *Science* 155: 1203-1207.

[195] The Bible is replete with scripture confirming God's pleasure at the sight of his creation: Genesis 1:4.10, 12, 18, 21 and 25; hence the command to take care of the earth: Genesis 2:15. For an analysis of the role of religion in general, and the Bible in particular, on environmental policy see Andrew Morris & Benjamin Cramer, 'Disestablishing Environmentalism', (2008) *Environmental Law*, 39 (32): 309 - 396.

[196] T Aquinas, *Summa Theologica* (Blackfriars, 1975) 2a2ae, 66, 2. Cited in Alexander Kiss and Dinah Shelton, *International Environmental Law*. (2004) New York, Transnational Publishers.

[197] Alexander Kiss and Dinah Shelton, Ibid. See also Erika Zimmerman, 'Valuing Traditional Ecological Knowledge: Incorporating the Experience of Indigenous Peoples into Global Climate Change Policy' (2005) *New York University Environmental Law Journal*, 13: 803, p. 807, who notes that 'a close relationship with the environment is central to indigenous people's way of life, as it is tied to the religious beliefs, social traditions and language'.

[198] Wiredu, K, 'Philosophy Humankind and the Environment' in Odera Oruka (Ed) (1996*) Philosophy, Human and Ecology: Philosophy of Nature and Environmental Ethics*, Nairobi: ACTS Press, 30, at p.46.

[199] See Ramachandra Guha, *Environmentalism: A Global History*. (2001) New York, Longman. There were however national statutes dating as far back as the Middle Ages addressing specific pollutants or protecting specific forests or water bodies. An example given is the 1306 Ordinance of Edward I prohibiting the use of coal in open furnaces in London: See Alexander Kiss and Dinah Shelton, op cit note 197, at p. 1.

philosophers, scientists, preachers and activists who highlighted the need for environmental regulation for the survival of all forms of life on earth. Some of the largest and oldest conservation charities were established in the United Kingdom (UK) and the US between1889 and 1895. These include the Royal Society for the Protection of Birds and the National Trust in the UK, and the Sierra Club in the US.[200] In tandem with this public consciousness, governments began to set up new state institutions such as forest, wildlife and heritage departments to take control of natural resource management.[201]

It is clear from the goals and mission of the early conservation charities that the focus on preservation or conservation had an elitist slant. They catered to the interests of certain groups and failed to capture the imagination of poor people, for example, who often were relocated to pave way for new parks and forest reserves or burdened with conservation demands they could hardly appreciate. In Africa and other colonial outposts, conservation policies and legislation were adopted that created large swathes of protected areas as part of the 'return to the land' ideology mostly for the pleasure of white settlers and to the exclusion of local people.[202]

In Malawi, colonial authorities were so worried about land and soil degradation in the colony that they introduced legislation to make natives undertake conservation agriculture, to the chagrin of the natives.[203] The disdain over conservation agriculture or afforesta-

[200] The Royal Society for the Protection of Birds was established in 1889 by Emily Williamson. It seeks to promote conservation and protection of birds and the wider environment through public awareness, advocacy and managing nature reserves in the UK. At its founding its aim was to counter the 'barbaric trade in plumes for women's hats which was responsible for destruction of egrets, birds of paradise and other species whose plumes became fashionable in the late Victorian era': see www.rspb.org.uk. The National Trust on the other hand was established in 1891 by Octavia Hill as a charity to 'preserve historic places and spaces'. Its formal purpose is the 'preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and, as regards lands, for the preservation of their natural aspect, features and animal and plant life….' see www.nationaltrust.org.uk. The Sierra Club was established by John Muir a Scottish preservationist, in 1892. Its mission is to 'explore, enjoy, and render accessible the mountain regions of the Pacific Coast; to publish authentic information concerning them; to enlist the support and cooperation of the people and the Government in preserving the forests and other natural features of the Sierra Nevada Mountains'. The general thrust of its work is to advocate for green politics and in that regard counts among its successes the protection of millions of acres of wilderness and helping pass land mark federal legislation such and the Clean Air Act 1970, the Clean Water Act 1972 and the Endangered Species Act 1973: see www.sierraclub.org.

[201] Alexander Kiss and Dinah Shelton, op cit note 197, at p. 1.

[202] Ramachandra Guha, op cit note 199. See also J S Adams and T O McShane, *The Myth of Wild Africa: Conservation without Illusion* (1996) Berkeley, CA, University of California Press. Cited in Brum Buscher and Ton Dietz, 'Conjunctions of Governance: The State and Conservation-development Nexus in Southern Africa' (2005) *The Journal of Transdisciplinary Studies*. 4. (2).

[203] See section 5.3 below for a discussion on evolution of colonial conservation legislation. For a thorough historical account of the role of colonial conservation policies on the social, economic and political landscape of colonial Malawi, see generally Wapulumuka Mulwafu, *Conservation Song: A History of Peasant-State Relations and the Environment in Malawi, 1860 – 2000* (2010) Cambridge, The White Horse Press.

tion has adversely affected policy making and implementation so that even with best intended policy instruments, successive administrations from colonial to post-colonial era have failed to galvanize grassroots support for these policies.[204] In addition, colonial environmental policies were so hated by natives that they spawned a rallying point of anti-colonial sentiments during the struggle for independence.[205]

In the developed world the publication in 1962 of Rachel Carson's book entitled *Silent Spring* generated a new wave of public awareness of the damage done to the environment by economic activities. This new public consciousness targeted enterprises that polluted and activities that posed a danger to the working and living environment. In tandem with this new wave, pressure groups dedicated to environmental activism such as Friends of the Earth and Greenpeace were established in 1969 and 1971 respectively.[206] These introduced new issues such as the impact of nuclear energy on the environment, concerns over trade in and trafficking of endangered species, and international trade in ivory and rhino horn, among others.

The main contribution of organisations such as Greenpeace and Friends of the Earth activism has been their direct-action approach to environmentalism associated with anti-nuclear, anti-whaling protests for which they have been globally known. Their counterculture environmentalism has set them apart from the approaches of the more traditional environmental groups such as the Sierra Club. The latter tend to focus on middle class and consumer response to such concerns as air and water pollution, open spaces, energy and climate change impacts on lifestyles.[207] Nevertheless, both the traditionalists and the more militant environmentalists in the developed world raised concerns and promoted the cause for the environment for what it is and its contribution to lifestyle.[208] But as Guha[209] points out, these waves of environmentalism also coincided with and failed to tame the tide of the 'development

[204] For a historical account of the political economy of deforestation in colonial and post-colonial Malawi see Peter Walker, 'Roots of Crisis: Historical Narratives of Tree Planting in Malawi' (2004) *Historical Geography*, 32: 89-109.
[205] Wapulumuka Mulwafu, op cit note 203.
[206] Friends of the Earth was established in 1969 while Greenpeace was formed in 1971 both originally as anti-nuclear lobby groups and with roots in the Sierra Club. The founders split from Sierra Club due to their radical approach to environmental activism including their direct-action approach to activism. See Brian Doherty, *Environmentalism, Resistance and Solidarity; The Politics of friends of the Earth International*. (2013) Basingstoke, Palgrave; and Frank Zelko, *Make it a Green Peace: The Rise of Countercultural Environmentalism*. (2013) New York, Oxford University Press.
[207] Brian Doherty, ibid.
[208] Ibid.
[209] Ramachandra Guha, op cit note 199.

craze' that followed the end of World War II. It is precisely the manner in which the 'development craze' affected different groups and interests that determined world views on environmental regulation and activism.

The rise of the Environmental Justice Movement (EJM) in the US provides a good illustration of the differences. Although established around the same time as the second wave of environmentalism, the EJM sprang out of the civil rights movement and was suspicious of mainstream environmentalism, which was considered a 'white man's thing'. The EJM focused on urban environmental issues such as the siting of toxic facilities in minority and low-income neighbourhoods.[210] It considered mainstream environmentalism as not 'people-centred' because of its eco-centric focus. In turn, mainstream environmentalism did not embrace the EJM based on the perception that minority and low-income groups did not prioritize environmental issues, especially if economic survival was at stake.[211] In essence, the more affluent, the middle and upper classes, are perceived to be more environmentally conscious than poor and minority groups.

The experiences of the EJM in the US have considerable resonance with the perception that poor people in developing countries have no environmental consciousness, despite no evidence to support the thesis.[212] However, environmentalism or the lack of it, cannot be simply explained as a post-materialist cultural shift as has been claimed by some scholars. Thus, while for developed countries environmentalism reflects a 'shift from giving top priority to physical sustenance and security towards heavier emphasis on belonging, self-expression, and the quality of life'[213] for a majority of the population in developing countries, nature and human survival are inseparable. The importance Africans attach to land resources and their responsibility over the resources to future generations attests to the communitarian ideas of nature as belonging to past, present and future generations rather than merely for individual curiosity and gratification[214]. Thus, while developed countries can detach the environment and nature from humanity and livelihoods and rely on technology for their sur-

[210] See Martin V Melosi, 'Equity, Eco-racism and Environmental History', (1995) *Environmental History Review*, 19 (3):1 - 16.
[211] Ibid, at pp. 5-6.
[212] See Steven Brechin & Willet Kempton, 'Global Environmentalism: A Challenge to the Post-Materialism Thesis? (1994) *Social Science Quarterly*, 75 (1):245-269. On the contrary the authors cite grassroots movements such as the tree planting Greenbelt movement in Kenya and the anti-deforestation Chipko movement in India led by women activists as well as surveys which show considerable environmental concerns in developing countries.
[213] Ronald Inglehart, *Cultural Shift in Advanced Industrial Society*, (1990) Princeton N.J, Princeton University Press, at p. 90.
[214] See K Wiredu, op cit note 198.

vival, in Africa technology or know-how cannot substitute humanity, community and responsibility to future generations. This has implications on how environmental wellbeing and social justice are perceived and constructed.[215] In Africa environmental responsibility does not centre on individual wellbeing as is the case with the western world where anthropocentrism is the main basis of regulation.

3.3 Anthropocentrism, Equity and Regulation

There have always been limits to the anthropocentric and utilitarian approach to environmentalism. Philosophers such as John Locke, while declaring that 'we may claim nature for our own private purposes', went on to qualify this by stating that any exploitation must 'leave enough and as good for others'.[216] Hugo Grotius, on the other hand, stated that it is the right of the community to share what 'nature gives mankind for common use' like the sea and the air and cannot be indiscriminately appropriated or despoiled for private profit.[217] This was the beginning of the recognition of the principle of intergenerational and intra-generational equity. It has therefore been argued that human beings have a moral responsibility to preserve the environment for future generations even if no specific human beneficiaries can be identified.[218]

The utilitarian or anthropocentric approach has been associated with the growth of environmental law, which tends to focus on human issues that address public health, public utility and wellbeing such as conservation of nature, pollution control, and access to clean water and sanitation and generally human health. The conservation of biodiversity and endangered species, on their own account, only became important objects of environmental law much later[219] when the need for harmony between nature and mankind was specifically highlighted in IEL, albeit with clear focus on human welfare.[220] This harmony has been

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[215] See Jon Sylvester & Ruth Gordon, op cit note 134, pp. 5 - 6.
[216] Locke, SGT, 1690, 33, p 277) cited in John Dreher, 'Evolution and the Goal of Environmentalism' (2014) *Forum on Public Policy*: A *Journal of the University of Oxford Round Table*, Gale Academic OneFile: http://forum on publicpolicy.com>archivevol2011. No.2>Dreher, p.2.
[217] Benjamin Straumann, 'Ancient Caesarian Lawyers in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius's de lure praedae', cited in John Dreher, op cit note 216, at p. 4.
[218] D Parfit, 'Future Generations, Further Problems', (1982) *Philosophy and Public Affairs*. 11(2) at p. 119.
[219] Alexander Kiss and Dinah Shelton, op cit note 197.
[220] Principle 2 of the Stockholm Declaration on the Human Environment requires that '(T)he natural resources of the earth, including the air, water and flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate' while Principle 1 of the Rio Declaration declared that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'. This has been recently repeated in the Rio + 20 Summit Outcome: see op cit note 56.

highlighted in the context of promoting justice between species[221]. Environmental regulation has consequently been constructed around the concepts of equity and justice among the present generation, between the current and future generations and between humans and nature.[222]

The justice and equity dimensions have also been understood as a requirement on the state and the international community to allocate resources fairly including the burdens and benefits associated with their utilisation in society. This has implications for competing social and economic policies over environmental resources across generations. The recognition of the rights of future generations can be justified on the basis of the survival of humanity that relies on this genetic and biological continuum.[223] However, uncertainties arise when considerations of how much should be passed on and how to determine a generation and its preferences have to be made in environmental regulation.[224] On the other hand, the ecocentric approach, which highlights justice and equity between species and ascribes value to nature irrespective of its utility to human beings,[225] has not gained consensus in IEL.[226] An extension of this approach to accord non-human species legal personality has not been successful.[227]

Justice and equity are also important in understanding the role of the economic considerations on environmental regulation, a key component of SD. There are three related challenges that the economic system brings to environmental regulation. The first challenge is the 'tragedy of the commons' where environmental goods and services are considered 'public goods', hence are not ascribed any value and are shared by all leading to unsustain-

[221] As pointed out by Louis Kotze et. el, op cit note 10, the muting of non-human species in IEL and general environmental law has contributed to the climate problem in general and climate injustices in particular: see pp. 7-9.
[222]Principle 2 of the Stockholm Declaration on the Human Environment: https://legal.un.org › avl › pdf › dunche>.
[223] M Gruter, 'The Origins of Legal Behaviour' (1979) *Journal of Social Biology*, 43.
[224] Ibid, at p. 10.
[225] Some international conventions have incorporated the intrinsic value of nature as the basis for protection: the Berne Convention on the Conservation of European Wildlife and Natural Habitats whose preamble recognises that 'wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic, and intrinsic value that needs to be preserved and handed on to future generations'. This has also been echoed in the Preamble to the Convention on Biological Diversity 1992: https://www.cbd.int › convention.
[226] There are attempts by scholars and activists opposed to the dominance of the anthropocentric approach to highlight the equality between species, through the adoption of a Declaration on Human Rights and Climate Change. For a review of the draft declaration see Kristen Davis, Sam Adelman, Anna Grier, Catherine Iorns Magallanes, Tom Kerns and S Ravi Rajan, 'The Declaration on Human Rights and Climate Change: A New Legal Tool for Global Policy' (2017) *Journal of Human Rights and the Environment*, 8 (2):217-253.
[227] Christopher Stone, 'Should Trees Have Standing Revisited: How far will Law and Morals Reach?' (1985) 59 S.Cal. Rev. 1.

able exploitation. On the other hand, environmental problems affect the poor disproportionately, yet nationally or globally the poor are not major polluters.[228] The climate system provides a prime example where the bulk of GHG emissions are from developed countries; yet the resulting climate harms disproportionately fall on the poor in developing countries. The second is what can be termed 'competitive disadvantage', according to which measures to protect the environment may lead to costs and burdens that make an economy uncompetitive. Yet, the environmental costs of high pollution levels, greater resource exploitation and massive social and cultural dislocation, are largely born by the poor.[229] The third challenge relates to the need for cooperation between states, with emphasis on the requirement for developed countries to assist developing countries to meet their international commitments. These justice and equity concerns are particularly highlighted in international climate negotiation debates where pollution of the atmosphere as a common good causes the common problem of global warming with different consequences for developing and developed countries.[230]

Equity and justice considerations are also important in addressing the structure and framework of IEL in general and sovereign rights in particular. States are equal in international law according to the Charter of the United Nations.[231] The relationship between states is governed by rules adopted by consent either bilaterally or in multilateral settings. However, power relations determine the extent to which developing country concerns can be addressed and allow them to influence international decision-making and implementation of commitments.

The above challenges have implications for the regulation of the environment and climate change, since any asymmetry in power relations promotes unrestrained consumption patterns on the part of those with requisite access and increasing poverty on those without. Hence the controversy surrounding the common but differentiated responsibility under the UNFCCC,[232] which is more of an expression of national interest than acceptability of the principle.[233]

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[228] See Julian Agyeman et al, 'Exploring the Nexus: Bringing Together Sustainability, Environmental Justice and Equity' (2002) *Space and Polity*, 6 (1): 77-90.
[229] Ibid, at p. 79.
[230] Henry Shue, *Climate Justice: Protection and Vulnerability*. (2014) Oxford, Oxford University Press.
[231] Article 2.1 of the Charter of the United Nations: https://www.un.org/en/about-us/un-charter/full-text.
[232] See Christopher Stone, op cit note 9.
[233] Thus, while the US accepts the principle, it refuses to interpret the principle as requiring it to compensate countries affected by climate change arising from historical GHG emissions for which the US and other developed countries are largely responsible: See op cit note 82. This refusal is not based on fact or principle, it is an expression of power and national interest to avoid legal liability. See also O Schachter, op cit note 176.

3.4 Equity in the Capability Approach to Development

In its 2011 Human Development Report (HDR), the UNDP argued that 'promoting development entails addressing local, national and global sustainability; this can - and should be - equitable and empowering'.[234] In defining equity, the report noted that the term is used interchangeably with fairness and refers to distributive justice. According to John Rawls, justice can be seen as a standard by which society distributes its basic resources.[235] It entails a morally justifiable apportionment of benefits and burdens among members of society[236] or a process for determining the initial entitlement to a scarce resource that can be converted into any social good.[237]

The benefits and burdens of development include the distribution of opportunities such as wealth, education, health, as well as burdens emanating from development impacts such as dirty air and water, hazardous or toxic substances and chemicals, and waste dumps, among others.[238] It was the inequitable distribution of environmental benefits and burdens that led to the evolution of the EJM in the US, hence its focus on environmental justice. As the civil rights movement petered in the 1970s, it was clear that, amidst 'the development craze', the impacts of the burdens of development such as the health of the living and working environment were critical to the exercise of civil rights claims themselves. The ensuing community activism tackled the consequences of skewed distribution of economic benefits and burdens that threatened the black minority and low-income neighbourhoods.[239] The EJM addresses situations where some individual or group suffers disproportionate environmental harm or loss or has unequal access to environmental goods or less opportunity to participate in environmental decision-making.[240] The question however remains how distributive justice can be attained.

Although the formula may be controversial, the principle requires that all things being equal, every person must be treated equally in the distribution of environmental benefits

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[234] UNDP, *Human Development Report: Sustainability and Equity*. (2011) New York, Pelgrave Macmillan, at p. 18.
[235] John Rawls, *A Theory of Justice. Cambridge* (1971) Harvard, Harvard University Press.
[236] Iris Marion Young, *Justice and the Politics of Difference*, (1998) Princeton. Princeton University Press, p. 15 -16.
[237] Bruce Ackerman, *Social Justice in the Liberal State*, (1980) New Haven, Yale University Press.
[238] See generally Kristin Shradder-Fretchette, *Environmental Justice: Creating Equality, Reclaiming Democracy.* (2002) New York, Oxford University Press.
[239] Robert Bullard and Beverly Hendrix Wright, 'Environmentalism and the Politics of Equity: Emergent Trends in the Black Community', (1987) *Mid-American Review of Sociology*, 12(2):21 -37
[240] Ibid, p. 3.

and burdens.[241] And as pointed out by the HDR, while inequality is not synonymous with inequity, because some inequalities may not be unjust, the two are interrelated in practice.[242] Following Amartya Sen, who proposed that equality must be addressed in the context of capabilities, the HDR argues that it is the unequal access to capabilities that causes inequalities in development outcomes.[243] Amartya Sen defines capabilities as what normatively a person requires in order to do or to be and not the income or possessions of the person.[244] Consequently, the capability approach has the potential to ease the philosophical conundrum of distributive justice by focussing on enablers of development rather than materials things.

The capability approach is a departure from the GDP paradigm that exclusively focuses on incomes and commodities and somewhat treats human beings as statistics without looking at what they individually are or subject to and how they can achieve what they hope to do or be. The capability approach also facilitates disaggregation of competing interests to enable policy makers focus on the most in need: women, children, the poor, persons with disabilities, minority groups and other vulnerable groups.[245] It widens the scope of what counts in human development and individual wellbeing and invites policy makers to more normatively engage with the factors that need to be addressed to achieve sustainable human development. According to this approach, it is expanding opportunities to access capabilities that facilitates sustainable human development.[246] The application of this approach however depends on the overall legal system in terms of how it can accommodate notions of equity in the legal framework.

3.5 Equity, the Law and Regulation

The term equity has a long history in legal tradition and is associated with the dispensation of justice in difficult cases, namely, where the application of the law would lead to injustice. In that sense, equity has more affinity to social justice as discussed in sections 3.3 and 3.4. The term has roots in the Latin word, *aequitas*; it also finds expression in biblical text[247] in

[241] Kristin Shradder-Fretchette, op cit note 238, at p. 24.
[242] UNDP, op cit note 234, at pp. 18 -19.
[243] Ibid.
[244] Amartya Sen, op cit note 51; See also Martha Nussbaum, op cit note 95.
[245] UNDP, op cit note 214; See also Douglas Hicks, 'Discrimination and Capabilities: Insights from Amartya Sen' (2002) *Journal of Religious Ethics,* 30 (1):137 - 154.
[246], UNDP op cit note 234.
[247] Isaiah 11:4 declares that: 'But with righteousness shall he judge the poor, and reprove with equity for the meek of the earth: and he shall smite the earth with the rod of his mouth, and with the breath of his lips shall he slay the wicked.'

which God proclaims equity for the meek and the oppressed; and in Shakespearian writings[248] where the text of the law is considered absurd and contrary to notions of justice. In English legal tradition, the common law required specific pleading legal formats without which no remedy could be granted. For those who failed to place their claims or complaints within established writs, there was no recourse, until courts of equity began to intervene, when the King, through the Chancellor,[249] provided reprieve. As Lord Wolsey poignantly put it:

> (The King) ought of his royal dignity to mitigate the rigour of the law, where conscience has the most force, therefore in his loyal place of equal justice, he has constituted a chancery, an officer to execute justice with clemency, where conscience is opposed by the rigour of the law. And therefore, the Court of Chancery has been heretofore called the Court of Conscience, because it had jurisdiction to command the high ministers of the common law to spare execution and judgment when conscience has most effect.[250]

Equity has therefore been associated with the quest for solace, reprieve, alleviation and sustenance for the suffering, oppressed and marginalized, contrary to the common law whose focus was legality. The conflict between the common law and equity is well documented in English legal history and for a time the two systems ran parallel until the Judicature Acts 1883 when the two systems were fused. But equity has bequeathed to the general common law certain remedies such as injunction, tracing, and accounting, among other intrusive tools to achieve justice that historically the common law did not provide.[251] In addition, equitable jurisdiction is associated with certain maxims and principles that facilitate the

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[248] *The Merchant of Venice* is considered the epoch dramatic expose of the conflict between law and equity. While the dramatic effect of 'take your pound of flesh but shed no blood' can raise eyebrows in legal interpretation: see Thomas Bilello, 'Accomplished by what she lacks: Law, Equity and Portia's Con' (2004) *Law and Literature*, 16 (1): 11-32; and Maxine MacKay, '*The Merchant of Venice*: a Reflection of the Early Conflict Between Courts of Law and Courts of Equity' (1964) *Shakespeare Quarterly*, 15 (4) 371 -375, there are passages that illustrate the tension between the letter of the law on one hand, and justice and equity on the other. Bassanio makes this tension come alive when he pleads thus with Shylock:
'It must appear
That malice bears down truth. And I beseech you,
Wrest once the law to your authority.
To do a great right, do a little wrong' (IV.i.211-14).
See also Stephen A Cohen, 'The Quality of Mercy: Law, Equity and Ideology in *The Merchant of Venice*' (1994) *Mosaic: An Interdisciplinary Critical Journal*, 27 (4) 35 – 54.

[249] The office of the Chancellor had religious connection; this was the repository of the King's conscience. The earliest recorded equity jurisdiction date as far back as 12th century: see S K Chattopadhyay, 'Equity in International Law: Its Growth and Development' (1972) *GA Journal of International and Comparative Law,* 5:380.

[250] William Houldsworth, *A History of English Law* (1945) 3rd Edition, cited in S K Chattopadhyay, Ibid, at p. 381.

[251] See J Martin, *Hanbury and Martin's Modern Equity*, (2012) London, Sweet & Maxwell.

quest to achieve justice. These include 'equity is equality', 'he who comes to equity must come with clean hands' or equity will not suffer a wrong without a remedy'.

As to the place of equity at international level, Lauterpacht has written that:

> It forms part of it to the same degree that considerations of morality, good conscience and good faith have been adopted as part of municipal systems of various States. Some of these principles have obviously found their way into English equity in the restricted meaning of the term; others have found their place in the English common law proper, just as they have found their way into the Codes of France, Germany, or Switzerland.[252]

In these various jurisdictions, equity has been used as a tool to adapt the law to the facts of individual cases (equity *infra legem*), to fill gaps in the law (equity *praeter legem*), or as a reason to refuse to apply unjust laws (equity *contra legem*).[253] International Arbitration Tribunals have, for example, applied equitable principles where the law was not clear, as was the case in *The Guiana Boundary Arbitration*[254] where the Arbitrator accepted as a rule of necessity, in the absence of evidence, to apply a boundary line that afforded the most equitable partition of the disputed territory. In the *Shufeldt Arbitration,*[255] the Tribunal went as far as stating that it had power to decide considering what it deems 'just and equitable, rather than minutely observing legal procedures and formalities.'[256]

On the other hand, Article 38 of the United Nations Charter mandates the ICJ to apply general principles of law recognized by civilized nations and '……subject to Article 59, judicial decisions and teachings of most highly qualified publicists of various nations, as subsidiary means for determination of rules of law'. Hence, though not expressly specified, the ICJ has applied equitable principles but not without controversy. For example, while in the *Corfu Channel Case,*[257] the ICJ based its decision on humanitarian grounds, in the *South West Africa Case* the ICJ refused to consider humanitarian considerations as a basis for generating legal rights and claims, arguing that the ICJ '…is a court of law and can take account

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[252] I H Lauterpacht, *International Law: being the Collected Papers of Hersh Lauterpacht* (1970) 257, cited in S K Chattopadhyay, op cit note 229, at p. 381.

[253] See Michael Akerhurst, 'Equity and General Principles of Law', (1976) *International and Comparative Law Quarterly*. 25 (4):801 - 825. But as Michael Akerhurst points out, these usages of equity vary considerably across countries and tribunals and have generated considerable debates, especially with regard to the extent to which a court may depart from a rule on the basis that such a rule is inequitable. See also Vaughan Lowe, 'The Role of Equity in International Law' (1989) *Australian Year Book of International Law,* 56.

[254] RIAA, (1904) Vol XI, pp. 11-23.

[255] RIAA (1930), Vol II, pp. 1079-1102.

[256] Michael Akerhurst, op cit note 253, at page 803. Scholars agree that the use of equity in some international arbitration cases has been utilised by agreement of the parties: Michael Akerhurst, op cit note 232, and Vaughan Lowe, op cit note 253.

[257] [1949] ICJ Rep 4 at 22.

of moral principles only if these are given sufficient expression in legal form'.[258] Individual opinions of ICJ judges have however given support to the equity and justice jurisdiction. In the *North Sea Continental Shelf Case,*[259] Judge Ammoun expressly declared that 'new international law' was founded partly on considerations of social justice.

There are a number of objections to invoking equity as the controversies from the ICJ and international arbitration tribunals suggest. Equity, as the famous length of the 'Chancellor's foot' demonstrates, is subjective.[260] It has therefore been contended that it is quite possible to use equity to justify discrimination on grounds of race, just as it may be used to justify invasion of a sovereign state on humanitarian grounds. Secondly, many of the issues on which equity may be called upon for climate change and environment regulation require the balancing of competing interests that an equitable jurisdiction may not sustain. An example is the dissenting opinion of Judge Gros in the *Fisheries Jurisdiction Case,*[261] which highlighted the danger. It was observed here that to hold a balance between economic survival of a people and the interests of the fishing industry of other states, raised issues which were too complex and explosive to resolve by the application of equity, and striking such a balance was an economic and political task, not a legal one.

These objections mirror the controversies surrounding the enforceability of ESCR in municipal law in which economic and political balancing is not considered the province of the judiciary. There are differing approaches in various jurisdictions, although in general judges have moved beyond the objection that social and economic rights are political in nature, considering that these rights are constitutionally guaranteed in a number of countries in the developing world. On the other hand, the resource question and the mandate of judges to rank or prioritize needs and interests remains a contentious question.[262]

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[258] [1966] ICJ Rep 3 at 34.
[259] [1969] ICJ Rep 3.
[260] A quip ascribed to John Seldon, *Table Talk*, (1689), London, J R Smith, at p. 49, quoted in M B Evans & R I Jack, *Sources of English Legal and Constitutional History* (1984) Sydney, Butterworth, pp. 223 – 224, summarises the frustrations with conscience as the basis of jurisdiction: 'Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.'

[261] [1974] ICJ Rep, 3, at pp.146 - 147.
[262] For a thorough review of national and international experience in enforcement of socio-economic rights see Malcom Langford, 'Domestic Adjudication of Economic, Social and Cultural Rights: A Socio-Legal Review' (2010) I*nternational Journal of Human Rights,* 11.

In the case of applicability of equity, however it is safe to argue that equity may be relied on where it exists as part of the general principles of law, recognized by civilized nations as provided for under Article 38.1 of the Charter of the United Nations. In that regard, the question is not whether the principle is valid or not but whether it is recognized by most countries.[263] In addition, equity will be valid and enforceable where a treaty, agreement or international covenant expressly provides for it. Even in that regard, the interpretation of the equitable principles or jurisdiction will be aided by the application of the principles alluded to earlier on in this section: equity *infra legem*, equity *praeter legem* or equity *contra legem*, as may be appropriate in the circumstances of the case.

3.6 Equity in the Common Law and Statutory Regulation

Equity can also play a stabilizing influence on the rigors of a statutory regulatory regime. In this regard, some scholars have blamed the malaise in environment and climate change regulation on the multitude of statutes that do not provide space for evolution of equity and social justice considerations. The formalism of the statutory method has left out a majority of the population that are outside the formal economy, by reason of their voice and interests not being considered in policy discourse, making regulation harsh and insensitive to these groups.[264] In particular, the fact that the state cannot act as a neutral arbiter that can apply and adopt objective practices that balance the interests of different stakeholders exposes environment and climate change regulation to capture by vested interests. As the main agent and sponsor of development, the state cannot fairly address the tensions that arise from the environment and development interface. These vested interests make the state less effective as a law maker, and an implementing and enforcement agency.[265] This is much more so with

[263] See generally Michael Akerhurst, op cit note 253, pp. 813 - 824.

[264] An interesting theoretical insight to regulation is that of Hernando De Soto, who focused on the impact of bureaucracy and mercantilism on poor people. According to De Soto, poor people's initiative and entrepreneurship to use informal means of production and reproduction are often frustrated by the weight of bureaucracy and its regulatory machinery. These informal means of production and reproduction fall outside the planned or regulated economy which is dominated by vested interests of bureaucracy and mercantilism. They are labelled illegal but not immoral as they are borne out necessity for the poor to meet their basic needs. The means are illicit but the ends are licit. De Soto argued that since the poor are victims of a hopelessly inefficient regulatory system designed to serve vested interests; he therefore prescribed deregulation and decriminalisation. De Soto's thesis resonates with the common law environmentalism approach, at least in the sense that the statutory method suppresses innovation and experimentation. But even with environmental crime that the poor often fall foul of such as charcoal burning and trade or poaching from protected areas, the problem is distribution of resources which criminalises the poor seeking livelihoods while authorising plunder by the rich, not for survival or livelihood, but often to enrich themselves. For a review of De Soto's work, see Ray Bromley, 1990, 'A New path to Development? The Significance and Impact of Hernando De Soto's Ideas on Underdevelopment Production and Reproduction'. *Economic Geography*. 66(4): 328346.

[265] Some scholars have gone as far to claim that the reason common law environmentalism was abandoned and these vested interests allowed to influence environmental regulation may be because the common law was too

developing countries that have to contend with resource constraints, external influences and a less engaging population.

It is for these reasons that some scholars have questioned the abandonment of the common law, which includes principles of equity,[266] in the regulation of the environment and climate change. It has been argued that the common law affords a better approach in environmentalism as it allows for experimentation and innovation, which are necessary with changing technology and political choices. Compared to the command-and-control approach of the statutory method, the common law and equity offer a flexible and more participatory regime that can consider local circumstances and provide for space for learning from other jurisdictions.[267]

On the other hand, the common law and its reliance on judges has been criticized as not being as suitable to the growing demand for environment and climate change regulation. This is especially because the common law relies on complainants or victims to file disputes for adjudication[268]. In addition, the judiciary has its own capacity limitations to appreciate scientific principles and data and being able to interpret these to meet regulatory demands. Nevertheless, a system with more common law principles is better than the current one which focuses on command and control with limited room for community participation in development application and innovation.[269]

3.7 Equity in Sustainable Development

The main objective of the regulatory framework for environment and climate change is essentially to balance the economic, social and environmental consequences of development activities. Over the years, the question has centred on how much to conserve in order to

effective: See Roger Meiners & Bruce Yandle, 'Common Law Environmentalism' (1998) *Public Choice* 94: 49 -96.

[266] It is worth noting that the common law is not necessarily the common law of England before or after equity; though that is where it was developed. The common law essentially comprises judge-made law using precedent but adapting the principles to deal with new issues and cases. It is based on an adversarial system in which each party brings its witnesses and the judge renders judgment after evaluating the evidence and applicable law, sometimes comparable case law from other jurisdictions is utilised. See Roscoe Pound, (1963) *The Spirit of the Common Law*, New Brunswick, Transaction Publishers.

[267] Henry Butler, 'A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy' (2008) *Case Western Reserve Law Review*. 58 (3):705 - 752.

[268] The epistolary jurisdiction provided for in section 32 of the Constitution of India, which the Supreme Court of India has been used to adjudicate environmental wrongs based on a letter setting out a dispute or wrong, has the potential to address this concern: for a review of this jurisdiction, see Garima Prashad, *Indian Judicial Activism on the Right to Environment* (29 June, 2018), Available at SSRN: http://ssrn.com/abstract=3391846 or http://dx.doi.org/10.2139/ssrn.3391846.

[269] See Richard Epstein, 'From Common Law to Environmental Protection: How Modern Environmentalism has lost its Way' (2015) Paper presented at the Classical Liberal Institute on the Ends of Capitalism, New York University School of Law: Accessed at http://pdfs.semanticscholar.org.

ensure that consumption does not deplete natural capital. Consequently, the concepts of preservation and conservation have preceded the current focus on SD.

Although popularized by the IUCN *World Conservation Strategy: Living Resources Conservation for Sustainable Development* 1980[270] and the Brundtland Commission's *Our Common Future 1987*[271], SD has a long history. The ideas of progress from the Greco-Roman times through to the ideas of material advancement associated with the industrial revolution in nineteenth century Europe and economic growth of post-war times have had considerable influence on the conceptual evolution of the term.[272]

The material advancement from the use of technology in the production of goods particularly during the industrial revolution promised limitless possibilities of wealth creation and comfort. This was also a period of massive exploitation of environmental resources that financed the Western industrial empire. However, the growing gap between the rich and poor within and between states raised concerns about the sustainability of this model. A paradigm shift began to emerge to deal with this new reality. Poverty in developing countries could not be eradicated or reduced by the western model of economic growth and high consumption rates. The United Nations Conference on the Human Environment in 1972 (UNCED) addressed sustainability in a number of its principles to underline the point that development should address economic, social and environmental issues for it to be sustainable over the long term. It has consequently been argued that for development to be sustainable it must 'improve economic efficiency, protect and restore ecological systems and enhance the wellbeing of all people'.[273] Sustainable development highlights the limits to economic growth and seeks to pursue a different type of growth that is qualitative rather than quantitative. These ideas shaped the SD concept as it moved towards crystallisation prior to the Rio Summit.

The Brundtland Commission definition clearly highlights the equity or fairness requirement in the development process in that it addresses 'the needs' of people in the present generation without compromising those of future generations. Expressing the requirements of development as 'needs' has the advantage of minimizing the demands that the development process puts on the resource capacity; hence the likelihood that both intra-generational

[270] See https://portals.iucn.org › library › efiles › documents › wcs-004.
[271] See https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.
[272] For a thorough historical account of the concept of sustainable development, see Jacobus Du Pisani 'Sustainable Development - Historic Roots of the Concept', (2006) *Environmental Sciences*. 3 (2):83 - 96.
[273] International Institute for Sustainable Development, 2003, Basics and Issues: cited by Du Pisani, Ibid, at p. 93.

and intergenerational fairness can be met. It has been argued, however, that the 'needs' approach does not address the capability requirements of development as defined by Sen.[274] It is difficult to see how development without capabilities can be sustainable, without perpetuating people as objects of charity instead of development actors.

In addition, SD has been accused of trying to meet the interests of everyone. In particular, its popularity globally among politicians of every persuasion underlines the limits of its reach and remains contested, as do the means and approaches to achieving its objectives.[275] Those seeking to promote economic growth and those seeking to maintain 'business as usual' can point to the fact that the Brundtland Commission did not discourage western consumerism.[276] The Commission also failed to consider cultural and normative dimensions of development for societies for whom economic growth is not an important consideration. In addition, the Brundtland Commission ignored existing intra-country and international inequalities that make SD difficult to achieve.[277]

As Du Pisani further points out, the equity dimension of sustainability was seriously undermined by the Brundtland Commission when it failed to require developed countries to grow less or transfer resources to developing countries.[278] On the whole, developing countries are less likely to temper their growth targets for the benefit of future generations or for the environment. On the contrary, the SD approach seems designed to maintain developing countries as providers of environmental resources thereby facilitating more exploitation of nature.

The UNFCCC, which is the most widely ratified IEL, provides for the right to SD.[279] The provision specifically cushions state parties from any hardship that climate change response measures may bring. It requires that in taking such measures, a state party must consider its national context and that economic development is essential for addressing the impacts of climate change. Clearly both developing and developed countries can easily cite this provision in support of pro-growth policies that harm the environment or the climate system.

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[274] Ortud Lebmann and Felix Rauschmayer, 'Reconceptualising Sustainable Development on the basis of the Capability Approach: a mode and its difficulties' (2012) *Diskussionspapiere*, No. 2/2012.
[275] It has been argued for example that the term is a rallying platform for people with very different agendas, from those who consider it the means to save the earth to those who seek to continue business as usual, holding on to the benefits of economic growth and using global governance to arrest environmental degradation: see Jean Graz et al, 'Towards an evolutionary environmental regulation of capitalism: sustainable development 20 years after'(2007) *Future Routes for Regulation Theory*, Lausanne, Switzerland.
[276] Jacobus Du Pisani, 2006, op cit note 272, p. 93.
[277] D Reed, *Structural Adjustment, the Environment and Sustainable Development* (1995) London, Earth Scan.
[278] Ibid.
[279] Article 3.1 of the UNFCCC.

Despite the foregoing concerns, there is considerable space to engage the dominant development paradigms in developing economies by balancing the three pillars of SD. In particular, SD incorporates notions of equity that provide the basis for enabling people to meet their needs or their capabilities. Thus, although the SD approach does not specifically articulate the capability function of development, its fulcrum is to enable human needs of present and future generations to be met. The task for policy makers and regulators is to ensure that meeting needs is not just for present generations. On the other hand, on the basis of Amartya Sen's capability theory,[280] if development is considered as freedom to do or be what one desires, the link between human freedoms and development is clear. It is therefore necessary in the context of SD to understand not only the human rights (entitlement) implications of the development process, but also the role and function of human rights in enabling equitable or sustainable development. Some commentators have thus suggested that SD can be a guiding tool at the 'interstices' of the system of economic development, environmental protection and human rights.[281]

3.8 Equity in the Rights-Based Approach to Development

It has been observed that during the Cold War, throughout the 1950s up to the fall of the Berlin wall in 1989, development theory and practice did not focus on 'rights', 'human rights' or 'rights-based approach' to development.[282] Developed countries were busy keeping their 'friends' and 'allies' for or against communism and therefore made no demands for developing countries to implement any human rights standards. Thus, despite the adoption of the UDHR[283] in 1948 and, subsequently, the ICCPRs[284] as well as the ICESCRs[285], the language of 'rights', 'human rights' or RBA did not enter the development lexicon, until recently.[286] There is real concern therefore that the language of rights tends to be associated with specific global trends and may therefore be hijacked by specific interests who drive its agenda and set its limits and boundaries.

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[280] Amartya Sen, op cit note 51.
[281] Marie-Claire Cordonier Seggey & Ashfaq Khafan, 'Introduction' in Marie-Claire Cordonier Seggey and Ashfaq Khafan (eds), *Sustainable Development Law: Principles, Practices and Prospects*. (2004), New York, Oxford University Press,, at p. 1.
[282] See Katarina Tomasevski, *Development Aid and Human Rights Revisited* (1993) New York. NY, Pinter.
[283] See op cit note 125.
[284] See op cit note 126.
[285] See op cit note 127.
[286] Peter Urvin, 'From the Right to Development to the Rights Based Approach: How Human Rights Entered Development', 2010) Andrea Cornwall and Deborah Eade, *Deconstructing Development Discourse: Buzzwords and Fuzzwords*, Oxford, Oxfam GB.

Globally, direct reference to human rights in development can be traced to the debate on the right to development (RTD) in the United Nations General Assembly (UNGA) in the first half of the 1970s. Although the debate did not yield tangible outcomes until 1986 when the UN adopted the Resolution on the Right to Development, 'the notion of the right to development provided legal and ethical authority to the developing countries' quest for international redistribution of resources.'[287] According to the United Nations Resolution on the Right to Development:

> The right to development is an inalienable human right by 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.[288]

On the adoption of the RTD in 1986, a majority of members of the UNGA interpreted the right as a national, international, individual and a collective right.[289] Hence the RTD has a different conceptual reach and framework from that of the CPR or the ESCR under the ICCPRs and the ICESCRs. The RTD is also unique, especially because it spans across a number of development-related frameworks such as the global financial and governance systems as well international trade.[290] In particular, it has been pointed out that:

> …the right to development has unique features that characterize it as a separate and independent right. Its emphasis on establishing a fair international economic order, the pivotal role that it plays in development discourse, as well as its comprehensive nature are some of the elements that necessitate its characterisation as a separate right.[291]

Not only is the RTD a unique and separate right, it also expresses many of the rights stipulated in ICCPR and the ICESCR. The RTD is a vehicle through which economic, social and cultural rights and political development can be expressed.[292] In addition, the RTD involves a lot more parties and stakeholders and their cooperation for its realisation than the more individual rights associated with the ICCPR and the ICESCR. These include the state,

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[287] Ibid.

[288] See www.uhch.ch/html/menu3/b/74.htm.

[289] See Felix Kierchmeier, Monika Luke and Britt Kalla, *Towards the Implementation of the Right to Development: Field Testing and Fine Tuning the UN Criteria on the Right to Development in the Kenyan* - German Partnership. Geneva. Friedrich - Ebert - Stiftung.

[290] Felix Kierchmeier, Ibid. See also Messenbeg Tadeg, 'Reflections on the Right to Development: Challenges and Prospects', (2010) *African Human Rights Law Journal,* 10:325-344.

291 Messenbeg Tadeg, Ibid, at p. 325.

292 The Malawi Constitution provides for the right to development in almost similar terms. See op cit, note 440. This has provided room for realisation of many ESCR that are not directly provided for elsewhere in the Bill of Rights. See also section 1.1 above.

private and public firms and the international community.[293] The RTD has a communitarian and humane approach to legality in line with African legal philosophy[294]. These characteristics have caused considerable controversy in interpretation and implementation, and to date the RTD remains on the margins of universal rights.

Despite the challenges of universality of the RTD and the fact that there is no binding international instrument, the RTD has been incorporated in regional instruments such as the African Charter on Human and Peoples Rights[295] adopted in Banjul, the Gambia in 1981, which entered into force in 1986. The RTD has also been incorporated in various ways in national constitutions in Africa.[296] The African Commission on Human Rights and Peoples' Rights has applied the provisions of the African Charter on Human and Peoples' Rights on the RTD recommending a state party to allow an indigenous community to return to their ancestral lands from which they had been evicted in the 1970s to create a nature reserve.[297] The recommendation of the Commission provides hope for the RBA to development to deliver outcomes that facilitate equitable access to resources. The determination however exposes a conundrum that the RTD and its equity requirements may highlight. The decision may run counter to the key objectives of meeting SD imperatives because sustainable utilisation and management of environmental resources is as much a concern for the RTD and other minority groups as it is to SD.[298]

The RTD and the challenges facing its interpretation and implementation highlight the close affinity between development and environmental regulation. In seeking to address the root causes of underdevelopment, the RTD has to confront the development paradigm under which developing countries have been deprived of policy space shaping international development. In particular, the continuation of economic policies based on exploitation of

293 Messenbeg Tadeg, op cit note 290, p. 326. Citing O Sheehy, 'The Right to Development and the Proliferation of Rights in International Law' (2002) *5 Trinity Law Review,* 253.
[294] See section 2.5 below, and Wiredu, op cit note 198.
[295]See https://au.int › treaties › african-charter-human-and-peoples-rights.
296 The Constitution of Malawi and South African Constitution provide for the RTD in the bill of rights while those of Ghana and Uganda provide for this in the principles of state policy.
[297] The case of the *Centre for Minority Rights Development (Kenya and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* issued in May of 2009 applied the provisions of Article 22 of the African Charter on Human and Peoples' Rights. The minority indigenous group alleged Kenya had violated the provision when it forcibly evicted them from their ancestral land in 1973 to pave way for a nature reserve without affording them as a people the right to participate in decision making. The African Commission on Human and Peoples' Rights agreed with the minority claims and recommended that compensation and reparation be given to the indigenous group including a return to their ancestral lands.
[298] For a full discussion of the case including its implications see Rebecca Browning, 'The Right to Development in Africa: An Emerging Jurisprudence? Examining the Endorois recommendation by the African Commission for Human and People's Rights' , *Kenya Law Journal*.

(raw) natural resources puts developing country economies at the mercy of developed country policies designed to exploit ex-colonies.[299] As developing countries are unable to dictate prices on the international market, the impact of globalisation accentuates the vulnerability of these economies and the adverse impacts these have on the RTD. This explains why commentators on the RTD 'stress the danger posed by globalisation to existing human rights standards. This renders individual states, acting alone, unable to satisfy the obligations imposed by international human rights instruments',[300] such as the RTD. The volatility of international markets weakens developing countries capacity to deliver the RTD and is particularly harsh on small-scale farmers in developing countries such as Malawi who have to contend with dwindling commodity prices and rising agriculture input prices.[301] This is because, as Susan George points out:

> Throughout the entire post-war period, the price of goods manufactured in the North consistently outran the price of raw materials exported by the South, something had to take up the slack if the Third World was to continue importing materials from the industrialized countries: That something was Bank debt.[302]

Escalating debt in the 1980s led to the adoption of structural adjustment programmes (SAPs) by international financial institutions as a tool for restructuring developing economies to manage escalating debt and increasing poverty. SAPs prescribed rolling back the frontiers of the state including privatisation of state entities, deregulation and opening up developing country economies to international markets. In general, these policies encouraged asset stripping and environmental degradation as heavily indebted countries needed to generate more revenue, mostly from natural resources, to service high debt levels.[303] This further exacerbated environmental degradation.

Following the failure of SAPs, international development institutions began to introduce social concerns into development thinking to deal with rising poverty and bad governance to which SAPs itself contributed. In particular, human rights became a new currency in development assistance. The UNDP also explicitly highlighted poverty reduction as a key

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[299] Susan George, 1976, *How the other Half Dies: The Real Reasons for World Hunger*, Harmondsworth, Penguin Books Ltd, at p. 158.
[300] Messenbeg Tadeg, op cit note 290, p. 243.
[301] Gracian Banda, *The World Bank and Poverty Alleviation in the Third World: The Case of the Peasantry in Malawi* (1992) Unpublished LL.M Dissertation. University of Warwick. United Kingdom.
[302] Susan George, op cit note 299, at p. 45.
[303] D Reed, op cit note 277.

objective of sustainable human development, thus expanding the concept of SD as articulated in its 1990 HDR.[304] The World Bank and IMF introduced poverty reduction strategies as new instruments for development assistance. They required human rights as one of the objectives and not just a means of achieving development.[305] The framework proceeded on the basis that individual governments would lead and determine the nature and content of PRSPs, in response to the criticism of the prescriptive approach that these institutions had followed in development assistance. The reality however was that the World Bank and the IMF provided the requisite templates to ensure the PRSPs catered to their own respective interests.[306]

In particular, PRSPs were required to promote access to justice and citizen participation in economic policy-making and implementation which, on the face of it, sound democratic and empowering for national governments and their citizens. Nevertheless, the decision to accept and promote one set of human rights but not others has been criticized as self-serving.[307] Thus, while the RBA has been firmly incorporated into the UN development agenda as articulated in the UN Secretary General's speech in 2005[308] and the PRSPs framework promoted by the World Bank and IMF, the RTD remains a legal controversy and a non-binding instrument.

It is clear that the RBA is more politically correct and palatable for international development institutions rather than the RTD. This is because the RBA to development allocated the obligation to meet rights claims to national governments rather than to donors or international financial institutions. On the other hand, the RTD carries with it not only claims for equitable development both at national and international level, but also historical obligations of the developed countries to transfer resources and restructure the international economic system to reflect equity considerations.[309]

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[304] UNDP, Integrating Human Rights with Sustainable Human Development: A UNDP Policy Document. (1998) Online http://hurilink.org/tools/UNDP cited in Robin Perry, op cit note 305.
[305] Robin Perry, 'Preserving Discursive Spaces to Promote Human Rights: Poverty Reduction Strategy, Human Rights and Development Discourse' (2011) *McGill International Journal of Sustainable Development Law and Policy* 7(1):61 - 87.
[306] Ibid, p. 64.
[307] Ibid.
[308] Kofi Anan, 'In Larger Freedom: Towards Development, Security, and Human Rights for All'. (2005) *Report on United Nations Reform*. United Nations, New York, cited in Mark Darrow and Louise Arbour, 'The Pillar of Glass: Human Rights in Development Operations of the United Nations'. (2009) *American Journal of International Law*, 103: 449 at p. 499.
[309] Robin Perry, op cit note 305, at p. 64.

The RBA is primarily premised on individual entitlements and freedoms, providing a set of claims and processes for realizing these claims.[310] There is increasing realisation however that the substantive and institutional architecture upon which these claims are built is the very framework that has promoted skewed development both at domestic and international level. The RBA is built on a system that prioritizes certain outcomes for certain actors, to the detriment of others, a system that is inherently inequitable and conceals serious power imbalances.[311] In addition, the RBA depends on the efforts of the individual victim to seek redress; yet most of such victims have no capacity to seek redress.

The RTD on the other hand sought to ameliorate the inequitable distribution of power and resources across the globe at individual, community, national and international levels. It sought to provide an enabling framework by which the needs, claims and requirements of the poor can be addressed, especially with regard to crippling economic conditions that have been historically determined. The RTD highlights the need to address these historical injustices that have perpetuated want, poverty and environmental degradation and impacts of climate change and hence constrained SD. In essence, the RTD is an attempt to equalize opportunities that capitalist development has for centuries made the preserve of the developed world. It promotes equity which is a condition precedent to the achievement of SD.

It has therefore been argued that the RBA to development through the incorporation of human rights into the PRSP framework has the potential to neuter the engagement between human rights and development. The RBA to development as advocated by international development institutions co-opts certain human rights as tools for achieving development as understood by the orthodoxy consensus rather than a dynamic, restive and political tool for engaging with the developed world.[312] The RTD and its claims for equalising opportunities and the redistribution of resources at local, national and international levels has a better rights content and empowering framework to achieve equitable development than the RBA as postulated by international development proponents. The RTD can provide the requisite capability to make development equitable and therefore sustainable.

[310] Peter Urvin, 'From the Right to Development to the Rights Based Approach: How Human Rights Entered Development'. In Andrea Cornwall and Deborah Eade, *Deconstructing Development Discourse: Buzzwords and Fuzzwords*, (2010) Oxford, Practical Action and Oxfam GB.
[311] Ibid.
[312] Robin Perry, op cit note 305.

3.9 Conclusions

This chapter has analysed the role of equity in the framing of the regulation of environment and climate change. It has been argued that the regulatory framework for environment and climate change has been influenced by certain interests which reflects its present structure and content. The chapter has analysed the role and function of global environmentalism and the manner in which the movement shaped issues and content for regulating the environment and climate change. It has also examined the philosophical underpinning of equity and social justice in the context of the evolution of the regulatory architecture for environment and climate change. The interface between equity and the evolution of the concept of SD has also been highlighted to determine the extent to which SD incorporates equity norms.

The chapter has also examined recent development thinking, especially from international development institutions that has highlighted the need to address social concerns in development regulation and has highlighted the role of human rights as conceptualised by international development institutions. In this regard, the chapter has explored the interface between the RBA and equity considerations in development regulation especially in the context of the RTD adopted by the UNGA in 1986. It has been argued that while the RBA contains rights narratives such as fairness that can facilitate SD, its focus is on individual claims and the relative obligations of national governments. The approach is essentially Eurocentric and assumes capacities that are not available in the developing country context. The RBA as championed by international development practitioners and institutions eschews notions of resource redistribution either at national or international level. The support for the RBA is intended to serve the interests of these institutions by ensuring that there is transparency and accountability as well as good governance that will enable national governments to meet their financial and trade commitments at international level.

It has therefore been argued that equity makes ethical demands and a re-conceptualisation of the law to address power imbalances as advocated by the RTD. It requires a re-examination of the norms and institutions that have confined development outcomes to certain histories and geographies. Equity requires that those victimised by 'rights holders' as provided by statute and general common law are fairly treated and the institutional architecture promoting such a framework revised. Such an analysis is likely to amplify meaningful change to the letter and implementation of national constitutions, policies and legislation and international instruments related to SD. In the context of the challenges of the RBA and the RTD, the next chapter examines some principles of equity at international, regional and national levels to highlight the role equity can play to address such concerns.

CHAPTER 4
PRINCIPLES OF EQUITY IN DEVELOPMENT, ENVIRONMENT AND CLIMATE CHANGE REGULATION

4.1 Introduction:

This chapter examines the role of general principles of equity in international, regional and domestic development policy and environment and climate change regulation. The first part focuses on the influence that equity principles have had on regulation based on relevant international, regional and domestic instruments that have incorporated equity norms. Secondly, the chapter analyses the role of equity in Malawi's development policy and environment and climate change regulation focusing on the evolution of constitutional norms that espouse and entrench equity principles and the extent to which these have influenced environment and climate change policy and legislation framework. The third section builds on the underlying constitutional mandate of requiring policy and law making to reflect the interests of the people of Malawi, to assess the extent to which the Constitution, international instruments to which Malawi is a party and customary law can support and promote equity in environment and climate change regulation.

4.2 General Principles of Law and Regulation

Chapter three has briefly considered how principles of equity have been used at international level especially in the context of developing jurisprudence in international arbitral tribunals and the ICJ.[313] While the use of general principles of law and equity is controversial at international level, the situation is much more fluid at national level. In particular, the controversy has centred on the extent to which the dominant positivist sources of law can accommodate general principles of equity which are based on natural law. The positivist school defines law as what the sovereign pronounces[314] or that which a rule of recognition says the law is.[315] General principles of equity on the other hand derive their ultimate of authority from natural law, and includes natural reason, morals, social justice or ethics as the basis of legal norms.[316] According to positivists, until a set of morals are transformed into law

[313] See section 3.5 above.
[314] J Austin, *The Province of Jurisprudence Determined*, (1995) New York, Cambridge University Press,
[315] According to Professor Hart a rule of recognition is a central foundation rule that validates a legal system. It is that rule that provides and defines a common identifying test for legal validity: see H L A Hart, *The Concept of the Law*, 2nd Edition, 1994.
[316] See J M Finnis, *Natural Law and Natural Rights*, (2011) Oxford, Oxford University Press; and R Dworkin, *Taking Rights Seriously*, (1978) Massachusetts, Harvard University Press.

through a sovereign intervention or an existing rule of recognition, they are of no legal consequence.[317] The positivist approach has dominated law making through legislation. Its advocates argue that it ensures certainty in legal norms, allows those in power fulfil their political mandate, instead of depending on the pronouncements of the judicial branch.[318] It also ensures separation of powers, under which the Legislature makes the law, the judiciary interprets and the Executive implements and enforces.[319]

However, despite the prevalence of legislation, judges use general principles in a number of situations even where legislation exists. This is largely due to the realisation that no written law can cover every conceivable situation requiring regulation; yet judges are required to rule on every case even where there is no legislation covering the facts or where there is a gap in the law.[320] In addition, general principles provide guidance in relation to indirect consequences of acts or omissions that are invalid by reason of existing legislation, but which society largely approves.[321] The cases in which this can be done depend on various circumstances. Scholars have identified at least five purposes for which general principles may be used.[322] The first is where a principle is used as a tool for interpreting the law. Thus, where legislation may be interpreted in more than one way, the presumption is that the interpretation that conforms to principle will be preferred to that which does not. Secondly, where the legal position is established by precedent, such law may be modified by using general principles. Legislation can also be modified by constitutional principles in the same manner. The third instance in which general principles are used is where a court declares that a law will not apply to a particular set of facts as to do so would sacrifice certain principles. An example of a principle of equity that may be applied to avoid the unintended consequences of a law is the principle that equity will not allow a statute to be used as an instrument of fraud.[323] The fourth instance is where a court uses general principles to make a new

[317] This is the ICJ reasoning in the South West Africa case: see op cit note 258.
[318] See O Schachter, op cit note 176.
[319] This framework is actually well entrenched in many constitutions including that of Malawi: see sections 7 to 9 of the Constitution. The separation of powers is not as clear cut, however, since the Executive invariably initiates and shapes legislation; and the common law has always been recognised as a source of law made by the judiciary: see section 3.6 above.
[320] See Percy Corbett, 'The Search for General Principles of Law', (1961) Virginia *Law Review*, 47(5): 811 – 826 at 813.
[321] Ibid.
[322] See Joseph Raz, 'Legal Principles and the Limits of Law', (1972) *The Yale Law Journal*, 81(5): 823 - 854
[323] An often-cited example is the legislation requiring that contracts pertaining to land must be in writing in accordance with the English Statute of Frauds 1677. Where a party has partly performed the contract, a court will not invalidate the transaction, by reason only that it is not in writing, as to do so will be to use the statute for a purpose for which it was not intended. This principle has been well established since *Rochefoucauld v Bowstead* [1897] 1 Ch. 196 which held that despite clear language of a statute, a court will not allow a statute

rule where none exists. The principle that "equity will not suffer a wrong to be without a remedy" is an example of the role of general principles to fill a gap in law and essentially enable a court to make a new law to avoid a perceived injustice. Finally, general principles are used as the basis for official or agency action. Examples include the sentencing powers given to courts and the exercise of discretion granted to officials or regulatory agencies.

Principles are generally vague and are intended to guide the operation of specific rules. They provide space for the incorporation of policy goals, values and objectives. Such flexibility is only useful where the general principles are used to guide official or court decision making rather than individual behaviour. Thus, it is generally where there is need to guide individual behaviour that specificity in rules is required to avoid injustice. General principles have been reflected in a number of regional and international instruments as well as national policies and legislation. Here the rules seek to enhance standardisation and harmonisation, hence the rules are general in nature in order to promote approaches and direction that enhance common or shared sector or regional and international objectives.

4.3 Equity in International Instruments

Equity has been specifically and explicitly incorporated in some MEAs and IEL such as the Rio Declaration and the UNFCCC. The Rio Declaration incorporates equity to highlight the importance of procedural and substantive fairness in development and environmental regulation.[324] Among other goals, the Rio Declaration seeks to establish 'a new and global partnership' and to work towards agreements that respect the interests of all and the integrity of the global environmental system. In linking development and environment, the Rio Declaration highlights the causes of underdevelopment and the need to prioritise the interests and needs of the poor as well as developing countries in order to achieve SD.[325] Principle 3 specifically calls for the implementation of the RTD as a means for achieving equity in development and environmental protection.[326] In addition, many of the principles regulating environment and climate change have equity elements in that they demand and require fairness.

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to be used as an instrument of fraud. Lord Lindley famously declared that 'notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant and that the grant, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute, in order to keep the land himself.'

[324] See both the Preamble to and Principles 3 and 7 of Rio Declaration.

[325] See Principles 5 to 8 of the Rio Declaration.

[326] Although the role of equity in achieving development and environmental needs and interests of all was not specifically mentioned in the Stockholm Declaration on the Environment and Human Development 1972, there are provisions that highlight the need to address the inequalities in both the national and international economic systems that contribute to underdevelopment and environmental degradation. This is clear from principles 2, 9, 10 and 11 of the Stockholm Declaration.

These include principles of SD, public participation, polluter pays, intergenerational and intra-generational equity, the common concerns of human kind and common but differentiated responsibilities which have influenced the development of environment and climate change regulation across the globe.

4.3.1 Equity in the UNFCCC

As already pointed out, the UNFCCC provides for intergenerational and intragenerational equity and differentiation of state responsibility based on historical GHG emissions in dealing with impacts of climate change.[327] Developed country parties are required to take the lead in dealing with climate change and its adverse effects. This is because, as the preamble to the UNFCCC acknowledges, developed countries have the largest share of historical and current global GHG emissions. The UNFCCC thus gives developing countries the 'right' to continue emissions in order to meet their social and development needs. The preamble however provides that the concession for developing country GHG emissions to grow in order to meet their social and development needs, is in recognition of the need to ensure 'sustained economic growth and the eradication of poverty'. It is however not clear how developing countries should respond in policy terms to their perceived 'right' to increase their GHG emissions in order to meet their social and development needs, considering that, as the preamble acknowledges, response actions to climate change may have adverse impacts on climate change. This is more so in view of the need for technology for achieving energy efficiency and controlling GHG emissions, which most developing countries cannot easily afford. These contradictory principles can only be reconciled on the basis that the developing countries continue to be dependent on the developed world for their technical and financial requirements to deal with the climate change problem.

Further, in line with equity imperatives, the UNFCCC highlights the need to balance technical requirements for addressing climate change with existing economic realities. Thus, even in relation to the more technical and scientific precautionary principle, state parties are allowed to consider different social and economic contexts, as the UNFCCC requires that response measures must be cost effective and deliver global benefits at the lowest possible cost.[328] In terms of policy choice, developing countries are likely to face significant challenges to take climate actions for improving their economic development that address environmental problems without a fundamental shift in development thinking.

[327] Article 3.1 of the UNFCCC.
[328] See Article 3.4 of the UNFCCC.

In addition, the UNFCCC specifically provides measures for adaptation actions to address the impacts of climate change and requires developed country parties to assist developing countries meet costs of adaptation[329]. Developing countries prepare adaptation plans based on this promise, particularly because the UNFCCC requires state parties must prioritise the needs and special circumstances of developing countries who would bear a disproportionate and abnormal burden of the impacts of climate change.[330] Further, although the UNFCCC does not specifically allude to the RTD, it makes reference to the right to sustainable development and, in that context, calls for balance between taking measures to address climate change and the need to promote economic development, which is essential for acquiring the means for dealing with climate change impacts.[331]

It is clear however, that although interrelated, the RTD and the right to SD are not necessarily the same considering the context in which the two concepts were developed.[332] Development equity which is the hallmark and building block of the RTD is not a priority to the right to SD.[333] The UNFCCC however further requires state parties to 'promote a supportive and open international economic system that would lead to economic growth', hence enabling parties to better address climate change issues.[334] This provision, though not couched in the language of the RTD and still prioritising economic growth, also highlights the inequitable nature of the international economic system[335] and the negative effects this may have in the task of addressing climate change. This formulation can therefore be used to promote the RTD and its equity requirements at global and national level.

4.3.2 Equity in the Paris Agreement

The Paris Agreement on Climate Change 2015[336] adopted and repeated some of the language and provisions of the UNFCCC, including the principles of equity such as the common but

[329] Article 4.4 of the UNFCCC.
[330] See Article 3.2 of the UNFCCC.
[331] See Article 3.4 of the UNFCCC.
[332] The right to development has been constructed and popularized as a developing country instrument for addressing global inequalities. The right to sustainable development on the other hand has a specific affinity to the principle of sustainable development as popularized by the Brundtland Commission in *Our Common Future* 1987.
[333] As discussed in section 3.7 above, sustainable development as conceived by the Bruntland Commission does not specifically address equity between developing and developed countries. The Brundtland definition allows developed countries to continue with their existing development and consumption levels, without accounting for historical liability or their impacts on less privileged economies.
[334] See Article 3.5 of the UNFCCC.
[335] In much the same manner that the right to development highlights the need to reform the international economic system and its overall effects on development.
[336] See op cit note 76.

differentiated responsibilities and the special needs and circumstances of developing countries.[337] The preamble to the Paris Agreement has however gone further to incorporate a human rights perspective to climate change. It requires state parties, when taking climate change action, to respect, promote and consider human rights obligations such as the right to health, rights of indigenous people, local communities, children, migrants, persons with disabilities and other vulnerable groups. It also requires implementation of and compliance with the RTD, gender equality, empowerment of women and intergenerational equity. There is also reference to the need to 'ensure the integrity of all ecosystems' and the importance, for some, of the concept of 'climate justice'.[338] In line with the UNFCCC, the preamble to the Paris Agreement highlights 'the intrinsic relationship that climate change actions, responses and impacts have with equitable access to SD and eradication of poverty'. In this regard, the Paris Agreement calls for 'sustainable lifestyles and sustainable patterns of consumption and production'. It further requires developed countries to take the lead to promote these as important measures for addressing climate change. The Agreement seeks to move development thinking and actions towards low GHG emissions and climate resilient pathways.[339] There is therefore considerable attention to development equity in climate change regulation globally as the key response action in order to address the climate change crisis.

Some of the provisions in the Paris Agreement such as the right to health, right of indigenous people and local communities have been articulated for the first time in an international climate change agreement. This should suggest their importance in the development of the regulatory architecture for climate change. But the Paris Agreement does not go further to articulate the specific obligations of state parties and mechanisms for realising these rights in the text. As is the case with most international instruments, states have discretion to design policies and legislation to domesticate these climate change human rights provisions considering their national context. Despite this limitation, the Paris Agreement has provided a framework for considering both the RBA to climate change as well as equity

[337] See the Preamble to Article 2.2 of the UNFCCC.
[338] The Paris Agreement has not defined 'climate justice'. It is however generally understood to refer to the understanding that those who are least responsible for climate change suffer its gravest impacts. This makes it imperative to frame the climate change problem as an ethical and social justice issue, rather than an environmental or physical one. See Mary Robinson Foundation, *The Geography of Climate Justice. An Introductory Resource*. Available at www.ria.ie/climatejustice.aspx. A more comprehensive definition is offered by Louis Kotze et al, op cit note 10 at p. 1, where they state that: 'We understand climate injustice to broadly embrace climate-related impacts on present and future generations of vulnerable humans and non-human beings (inter- and intra-species injustices) that affect their wellbeing in substantive and procedural ways.' This definition recognizes both intragenerational, intergenerational as well as intra-species and inter-species justice, and therefor provides a more comprehensive framework for regulation.
[339] Article 2 to the Paris Agreement.

considerations, including the RTD, when taking climate change actions. In addition, in line with the equity principle, including the common but differentiated responsibilities and respective capabilities of the state parties as articulated in Articles 3 and 4 of the UNFCCC, the Paris Agreement has highlighted new principles for guiding development interventions such as low carbon and climate resilient development pathways advocated under the Agreement.

4.3.3 Equity in the African Union, COMESA and SADC

At regional level, principles of equity and social justice form part of the fundamental principles of the African Union (AU)[340], the Southern Africa Development Community (SADC)[341] and the Common Market for East and Southern Africa (COMESA)[342] to which Malawi is a party. In articulating their development objectives, all these regional bodies provide for principles or fundamental principles in their constitutive instruments that anchor the establishment of and define the relationship between and among member states. Member states have an obligation to reflect these in their overall policy objectives and domesticate them in their national instruments. In particular, the AU seeks to promote social justice and the achievement of balanced economic development;[343] the SADC highlights the need to achieve equity, balance and mutual benefit among its member states;[344] while COMESA focusses on accountability, economic justice and popular participation in economic development[345] as some of the guiding principles. The call for equity, achievement of social justice and balance in economic development highlight the need to equalise development outcomes both between and among member states but also within member states.

The foregoing commitments provide policy space for countries to draw on for their respective national policy and legal framework. However, the domestication of the principles generally remains with nation states and their impact is subject to the national interest of member states. It is important therefore to examine some of the hurdles that state parties encounter in domesticating international commitments and how these affect implementation of equity principles for the benefit of their respective citizens.

[340] See https://au.int › default › files › treaties › 7759-file-oau_charter_1963.
[341] See https://www.sadc.int › documents-publications › sadc-treaty.
[342] See https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf.
[343] Article 4 of the AU Constitutive Act.
[344] Article 4 of the SADC Treaty.
[345] Article 6 of the COMESA Treaty.

4.4 Equity in International Law and Development Policy

The Malawi Constitution acknowledges the role of international law in a number of respects. It specifically declares that the 'Republic of Malawi is a sovereign state with rights and obligations under the Law of Nations'.[346] As such it is a principle of national policy that the state must govern 'in accordance with the law of nations and rule of law and seek to further the development of regional and international affairs'.[347] This provision imposes on the state and all its organs the obligation to adhere to international law and take active steps in its application and development and refrain from actions that undermine international commitments. In this regard, the Constitution requires courts in interpreting the Constitution, where applicable, 'to have regard to current norms of public international law and comparable foreign case law'.[348] This supports the growing trend in the use of the comparative law method for identifying and developing new legal norms in international law, without the often cumbersome and fractious process of treaty making or the time-consuming development of customary international law.[349]

In particular, it has been observed that because Malawi does not have a long record of human rights litigation, international law and comparative foreign case law can play important functions in developing appropriate jurisprudence.[350] This observation equally applies in relation to IEL. Nevertheless, this does not mean that IEL can be applied in every constitutional interpretation. IEL or comparable foreign case law will properly come in aid where the constitutional provision is not clear on its own; where the provision is comparable to international law or a foreign constitutional provision; or where local context allows or permits use of the IEL norm.[351] In addition to the paucity of constitutional litigation in Malawi as a basis for having regard to IEL and comparable foreign case law, 'comparable jurisprudence also helps to advance the ends of objectivity and fairness because it allows a

[346] Section 1 of the Constitution. This provision clearly does not suggest that Malawi as a country is regulated by international law; it merely says the country has rights and obligations under international law. The principle of dualism in incorporation of international law, as stipulated in section 211 of the Constitution, has been clearly entrenched. See Trevor Chimimba, 'The Search for Identity and Legitimacy: The Evolution of Malawi's Constitution'. (2012) *Malawi Law Journal*, 6(1):55 – 56.
[347] Section 13 (k) of the Constitution.
[348] Section 11 (1) (c) of the Constitution.
[349] Tseming Yang, 'The Emergency of the Environmental Impact Assessment Duty as a Global Norm and General Principle of Law', (2018) *Hastings Law Journal*. Available at http://ssrn.com/Abstract=3202454.
[350] Danwood Chirwa, op cit, note 54 at p. 27. This observation is also relevant in relation to environment and climate change litigation. As Malawi has had very few environmental cases litigated in the courts: see Gracian Banda & Thoko Ngwira, op cit, note 67. There have been prosecutions especially involving wildlife crime: see *Akimu v. Republic*, High Court Revision Case Number 9 of 2003 (unreported).
[351] Danwood Chirwa, op cit note 54.

judge to decide a case on the basis of objective, rather than subjective, principles'.[352] The application of IEL norms or comparable foreign case law can facilitate a more equitable regulatory response based on considerations of what has been tried and tested elsewhere.

Thus, despite the principle of dualism which requires domestication of applicable international agreements through statutes, courts are required to utilise IEL and comparable foreign case law in interpreting the Constitution as interpretive aids. In addition, the Malawi Supreme Court of Appeal has held that even if an international instrument has not been domesticated in accordance with section 211 of the Constitution, courts are required to interpret and apply domestic law on the subject in a manner that does not go against the provisions of the international instrument.[353] These provisions have a bearing on how legislation is developed and the manner in which the judiciary interprets provisions that have evolved at international level. Finally, the Constitution requires that a right under the Constitution may only be limited in accordance with international human rights standards;[354] and any derogation from a constitutional right during a state of emergency must be consistent with the obligations of the state under international law.[355] Thus, a limitation to or derogation from a constitutional right that is inconsistent with IEL norms may be held unconstitutional. Again, this provides opportunity to use best practices elsewhere as a means for advancing equity and fairness especially where rights content and limits are uncertain at domestic level.

4.4.1 Equity in International Best Practices of Environmental Regulation

The use of certain approaches and practices from specific jurisdictions which have been hailed as models and are introduced as part of bilateral agreements in specific sectors has also shaped regulation in developing countries. Examples include provision for environmen-

[352] Danwood Chirwa, op cit note 54.
[353] Per *In the matter of the Adoption of Children Act (cap 26:01) and in the matter of David Banda (A Male Infant)* MSCA Adoption Appeal Number 28 of 2009 (unreported). This however does not address the question whether domestic legislation can override an international law norm which is domesticated in Malawi, a question that was decided in the positive in *Gondwe v Attorney General* (1996) MLR 492. However international tribunals such as the African Commission on Human and Peoples Rights, in *Media Rights Agenda v Nigeria*, Communication Numbers 105/93, 128/94, 130/94 and 152/96 (1998) are emphatic that domestic law cannot take precedence over international human rights standards under the African Charter on Human and Peoples' Rights: see para. 66. There is therefore clear 'jurisprudential tension' on the relationship between domestic and international law: See R Kapindu, 'The Relevance of International Law in Judicial Decision Making in Malawi': accessed at: https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/9Kapindu.pdf.
[354] Section 44 (2) of the Constitution.
[355] Section 45 (3) of the Constitution.

tal impact assessments (EIA) or strategic environmental impact assessments (SEIA) in projects or programmes financed by the World Bank and the US Government.[356] Unlike the common law and statutory law systems imposed by the colonial administration, however, these practices and models are consensual on the face of it. Nevertheless, developing countries with less bargaining power or technical competence readily agree to them without much reflection. They may come through technical assistance in which consultants are recommended or provided as part of a project. They may be part of conditionality for provision of loan facilities by international institutions such as the IMF, the World Bank or donor agencies such as DFID or USAID.

Provision of foreign technical assistance and models has led to the diffusion of practices across the globe in environment and climate change regulation. EIA is one principles of environmental policy developed in the US in the 1970s which has been widely adopted across the globe. Its incorporation in the Rio Declaration,[357] has further solidified its place as a general principle of environmental policy.[358] Some commentators have gone even further to argue that based on a recent survey on the world-wide adoption of EIA duty it can safely be considered a 'general principle of law recognised by civilised nations' in accordance with Article 38 of the Statute of the ICJ.[359] Malawi has domesticated EIA in its National Environmental Policy (NEP) 2004 [360] and the Environment Management Act (EMA) 2017[361], and a number of projects and programmes have undergone an EIA process.

The main objective of an EIA is to integrate all possible concerns and issues affecting a project or programme in decision making.[362] More importantly, the EIA procedure seeks to ensure that scientific, economic, social and other factors are considered and hence all

[356] The EIA principle originated from the United States under the National Environment Policy, which also created an autonomous enforcement agency called the Environmental Protection Agency.
[357] See Principle 17 of the Rio Declaration, which states that 'Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have significant impact on the environment and are subject to a decision of a competent national authority.' EIA was also implicitly recognized in the Stockholm Declaration on the Human Environment, which called for rational development planning considering environmental protection: Articles 13 – 15. EIA has subsequently been incorporated in MEAs such as the United Nations Convention on the Law of the Sea 1982 (Articles 204 – 206); Article 2 (4) (1) (f) of the UNFCCC; Article 14 of the CBD 1992; and Annex E of the Stockholm Convention on Persistent Organic Pollutants 2001. For a thorough discussion see Tseming Yang & Robert Percival, op cit note 326.
[358] Almost all countries in the Southern Africa region have some form of EIA legal framework. For a thorough review see SAIEA, *SADC Environmental Legislation Handbook*. DBSA, Third Edition: www.saiea.com. Malawi formally adopted the principle of EIA in its 1996 NEP and EMA. The EMA 2017 has continued to entrench this principle.
[359] See Tseming Yang, op cit note 357. The survey shows that out of the 197 countries whose legislation were analysed, 183 have provisions for EIA.
[360] See faolex.fao.org › docs › pdf › mlw169499.
[361] http://extwprlegs1.fao.org/docs/pdf/mlw169354.pdf.
[362] In recent years international practice has highlighted the need for social issues to take prominence and hence now the principle has been renamed environmental and social impact assessment: see section 24 of EMA 2017.

stakeholders provide input in the project and programmes. The focus on social issues in particular has considerable potential to infuse equity objectives into project and programme design and decision making. However, the EIA procedure has often been a process for endorsing what has already been decided, especially because of limited public participation[363]. The involvement of local communities is a challenge considering that most are unable to appreciate the technical reports that are produced by EIA experts. This has potential to side line equity issues in practice while theoretically the law provides the opportunity for its incorporation.[364] It is important therefore that the design of EIA must specifically address the knowledge and power imbalances that local communities in the EIA process.

4.4.2 Equity in domesticating International Environmental Agreements

There are a number of constraints that affect the use of norms of public international law in the field of environmental law that have significant implications for the incorporation of principles of equity. This is mainly because, like most common law countries, Malawi subscribes to the dualist approach to the implementation of international instruments under which IEL or MEAs would only become part of the law of Malawi and therefore enforceable in Malawi courts when signed or acceded to by the President and specifically enacted into law by Parliament.[365] Thus, although Malawi has signed and ratified a number of MEAs, many of these are not yet part of the laws of Malawi. This position strengthens the positivist approach to law making and makes application of principles of equity that are expressed in IEL and MEAs entirely dependent on political will and state interest.

It is also an established general principle of law that where there is a conflict between a statute and an international instrument, statute generally prevails. This is an expression of national sovereignty and may affect equity either way in that it is possible for a state to renege on its international obligations either for the benefit or to the detriment of the country[366]. On the other hand, there are well-established principles of interpretation to the effect

[363] See John O Kakonge, 'Problems with Public Participation in Environmental Impact Assessment Process: Examples from Sub-Saharan Africa' (1996) *Impact Assessment*, 14 (3): 309 – 320, who outlines some of the major challenges in implementing EIA in Africa; and I B M Kosamu, A A Mkandawire, W Utembe & H W T Mapoma (2013) 'Public Participation in Malawi's Environmental Impact Assessment (EIA) Process' (2013) *African Journal of Environmental Science and Technology*, 7 (5): 307 – 311.

[364] For an early review of the efficacy of the EIA practice process and legislation framework, see Solani Dennis Mhango, 'The Quality of EIA in Malawi: a retrospective analysis', (2005) *Development Southern Africa*, 22 (3): 409 - 428. See also Ishmael Bobby Mphangwe Kosamu, 'Environmental Impact Assessment in Infrastructural Projects in Malawi', (2011) *Sustainability Science*, 6: 51 – 57, who lists a number of hurdles in implementing EIA in Malawi. These include limited experiences of EIA practitioners, EIA costs, lack of coordination between EIA and urban planning procedures and the lack of political will.

[365] Section 83 and 211 of the Constitution.

[366] See section 4.4.3 below.

that where Parliament passes a statute to give effect to an international instrument, the presumption is that Parliament intends to fulfil its international obligations.[367] This, in addition to the *pacta sunt servanda* principle, is intended to ensure that no state enacts a law to defeat the objectives of an international obligation to which it is a party.[368] Nevertheless, it is the manner in which a country gives effect to an international instrument that can determine the extent to which the instrument can be domesticated. In Malawi, a statute may directly enact the provision of an international instrument which will be set out as a schedule to the Act.[369] Alternatively, statute may use its own language to give effect to MEAs.[370] The latter is the most common method of domestication in Malawi,[371] and may have both positive and negative implications for principles of law intended to promote equity, as the next section demonstrates.

4.4.3 National Interest in International Agreements

Unlike some of its neighbours in southern Africa, the adoption and domestication of international instruments in Malawi is mired in confusion, which may compromise fulfilment of the interests of the people of Malawi as required by the Constitution. For example, the Constitution gives the President power to 'negotiate, sign, enter into and accede to international agreements…'[372] but does not provide any supervisory role to Parliament. Thus, the President can commit the country to an international obligation without parliamentary approval. The Zimbabwe and South Africa constitutions on the other hand are explicit about the role of Parliament in entering into international agreements. In Zimbabwe, the power of the President to enter into international agreements is subject to approval by Parliament[373] while in South Africa an international agreement binds the Republic upon approval by resolution in both the National Assembly and the National Council of Provinces.[374] The South Africa and Zimbabwe constitutions provide space for the interests of citizens to be considered through representation before an international obligation can bind the state. The Malawi position on

[367] Ian Brownlie, *Principles of Public International Law* (1990) Oxford, Clarendon Press.
[368] Per *In the matter of the Adoption of Children Act (cap 26:01) and in the matter of David Banda (A Male Infant),* op cit note 333.
[369] This is the manner in which the Arbitration Act 1967 domesticated the Convention on the Execution of Foreign Arbitral Awards 1927; and the Geneva Convention Act 1967 domesticated the Geneva Conventions 1949.
[370] Ian Brownlie, op cit note 367.
[371] An example is the Geneva Convention Act (cap 12:03 of the Laws of Malawi) which was enacted wholesale.
[372] Section 89 of the Constitution.
[373] Section 327 of the Zimbabwe Constitution (Act Number No. 20 of 2013): https://www.parlzim.gov.zw › component › download.
[374] Section 231 of the South Africa Constitution (Act Number 108 of 1994): https://www.gov.za/sites/default/files/images/a108-96.pdf.

however does not require that the Executive considers the interests of the people by involving Parliament when committing to an international agreement.

In addition, in Malawi there is no policy guidance in the process of adoption and domestication of international agreements, which can further compromise the constitutional mandate to further the interests of the people of Malawi, including equity imperatives. Zambia, for example, has specific legislation for the process of negotiation, adoption, ratification and domestication of international instruments.[375] The legislation provides for duties of the Minister responsible for the subject of the international agreement to determine whether it is in the best interest of the country to ratify the agreement. If so determined, the Minister in consultation with the Attorney General prepares a Cabinet Memorandum seeking approval in principle to ratify the international agreement. Upon Cabinet approval, the proposal is submitted to the National Assembly for approval. When the proposal is approved by the National Assembly, the Ministry of Foreign Affairs prepares and deposits the instrument of ratification in accordance with the international instrument.[376]

Malawi has no provision requiring relevant government departments to provide the necessary information as well as planning to ensure that the domestication of any MEA is in the national interest.[377] The Zambia approach would provide assurance that MEAs to which the country commits are in the interest of its people and which promote equity in regulating environmental resources on which people depend. In the absence of such guidance, there is significant potential for certain individuals and entities to promote their own interests at the expense of the interests of the people of Malawi as required by the Constitution and development equity objectives.

There have been instances where some government departments have taken a policy position at national level that is in conflict with MEAs Malawi has ratified, compromising development equity objectives in the process. A good example is the controversy surrounding the domestication of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) adopted in 2001[378] which Malawi ratified in 2006. In accordance

[375] Ratification of International Agreements (Act Number 34 of 2016): http://extwprlegs1.fao.org/docs/pdf/zam170974.pdf.
[376] Ibid.
[377] There are some provisions in the Constitution regarding the ratification of international agreements, but not as explicit. For example, section 96 (1) (f) provides as a cabinet responsibility to advise the President on what international agreements should be concluded or acceded to and to inform Parliament thereon. This responsibility is on the entire cabinet and therefore too general. A provision such as that in section 3 of the Zambian Ratification of International Agreements Act provides certainty in the regulatory process by fixing the obligation on a specific minister.
[378] International Treaty on Plant Genetic Resources for Food and Agriculture: http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-001346.txt.

with the treaty, Malawi is required to put in place policy and legislation to protect and promote farmers' rights to use, exchange and reuse genetic resources and to participate in decision making regarding the regulation of genetic resources for food security and agriculture in general.[379] However, the Ministry of Agriculture, which is responsible for implementing the ITPGRFA, has not been keen and at times has shown ambivalence and almost hostility to the ITPGRFA, especially as it seeks to promote and protect farmers' rights which the Ministry has perceived is in conflict with breeder's rights.[380] On a number of occasions, Ministry officials either refused to acknowledge farmers' rights as stipulated in the ITPGRFA or shifted responsibility to the Environmental Affairs Department (EAD) to enact legislation to implement farmers' rights. The main reason for this opposition is that the plant breeders in the Ministry do not acknowledge the role of farmers as breeders or that the farmer can have the same rights as that of professional breeders. On the other hand, the Ministry of Agriculture has facilitated the enactment of a Plant Breeders Rights Act 2018[381] which only promotes development and protection of plant varieties developed by professional plant breeders. Considering that these plant breeders use plant materials collected, conserved and in a number of cases improved by local farmers, there is real concern that the intellectual property rights of farmers will not be honoured.

The above controversy not only reflects the consequences of the lack of policy guidance to promote the interests of the people of Malawi, it also goes against the equity principles espoused by the constitutional provisions highlighted in this chapter.[382] This is an example of adopting policy positions without considering an express national interest. The policy promoted by the Ministry of Agriculture requires that small-scale farmers buy seed and pesticides from multinational corporations who dominate the seed and pesticide market, which most of these poor farmers cannot afford. The Ministry of Agriculture believes that the country's food security concerns can only be resolved through use of improved seed

[379] See Article 9 of the ITPGRFA, which outlines these rights as the right to save, use, exchange and sell farm-saved seed subject to national law, the right to protection of traditional knowledge relevant to plant genetic resources for food and agriculture, the right to equitably participate in sharing benefits arising from utilization of plant genetic resources for food and agriculture, and the right to participate in decision making at national level in matters related to conservation and sustainable use of plant genetic resources.
[380] See CEPA, *Status of Implementation of Farmers Rights in Malawi*, (2010) Centre for Environmental Policy and Advocacy, Blantyre; and Gracian Banda and William Chadza, *Farmers Rights Sustainable Agriculture and Development in Malawi: Exploring Policy Options and Approach'*, (2012) Centre for Environmental Policy and Advocacy, Blantyre. Copies on file with the author.
[381] Act Number 20 of 2018.
[382] See section 4.5 below.

varieties[383] and is ambivalent regarding the concerns expressed by civil society organisations that the promotion of these foreign plant varieties will adversely affect the conservation of agro-biodiversity and undermine the very effort of promoting food security.[384]

4.5 Equity in the Malawi Constitution

4.5.1 Equity in the Fundamental Principles of the Constitution

As pointed out earlier,[385] although in the common law tradition equity evolved as an instrument for tempering the rigours of the common law, equity owes its genesis to the concept of social justice. Consequently, equity has been employed in national constitutions adopted following long periods of oppression, inequality and injustice. This is the case with a number of countries in southern Africa, such as Malawi, South Africa, Namibia and Zimbabwe. In that regard, equity has been used as an instrument for achieving fairness and equalising development opportunities and outcomes.

For developing countries, equity provides the fulcrum for addressing the unfairness of the international economic system and its implications for the development aspirations of states, communities and individuals.[386] Equity has been incorporated in national constitutions that link freedoms to development outcomes as a means to address interests of the people by promoting due process and the need to equalise development opportunities. The constitutional provisions on the RTD[387] and the right to equality and prohibition of discrimination[388], are enacted alongside specific principles of national policy that seek to equalise access to resources and achieve equitable development outcomes. What is clear however is that national constitutions tend to be inward looking and rarely articulate the need to equalise development opportunities between states. Hence the RTD has been confined to domesticating individual and, as necessary, group rights, with little or no guidance on how the state should approach development in international relations.[389]

The Constitution is one among many that highlight the role of equity in governance in general and development in particular. Part II and III provide for fundamental principles of the Constitution and principles of national policy that have a strong bearing on equity and

[383] See section 3.1 of the National Agriculture Policy 2016: https://reliefweb.int/sites/reliefweb.int/files/resources/NAP_Final_Signed.pdf.
[384] This position is in sharp contrast to the principles in the Constitution and the National Environmental Policy.
[385] See sections 3.3 to 3.5 above.
[386] See section 3.8 above.
[387] Section 30 of the Constitution.
[388] Section 20 of the Constitution.
[389] For a detailed discussion on the RTD see section 3.8 above. The Paris Agreement is one MEA which specifically incorporates the RTD: see section 4.3.2 above.

social justice in development and environmental governance as the basis for exercise of state power.[390] An important constitutional principle is the requirement that the exercise of state power is conditional on the sustained trust of the people of Malawi who, in accordance with the preamble to the Constitution, have established a constitutional order[391] to guarantee the welfare and development of the people of Malawi. The Constitution requires that state authority must only be exercised to protect and serve the interests of the people of Malawi.[392]

This thesis argues that promoting the interests of the people of Malawi entails incorporating equity in the development process and it is in determining what constitutes the 'interests of the people of Malawi' that the equity norms can be understood. The Constitution sheds some light on how those interests may be identified. Firstly, the Constitution expresses a social contract provision under which the authority to exercise state power is expressed through elections conducted in accordance with the Constitution and any law made thereunder.[393] Political parties seeking to contest elections are required to register with the Registrar of Political Parties.[394] In addition to its constitution and rules, a political party is required to present its manifesto for registration.[395] The manifesto outlines the party's political programme and on the basis of which it seeks to exercise state power. The manifesto acts as a statement of policies that voters will evaluate in deciding whether to vote for a particular party. In theory therefore, a manifesto should outline a menu of the interests of the people of Malawi as understood by the political party seeking political office. In voting for a particular political party, the people of Malawi make known their preference for the manifesto of that party. The political manifesto should therefore be the basis for policy making in development and environment and climate change regulation.

Identifying the interests of the people of Malawi through electoral success can however be quite a challenge. Not least because the motivations for electoral choice go beyond what is in the best interest of the people of Malawi, since it is essentially the rule of the majority, rather than a political manifesto that best suits the constitutional mandates, that

[390] See UNEP, *New Frontiers in Environmental Constitutionalism*. (2017) UNEP, Nairobi.
[391] The preamble provides the motivations to the social contract among the people of Malawi. When read with the fundamental principles, the preamble provides the basis of state authority and the conditions of its exercise.
[392] Section 12 of the Constitution.
[393] Section 4 of the Constitution.
[394] Section 12 (1) of the Political Parties (Act Number 1) 2018: https://malawilii.org › legislation › act.
It is worth noting that one can contest in elections either as a Member of Parliament or as President without belonging to any political party. In that case, there is no need to register under the Act. Nevertheless, a political programme of some sort will be required for campaign purposes.
[395] Section 12 (2) of the Political Parties Act 2018.

will attain electoral success.[396] The Constitution has sought to balance this dissonance specifically in various ways. While the Executive which makes and implements policy is specifically required to 'embody the express wishes of the people of Malawi', those wishes must promote the values of this Constitution'.[397] The Legislature (representing political parties including independents that have won seats in the National Assembly) which makes law must not only reflect the interests of all the people of Malawi in its deliberations, but also 'further the values explicit or implicit in this Constitution'.[398] Finally, the Judiciary, which is charged with the interpretation, protection and enforcement of the Constitution and all laws, must carry out its functions 'in accordance with the Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of the law'.[399] The Constitution is therefore the supreme arbiter of what constitutes the interests of the people of Malawi as expressed in electoral mandate, but also as embedded in the values and tenets of the Constitution.

The Constitution provides further guidance to the task of identifying the interests of the people of Malawi which have equity objectives. Firstly, it states that:

> The inherent dignity and worth of each human being requires that the State and all persons shall recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups or minorities whether or not they are entitled to vote.
>
> All persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.
>
> All institutions and persons shall observe and uphold the Constitution and the rule of law.[400]

[396] The rule of the majority has been manifested in some really cruel ways under which a political party has assumed power when its candidate has scored just a third of the votes under the 'first past the post' electoral system that Malawi has adopted under the Presidential and Parliamentary Elections Act (Number 31 of 1993: https://mec.org.mw/wp-content/uploads/2018/11/electoral-laws-final.pdf. For a review of the electoral system regulation and its impact on environmental representation, see Gracian Banda, op cit note 72. The Malawi Supreme Court of Appeal has, however, recently declared that the word 'majority' of votes under section 80 of the Constitution means 50% plus 1 of the votes cast: see *Prof Arthur Peter Mutharika & The Electoral Commission v Dr. Saulos Klaus Chilima & Dr. Lazarus McCarthy Chakwera*, MSCA Constitutional Appeal Number 1 of 2020 (unreported): https://malawilii.org/mw/judgment/supreme-court-appeal/2020/1.
[397] Section 7 of the Constitution.
[398] Section 8 of the Constitution.
[399] Section 9 of the Constitution.
[400] Section 12 (1) (d-f) of the Constitution.

The Constitution therefore recognises that the inherent dignity and worth of every human being, as highlighted in the preamble,[401] entitles every human being to protection of their fundamental human rights and views irrespective of their capacity or otherwise to vote. It follows that in establishing the interests of the people of Malawi attention must be given to the protection of the worth and dignity of every human being by reason only that they are human. No person is above the law, hence legally every person must be treated equally. Secondly, irrespective of their right to vote,[402] the Constitution provides for mutuality and solidarity in rights recognition and protection. It states that:

> Every individual shall have duties towards other individuals, his or her family and society, the State and other legally recognised communities and the international community and these duties shall include the duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; and in recognition of these duties, individual rights and freedoms shall be exercised with due regard for the rights of others, collective security, morality and the common interest.[403]

In essence this provision expresses a social contract and social justice framework on the basis of which society is organised and through which each person's interest is expressed, evaluated, recognised and protected. It is because of the interdependence of human existence that each person owes duties to the other, the local and the international community. For this reason, the Constitution calls on each individual to safeguard, promote and reinforce mutual respect and tolerance. More importantly, the provision emphasises that in exercising their respective rights and freedoms, each individual must consider the rights of others as well as the collective security, morality and the common interest. Although this provision seems to focus on individual duties and freedoms, it has a clear communitarian policy-directive usage in decision making for officials or institutions to focus on interdependence of rights and duty bearers.[404] The Constitution requires that collective security, morality and common interest shall be the guiding principles in determining the interface between individual duties and freedoms. It is worth emphasising that the scheme of the Constitution is expansive in its directives requiring decision makers to go beyond the dictates of legal prescriptions. The

[401] The preamble stipulates that the people of Malawi adopted the Constitution considering, among other things, 'the sanctity of human life and unity of all mankind' and 'seeking to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful international relations'.
[402] Section 12 (1) (d) of the Constitution
[403] Section 12 (2) of the Constitution.
[404] In line with the functions of general principles as discussed in section 4.2 above.

reference to common interest, morality and collective security is an appeal to good conscience and humanity, which are the foundations of equity.

Finally, the Constitution directs what decision makers need to consider in interpreting the Constitution. It declares that in the interpretation and application of any laws and the resolution of political disputes, the Constitution is the supreme arbiter and ultimate authority.[405] In this regard, the Constitution requires that in formulating and applying any legislation, and in applying and developing the common law and customary law,[406] relevant organs of state shall have regard to the principles and provisions of the Constitution. Although all the organs of state and all persons must be guided by and will interpret the Constitution in their decision making, the Constitution gives the judiciary authoritative mandate to interpret, apply and enforce the Constitution.[407] In this regard, the Constitution requires that the courts must develop appropriate principles for interpreting the Constitution to reflect its unique character and supreme status[408]. In doing so, the courts are enjoined to 'promote the values which underlie an open and democratic society; take full account of the provisions of Chapter III and Chapter IV; and where applicable, have regard to current norms of public international law and comparable foreign case law.'[409]

4.5.2 Equity in the Principles of National Policy

In addition to the fundamental principles stipulated in Part II of the Constitution, Part III provides for principles of national policy to guide state policy in various aspects of regulation including development policy and environment and climate change management. First, the Constitution requires the state must actively promote 'the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving'[410] a number of stated goals. Among the principles stipulated under Part III, those addressing gender equality, environmental protection, dignified rural standard of living and economic management have specific resonance to equity and social justice.

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[405] Section 10 (1) of the Constitution.
[406] In accordance with section 200 of the Constitution, the law applicable in Malawi includes the Constitution, Acts of Parliament, common law and customary law. All Acts of Parliament, the common law and customary law must be consistent with the Constitution; and any legislation or law that is contrary to the Constitution will be invalid to the extent of the inconsistency: section 5 of the Constitution.
[407] Section 10 (2) of the Constitution.
[408] See the dictum of Banda, C J in *Attorney General v. Nseula*, op cit note 473.
[409] Section 11 (1) of the Constitution. Chapter III provides for constitutional principles of national policy; while Chapter IV contains a bill of rights.
[410] Section 13 of the Constitution.

In relation to gender equality, the Constitution calls for full participation of women in all aspects of Malawian society on the basis of equalising opportunities with men and to implement policies of non-discrimination.[411] The Constitution also calls for responsible management of the environment and natural resources in order, *inter alia*, 'to prevent the degradation of the environment; provide a healthy living and working environment for the people of Malawi; and accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources'.[412] It further requires the state to enhance the quality of life in rural communities and 'recognise standards of rural living as a key indicator of the success of Government policies'.[413] Finally, in relation to economic management, the Constitution requires the state to 'achieve a sensible balance between the creation and distribution of wealth through the nurturing of a market economy and long-term investment in health, education, economic and social development programmes.'[414]

These provisions provide guiding principles of state policy that directly address equity and social justice both in a development policy context in general as well as in environment and climate change regulation in particular. The role of women in development and the protection of rights of women has been articulated in a number of international[415] and regional instruments,[416] while the need for equality and equity stands at the centre of many initiatives intended to bridge the gap between men and women regarding access to resources.[417] Gender equality is an essential ingredient in achieving equitable development in general and SD in particular. As an example, since women and especially those in rural areas,

[411] Section 13 (a) of the Constitution.
[412] Section 13 (d) of the Constitution.
[413] Section 13 (e) of the Constitution.
[414] Section 13 (n) of the Constitution.
[415] The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW): https://www.un.org › womenwatch › daw › cedaw
Is one widely ratified international instrument providing for equality between men and women. Malawi ratified the CEDAW in 1987 and is among the other 189 state parties. Malawi has domesticated the Convention both in its constitutional principles and bill of rights as well as in various pieces of legislation, including the Gender Equality Act 2010.
[416] The Revised SADC Protocol on Gender and Development 2016 seeks to integrate gender issues in development. The Protocol focuses on empowerment of women, elimination of discrimination and achieving gender equity and equality, and sets targets for state parties to meet at national level through constitutional and legislation provisions, governance arrangements, education and training and productive resources and employment, among other interventions.
[417] The SADC Guidelines on Gender Responsive Budgeting provides a good example of a regional instrument intended to infuse equity into development in more practical ways. In defining gender responsive budgeting, the Guidelines state that they are not about whether an equal amount is spent on women and men but whether the spending is adequate to women and men's needs. It includes reprioritising expenditure and revenue, considering the different needs and priorities of women and men: see SADC Guidelines on Responsive Budgeting 2014, at p. 14.

are generally primarily responsible for economic survival of their families, skewed access to natural resources between men and women adversely affects their development capabilities responsibilities thereby jeopardising present and future generations' development aspirations.[418]

The principles provide for intergenerational equity, such that the prevention of environmental degradation, the requirement for a healthy living and working environment, and conservation of Malawi's biological diversity, are intended to achieve SD within and between generations. The Constitution does not provide for a right to a clean and healthy environment in the Bill of Rights; hence the principle of national policy provided for under Part III provides the clearest statement of state environmental responsibilities from a constitutional context. This framework has limitations in enhancing SD since the absence of justiciable rights may undermine a more robust response to environmental degradation that an RBA would have provided. Malawi however developed specific policies and legislation that have strengthened this constitutional principle including the enactment of the NEP 2004 and the EMA 2017, which provide for an enforceable right to a clean and healthy environment.[419]

The focus on a dignified rural standard of living is a recognition of the neglect and vulnerability that characterises rural communities.[420] In most cases policy makers focus on urban areas in terms of investment while rural communities barely notice state presence. The state responsibility to enhance the quality of rural life[421] provides a framework for addressing the neglect and discrimination that rural communities often face in policy influence and resource allocation towards development initiatives. This has particular significance to environment and climate change regulation in that the rural economy being predominantly agricultural and subsistence has more reliance on environmental resources and is more vulnerable to the vicissitudes of climate change than the urban areas; hence the need to pay specific attention to addressing resilience and sustainability of the rural economy in achieving SD outcomes. The Constitution, however, does not focus on the rights of rural women as required under the CEDAW,[422] an important equity provision that needs to be taken up through legislation.

[418] See Article 14 of CEDAW.
[419] See section 4 of the EMA 2017. For a detailed discussion see section 5.7.2 below.
[420] See Garton Kamchedzera & Chikosa Banda, 'Dignified Rural Living, The Right to Development and Legislation in Malawi.' (2009) *South African Journal of Human Rights*, 25(1).
[421] Section 13 (e) of the Constitution.
[422] Article 14.

Finally, the need to create a balance between the creation and distribution of wealth incorporates equity considerations in both development policy as well as environment and climate change regulation since inequitable development interventions have negative implications for environment and natural resources conservation in particular and SD in general. Although the mechanisms for achieving this principle are not spelt out, it recognises the role that differential endowments, capacities and locations play in determining development outcomes. Hence, while taxation and other distribution policy instruments can address inequities, the manner in which development gains are invested in populations and ecosystems have long-term impacts on SD, and hence equity and social justice.

4.5.3 Equity in Non-Justiciable Principles of National Policy

The principles of national policy are expressly stated as non-justiciable. They are directory in nature but courts are entitled to have regard to them when interpreting or applying the Constitution or any law or when reviewing decisions of the executive.[423] They are considered as mere guidelines for decision making by state organs. However, provisions dealing with or directly affecting environment and climate change are stipulated as principles of national policy in the Constitution and therefore not justiciable. The question is therefore what is the effect of the non-justiciable environment and climate change principles?

There are two sub-questions to be determined. The first concerns the reasoning behind making some provisions justiciable and others not. The second relates to the utility of the principles, especially in the context of environment and climate change regulation. It has been observed that the non-justiciable principles may have been included based on an understanding of ESCR as not the province of the judiciary because they involve decision making on social policy and financial obligations that the judicial branch is not equipped to make.[424] 'Advocates of this position have asserted that, while rights to housing, education, health and other forms of social welfare may have value as moral statements of a nation's ideals, they should not be viewed as declarations of enforceable rights'.[425]

[423] Section 14 of the Constitution.
[424] See Danwood M Chirwa, 'A full loaf is better than half: The constitutional protection of social, economic and cultural rights in Malawi' (2005) *Journal of African Law*, 49 (2); Eric C Christiansen, 2007, 'Adjudicating non-justiciable rights: Social-economic Rights and the South African Constitutional Court'. 38 *Columbia Human Rights L. Rev*. 321
[425] Eric C Christiansen, Ibid, pp. 321 – 322.

It has been argued that reading the text of the Constitution one cannot understand the reasoning behind making some ESCR as justiciable while others are not. There is no appreciable rationale as to why the right to food, shelter, housing and education should be protected under the Bill of Rights; while the rights to nutrition, a healthy living and working environment, and health care are provided for under principles of national policy.[426] Interestingly, some rights are protected both under the Bill of Rights and the principles of national policy. These include education, non-discrimination, rights of children and women, for example. Hence the only reason that environment, natural resources and biodiversity issues can be considered as non-justiciable rights is because they only appear under a part that is expressly declared as comprising non-justiciable provisions.

The reason for non-justiciability of the principles is therefore not necessarily because they overwhelmingly deal with social policy and financial decision making. Instead, the makers of the Constitution seemed to have used their discretion of which rights and concerns should be under the enforceable Bill of Rights and which ones should go under the principles of national policy. Either way, the non-justiciable provisions in Part III do not reflect the preambular dictates of the Constitution or the fundamental principles of the Constitution, which require all state organs and persons exercising state authority to prioritise the interests of the people of Malawi.[427] As earlier pointed out,[428] a majority of Malawians live in rural areas where environmental resources are the bedrock of survival and climate change poses a serious threat to their livelihoods. There can be no compliance with these constitutional dictates where the very basis of survival of over 80% of the population is being threatened.

This perhaps explains why a number of principles of national policy are taken up further in the Bill of Rights in Part IV of the Constitution where specific enforceable rights are stipulated which, if read broadly as required,[429] will enhance the justiciability of the non-

[426] Danwood Chirwa, op cit note 424, p. 213.
[427] Both the preamble and section 12 of the Constitution are quite clear that the welfare and development of the people of Malawi are the paramount consideration in any policy or decision making by any organ or official of the state.
[428] See section 4.6 above.
[429] The Malawi Supreme Court of Appeal has, in a number of cases, declared that the Constitution must be read broadly, purposefully and holistically without any one provision in isolation: See generally Chifundo Kachale, 2012, *Judicial (In)activism in Malawi? A Critical Analysis of the `impact of Constitutional Jurisprudence on Constitutionalism and the Rule of Law* (2012) PhD Thesis, SOAS, University of London, http://eprint.soas.ac.uk, citing *Attorney General v Fred Nseula and Malawi Congress Party*, MSCA Civil Appeal Number 32 of 1997; and *The State & The Malawi Electoral Commission, ex parte Rington Nzima*, MSCA Civil Appeal Number 17 of 2004 (unreported).

justiciable provisions in Part III. The rights of women to equality, the prohibition of discrimination, and the right to property are guaranteed under the Constitution.[430] The gender equality and non-discrimination provisions are particularly important since women, especially in rural areas bear the brunt of environmental degradation, climate change impacts and skewed access to resources[431].

Further, although the Constitution does not provide for a right to a clean and healthy environment, as is the case in constitutions of other countries,[432] it makes provision for the right to life and dignity, which has been interpreted to include a right to a healthy environment since an environment that is not healthful threatens the right to life[433] and violates a dignified existence.[434] This is in line with the prevailing rules of constitutional interpretation which require broad, purposeful and holistic reading of the constitutional text.[435] In this regard, the Supreme Court of Uganda has held that rights of future generations stipulated in directive principles of national policy in the Constitution can be interpreted by reference to the right to a clean and healthy environment in the Bill of Rights, since these intergeneration rights can be compromised by the violation of the right to a clean and healthy environment.[436] The Court even went further to declare that these directive principles of national policy have gone beyond mere guidelines for constitutional interpretation and may in themselves be justiciable.

In the same vein, the directive principle requiring the state to strike a sensible balance between the creation and distribution of wealth and therefore promoting social justice and equity in the distribution of development interventions and outcomes, can be justiciable if read together with some provisions in the Bill of Rights. This is particularly the case with regard to provisions that outlaw discrimination. These provisions prohibit discrimination on the basis of race, sex, religion, colour, political, social origin, property or birth.[437] They oblige the state to legislate against inequality in society and prohibit discriminatory practices

[430] See sections 20 and 24 of the Constitution.
[431] See Article 14 of the CEDAW.
[432] For example, section 24 of the constitution of South Africa, and section 73 of the constitution of Zimbabwe, which provide for a right to a clean environment.
[433] See op cit, note 54.
[434] See Garton Kamchedzera and Chikosa Banda, op cit note 420.
[435] See *Attorney General v Fred Nseula*, op cit, note 473.
[436] See *Amoti Godfrey Nyakaana v National Environmental Management Authority & Others*, Constitutional Appeal Number 5 of 2011: https://ulii.org/ug/judgment/supreme-court-uganda/2015/14.
[437] Section 20 (1) of the Constitution.

and their propagation.[438] The principle can also be read together with the RTD and specifically to the right to enjoy economic, social, cultural and political development, with special consideration being given to women and children.[439] The Constitution states that,

> 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.
>
> The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
>
> The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.[440]

This provision is the clearest constitutional statement intended to balance individual rights with communitarian notions of social justice and equity in development policy. It requires the state to take measures not only to equalise opportunities of access to basic resources but also to eradicate social injustices and inequalities. These social injustices and inequalities will include historical injustices such as those relating to access to land, water and productive resources including infrastructure investments that have considerable bearing on the ability of certain groups to break off the poverty cycle that has been entrenched by the prevailing development paradigm. The Constitution further requires the state to undertake reforms aimed at eradicating social injustices and inequalities, thereby strengthening the role of equity in shaping development outcomes.

4.5.4 Application of Equity in the Malawi Legal System

A vexing question has been the applicability of doctrines of equity in the context of the Constitution of Malawi. This is because, although the text of the repealed 1966 Constitution specifically provided for the application of doctrines of equity in Malawi,[441] the 1994 Constitution does not include doctrines of equity as part of the applicable law in Malawi. The 1994 Constitution states that:

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[438] In this regard Government has enacted the Gender Equality Act 2012 which, inter alia, seeks to promote gender equality with regard to access to productive resources, development opportunities and decision making considering the impacts these have on economic growth and development. See the memorandum to the Gender Equality Bill (Number 49 of 2012).

[439] Section 30 (1) of the Constitution.

[440] Section 30 (2), (3) and (4) of the Constitution.

[441] Section 15 of the repealed 1966 Malawi Constitution provided that the law applicable in Malawi are Acts of Parliament, the common law, doctrines of equity and statutes of general application in force in England on

> Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance with and in pursuance of this Constitution:
>
> Provided that any law currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court.[442]

There are two considerations in the interpretation of this provision. The first is that when compared to the 1966 Constitution, the 1994 Constitution has deliberately left out doctrines of equity and statutes of general application as part of the laws of Malawi. A reasonable conclusion would seem to be that these are no longer part of the laws of Malawi after the appointed day, which is 18 April 1994.[443] The second consideration is that the proviso to section 200 of the Malawi Constitution states that any law that is in force before the appointed day will continue to apply until amended or repealed. Some commentators have argued that the absence of doctrines of equity and statutes of general application from this provision means that the framers of the Constitution abolished the application of these laws. It is thus contended that even the proviso in section 200 cannot save doctrines of equity and statutes of general application when these were deliberately left out in the main provision.[444] It is, however, conceded that Malawi courts continue to apply doctrines of equity such as injunctions, specific performance, tracing, application of equity maxims, among others. No case has challenged the continued application of doctrines of equity. It is also recognised that the exclusion of doctrines of equity from the laws of Malawi would leave a serious *lacuna* in the law and administration of justice in that a number of remedies may no longer be available.[445]

It is worth noting that although the British Central Africa Order in Council 1902 and the repealed 1966 Malawi constitution listed doctrines of equity as part of the applicable law, Malawi has never had courts of equity as separate from courts of common law. Even in England since the Judicature Acts 1883, the common law and equity jurisdictions were fused. The common law of England applicable in Malawi has therefore always included

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11 August 1902. This provision repeated the 1902 British Central Africa Order in Council which first declared the law applicable to Malawi, then Nyasaland.

[442] Section 200 of the Constitution of Malawi 1994.

[443] See section 215 of the Constitution.

[444] See Justin Kalima, *The Effectiveness of Environmental Law in Malawi: An Analysis of the Legal Tools for achieving Environmental Protection with Emphasis on the Criminal Sanction*. (2006) Unpublished PhD Thesis, University of KwaZulu Natal. Durban, p. 45.

[445] Ibid, at p. 46.

equity. It follows that despite the apparent separation between 'doctrines of equity' and the common law in British Central Africa Order in Council 1902 and the repealed 1966 Malawi constitution, equity jurisdiction in Malawi has always been part of the common law. In fact, the common law and equity jurisdiction in Malawi has been so fused into the entire legal system that one cannot easily be applied without the other and achieve the ends of justice as required under the laws of Malawi. These observations may explain why the framers of the 1994 Malawi Constitution just listed the common law bearing in mind that the common law as presently constituted includes the equity jurisdiction. It is also worth highlighting that the 1994 Constitution does not expressly exclude the equity jurisdiction; one can argue that a law cannot be abolished or amended by mere implication.

This may explain why Malawi courts have continued to apply equity norms without debate. In particular, the remedy of injunction which is one of the most important judicial remedies in public and private law is essentially an equitable remedy. The grant or refusal of an injunction prayer invariably turns on equity rules in which the balance of convenience or the balance of justice based on the facts is the guiding principle[446]. Justice Tembo in *National Democratic Alliance v Thom Chiumia & Others*[447], specifically acknowledged the applicability of equity doctrines in Malawi when he declared that:

> ….equity means: Primarily fairness or natural justice. A fresh body of rules by the side of the original law, founded on distinct principles, and claiming to supersede the law in virtue of the superior sanctity inherent in those principles. Equity is a body of rules formulated and administered by the Court of Chancery to supplement the rules and procedures of the common law. By the judicature Act 1873, the Court of Chancery was amalgamated with the Common Law Courts to form the Supreme Court, and rules of equity are administered in all divisions of the court, and where there is any conflict between the rules of law and equity, equity is to prevail.

In *Chinyama Phiri v Martina Kachere*[448], Justice Kenyatta Nyirenda declined to grant an to stay a court order on the ground that the Claimant did no come to court with clean hands having himself flouted a court order. The learned Judge held that 'a…party is not entitled to obtain an equitable remedy because the party is acting unethically or has acted in bad faith with respect to the subject of the complaint- that is with 'unclean hands'. The doctrine is

[446] The case of American *Cynamid Co v Ethicon Limited* (1975) A C 396 established the equitable principles for the grant or refusal of an injunction.
[447] High Court of Malawi Civil Cause Number 58 of 2003 at p.5.
[448] High Court of Malawi Civil Cause Number 282 of 2016 (unreported)

often stated as "those seeking equity must do equity" or "equity must come with clean hands"[449]. It follows that the equity jurisdiction is entrenched in Malawi law.

Finally, following the observation in section 3.5, it can be argued that equity is so intertwined with social justice that it is safe to say that its core objectives, doctrines and elements have been preserved in the fundamental principles as well as the human rights provisions in chapter II to IV of the Constitution that promote the interest of the people of Malawi in general and social justice in particular.[450] In addition, being part of the fundamental principles of the Constitution to promote the welfare and interest of the people of Malawi, it is safe to argue that equity is an overriding policy and legal requirement in Malawi. It therefore follows that equity both in the form it was received in Malawi from England in 1902 and as a concept of social justice are part of the laws of Malawi and therefore important considerations for environment and climate change regulation.

4.6 Equity in Customary Law

The earlier sections of this chapter have argued that the main principles that have structured environment and climate change regulation are primarily derived from external sources such as developed country legislation or international instruments. The origin of these principles may be different but they have similar outcomes in the context of developing countries. They substitute local forms of governance and lifestyles with what is considered as civilised and modern. Their social mission is 'homogenising and hegemonising.... society conceived as inherently atomised and centreless'[451] as was the case with pre-colonial societies. Consequently, international law defined a state in a manner intended to replace these 'atomised

[449] Ibid, p.3.
[450] The Constitution provides for a number of equity related concepts such as the equality clause in section 20; the right to development in section 30; the fair labour relations clause in section 31; and the administrative justice clause in section 43.
[451] AP Thornton, *Doctrines of Imperialism*. (1965) New York, John Wiley & Sons Inc., p. 58, cited in Trevor Chimimba, op cit note 346, at p. 25.

and centreless societies' with what the colonising entities conceived as subjects of international law,[452] thereby catalysing and legitimising colonial expansion and the imperialist project.[453] This process subsumed local governance systems such as customary law and facilitated the dominance of statutory law.

Considering the challenges associated with infusing equity in statutory regulation,[454] the question has often been asked whether customary law, which is the corpus of lived norms of communities, can provide an alternative regulatory instrument. This section analyses the challenges and opportunities posed by customary law in achieving development equity in general and responsive environment and climate change regulation in particular.

4.6.1 The Common Law influence on Customary Law

The adoption of colonial law and administration in many developing countries introduced the common law or Roman Dutch law, and statutory law systems as the dominant legal systems. In Malawi, starting with the Africa Order in Council 1889, which led to the declaration of the Nyasaland Protectorate in 1891, to the British Central Africa Order in Council 1902 which imposed colonial law and administration, legal principles as applied in England became the law applicable in Malawi, while customary law was subject to the common law.[455]

The colonial administration experimented with direct rule first, until 1922 when indirect rule was established after noting that the break-up of tribal rule had made governance difficult for colonial authorities. Indirect rule was an opportunity to strengthen the relationship between colonial and traditional authorities. Nevertheless, the colonial administration was responsible for all law making and enforcement and policing. In environment and conservation matters, there was police presence even in rural areas to enforce soil conservation measures introduced by statute. These policing measures stoked political unrest and in a

[452] In order to qualify as a state and therefore a subject of international law, a political entity had to be 'completely supreme over all its members, and subject to no external authority, must have reached a certain degree of civilisation, have ceased to be nomadic and become owner of a fixed territory, have provided for continuity of its existence, and have attained a certain size of importance.' T J Lawrence, *The Principles of International Law*, (1895) London, Macmillan & Co, p. 60, cited in Trevor Chimimba, op cit note 346 at p. 23. It followed that European powers were entitled to colonize and establish statehood on native territories and peoples for lack of polity organized as states as defined by their international law.

[453] Peter Fitzpatrick, 'Terminal Legality and (de)composition of law', in Diana Kirkby & Catherine Carleborne (Eds) (2001) *Law, History and Colonialism: The reach of the Empire*. Manchester/New York, Manchester University Press.

[454] See section 3.6 above.

[455] See 2.2.1 above.

number of instances pitted native authorities against their own subjects, weakening trust in traditional governance in the process.[456]

Almost all the legislation adopted during the colonial era was command-and-control in nature and centralised in its making and enforcement. The norms and institutions stipulated in these statutes were all imposed in sharp contrast to the nature of customary law 'which is driven by ordinary people engaging with each other, rather than by formal processes of challenging rules or laws…'[457] as is the case with the common law or statute. Under customary law, although overall power was vested in the chiefs, governance was in practice by consensus with diffuse systems of participation through smaller chiefs and their respective council of elders.[458] The customary law system allowed all adult males[459] to have a say over deliberation and collective decisions reached were binding on all. This participation in regulation, which is singularly lacking in the common law and statute-based systems, promoted collective interest and equity both in process and substance of decisions.

The common law and customary law systems however hardly interact, with adverse consequence for promoting community interests and regulatory efficiency. 'The fixed, hierarchical system of state law that is intolerant of negotiated rules sometimes stifles communities' customary law into obscurity'.[460] On the other hand, the lack of community engagement with state law beyond the strictly formal process of legislative representation has led to state law being largely ignored by communities.[461] One important equitable principle of customary law that has stood the test of time and is manifested in customary land tenure is the communitarian and relational nature of access to resources, rather than the individualistic and autarchic[462] framework championed by the common law and statute. This principle promotes the welfare and development of members of the community including the less privileged and vulnerable by providing them access to resources most of which are land based. Over time this custom has been whittled down by legislation encouraging individual tenure

[456] See Mathieu Deflem, 'Law Enforcement in British Colonial Africa: A comparative analysis of imperial policing in Nyasaland, the Gold Coast and Kenya' (1994) *Police Studies*, 17:48 – 50.
[457] Wilmien Wicomb, 'Law as a complex system: facilitating meaningful engagement between state law and living customary law'. (2011) Paper presented at the IASC International Conference on the Complex Commons, Hyderabad, India, January 2011, page 13. Accessed at: https://www.academia.edu/8404031/Law_as_a_complex_system_facilitating_meaningful_engagement_between_state_law_and_living_customary_law.
[458] Ibid.
[459] The male domination in customary law making has received considerable adverse comment. See generally Muna Ndulo, op cit note 123.
[460] Wilmien Wicomb, 'Customary communities as peoples and their customary tenure as culture: What we can do with the Endorois decision, (2011) *African Human Rights Law Journal*, 11:422 – 446, at p. 426.
[461] Ibid.
[462] Ibid.

and enclosures and has alienated entire communities from their resources leading to landlessness, land degradation and other regulation challenges.[463]

The dominance of the common law and statute has also compounded the task of identifying applicable customary law, making the assessment of its equity credentials problematic. Mnisi has characterised customary law as either 'official customary law' or 'living customary law' to highlight the different permutations of the system. Official customary law is what state law has identified and recognised, while living customary law is the evolving context and location specific norms that communities live by, identify with and reflect their daily realities and interests.[464] Much of what is perceived as customary law is essentially what colonial 'administrators, legislators and the courts perceived as customary law and not necessarily living customary law to which a majority of people relate.[465] The uncertainty over what the corpus of customary law is has been accentuated because customary law is largely unwritten, differs from place to place, is constantly evolving and is 'uneasily poised on the boundary between law and fact'.[466] The South African Constitutional Court emphasised this point in an earlier case where it cautioned that 'although a number of textbooks exist and there is a considerable body of precedent, courts today must bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied'.[467] This observation has particular resonance to the state of customary law in Malawi where, during over 30 years of one-party rule, the state set up traditional courts to administer a version of official customary law that served the interests of that regime.[468]

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[463] See the National Land Policy 20002. Malawi has recently revised its land legislation through the Land Act 2016, the Customary Land Act 2016 and amendments to the Registered Land Act 1967, to provide for the registration of customary land into individual, family or communal titles. This is intended to strengthen tenure and provide local communities opportunity to invest in their land through titled property than can be used as security for loans. On the other hand, this legislation can increase enclosures and landlessness as the more powerful and wealthy can eventually buy up and displace the less privileged.

[464] S Mnisi, 2007, *Post-Colonial Culture and its influence on the South African legal system – exploring the relationship between living customary law and state law*. (2007) Unpublished PhD Thesis, University of Oxford.

[465] See Drucilla Cornell, 'The Significance of the Living Customary Law for an Understanding of Law: Does Custom Allow for a Woman to be Hosi?'(2009) *Constitutional Law Review*, 2:395 – 408, citing the dictum of Justice Van der Westhuizen in the South African Constitutional Court case of *Shilubana & Others v Namitwa* [2008] ZACC 9 at para. 35. See also Muna Ndulo, op cit note 123.

[466] T W Bennet, *Customary Law in South Africa*, (2007) Cape Town, Juta, p. 144; cited in Loretta Feris, 'A Customary Right to Fish when Fish are Sparse. Managing Conflicting Claims between Customary Rights and Environmental Rights' (2013) PER/PELJ 16 (5) 556/614 at p. 565.

[467] *Alexcor v Richtersveld Community*, 2003 (5) SA 460 (CC), note 51.

[468] See L J Chimango, 'Tradition and the Traditional Courts in Malawi', (1977) *The Comparative and International Journal of Southern Africa*, 10(1): 39-66.

4.6.2 The Constitution, Customary Law and Equity

It is also noteworthy that although almost all democratic constitutions have placed customary law at the same level as the common law,[469] the practice has been to elevate the common law and to religiously apply its precedents, often at the expense of customary law. This has caused some judges to remind that 'customary law has a status that requires respect'[470] and 'customary law is protected by and is subject to the Constitution in its own right'.[471] It is 'an independent source of norms within the legal system'[472] in the same manner as the common law.

The Constitution stipulates that courts applying or developing the common law or customary law shall have due regard to 'the principles and provisions of this Constitution'.[473] However, unlike the South African Constitution under which legislation can only encroach on customary law by express provision[474] the Malawi Constitution is silent and leaves that decision to the courts, and seems to suggest that it is up to the parties to raise customary law themselves.[475] This uncertainty may perpetuate the neglect in the application of customary law, especially in areas where there has been much legislative activity such as in environment and climate change regulation. Yet 'the need to adequately and accurately validate the existence of custom weighs especially heavy when the custom relates to the use of natural resources',[476] and therefore requiring clarity in the judicial process. In addition, because a majority of people are based in rural areas and environmental resources such as land, fish, forests and water, are the bedrock of their livelihoods, the use of legislation based on experiences elsewhere cannot provide a viable basis for a responsive regulatory framework.

[469] See section 200 of the Constitution, which preserves the common law, customary law and Acts of Parliament in force before 18 May 1994.
[470] *Shilubana & Others v Namitwa* op cit note 465, par. 43.
[471] Per Justice Langa in *Bye v Magistrate, Khayelitsa* [2004] 1 SA 580, par. 41.
[472] *Alexcor v Richtersveld Community*, op cit note 467, at note 51
[473] See section 10 (2) of the Constitution. The full implication of the constitutional mandate on the judiciary was highlighted in *Attorney General v Fred Nseula and Malawi Congress Party*, (1999) MLR, 313, at, p.324, where the Malawi Supreme Court of Appeal, per Banda, C J, laid down the approach to interpreting the Constitution as follows: 'Constitutions are drafted in broad and general terms and, they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in a narrow legalistic and pedantic way but broadly and purposively. The intention should be aimed at fulfilling the intention of Parliament…All the provisions bearing upon a particular subject must be brought to bear and must be so interpreted as to effectuate the purpose of the Constitution'.
[474] Section 211 (3) of the Constitution of South Africa states that 'courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. Although the decision whether customary law applies lies with the courts, there is a much clearer obligation to apply existing customary law. In particular, the Supreme Court of Appeal of South Africa held in *Gongqose v Minister of Agriculture Forestry and Fisheries*, Case Number 1340/17, declared that 'the injunction to apply customary law is not rendered subject to any legislation generally, but only to legislation that specifically deals with customary law'.
[475] See section 64 of the Courts Act 1958 discussed below.
[476] Loretta Feris, op cit note 466, at p. 565.

These considerations underscore the need for clarity on the applicability of customary law, especially since customary law may serve as a basis for claims to natural resources on which a large majority in developing countries depend.[477]

There is serious potential for conflict between the application of customary law on the one hand and statute or the common law on the other hand. As pointed out in chapter 2.3 and 3.6, the power dynamics between the drivers of statute and common law on one hand and those advocating for customary law is such that resolution of such conflict will favour the former. This has considerable implications for the application of customary law and the extent to which it can promote equity. In addition, with the advent of democracy and human rights, the application of customary law has been complicated by the perception that customary law is antiquated, undemocratic and not responsive to the human rights ethos. Yet, as argued by Ozoemena, because of its nature as living law, customary law is evolving.[478] This requires a new approach for ascertaining applicable customary law that addresses these concerns in the context of achieving development equity and a responsive environment and climate change regulatory system.

One of the lingering debates on the nature and application of customary law has been the extent to which customary law can accommodate human rights, especially the rights of women.[479] Muna Ndulo has pointed out that due to its unwritten and flexible nature, decisions on what is customary law may turn on the gender make-up or interests of the decision makers,[480] thereby further complicating its reliability as a legal norm. However many democratic constitutions, including those of Malawi, South Africa and Zambia, apply both customary law and human rights. There are cultural practices and customary norms that clearly discriminate against women, such as those relating to chieftainship and property rights[481]. The Constitution prohibits discrimination,[482] and protects women from discrimination on

[477] Loretta Feris, op cit note 466 at p. 567, citing *Alexcor v Richtersveld Community*, op cit note 467.
[478] R N Ozoemena, 'Legislating as a Critical Tool in addressing Social Change in South Africa: Lessons from Mayelane v Ngwenyama' (2015) PER/PELJ 18(4) 970/992 who highlights, in the context of recognition of customary law marriage in South Africa, that the requirement for consent of the existing wife as a condition for a man to marry a second wife under the Recognition of Customary Marriages Act fails to protect 'double family' situations where husbands leave their wives in rural areas and 'marry' another woman in the city where they go to work: pp. 971, 985.
[479] See Muna Ndulo, op cit note 123, at p. 96 where he argues that '....in most cases men often staff the local courts and the men are often chosen for their familiarity with customary norms. Such men are more inclined to defend what they see as traditional norms than the living norms law of communities.' See also op cit note 479.
[480] Muna Ndulo, op cit note 123.
[481] See op cit, note 519 and 520.
[482] Section 20 of the Constitution provides: 'Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status'.

grounds of gender or marital status. In addition, the state is required to pass legislation to eliminate customs and practices that discriminate against women.[483] It follows that any customary norm that violates the Constitution can be invalidated by the courts. The question is to what extent can the Constitution redress discriminatory customary practices while retaining legitimacy and acceptability in the communities practicing them. Court decisions in South Africa on constitutionality of certain customary laws demonstrate that the issue of what is the existing customary law is not straight forward.[484]

The South African Constitutional Court in *Shilubana & Others v Namitwa,*[485] dealt with a deeply entrenched customary law norm which also obtains in Malawi under which only male children can succeed as traditional authority. The court reviewed the concept of living customary law and observed that customary law norms are a flexible set of practices, processes and ethical principles by which a majority live and respect. It cannot be solely dependent on what has applied in the past or the perceptions of opinion or traditional leaders. Unlike the definition of custom at common law,[486] living customary law cannot be ascertained by considering its antiquity or whether it has been consistently applied. Customary law is flexible, context specific and changing.[487]

In Malawi, the Constitution identifies customary law as one of the three sources of law in addition to statute and the common law. However, because customary law is largely unwritten, it needs to be ascertained. The Courts Act makes provision for principles for ascertaining customary law, as follows:

> If in any proceeding where a matter of customary law is material, such law shall be treated as a question of fact for purposes of proof. In determining such law, the court may admit the evidence of experts and persons whom the court considers likely to be well acquainted with such law. Provided that a court may judicially note any decisions of its own or of any superior court, determining the customary law applicable in a like case.[488]

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[483] Section 24 states: '(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status... (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women...'

[484] *Shilubana & Others v Namitwa*, op cit note 465. See also the dictum in *Alexcor v Richtersveld Community*, op cit note 467, at note 51.

[485] *Shilubana & Others v Namitwa*, op cit note 465.

[486] For custom to be applied as law at common law it 'must be certain, uniformly observed for a long period of time and reasonable': *Shilubana & Others v Namitwa* op cit note 465, at para. 48.

[487] Drucilla Cornell, op cit note 465, at p. 465.

[488] Section 64 of the Courts Act 1958.

It follows that customary law has to be proved as fact by witnesses who can testify to its existence. It may also be ascertained by expert evidence or the court may take judicial notice of its own precedents or those of superior courts. Hence the decision whether a particular customary law indeed exists will essentially rest on expert evidence, though ultimately that will be the decision of the court. The prevailing practice however seems to suggest that the evidence of the expert or persons whom the court considers to be likely to be well acquainted with the customary law will take precedence unless there are conflicting opinions and the court has to determine the weight to be attached to the evidence.[489] In Malawi, the publications by John Ibik in the 1970s have been consistently cited by the courts as representing customary law.[490]

These approaches however do not fully respect the constitutional powers of the court in determining applicable customary law and ignore the dynamism of customary law as context specific and constantly evolving.[491] In the first place, the Constitution clearly requires that in interpreting any law, including customary law, the Constitution is the supreme arbiter, and all organs of state, including the courts, must have regard to principles and provisions of the Constitution.[492] Using the opinions of experts or taking judicial notice of the views of traditional authorities is not adequate as this may leave out the impact of constitutional provisions as they interface with lived experiences. In this regard it is important to highlight that the Constitution gives every person the right to participate in the cultural life of his or her community.[493] And culture being the crucible for customary law, it follows that customary law is protected as a human right. As such right it can only be limited or curtailed if the

[489] As happened in *Kamchacha v Nkhota* (1966-168) ALR Mal. 518 in which the Court had to choose between an expert resident in the community concerned and another from outside the community. On the other hand, in *Zoba Jere v Attorney General & Masabane Jere, Civil Cause Number 155 of 2018* (unreported), the High Court took judicial notice of the ruling of Inkosi ya Makosi and 'gave it the force of law', see p.5 of the ruling.

[490] John Ibik, *Restatement of African Customary Law*. (1970) London, Sweet & Maxwell. Ibik *Malawi I: The Law of Marriage and Divorce* (1970) (Restatement of African Law: 3); Ibik, *Malawi II: The Law of Land, Succession, Movable Property, Agreements and Civil Wrongs* (1971) (*Restatement of African Law*: 4). John Ibik who was from the School of Oriental and African Studies of the University of London was described as a distinguished researcher and expert on African law in *Mungomo v Mungomo* (1997) 1 MLR 447, which adopted Ibik's position that a valid customary marriage requires consent of two marriage advocates. See *Kamuzu (Administrator of Deceased Estate) v Attorney General*, Civil Cause Number 1839/1997, HC 2004: accessed at https://malawilii.org/mw/judgment/supreme-court-appeal/2004/3 where Justice Chimasula cited Ibik extensively to establish applicable Sena customary land law.

[491] There have been a few instances however where what was considered settled customary law has been revised by the courts considering the current practice. Thus, while in *Mungomo v Mungomo*, supra, it was held that marriage advocates must be close relatives of the contracting parties, in *Mwangobola v Mwangobola*, Civil Appeal Case Number 4 of 1989, it was held that it was unnecessary for marriage advocates to be close relatives of the parties.

[492] Section 10 as read with section 11 of the Constitution. Section 11 requires a full consideration of key parts of the Constitution that deal with fundamental principles, national constitutional principles, human rights and other provisions. The dictum of the Malawi Supreme Court of Appeal in *Attorney General v. Fred Nseula*, op cit note 473, is instructive in this respect.

[493] Section 26 (1) of the Constitution.

limitation is in accordance with the Constitution.[494] It follows therefore that the use of expert witnesses should only provide guidance in evaluating the cultural dimension of the practice in the context of the Constitution.

As observed by the South African Constitutional Court in *Shilubana & Others v Namitwa*, the court must undertake a nuanced evaluation of the prevailing factors to ascertain the living customary law by which a majority live and respect. Justice Van der Westhuizen laid down three steps for the court to follow. First the court must consider tradition without losing sight of the influence of legal pluralism introduced by colonial rule and international law. Secondly, a court must consider whether the relevant authorities could modify the custom in issue, in which case proof of the past and present status and reasons for the alleged change must be proffered. Thirdly the court must weigh existing expectations and the need for flexibility against other countervailing factors such as the need for legal certainty and existing vested and constitutional rights.[495]

Such an analysis will enable customary law to develop its own principles to reflect the living realities of the community in question rather than through common law lens.[496] In essence, customary law has to be evaluated in the context of the constitutional requirements to promote the interests of the people of Malawi, the fundamental principles of the Constitution requiring state organs to account to the people of Malawi, the constitutional principles of national policy regulating development policy as well as environment and climate change regulation and the human rights provisions in the bill of rights. This will highlight the ethical, social justice and equity dimensions of a customary practice to be applied by the court. It will also highlight that no branch of the law is outside the customary law regime where constitutional dimensions are considered.[497]

In the environmental law context, the South African case of *S v Gongqose* dealt with the conflicting claims and expectations of the customary right to fish in the face of declining marine resources.[498] The indigenous Dwesa and Cwebe of Eastern Cape were dispossessed of their natural resources and denied access to customary rights to those resources. The accused community members were arrested while fishing in a reserve. The question before the

[494] The right to participate in a culture of one's choice is derogable under section 44 (2) of the Constitution if the limitation is prescribed by law, is reasonable, is recognized by international human rights standard and is necessary in an open and democratic society.
[495] *Shilubana & Others v Namitwa* op cit note 465, at paras. 43 to 47.
[496] Drucilla Cornell, op cit note 465, at p. 405.
[497] In view of the observations made in section 4.6.1 above, the constitutional uncertainty about when customary law will apply may necessitate amendments to the Courts Act or enactment of specific legislation.
[498] For a thorough review of the decision see Loretta Feris, op cit note 466.

court was whether the community could raise a customary right to fish in a reserve protected by statute as a defence to the prosecution case. Evidence including that of experts established the existence of the right based on the cultural traditions of the indigenous communities in the area. The magistrate, while finding that the constitutionality of the fishing ban was in doubt, nevertheless convicted the accused in accordance with the provisions of the Marine Living Resources Act 1998. As Feris points out,[499] the learned magistrate however did not allude to the conservation programme which was the basis of the legislation; hence the obiter dictum,[500] concerning the constitutionality of the fishing ban, did not benefit from a nuanced analysis of the implications of the customary law on natural resources conservation.[501] Citing the case of *Christian Education South Africa v Minister of Education,*[502] Feris emphasises that in balancing the competing claims between customary rights and the conservation obligations, the court must put more weight on protecting the national interest, suggesting that where, as was the case in *S v Gongqose*, the question is which right to prioritise, the scale may tip on the side of meeting a state's sustainable resource management obligation than a community's right to fish in accordance with its customary norms.[503]

This balancing process requires a flexible approach to legal reasoning and resonates with the directions put forward by Justice Van der Westhuizen in *Shilubana v. Namitwa* for ascertaining the existing living customary law. This is the approach the Supreme Court of South Africa[504] took on appeal against the decision of the High Court[505] in *Gongqose v Minister of Agriculture, Forestry and Fisheries*. In determining the relationship between the customary law of the Dwesa and Cwebe community and the Marine Living Resources Act 1998, the Supreme Court held that the customary right to fish was protected under section 211 (3) of the constitution of South Africa since the Act did not expressly or by implication extinguish that right. The court further held that customary law and conservation can and did

[499]Loretta Feris, op cit note 466, p. 561.
[500] The magistrate court has no jurisdiction to declare on the constitutionality of any legislation; hence the statement doubting the validity of the Marine Living Resources Act 1998, had no bearing on the decision. See Loretta Feris, op cit note 466, p.561.
[501] This is the criticism levelled at the African Human Rights Commission decision in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* issued in May of 2009. For a thorough analysis of the case see Rebecca Browning, 'The Right to Development in Africa: An Emerging Jurisprudence? Examining the Endorois recommendation by the African Commission for Human and People's Rights', (2011) *Kenya Law Journal.*
[502] 1998 12 BCRL 1449 (CC).
[503] Loretta Feris, op cit note 466, at p. 569.
[504] *Gongqose v Minister of Agriculture, Forestry and Fisheries*, op cit, note 474.
[505] Ibid. The High Court of South Africa essentially confirmed the convictions of the accused, though on different grounds. While upholding the customary rights of the accused to fish without a license, the High Court upheld the convictions on the ground that the conduct of the accused was unlawful and because they had not applied for exemption as required under the Marine Living Resources Act 1998.

co-exist and, in contrast with Feris,[506] highlighted that the Dwesa-Cwebe communities 'had a greater interest in the marine resources associated with their customs and traditions than any other people'.[507] The Supreme Court was further fortified in its opinion that customary law and conservation can co-exist because it found that the customary law of the Dwesa-Cwebe community provided for sustainable conservation and utilisation of the marine resources.[508] The approach of the Supreme Court of South Africa on the relationship between customary law and statute has the potential to provide more meaningful space for the application of customary law than a blanket conclusion that so long there is legislation regulating a resource or the environment then only that legislation will apply. As has been argued in section 4.5.1, customary law provides opportunity for negotiated regulation and therefore more likely to achieve equity than national legislation based on the formalism of legislative representation.

With respect to the status of customary law in Malawi, it can be argued that the principles stipulated in *Shilubana v Namitwa* provide a good starting point for evaluating the applicability of customary law in the context of existing statute and the Constitution. In the first place, it is established that there is only one hierarchy of sources of law led by the Constitution and in which the common law and customary law have equal status. Secondly, customary law is not defined by long user, rather its force lies in lived realities and acceptance in the community concerned. Thirdly, despite the provisions of the Courts Act examined above[509], a court must undertake the evaluation of a customary norm in the context of the Constitution which requires that the text be broadly considered with a purposeful and generous reading[510] and essentially focussing on the founding principles of the Constitution earlier examined[511]. The language, goals of any applicable statute can then be analysed in the context of the customary norm, their synergy or dissonance with the ultimate aim of addressing what community interests or national policy the statute is promoting, such as those relating to sustainable utilisation and management of a resource, as was done in the case of *Gongqose v Minister of Agriculture, Forestry and Fisheries*.[512] Fourth, with this nuanced analysis, the question of consistency between customary law on one hand and human rights on the other can easily be resolved.

[506] Loretta Feris, op cit note 466.
[507] *Gongqose v Minister of Agriculture, Forestry and Fisheries*, op cit note 474, at para 56.
[508] Ibid; see also paras 26 to 33.
[509] See op cit, note 491.
[510] See op cit, note 471.
[511] See section 4.5.1 above.
[512] See op cit, note 474.

As argued in section chapter 2[513], customary law is determined by ethical principles by which the majority live and respect. It is different from the statutory method which relies on state authority, which is implicated with interests of dominant stakeholders. It is also different from the common law which developed from judicial reasoning based on prevailing social, economic and cultural conditions, mainly of England. Customary law is more akin to natural law based on the moral authority of the principles and can better deliver equity, especially for regulating environmental resources on which the majority rely. Customary law can better promote humane considerations based on community embeddedness, rather than mere legality. In this regard, it has been argued that customary law has a different conception of law from western jurisprudence, which has divorced legality from justice, and where lawfulness has replaced justice as a measure of ethical conditions.[514]

Customary law can better promote equity and social justice based on lived experiences of mutual interdependence and the pursuit of a communitarian ethos in access to resources. This is specifically highlighted in the fundamental principles of the Constitution[515], which this thesis urges need to be taken more seriously than has been the case to date. Customary law promotes equitable access to all key resources such as land, water, fish and wildlife resources, through communal ownership and can better ensure protection of vulnerable groups.[516] Statute has radically changed the role of lived experiences in law making and replaced them with western individualistic arrangements promoted in foreign statute and some international instruments. However, statute law has been less equipped to deal with the resulting vicious cycle of poverty and environmental degradation and climate change, and has remained on the fringes of social organisation especially in rural areas.[517] This calls for a revision of the legal system to ensure it provides space for negotiation of rules beyond the formalism of legislative law making.

[513] See section 2.5.2 above.
[514] R Berkowitz, *The Gift of Science*, IX cited in John Murungi, (2006) 'African Jurisprudence: Hermeneutic Reflection' in K Wiredu (Ed) *A Companion to Africa Philosophy*, London, Blackwell p. 525.
[515] See especially section 12 (2) which has been analysed in detail in section 4.5.1 above.
[516] Wilmien Wicomb, op cit note 457.
[517] As argued by Wilmien Wicomb, op cit note 457, at p. 427, 'customary law developed in spheres invisible to the dominant legal system' …..yet it 'is central to the lives of most of their subjects'.

4.6.3 Customary Norms related to Environment and Climate Change in Malawi

Malawi has a number of customary norms that regulate environmental resources such as land, water, wildlife, forestry and fisheries. Among the customary norms, are those regulating customary land as community property held by traditional authorities for the benefit of the community, including rules on how customary land is acquired or inherited[518]. The most prominent and debated are the rule that female children cannot inherit customary land in patrilineal systems of inheritance, and male children cannot inherit property in matrilineal systems. [519] Chieftainship is also attained through either the female line in matrilineal societies or male line in patrilineal societies. [520] Traditional leaders have power to allocate and administer customary land[521] which includes authority over land-based resources such as wildlife, fish and water for which they control use and harvesting[522] as well as harvesting seasons and applicable rituals[523]. In addition, traditional leaders have dispute resolution responsibilities over land[524] and are also generally custodians of cultural beliefs such as witchcraft and other rituals; hence some forests such Khulubvi in Nsanje district have been conserved specifically for ancestral worship or as burial sites. [525] In general, compliance with customary norms depends on the authority of traditional leaders to ensure compliance since there is no state policing. [526]

[518] Section 2 of the repealed Land Act 1965 defined customary land as land that is held, occupied or used in accordance with customary law; while customary law was defined as customary law applicable in the area concerned. Thus, although customary land was not vested in traditional leaders, section 25 empowered these leaders to administer customary land subject to the directions of the Minister. These provisions entrenched the role of customary law and the territorial nature of customary land as belonging to the community. The Land Act 2016 however has changed the status of customary land and diminished the role of traditional authorities and customary law, which is now mostly regulated by statute: sections 5 and 6 which give powers of administering customary land to elected Customary Land Committees.

[519] See P. Kishindo "Differential Security of Tenure on Malawi's Customary Land: Implication for Investment" *in Development Southern Africa,* 1995, Vol. 12, No. 2, 167; J. S. Nankumba & M.R. Machika, *Dynamics of Land Tenure and Agrarian Systems in Africa: The Case of Malawi,* 1987 (Research Report presented to F.A.O and Malawi Government). The Land Act 2016 has not revised these customary law norms; they must therefore be tested against the Constitution.

[520] Section 20 of the Constitution prohibits discrimination on grounds of sex, while section 30 (3) requires the state to eradicate all forms of social injustices and inequalities.

[521] See *Kamuzu (Administrator of Deceased Estate) v Attorney General*, Civil Cause Number 1839/1997, HC 2004: accessed at https://malawilii.org/mw/judgment/supreme-court-appeal/2004/3.

[522] In relation to fishing, traditional leaders control who can use landing beaches and the prohibition of sites and seasons for fish breeding: see M. D. Kalanda-Sabola, E. M. T. Henry, E Kayambazinthu & J Wilson, 'Using Indigenous Knowledge and Traditional Practices in Fisheries Management: A Case of Chisi Island, Lake Chilwa, Zomba', (2007) *Malawi Journal Of Science and Technology*, Vol. 8, pp. 9 – 29.

[523] See Malawi Government, 'Fifth National Report to the Convention on Biological Biodiversity', 2019, Lilongwe, Ministry of Natural Resources, Energy and Mining. Accessed at: https://www.cbd.int/doc/world/mw/mw-nr-05-en.doc,%20accessed%20on%203%20August%202019.%0d

[524] Although the Land Act 2016 gives Customary Land Committees and Customary Land Tribunals powers to allocate and manage customary land, these powers are subject to approval by traditional authorities: see section 6 of the Land Act 2016.

[525] Ibid. See also W F Mwase, A. Bjornstad et al. 2006. The Role of Land Tenure Institutions in Conservation of Tree Species Diversity in Southern Malawi. A Norwegian University of Life Sciences Report.http://www.indiana.edu/~iascp/bali/papers/Mwase_%20Weston_Bjornstad_Boko....

[526] See EAD, *Land Use and Management Study*, Lilongwe, EAD.

Traditional knowledge and practices have contributed to the conservation and management of environmental resources and constitute important customary norms in the development of agriculture and traditional medicine. This includes the selection and exchange of plant genetic resources which have facilitated the development of seeds and planting materials on which much of modern crop and animal species are based[527]. These practices are based on traditional knowledge which is passed on from one generation to the next. However this intellectual property is not generally protected; while conventional scientific innovations are protected and facilitated under the patents legislation. In addition, because the traditional practices and genetic resources have been developed and conserved in the existing environment, they have traits that are essential for dealing with pests and diseases and other impacts of climate change. The genetic resources have the potential to provide resilience for adapting to the impacts of climate change such as droughts. Protecting these practices and resources require a *sui generis* framework legislation for protecting innovations from traditional knowledge that takes into account the exchange, sharing and multiple intellectual efforts of actors over time and space[528].

Climate change impacts are also revitalising debates about the knowledge systems developed by local people over millennium in adapting to climate change. In particular, due to long association with their respective environments, communities have developed local knowledge which enables them to predict onset of rains, floods or droughts and take measures to mitigate or adapt to the changing environmental conditions[529]. In Malawi and elsewhere in southern Africa, bouts of hurricanes, droughts and flooding have led researchers to search for community early warning systems in addition to scientific and conventional systems that government policies often prioritise. In Malawi indigenous knowledge early warning indicators include abundance of certain ants or birds, migration of certain animals such as hippos from the river to villages, the brightness of starts or appearance of moon with

[527] C. Machena & G. Banda (eds) *Community Farmers and Breeders' Rights in Southern Africa: towards a Framework for a Sui Generis Policy and Legislation*, (2002) Harare, The World Conservation Union.
[528] Ibid. Indigenous knowledge cannot be protected under the intellectual property rights legislation such as the Patents Act 1959 in Malawi that require innovations to be new, novel and involve an inventive step because traditional knowledge is incremental and no one single inventive step can be accredited. See A. Mushita A & C Thompson, *Biopiracy of Biodiversity: Global Exchange as Enclosure,* Trenton, Africa World Press, and The Crucible Group, *Seeding Solutions. Volume 2. Options for National Laws Governing Control over Genetic Resources and Biological Innovations,* (2001) Rome, IDRC/IPGRI.
[529] See Robert Trogrlić & Marc van den Homberg 'Indigenous knowledge and early warning systems in the Lower Shire Valley in Malawi', (2018) Technical Report, accessed at: https://www.researchgate.net/publication/327701675_Indigenous_knowledge_and_early_warning_systems_in_the_Lower_Shire_Valley_in_Malawi/citation/download; and P. M. Sithole & M. Chundu, 'Meteorological Indigenous Knowledge Systems for Prediction of Rainfall in the Chimanimani District of Zimbabwe and the Potential for Community Disaster Preparedness', *Open Journal of Social Sciences*, 8, 35-45.

concentric rings[530]; while in Zimbabwe the crying or appearance of certain animals, birds or insects herald particular intensity of rains, as is the appearance of dark clouds around the moon[531].

It is however observed that the inferior status of traditional knowledge systems have weakened their utility[532]. In particular, although indigenous knowledge systems can provide policy options to some of the emerging development challenges in environment and climate change regulation, the diffusion of this knowledge into regulatory norms requires that these be formally recognised, promoted and supported. As discussed earlier in this chapter, however, customary law is facing enormous challenges. In addition to the dominance of statute and the common law, the fact that customary law is unwritten exposes it to uncertainty and sometimes abuse by those entrusted with its administration and adjudication. Writing customary law into legislation may improve certainty but it can also dilute its context specific attributes; yet customary law may not evolve sufficiently fast enough to address pressing socio-economic issues requiring urgent attention. It follows that regulation needs to utilise a mix of tools including legislation, judicial pronouncements and customary norms. Thus while some customary norms may require codification because of their settled status, others may require to be left to the evolve. The utility of the concept of living customary law envisages that society over time addresses its socio-economic issues by rules of coping and progress in various fields of endeavour, some of which find their way in legislation, decisions and projects or programmes that are formalised.

4.7 Conclusions

This chapter has highlighted some of the major principles and approaches to environment and climate change regulation. It has been observed that the evolution of general principles has informed the development of international law in general and IEL law in particular, especially through international instruments such as the Rio Declaration, the UNFCCC, the Paris Agreement as well as regional instruments such as the SADC, COMESA and the AU treaties that provide for equity in development as well as in environment and climate change regulation. These reflect the quest for social justice and equity and have specific resonance with the development of the equity jurisdiction.

It has also been observed that the Constitution has entrenched equity provisions in fundamental principles in chapter II, the principles of national policy in chapter III and the Bill

[530] Robert Trogrlic & Mac van den Homberg, ibid, p.38.
[531] See P. M. Sithole & M. Chundu, op cit note 528, p.42.
[532] Ibid, p.42.

of Rights in chapter IV. While the enforceability and implications of the specific development, environment and climate change provisions may depend on the particular chapter of the Constitution they come under, there is clear direction that equity permeates throughout these constitutional provisions. The manner in which a court will interpret these constitutional provisions has been given considerable space because of the use of international law norms and comparable foreign case law which can enhance objectivity and fairness in legal interpretation. Nevertheless, both from the dualist perspective of domesticating international law and the supremacy of the Constitution, there is specific call for courts to prioritise local context in developing the applicable jurisprudence. This has the potential to enhance equity norms especially if it considers the lived experiences of the communities affected by development, environment and climate change regulation in question. The call to interpret the Constitution broadly, purposefully and holistically has the potential to amplify the application and diffusion of equity norms in different parts of the Constitution to promote a jurisprudence that can entrench equity.

The chapter has also observed that the legal systems and method developed by the colonial administration, including international law, has been dominated by statist approaches that do not address the interests of majority of the people. The role of customary law was severely stifled and in a number of cases misrepresented; what was customary law was what the colonial state wanted customary law to be. Customary law was applicable only if it was consistent with colonial conception of morality and justice and in most cases therefore has not reflected the lived realities of local communities. There are promising developments, especially from South African courts and jurisprudence, to create space for customary law development.

This chapter has therefore argued that, in the context of the equal status of customary law to the common law under the Constitution, customary law must be applied in accordance with the constitutional principles, bill of rights and reflect the values that underlie a democratic society. The South African Constitutional Court has thus advocated a nuanced approach to ascertaining applicable customary law that has potential to amplify lived realities and to facilitate equitable development and environment and climate change regulation. The thesis has therefore argued that the fundamental principles and principles of national policy in the Malawi Constitution provide considerable space to ameliorate the rigidities of the statutory method in a manner that can allow the infusion of principles of equity and social justice to inform the development of statute, the common law and customary law regulating

environment and climate change. It has been further argued that application of living customary law allows diversification of views and interests to be brought to bear at the anvil of statute making and environmental decision making, legal interpretation and enforcement mechanisms. The next chapter examines the development of environment and climate change law and policy in Malawi, focussing on the manner and extent to which this regulatory mechanism has addressed the equity considerations in its normative and institutional aspects of the regulatory framework.

CHAPTER 5
EQUITY IN ENVIRONMENT REGULATION AND DEVELOPMENT POLICY IN MALAWI

5.1 Introduction

This chapter examines the evolution of environment and climate change policies and legislation in Malawi in the context of the country's development policy to determine the extent to which equity norms have been incorporated. The chapter first analyses how the perceived phenomena of environmental degradation and climate change laid the foundation for the colonial and international development policy articulation of environmental regulation and the sense of environmental and climate injustice experienced by the local population. Secondly, the chapter examines the role of development policy in shaping environmental legislation, before reviewing the country's environmental law reform facilitated by the UNCED process in the context of the existing development policy. Finally, the chapter examines the extent to which the major environment and climate change related policies and legislation have addressed in the context of the growing threats of environmental degradation and the impacts of climate change.

5.2 Early Environmentalism and Environmental Regulation in southern Africa

Ideas of environmentalism and natural resources conservation in Malawi and other countries in southern Africa are interwoven with the work of Christian missionaries that preceded and often prepared for the colonial state.[533] Although the primary objective of Christian missionaries was to spread the Gospel, it was clear that effective missionary work required attention to a lot of other issues of human concern such as agriculture production, commerce, health and education. To date Christian missionaries have been at the forefront of the provision of health and education, though not as much in agriculture. But as environmental historians have pointed out,[534] the apparent limited interest or influence of Christian missionaries in the agriculture and natural resources sector can often obscure the role their ideas and values

[533] Wapulumuka Mulwafu, 'The Interface of Christianity and Conservation in Malawi, c 1850 – 1930' (2004) *Journal of Religion in Africa*, 34(3):298 – 319; Trevor Chimimba, op cit note 346, at p. 24. It is worth noting that many of the missionaries that worked in Malawi had contacts and interfaced with those in other parts of southern Africa; hence ideas between and among them diffused across the region: Rev Moffatt was one such missionary, see generally Richard Grove, 'Scottish Missionaries, Evangelical Discourses and the Origin of Conservation Thinking in Southern Africa 1820 - 1900' (1989) *Journal of Southern African Studies*, 15 (2).
[534] John McCracken, 'Politics and Christianity in Malawi, c 1875 – 1940: The Impact of Livingstonia Mission in Northern Malawi', (2000) Zomba, Kachere Monograph Number 8.

played in shaping colonial development policy as well as in environment and natural resources regulation.

Early Christian missionaries' travel journals and reports have provided a range of insights and opinions about the interactions they had with local people and their environment and what the missionaries perceived needed to be done to promote their evangelising and civilising missions. In particular, Christian Missionaries often evoked images of their encounters with local people and environment in almost Edenic terms. They described the land they passed through as being 'as wild as any enthusiastic lover of uncultivated nature could desire – the real thing, an African waste, but certainly not a desert'.[535] The majestic Mulanje Mountain in southern Malawi with its beautiful topography was described as a 'land of promise'.[536] The overall picture is a classic rendition of the 'reverence' of the natural world that had gripped the developed world and spawned the wilderness movement intended to reconnect humanity with nature in the 1930s and 1940s.[537] The African environment was 'offering the opportunity to experience a wild and natural environment which was no longer available in the domesticated landscape of Europe'.[538]

Hence, just like the civilising mission of the colonial state,[539] European settlers considered it their responsibility to inculcate environmentalism within the African psyche. This project had similar objectives to those of the Christian evangelicals who argued that the African and his primitive values and religion were morally bankrupt and was responsible for much of the environmental degradation that was sweeping across the arid and semi-arid regions of southern Africa.[540] Without the civilising influence of the colonial administration and Christianity these beautiful African landscapes would be lost in no time. The despoiling was akin to Adam and Eve eating of the forbidden fruit in the Garden of Eden. The moral decadence associated with deforestation was sharply highlighted even by scientists who used religious undertones, such as J D Hooker, who urged colonial authorities to protect forests, saying:

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[535] H H Rowley, *The Story of the Universities Mission to Central Africa*, (1881) London, cited in Wapulumuka Mulwafu, op cit note 477.
[536] Duff MacDonald, *Africana or the Heart of Heathen Africa*, (1882) London, cited in Wapulumuka Mulwafu, op cit note 477.
[537] For a discussion of the rise of global environmentalism and its impact on regulation globally, see section 3.2.
[538] David Anderson and Richard Grove, 'The Scramble for Eden: Past, Present and Future for African Conservation' in D Anderson and R Grove (Eds) *Conservation in Africa: People, Politics and Practices*, (1987) Cambridge.
[539] See section 2.2.2 above.
[540] For a thorough discussion of the role of Christian missionaries in colonial conservation policy in southern Africa, see Richard Grove, op cit note 533.

> the destruction of the forest means the deterioration of the most fertile, and the disfigurement of the only beautiful parts of the country...whatever view may be taken as regards the future of the country, it is as much the moral duty of a civilised government to set its face against forest destruction in these latitudes, as it is to discountenance any social evil, such as slavery or witchcraft. No one would propose that slavery or witchcraft should be encouraged in the Transkei for the sake of a few hundred pounds revenue, yet there are countries where events show that the temporary evil of slavery is as nothing compared to the irredeemable evil of forest destruction.[541]

The assertion that the 'temporary evil of slavery' was incomparable to 'the irredeemable evil of forest destruction' is remarkable and confirms the actual place of the native in colonial conservation politics. It also set the tone for the difference in perception between the native and white settler about environmental degradation and climate change.

The settler community also made a direct link between climate change, especially the ravages of droughts in the region, to the moral economy.[542] Indeed, the climate variability of the region was considered a direct result of its heathenness and the bouts of drought a clear manifestation of the consequences of moral degeneration and rejection of the redeeming power of the Christian faith.[543] This thinking permeated the evangelising zeal of the missionary community that provided both justification and call for the civilising mission of the colonial project. Christian missionaries and colonial scientists led the calls for conservation regulation to deal with this moral profligacy to address an environmental catastrophe that also threatened the settler community. They made a direct link between deforestation and climate change, and especially drought. It was thus argued that,

> ...when our neighbours propose to destroy their forests, not only are they ruining their own country, but they are decreasing our rain supply.... Should we permit our neighbours to cut off our scanty water supply which nature has given us in this dry country?... the timber trade from native states should be looked on as immoral for exactly

[541] J D Hooker, 'Forests', *Journal of Applied Sciences*, (1872) page 303; quoted in Richard Grove, op cit note 533.
[542] Richard Grove, op cit note 533; see also Georgina H Endfield and David J Nash, 'Missionaries and Morals: Climatic Discourse in Nineteenth Century Central Southern Africa' (2002) *Annals of the Association of American Geographers*.
[543] Georgina H Endfield and David J Nash, 'Drought, desiccation and discourse: missionary correspondence and nineteenth century climate change in central and southern Africa' (2002) *The Geographical Journal*, 168(1): 33-47.

the same reason that the liquor traffic is looked on as immoral, and laws passed for its suppression in native areas.[544]

The native neighbours were to blame for forest destruction and conservation measures had to be taken to prevent further degradation for the benefit of white settlers. Thus, although there was no evidence that Africans were responsible for deforestation or soil degradation in southern Africa,[545] natives were routinely blamed and colonial authorities adopted policies and legislation targeting native communities rather than white settlers.[546] In colonial Malawi, Scottish missionaries expressed serious concern with the 'slash and burn' methods of cultivation associated with the production of millet. The fact that millet was used for beer brewing, a 'social evil' and sin within the Presbyterian tradition, made this native agriculture practice more than a mere matter of deforestation. There was a biblical imperative to root out the sin. The missionary concerns were officially adopted in the soil conservation campaigns of the 1930s and 1940s.[547]

Finally, it is worth pointing out that many of the ideas in the colonial response to forest degradation had regional influence as well as global sources. The writings of missionaries such as Rev Moffatt of the London Missionary Society, J C Brown, a Scottish academic and botanist and D E Hutchins in the Cape Colony in the nineteenth and twentieth centuries provided the thinking behind the policy responses. Although often contradictory and sometimes conflicting, these missionaries and scientists reacted to the droughts and scientific developments of the time in the context of the Cape Colony environment and that of southern Africa in general. From their observations and recommendations, an exclusionist conservation ethic was born that informed the development of forest and wildlife protected areas. In particular, Hutchins who campaigned for stringent criminal provisions to protect forests based on his experience in the Indian forest service, was appointed a forest expert for the management of the Matopos in Rhodesia and the existing Cape Colony Forest and Herbage Act 1859/1888 was adopted by Rhodesia. The first forest reserves designated in Malawi, were modelled on the same Cape experience.[548]

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[544] Brown, Crown 'Forests of the Cape Colony, quoted in Richard Grove, op cit note 533, at p.185.
[545] Georgina H Endfield and David J Nash, op cit note 543.
[546] Richard Grove, op cit note 533, at p.185.
[547] John MacCracken, 'Conservation and Resistance in Malawi: The Dead North Revisited, c 1855 – 1907' in W Bernait & J McGregor (Eds) (2002) *Social History and Environments*, James Currey.
[548] See Richard Grove, op cit note 533.

It is clear from these approaches that the regulation of forests, wildlife and land was intended to serve the settler community. The natives were to blame for environmental degradation and their ideas and knowledge were irrelevant for purposes of responding to this problem. Moral economy was used to blame and suppress local knowledge while climate change arguments were used to support white environmental stewardship for the benefit of the settler economy. These informed policy and legal framework across the colonial empire including Malawi. As noted earlier, these observations have specific resonance with the western conception of the lack of environmental consciousness in developing countries to justify their version of conservation.[549]

5.3 Environmental Regulation in Colonial Malawi

5.3.1 Soil Conservation for Natives only

In Malawi, the manner in which white traders and planters were shielded from complying with colonial conservation measures, especially with regard to the soil conservation, reveals the extent of racialised environmentalism. The soil conservation campaigns of the 1930s and 1940s targeted the native population, such that although there was clear evidence of massive soil erosion in private estates run by white farmers, the stringent regulations only applied to natives.[550] The colonial state introduced the Land Conservation Policy of 1939 and subsequently enacted the Natural Resources Ordinance of 1946, which applied to African Trust Land, essentially land on which Africans lived and farmed. While no state resources were spared to enforce conservation measures on native lands, including maintaining conservation policing in rural areas[551], white farmers were merely encouraged to undertake conservation measures. On their part, white estate owners considered conservation measures such as terracing, ridging or construction of storm drains to control soil erosion as expensive and routinely ignored any recommendations or exhortations.[552]

As the problem of soil and natural resources degradation escalated in the post-war period, the colonial authorities devised various means to get the settler community on private land to undertake conservation measures. In one case the Natural Resources Board created under the Natural Resources Ordinance 1946 carried out conservation works on a heavily

[549] See section 3.1 above.
[550] Wapulumuka Mulwafu, 'Soil Erosion and State Intervention into the Estate Production in the Shire Highlands Economy of Colonial Malawi 1891 – 1964' (2002) J*ournal of Southern African Studies*, 28(1):25 – 43.
[551] See Mathieu Deflem, op cit note 429.
[552] Ibid, at p. 31.

degraded private estate, which turned out to be owned by a non-white owner.[553] It was not until 1952 that the colonial authorities for the first time agreed to apply the Natural Resources Rules made under the Natural Resources Ordinance 1946 to private estates. Proposals were made to provide incentives for estate owners to carry out conservation measures through provision of equipment, technical advice and labour, but due to financial constraints these proposals were not implemented.[554]

There were a number of constraints that the Natural Resources Board faced in enforcing the conservation rules. They included lack of technical capacity in that the Board had to rely on officers of the Department of Agriculture to identify degraded areas that required enforcement measures; the limited funding the Board had; as well as the skewed composition of its membership, which was entirely from the white community, many of whom were estate owners.

5.3.2 Landlessness and Environmental Degradation

Land ownership and tenure has been a vexing question since colonial incursion in Malawi. Missionaries and traders who had settled in the territory before British sovereignty was proclaimed acquired large tracts of land allegedly through treaties entered into with local chiefs. As Pachai points out, these treaties were a product of misunderstanding. When the settlers looking for land to settle gave the chiefs material items such as salt, plates, guns, beads, among others, the chiefs interpreted these as gifts expressing 'respect and friendship'. European settlers on their part took these as 'payments for land'.[555] When the colonial administration validated the white settler claims, and gave them freehold status with exclusive titles through certificates of claim, the chiefs were alarmed. Many families, especially in southern Malawi, were dispossessed and became landless or at best land poor.[556]

Many of the settler estates were however hardly developed and seem to have been carved out for speculative purposes, while Africans lived in cramped and congested conditions, leading to land degradation.[557] In post-independence Malawi, landlessness and cultivation in marginal areas has been exacerbated by continued acquisition of prime land by

[553] Only one example of conservation measures carried out on a degraded estate has been recorded; as it happens the estate was owned by an Asian. See Wapulumuka Mulwafu, op cit note 550.
[554] This proposal was warmly welcomed by estate owners but the colonial authorities were not keen to subsidize agriculture production in this manner. See Wapulumuka Mulwafu, op cit note 550.
[555] Bridglal Pachai, *Land and Politics in Malawi*, 1875 – 1975. (1978) Kingston, Limestone Press, pp. 30 – 31.
[556] Although the colonial administration tried to ameliorate the impact of these acquisitions through non-disturbance clauses in the certificates of claim protecting existing native rights to land that formed part of the freeholds, the clause was honored more in breach than in compliance. See Bridglal Pachai, op cit note 555, p. 45.
[557] Bridglal Pachai, op cit note 555, at p. 47.

local elites for cash crop production.[558] As pointed out below,[559] historical landlessness and recent 'land grabbing' for the export market are major causes of environmental degradation. They pose serious challenges to environmental regulation considering the inequity associated with requiring good husbandry practices on land degraded due to limited access to environmental resources caused by colonial and development policies designed for the elite community. In particular, in much the same way that the colonial authorities tolerated a *laisses faire* attitude towards the problem of soil erosion on white settler estates,[560] colonial officials turned a blind eye to forced labour called *thangata* under which natives dispossessed by land acquisitions by the settler community were forced to work on the white estates so they could continue to stay on the land from which they had been evicted.[561] In either case, the settler community were given massive subsidies for their private commercial interests, to the detriment of the native population.

5.3.3 'European Hunting Reserves' without Conservation

A similar racialised regulatory trend was common in wildlife conservation. Until the arrival of European settlors at the end of the nineteenth century, Malawi had 'such splendid herds of larger animals' and was considered the 'finest hunting country in the world', filled with 'elephant, buffalo, eland, lion, leopard, zebra, hippopotamus, rhinoceros and endless species of antelope'.[562] The wildlife numbers however began to dwindle after the arrival of the settler community, upon which the colonial authorities imposed stringent regulations to stem the wildlife loss.

Although the decline in wildlife numbers could easily be traced to the European market for sport hunting, the game regulations introduced from 1897 to 1930s targeted the native population and made it almost impossible for Africans to access wildlife.[563] The regulations

[558] See section 5.4 below.
[559] See section 5.4 below.
[560] Section 5.3.1 above.
[561] For a comprehensive analysis, see Clement Ng'ong'ola, 'The State, Settlers, and Indigenes in the Evolution of Land Law and Policy in Colonial Malawi' (1990) *International Journal of Historical Studies*, 23 (2) 27-58.
[562] In the words of one Scottish settler: see Brian Morris, *A Short History of Wildlife Conservation in Malawi*. (1966) Edinburg, Edinburg University Press, at p. 1.
[563] It is worth noting that up until 1926 the game regulations established game reserves which were essentially 'European hunting reserves'; they had nothing to do with wildlife conservation. As Brian Morris, ibid at p. 18, points out, it was the 1926 game regulations that referred to 'the need to conserve animals not as sporting game for an elite, but so that they might be seen and enjoyed by future generations.' Morris has traced the development of wildlife management in three phases The first is the period 1895-1930 dominated by game preservation for the European sport hunting elite; the period 1930-1964 when a number of reserves were established and wildlife was centrally managed focusing on crop protection and eradicating problem animals; the period 1964-1990, with declining wildlife numbers, sanctuaries were protected for tourist clientele and a fourth phase where the focus is on wildlife protection for generating foreign exchange. See Brian Morris, 'Wildlife Conservation in Malawi' (2001) *Environment and History*. 7 (3):357-372.

prohibited hunting without license and different licenses were required for different species with different fees attached. Apart from the logistics of acquiring a license, the fees were beyond the reach of most Africans. The law only allowed Africans to kill animals which posed danger to crops, livestock or human life'. Even traditional hunting methods such as use of pits, dogs and nets were proscribed in the 1926 regulations.[564] Not being able to afford a gun,[565] most Africans were deprived of the main means of acquiring meat, as they had done for centuries. The regulations left a sense of inequity in the native population and made enforcement particularly difficult for the colonial authorities.

5.4 Post-Colonial Development Policy and its Equity Implications

The post-independence state inherited a racialised and inequitable economy which was designed to benefit colonial authorities at the expense of local population. Access to environmental resources was restricted in the name of conservation which gained a bad name among the local population and became a flash point of political agitation. The new government turned to the prevailing economic growth model using the export market for cash crops to generate revenue for public services, with limited attention to social services. The impact of this development paradigm has had serious implications on environmental regulation and equity.

The post-independence state inherited an ailing economy, with no known exploitable mineral wealth.[566] Analysts did not give the new state a chance to survive economically.[567] Within a short time, however, the country achieved a near miracle of economic growth, from a GDP of K151 million in 1964 to K280 million in 1973. Together with the Ivory Coast, Malawi was one of the only two countries in Africa to reach a 7% annual growth rate[568]. The country's approach to its economic development challenge was uniquely pragmatic, with no

[564] This despite the fact that the teeming game numbers that European settlers found in Malawi and elsewhere in southern Africa at the turn of the nineteenth century were testimony to the sustainability of local hunting methods, such as use of traps, bow and arrow, nets, dogs, among others. See Justin Kalima, op cit note 444, at p. 21.

[565] As Brian Morris, op cit note 563, points out at p.24, the colonial policy was to keep guns out of reach of Africans, because wildlife was not for Africans.

[566] Colonial Malawi was more of a labour reserve to the plantations and mines of South Africa, Zimbabwe and Zambia than a colony developing its own economy. See Megan Vaughan, *The Story of an African Famine: Gender and Famine in Twentieth Century Malawi* (1987) Cambridge, Cambridge University Press.

[567] Kathryn Morton, *Aid and Dependence: British Aid to Malawi*. (1978) London, Croom & Overseas Development Institute.

[568] Leroy Vail, 'Peasants, Migrants and Plantations: A Study of the Growth of the Malawi Economy' (1984) *Journal of Social Science* 11: 1-36 at p. 1.

ideological identity associated with the Cold War alignments of the time.[569] It was helpful that the outgoing colonial authorities shared the same economic value system of an open economy.[570]

Malawi's post-independence development policies, which were enshrined in 10-year development plans, promoted agricultural modernisation 'to commercialise farming to make it a source of income for the masses and increase yields per acre by modernising farming methods, thereby freeing more land for cash crop production'.[571] This policy thrust translated into various directives including promoting a cadre of elites in the political, government bureaucracy, business and farming community[572] to go into commercial farming. They were given access to land, subsidised credit and agriculture inputs, intensive extension services, and the opportunity to grow lucrative cash crops such as burley and flue-cured tobacco, tea, coffee and other commercial crops.

The impressive economic growth of the post-independence era, however, did not trickle down into tangible improvements in the lives of majority of Malawians.[573] The symbolic investments that the new government championed and on which considerable resources were spent propped up the GDP growth, but they came at the cost of social services.[574] And when

[569] Unlike Tanzania and Zambia, who experimented with various forms of afro-socialism and social engineering, Malawi's Dr. Kamuzu Banda deprecated adherence to any specific ideology. He famously argued that '(I)n so far as I know Africa, if they (Africans) have any economic system at all, it is not capitalism, it is not communism, it is not socialism, it is definitely not statism, but individualism': see Frederick Pryor, 1990, *The Political Economy of Poverty Equity and Growth Malawi and Madagascar*, Washington DC, Oxford University Press and World Bank, at p. 7. In addition to zero tolerance of dissent at national level, Dr. Banda even defied Pan-Africanist resolutions at the Organization of African Unity on the question of trading with the Portuguese colonialists in Mozambique and the apartheid regime in South Africa, for which he made enemies in the region and across Africa. He argued that '…colonial geography made it impossible for (Malawi) to cut off all relations with Portugal, diplomatic, commercial, cultural and otherwise, because colonial history and colonial geography have denied it a port of its own…I do not want to be a hypocrite. I do not want anyone to accuse me of hypocrisy, after I leave this room, because it is impossible for me to accept such a resolution': see Government of Malawi, *Legislative Assembly Proceedings*, 8th September 1964, Zomba, Government Press, cited in Happy Kayuni, 'Malawi's Economic and Development Policy Choices from 1964 to 1980: An Epitome of Pragmatic Unilateral Capitalism' (2011) *Nordic Journal of African Studies*, 20(2): 112-131, at p. 123.

[570] But as observed by Jonathan Kydd, 'Malawi in the 1970s: Development Policies and Economic Change' (A Paper presented for the conference Malawi – An Alternative Pattern of Development, held at the Centre of African Studies, University of Edinburg, 24 – 25 May 194 cited in Happy Kayuni, ibid, at p. 121, Dr. Kamuzu Banda disagreed with the former colonizers, who were the biggest donors for the new government, on some of his grand or symbolic projects, such as the construction of a new capital city, a lakeshore road and a university campus.

[571] Government of Malawi, *Statement of Development Policies 1971 – 1980*, Lilongwe, Government of Malawi, p. 53.

[572] Within the farming community, peasants were segmented with successful peasants dubbed *achikumbe* or progressive farmers given the necessary push to increase agriculture production and innovation. See Gracian Banda, op cit note 301, citing Pryor, F. L. & Chipeta, C. 'Economic Development through Estate Agriculture: The Case of Malawi' in (1990) *Canadian Journal of African Studies*, 50.

[573] Jane Harrigan, *From Dictatorship to Democracy: Economic Policy in Malawi 1964 – 2000*, (2001) Aldershot, Ashgate.

[574] See Ravi Gulhati, *Malawi: Promising Reforms, Bad Luck*. (1989) Washington DC, World Bank.

the economy started to take a down turn at the end of the 1970s due to deteriorating terms of trade, transport bottlenecks as a result of the civil war in Mozambique and adverse weather conditions, the country had to embrace SAPs in the early 1980s.[575] The resulting currency devaluation, removal of subsidies for food and agriculture inputs cut deep into the livelihoods of the poor. It also exposed the negative consequences of the economic growth development model and its focus on GDP. The deepening poverty levels were a matter of concern and needed to be addressed.

The country's development policies did not provide for social welfare improvement until the 1982-1992 *Statement of Development Policies* which called for 'reduction of poverty, ignorance and disease'.[576] This coincided with the implementation of the SAPs in which initially Policy Framework Papers followed by PRSPs were used to implement the SAPs. In 1998 the country adopted a long-term national development policy, the *Malawi Vision 2020*, around which PRSPs and, subsequently, the *Malawi Growth and Development Strategy* (MGDS) as five-year medium-term implementation instruments were developed. The *Malawi Vision 2020* provides a framework for both development equity and sustainable environmental management. The Vision statement provides that:

> By 2020 Malawi as a God-fearing nation will be secure, democratically mature, environmentally sustainable, self-reliant with equal opportunities for and participation by all, having social services, vibrant cultural and religious values and being a technologically driven middle-income economy.[577]

In line with this vision statement, the first MPRSP was adopted in 2002, with the goal of achieving poverty reduction through the empowerment of the poor.[578] It was built around four pillars that responded directly to the country's Vision 2020: to promote rapid sustainable pro-poor economic growth and structural transformation; to enhance human capital devel-

[575] See Guy Mhone, *Malawi at the Crossroads: The Post-Colonial Political Economy* (1992), Harare, SAPES Books, at p. 27.
[576] See Chinyamata Chipeta, Economic Policy Framework'. In Guy Mhone, 1992, *Malawi at the Crossroads: The Post-Colonial Political Economy*. Harare, SAPES Books.
[577] Government of Malawi, *Vision 2020: National Development Perspective for Malawi*', (1998) Lilongwe, National Economic Council, p.27.
[578] According to the MPRSP, '(R)ather than regarding the poor as helpless victims of poverty in need of handouts and passive recipients of trickle-down growth, the MPRS sees them as active participants in economic development. The MPRS also emphasises prioritisation and action'. See Government of Malawi, 2002, *Malawi Poverty reduction Strategy Paper*, Ministry of Finance and Economic Planning, Lilongwe, at page xvi.

opment; to improve the quality of life of the most vulnerable; and to promote good governance.[579] The MGDS I (2006 – 2011),[580] which replaced the MPRSP (2002-2005), focused on wealth creation through sustainable economic growth and infrastructure development. Unlike the MPRSP, which was an IMF blue print, the MGDS was touted as a home-grown development strategy, although in substance did not deviate much from the MPRSP framework with its emphasis on good governance and empowerment themes.[581] The MGDS II (2011 – 2016)[582] specifically provides for the promotion of human rights as part of good governance and in that framework incorporated equity issues as follows:

> Government recognises that good governance hinges on the respect for human rights. The observance of human rights allows for equity in terms of participation in the development process by all, and a fair distribution of development gains by all. Government will, therefore, pursue a number of strategies to promote and protect rights and freedoms as enshrined in the Constitution of Malawi. These strategies include: enhancing human rights awareness; promoting equitable access to opportunities; strengthening legal protection and equitable treatment for marginalised populations, women and children; ensuring respect for prisoners' rights; strengthening human rights institutions; and improving conditions in prisons.[583]

Malawi's development policy therefore relies on human rights to achieve equity. As earlier observed, while human rights are a useful tool for achieving equity and social justice, it has limitations where the rights are not specifically stipulated or where the rights holders are unable to enforce their rights for various reasons. Two policy interventions have provided an alternative to the juridical model of human rights. The first is FISP, which is aimed at promoting food security among small scale farmers by providing subsidised agriculture inputs.[584] The second is the Community Based Rural Land Development Programme (CBRLDP) under which landless people were given the opportunity to relocate where Government purchased land for their resettlement. Both policy interventions however have met the challenge of distribution equity as less deserving beneficiaries benefit from FISP due to

[579] HIV/Aids, gender, environment, and science and technology were cross-cutting issues. See Government of Malawi, 2002, *Malawi Poverty Reduction Strategy Paper*, Ministry of Finance and Economic Planning, Lilongwe, at page xvi.
[580]See https://www.malawi.gov.mw/Publications/MGDS%20November%202006%20-%20MEPD.pdf.
[581] Apart from reflecting the IMF guideline for PRSPs, the MPRSP largely used language of the UNDP HDRs, which seeks to move development narratives from economic growth to human development.
[582] https://mitc.mw › images › downloads › other-documents › Malawi-G.
[583] Government of Malawi, 2011, Malawi Growth and Development Strategy (2011 – 2016), (MGDS II) Ministry of Finance and Economic Planning, Lilongwe, at p. xiii.
[584] See section 1.2.1 above, and Ephraim Chirwa & Andrew Doward, op cit note 47.

political factors, while the cost of the subsidies and land purchases are not sustainable to have meaningful impact[585]. The design of policy interventions in terms of distributive justice and sustainability has considerable bearing on the equitable nature of the policy outcomes. In particular, the extent to which the marginalised can be empowered will depend on the responsiveness of institutions responsible for delivering development benefits and those promoting transparency and accountability in the delivery of public services.

The MGDS II also provided for strategies for justice and rule of law that embody equity norms and are broader than the human rights approach. It stated that:

> Key strategies that will be pursued include: fostering independence and credibility of the judicial system; promoting supremacy and respect for the constitution; strengthening capacity of sector institutions; promoting law reforms to consolidate democracy and human rights; promoting a justice and legal system that is responsive to marginalised groups; and promoting a people-centred, accessible, affordable, and expeditious justice system.[586]

The MGDS II highlighted not only the role of access to justice and rule of law for achieving sustainable development; it also underlined the need for empowerment and a people-centred justice system as a precondition for SD. This policy statement encompasses all sectors of the economy including environment and climate change regulation. With specific reference to the environment, the strategy recognises that for a country dependent on natural resources such as Malawi (with priority areas being agriculture, tourism and mining), sustainable economic growth can only be achieved through 'empowering rural communities; ensuring equitable access to land and sustainable use of the environment'.[587] These policy statements modelled on the IMF framework of RBA to development and therefore subject to the limitation discussed earlier[588]. Nevertheless, beyond these statements, no specific instruments have been developed to realise the rights the MGDS II provides for.

The MGDS III (2017-2022)[589] on the other hand seems to have abandoned emphasis and focus on empowerment and good governance themes. Hence, although referring to governance issues such as the respect for human rights, the need for transparency and rule of

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[585] See Ephraim Chirwa & Andrew Doward, op cit note 47; Blessings Chinsinga, 'The Politics of Land in Malawi: The case of the Community Based Rural Land Development (CBRLDP)' (2011) *Journal of International Development*, 23:380-393; and Blessings Chinsinga 'Exploring Politics and Land Reform in Malawi: A Case Study of the Community Based Land Reform Programme', (2008) IPPG Discussion Paper Number 20, University of Manchester.
[586] MGDS II, at p. xiii.
[587] MGDS II, at p. vii.
[588] See section 3.8 above.
[589] https://www.undp.org › malawi › docs › UNDP_Malawi_MGDS) III

law, these are geared towards the main objective of the new strategy: to transform the country into a productive, competitive and resilient nation. There is no specific reference to achieving equitable development as was the case in the previous strategies.

There are a number of other constraints in implementing the equity framework in Malawi. In addition to the limitations of using the human rights framework as the tool for achieving equity, translating this framework into a mechanism that can easily be used to meet the needs of marginalised and vulnerable communities is problematic, not least because of lack of best practices or benchmark where this approach can be considered.[590] Some legislation to encourage access to environmental resources or public services has been enacted, but its influence is limited as a result of reliance on the RBA that requires individuals to proactively claim their entitlements instead of enacting measures to target the most marginalised. This legislative approach has not been able to identify and target the underlying factors fuelling marginalisation, vulnerability and discrimination. For example, legislation such as the Gender Equality Act 2013 and the Prevention of Domestic Violence Act 2007 that facilitate positive discrimination in relation to access to public services or empowering women to address domestic violence, are more likely to meet the interests of the educated and affluent urban dwellers who can take advantage of the equalising opportunities and have access to the grievance handling mechanisms.[591] They are ill suited to the plight of rural dwellers, more specifically rural women, as required under the CEDAW.[592]

In relation to access to land, the National Land Policy 2002[593] identifies skewed access to land and the need to devolve land management to local and traditional institutions as some of the major legislative reforms required.[594] However, neither the Land Act 2016 nor the

[590] See Donald A. Brown and Prue Taylor, 'Ethics and Climate Change: A Study of National Commitments', *IUCN Environmental Policy and Law Paper*, NO.86, IUCN, Gland Switzerland, 2015.
[591] The Gender Equality Act 2013 is intended to uplift women in various sectors of the economy by requiring no less than 40% of senior positions in the public service to be filled by women, and outlawing sexual harassment and gender discrimination in general has not been implemented. A similar experience has been observed in relation to the Prevention of Domestic Violence Act 2007 whose objective is to prevent domestic violence and protect persons against domestic violence. Thus, it has been reported that as of 2017, the National Assembly had 16% women representation, district councils had 11% women representation, while the public service had 24% women representation. According to the Principal Secretary in the Ministry of Gender, Children, Disability and Social Welfare, 'Some of the underlining causes include persistent stereotype attitudes and harmful cultural practices in the society, limited service providers at all levels for effective attainment of gender equality and women empowerment, and also limited dissemination of the Act at all levels.' See 'Malawi Far From Achieving Gender Equality' *The Nation*, 10 July 2017: https://www.mwnation.com/malawi-far-achieving-gender-equity-ps/.
[592] See op cit note 431.
[593] See https://www.malawi.gov.mw/images/Publications/policy/Malawi%20National%20Land%20Policy.pdf.
[594] See National Land Policy 2002, p. iv.

Customary Land Act 2016 makes any attempt to redistribute land to many landlessness families, thereby perpetuating inequitable land ownership dating back to colonial land policy. It has consequently been argued that policy interventions such as the CBRLDP to increase access to land for landless families on the basis of 'willing buyer and willing seller', are intended to maintain the status quo, rather than addressing skewed land ownership as most stakeholders are demanding.[595] In relation to rural empowerment, the National Decentralisation Policy 1998[596] and the Local Government Act 1998[597] (as amended) provide for local decision-making structures that encourage local empowerment. However, implementation of these instruments has been problematic, not least because policy makers at central government level are unwilling to cede their powers to local institutions.[598] The same trend has been observed in environmental regulation where sector departments in forestry, fisheries, and water and land resources have been reluctant to decentralise decision making and ownership of key state assets fearing loss of their powers, in some cases citing limited regulatory capacity at local level.[599] These challenges have a major impact on achieving equity in development objectives and ultimately have negative implications for environmental regulation, especially for poor rural communities, who entirely depend on environmental resources.

5.5 Environment and Climate Change Regulation after UNCED

Malawi's development policy has been in crisis for decades due mainly to the vicious cycle of poverty and environmental degradation. As pointed out in section 5.4, the country's struggle to address underdevelopment and the resulting poverty focused on achieving economic

[595] Blessings Chinsinga, 'The Politics of Land in Malawi: The case of the Community Based Rural Land Development (CBRLDP)' (2011) *Journal of International Development*, 23:380-393. See also LandNet, *Review of Land Related Legislation in Malawi*, LandNet, Lilongwe, 2014; Oxfam and LandNet, *Large-Scale Land Acquisition and Food Security in Malawi: Towards a Responsive Policy Framework*, Oxfam, Lilongwe, 2016.
[596] See https://localgovt.gov.mw › publications › other-documents › 12-malawi-de...
[597] See https://www.localgovt.gov.mw/publications/other-documents/8-local-government-act-1998.
[598] For a thorough review of the constraints to decentralization reform process and the political economy context that has defined the conflict among several stakeholders, namely, the citizenry and the state, the local and central bureaucracy, and government and donor community and the impact these have had on poverty reduction efforts, see Blessing Chinsinga, *Democracy, Decentralization and Poverty Reduction in Malawi*, (2009) Cambridge University Press; Blessing Chinsinga, 'Decentralization and Poverty Reduction in Malawi – A Critical Appraisal' in Gordon Crawford & Christof Hartmann, 2008, *Decentralization in Africa*, Amsterdam University Press, Amsterdam, p. 73.
[599] See Martin Mkandawire & Ben Yasin, 'Decentralization of Environmental Management in Malawi: Lessons from Donor-Supported Projects' (2004) *Journal of Environmental Assessment Policy and Management*, 6(1):51-72.

growth with limited investment in social services.[600] In addition to the vicious cycle of poverty and environmental degradation, this policy has created one of the most inequitable societies in the world.[601] The economic growth paradigm is supported by an environmental legal regime that seems to punish those most dependent on environmental resources as earlier pointed out regarding the manner in which agriculture, wildlife and forest resources were regulated.[602]

It was not until the UNCED in 1992 that the importance of those close to and most affected by environment and climate change regulation was highlighted and brought into sharp focus. Amongst the key innovations of the UNCED is the emphasis on stakeholders' participation, from problem identification to policy making. Following extensive stakeholders' consultations, Malawi adopted its first National Environmental Action Plan (NEAP) in 1994[603] pursuant to the country's commitments under the Agenda 21. The NEAP identified and analysed major environment and natural resources challenges the country is facing. These are soil erosion, deforestation, water resources degradation and depletion, threat to fisheries, threat to biodiversity, human habitat degradation, high population growth, air pollution and climate change.[604] As can be appreciated, almost all these challenges involve and have more devastating impacts on the rural poor and vulnerable who entirely depend on environmental resources for their livelihoods, as compared to those whose source of livelihoods lie elsewhere.

The NEAP identified no less than forty statutes that affected or were affected by environment and natural resources management. According to the NEAP, these statutes had inherent internal weaknesses: they failed to properly target those responsible for environmental damage and provided inadequate penalties making it difficult for offenders to be adequately punished.[605] The NEAP also highlighted limited institutional capacity to enforce existing policies and legislation as another constraint and called for broadening stakeholders' collaboration. It also noted that environment-related statutes grew piecemeal over time and were entirely sectoral, reflecting a specialist type of regulatory response with little or no

[600] See section 5.3 above.
[601] According to Oxfam, *A Dangerous Divide: The State of Inequality in Malawi*, (2015) Lilongwe, Oxfam, in 2004/2005, in the middle of impressive economic growth, the richest 10% of the population in Malawi accounted for 46% of the consumption, while the bottom 40% of the population only absorbed 15% of consumption. These figures worsened by 2011 when the richest 10% increased their consumption to 53%, while the poorest 40% saw their consumption slashed to 13% of the consumption.
[602] See section 5.3 above.
[603] The National Environmental Action Plan 1994 was revised in 2002: https://cepa.rmportal.net › Library › government-publications › view.
[604] Ibid, Vol. 1, Chapter 4.
[605] Ibid, Vol. 1, Chap. 3, para 3.5.3.

consideration for overall ecological sustainability. The NEAP also failed to adequately highlight the role of the development policy approach that focused on economic growth and largely ignored the interests of small-scale farmers, the poor and marginalised who depend on environmental resources. This oversight has permeated the entire environmental policy reform initiated under the NEAP 1994.

The NEAP highlighted the need to enhance coordination in the management of environment and natural resources.[606] Consequently, the country adopted the NEP in 1996 followed by enactment of the EMA in the same year to address this concern. This followed the observation that sectoral regulation led to jurisdiction conflicts among government departments charged with specific sector mandates, and weakened policy implementation and enforcement.[607] Lack of policy coherence and coordination is particularly inimical to addressing equity since the ensuing jurisdictional conflicts are more likely to favour the powerful and those who can navigate and influence policy decisions.

5.6 ***Framework Environmental Legislation and Equity***

The NEAP 1994 also highlighted the lack of a framework environmental statute that establishes 'national conservation principles and provides guidance and coherence to natural resource management… to deal with such cross-sectoral issues as overall environmental policy formulation, environmental planning, environmental quality criteria and standards, EIA, pollution of environmental media, institutional co-ordination and conflict resolution, and the monitoring of implementation of environmental policies by sectoral agencies.'[608] This is in line with government commitment to integrate environment and natural resources management issues into economic planning in accordance with the Rio Declaration,[609] which further specifically requires that in order for environmental legislation to be effective it must reflect

[606] Ibid.

[607] Efforts to improve sector coordination started with the establishment of the National Committee for the Environment in 1982 in the Office of the President and Cabinet (OPC). It was comprised of senior officials in key government departments, statutory bodies and the academia working in environment and natural resources sector. Its primary objective was to ensure that '...all economic and social activities in the country are consistent with sustainable development goals and for resolving inter-departmental conflicts in environmental management': NEAP 1994, para 3.5.3. This coordination function was managed through an Environment Unit in the OPC and eventually evolved into the EAD under the Minister responsible for environment. The EMA 1996 legislated for the office, powers and functions of a Director for EAD who acted as secretariat to the NCE that replaced the National Committee for the Environment.

[608] NEAP 1994, para 3.5.3.

[609] This is a commitment Malawi and the international community made under Principle 4 of the Rio Declaration which requires that states should integrate environmental protection into the development planning in order to achieve sustainable development.

the environmental and development context to which it applies.[610] This requires integration of environment management into development planning and was incorporated in the EMA 1996 in various forms.

First, the EMA 1996 established the NCE as an interdisciplinary and inter-departmental body to facilitate cross sector coordination.[611] Its mandate, however, was essentially advisory,[612] while its effectiveness was further undermined by the low-level representation in its meetings, making it difficult for the NCE to influence decision making in various departments.[613] Secondly, the EMA 1996 required the National Assembly to adopt a NEAP every five years, the objective of which was to facilitate the integration of environmental measures and strategies into development planning[614] and prohibited any development activity implemented in contravention of a district environmental action plan.[615] Thirdly, Part IV of the EMA required EIA to be conducted before implementing any development project which would have significant impact on the environment.[616] These mechanisms, together with administrative measures and enforcement powers given to the Director for Environmental Affairs, ensured development projects comply with environmental regulation.[617] Fourth, in line with the mandate to facilitate environment and development coordination to achieve SD, the EMA 1996 acted as the 'environmental constitution' against which existing statutory provisions and actions of other sectors can be weighed for legality.[618]

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[610] See Principle 11 of the Rio Declaration.

[611] Section 10 provides for composition of the NCE, which includes all heads of government departments; heads of key statutory bodies with mandates in environment and natural resources, the National Herbarium and Botanical Gardens and the Malawi Bureau of Standards; and representatives from non-governmental organizations, academia and the Chamber of Commerce and Industry.

[612] According to section 12 of the EMA 1996, the NCE advised the Minister of the protection and management of the environment; the integration of environmental considerations in development planning and harmonization of plans and policies of all stakeholders in the protection and management of the environment and natural resources.

[613] This was a result of the manner in which the statute was drafted. Section 10 EMA 1996 required heads of institutions or their representatives, hence the practice to send low-level staff to NCE meetings: see See EAD, *Harmonization of Environment and Natural Resources Management in Malawi* (2004) Lilongwe, Environmental Affairs Department, copy with the author.

[614] See section 21 and 22 of the EMA 1996.

[615] Section 23 (2) of the EMA 1996.

[616] Section 24 of the EMA gives power to the Minister to gazette projects that require EIA before they can be implemented. These were gazette the Environment (Specification of Projects Requiring Environmental Impact Assessment) Notice 1998, Government Notice Number 58.

[617] Sections 31 to 33 of the EMA 1996 provided for environmental incentives and disincentives, declaration of environmental protection areas, issuance of environmental protection orders respectively as a means of controlling and managing activities that are deleterious to or degrade the environment or natural resources.

[618] Section 6 of the EMA 1996 states that: '(N)othing in this Act shall be construed as divesting any lead agency of the powers, functions, duties or responsibilities conferred or imposed on it by any written law relating to the protection and management of the environment and the conservation and sustainable utilization of natural resources or limiting such powers, functions, duties or responsibilities'; while section 7 states: 'Where a written law on the protection and management of the environment or the conservation and sustainable utilization of

The EMA 1996 also acted as a measure to fill regulatory gaps or for addressing jurisdiction conflicts among sectoral agencies. Thus, matters related to water and air pollution, which are the responsibility of various agencies such as the departments responsible for water, road traffic, aviation, municipal and local authorities as well as water boards under various statutes, were provided for under the EMA 1996 so that there is coordination of policy response. This has led some commentators to argue that the EMA 1996 focuses on the brown environment such as waste management and industrial pollution while ignoring the green environment such as deforestation, soil erosion and land degradation, which are the major issues affecting a majority of the country's agriculture-based economy.[619] It is worth noting however that the EMA 1996 approach partly reflects an understanding of a framework environmental law that is stipulated in sections 6 and 7 of the Act. In essence, in addition to being an overarching instrument from which all other environment and natural resources statutes take inspiration, the framework statute is also considered a default instrument so that if there is no sector agency or statute dealing with a particular milieu of the environment then the framework law will regulate that subject matter.

The EMA 2017 has repeated much of the EMA 1996 and improved this framework to address concerns over the effectiveness of EMA 1996. It is important to examine the specific provisions of the EMA 2017 and related environment and natural resources statutes to consider their normative and institutional context, including the role of various stakeholders, and the extent to which they facilitate equity norms in regulation.

5.7 The Normative Framework of Environment and Climate Change Regulation

5.7.1 Guiding Principles and Equity

The first innovation of the UNCED reforms is the use of general principles as an integral part of environment and climate change regulation. Principles of law or policy have emerged as an important part of the normative framework, providing guidance where the law is still in flux or uncertain or to provide official discretionary space for decision making.[620] They play a significant role to guide policy makers to regulate the environment or climate change

natural resources is inconsistent with any provision of this Act, that written law shall be invalid to the extent of the inconsistency.'

[619] See Kasweswe Mwafongo and M Kapila, 'Environmental Management in Malawi' in Mohammed Salih & Shibru Tedla (Eds), *Environmental Planning, Policies and Politics in Eastern and Southern Africa*, (1999) London, MacMillan at p. 68.

[620] See the discussion on the function of general principles in section 4.2 above.

using universally acceptable norms towards SD.[621] The EMA 1996 was the first environmental statute to outline general principles related to environment and natural resources, such as the sustainability, the participation and public awareness principles [622] as advocated under the Rio Declaration. The EMA 1996 however only provided for a few general principles out of the many stipulated in the Rio Declaration. The NEP 2004 and the EMA 2017 expanded the list of general principles and included the polluter pays principle, the intergenerational and intragenerational equity principle, the precautionary principle and the integration principle, among others.[623] In addition, EMA 2017 establishes the Malawi Environmental Protection Authority (MEPA), which is responsible for overseeing implementation of these principles and generally the enforcement of the Act.[624]

The National Climate Change Management Policy 2016 (NCCMP),[625] is intended to reduce the social and economic impacts of the adverse effects of climate change,[626] lists no less than 12 general principles to guide the implementation of the NCCMP. These include: the need for the RBA in the management of climate change in line with the Constitution of Malawi; the common but differentiated responsibility and respective capabilities, which requires a developing country such as Malawi to align its domestic climate response with its national circumstances, stage of development and capacity to act; the equitable development principle which promotes access to resources and opportunities to all to enable everyone, especially marginalised and vulnerable groups; the polluter pays principle, requiring those responsible for climate change to pay the costs of addressing its impacts; and the need to uplift the poor and vulnerable as well as those with special needs and circumstances such as rural women, children, the elderly, child-headed households and the physically challenged.[627] On the other hand, unlike the EMA 2017, the NCCMP does not provide any guidance as to how these guiding principles will be reflected in the implementation of the Policy.[628] This has significantly affected the status and influence of general principles in climate change regulation.

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[621] See Helena Rijswick, 'The Road to Sustainability: How Environmental Law can deal with Complexity and Flexibility', (2012) *Utrecht Law Review*, Vol 8, Issue 3. See also section 4.2 above.
[622] Section 3 EMA 1996.
[623] See section (2) of the EMA 2017.
[624] See section 9 (4) of the EMA 2017.
[625] See www.ead.gov.mw › storage › app › media › Resources › Policies › Cl...
[626] See section 1.4 of the NCCMP 2016.
[627] See section 2.4 of the NCCMP 2016.
[628] The NCCMP 2016 only mentions general principles in section 2.4. The only other section where principles are mentioned is in a policy statement pertaining to capacity building which must be done in accordance with principles of 'green economy'. The guiding principles are just hanging in the NCCMP with no means of implementation.

Finally, it is worth pointing out that there is no consistency in the incorporation and implementation of general principles in policy and legislation pertaining to environment and climate change.[629] For example, while the guiding principles under the NEP 2004[630] are generally reflected in the EMA 2017,[631] the Water Resources Act 2013 incorporates general principles in the National Water Policy 2012[632] by reference[633] as well as by applying them in specific sections of the Act.[634] On the other hand, the National Forestry Policy 1996 and the Forestry Act 1997 provide the general principles in the general objectives of the policy[635] and purposes of the Act[636] respectively. These differences have implications for implementation of equity principles, especially considering many of the principles are interrelated and address related environmental resources.

It is important to standardise the approach for incorporating and implementing general principles across all sectors to ensure effective coordination. The approach taken by the EMA 2017 to align the principles to the environmental institution, has the potential to facilitate implementation of the legislation. Similarly, the approach taken by the Water Resources Act 2012 to refer to and clearly highlight general principles stipulated in the *National Water Policy* 2012 ensures that legislation clearly implement policy statements and make them binding.

5.7.2 The right to a clean and healthy environment and equity

The second normative improvement under the EMA 1996 was the right to a clean and healthy environment, which improved on the constitutional principles of national policy.[637] The EMA 2017 has further expanded the application and enforcement of the right to a clean

[629] Generally, policy informs legislation and provides direction in the form and content of proposed legislation. Policy also provides explanation and elaborates the motivations behind the legislation, which the legislation itself cannot include. The practice in Malawi is that a department first develops a policy based on studies and or stakeholders' consultations and once adopted by Cabinet, the policy is used as a basis for drafting legislation. There are deviations in some cases in that legislation may be developed without a policy or where a policy is developed after legislation has already been enacted. Unlike legislation, a policy is merely a statement of intent and is not binding. However, in *Symon Kuwedyo & Another v Africa Parks (Malawi) Ltd & Attorney General*, Personal Injury Number 113 of 2017 (unreported), the submission of the Attorney General that a wildlife management agreement had an inferior status to the Wildlife Policy and the National Parks and Wildlife Act seems to have been accepted by the High Court; hence, though not binding, a Government Policy carries considerable weight in the regulatory framework.
[630] See section 2.3 of the NEP 2004.
[631] See Part II of the EMA 2017.
[632] Principles outlined under section 3.4 of the National Water Policy 2006.
[633] See section 34 (3) of the Water Resources Act 2013.
[634] See equity principles to be used for purposes of water pricing under section 119 (2) (b) and (c) of the Water Resources Act 2013.
[635] See section 2.2 of the National Forestry Policy 1996.
[636] See section 3 of the Forestry Act 1997.
[637] See section 4.5.3.

and healthy environment. Thus, although the EMA 1996 provided for the right to a clean and healthy environment,[638] thus improving on the non-justiciable principles of national policy provided for in chapter III of the Constitution,[639] there were a few gaps in the manner the right was formulated under the EMA 1996. In the first place, the purview of that right was not provided for and was therefore subject to interpretation.[640] Secondly, there were concerns that the right to a clean and healthy environment under the EMA 1996 could only be invoked by persons who have suffered injury as a result of violation of the Act over and above the harm suffered by the general public. The NEAP 1994 specifically alluded to this *lacuna* in the enforcement mechanism and called for public interest litigation as an important consideration for enhancing enforcement efforts.[641]

In the absence of clarity over who has standing in enforcing the right to a clean and healthy environment, there were concerns that its utility would be severely restricted if interpretation is based on the common law understanding of standing under which only the Attorney General is responsible for representing the public interest.[642] This on its own can cause considerable injustice especially in countries where governments are not transparent and the Attorney General can easily be politically influenced. It is worse where a majority of the population is poor and illiterate, as is the case in Malawi and most developing countries. The standing rule can therefore perpetrate injustice and inequity by thwarting public interest litigation conducted by interest groups or civil society who have the resources and skills. There has consequently been a movement towards relaxing the *locus standi* rule. In relation to EMA 1996, it was argued that the phrase 'any person' can enforce violation of the Act[643], means the rule was already relaxed to cover anyone interested in enforcement of

[638] Section 5 EMA 1996.
[639] For a thorough discussion on the implications of these constitutional principles of national policy see section 4.5 in chapter 4 above.
[640] See Ralph Kasambara, op cit note 55, at p. 40.
[641] NEAP, op cit note 603, at pp. 32, 51.
[642] This common law rule requiring standing or personal interest limits the right to recourse to courts only for persons who can demonstrate they have suffered personal harm that is over and above that suffered by the general public: see *Gouriet v Union of Post Office Workers* (1978) AC 435.
[643] Section 5 (3) EMA 1996.

the law irrespective of whether such person suffered harm.[644] There was nevertheless lingering concern that a court could still find reason to read the common law standing rule into the Act in the absence of an express provision.[645]

The EMA 2017 has consequently gone further to clarify not only what constitutes the right to a clean and healthy environment,[646] but also expand and expressly identify persons who can enforce the right. Thus, MEPA, any lead agency such as a government department responsible for a sector of the environment, and any person interested in enforcing the right,[647] are all entitled to enforce the right to a clean and healthy environment.[648] In addition, the Act also imposes a duty on every person to safeguard the environment and to inform MEPA and any institution charged with environmental responsibility about any activity or phenomena that may affect the environment.[649] Thus, unlike the EMA 1996 which gave the responsibility for receiving complaints to the Minister responsible for environment, [650] EMA

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[644] For a thorough discussion on the public interest litigation under the EMA 1996, see Ralph Kasambara, op cit note 55, at p. 40. The author argues that quite apart from the fact that 'any person' means and includes every person who has the interest and capacity to enforce and the fact that section 3 of EMA 1996 imposes a duty on every person to take action to protect and manage the environment, a purposive reading of section 5 of EMA suggests that the task of the court is more than just determining justice between the parties but rather to administer social justice concerns that may arise from environmental degradation and therefore can affect any person. To illustrate, he cites the Australian case of *Building Owners and Managers Association (Aus) Ltd v Sydney City Council*, 55 R.G.LA. 44 which held that there is no good reason why the phrase 'any person' should be restricted to persons who have suffered loss or injury by reason of the defendant's violation of the Act when there is a general rule of law or convention indicating that all people are subject to the same laws and therefore entitled to expect compliance by everyone; consequently, '(T)he observer who feels strongly enough about the particular breach may well ask, since all are subject to the same law, why should this person's breach of it be allowed, why it should not be dealt with at my instance.'(Ibid, at p. 449).

[645] Tracy Dobson, 'Radical Restructuring of Environmental Policy to Preserve Biodiversity in Southern Africa: Malawi at Crossroads' (1998) *Journal of Natural Resources and Environmental Law* 13 (1): 149-175, at page 163, alluded to the fact that Parliament specifically rejected a clause that sought to make it abundantly clear that the *locus standi* rule had been abolished and consequently proof of personal interest was still necessary under section 5 (2) of EMA 1996. But as rightly pointed out by Ralph Kasambara, op cit note 55, Malawian courts do not use legislative history when interpreting a statute; it follows therefore that the sentiments expressed in note 595 are more likely to be adopted by the courts

[646] Section 4 (2) of EMA 2017 states that the right to a clean and healthy environment includes the right to various public elements or segments of the environment for spiritual, recreational, educational, health, or cultural purposes. Admittedly, this formulation does not cover all the components of the right, since economic and social components are not reflected. For a thorough analysis of what constitutes the right to a clean and healthy environment see Alexander Kiss, 'Concept and Possible Implications of the Right to Environment', in Kathleen E Mahoney & Paul Mahoney (eds), *Human Rights in the Twenty First Century: A Global Challenge* (1992) Boston, Dordrecht.

[647] The Act specifically states that a person interested in enforcing the right to a clean and healthy environment need not show that he or she is personally affected. On the other hand, the court retains power to control or prohibit litigation which is frivolous, vexatious or which is an abuse of court and goes further to provide that in every case it is the interest of the environment which will be the determining factor: see section 4 (5) EMA 2017.

[648] Section 4 (4) of EMA 2017. For the avoidance of doubt, the *locus standi* rule has been specifically jettisoned by section 4 (4) of EMA 2017 which states that there is no need to prove personal injury.

[649] See section 4 (1) as read with section 4 (3) EMA 2017.

[650] Section 5 (3) of EMA 1996 gave power to the Minister responsible for environment to hear complaints on violation of the right to environment. While this provided space for redress for those who cannot afford access

2017 has strengthened the enforcement of the right to a clean and healthy environment by providing it as a function of a professionally competent and independent MEPA to be discharged in the light of the general principles stipulated under the Act.[651] The Act also gives power to MEPA to investigate any complaint pertaining to the protection and management of the environment and take appropriate action.[652] This would ensure that persons aggrieved by the violation of their right to a clean and healthy environment can have the benefit of the technical skills and expertise of the MEPA to be utilised for redress of their grievances in a more equitable and just manner than would have been the case if it was the responsibility of a political office as constituted under EMA 1996.

5.7.3 Stakeholders Participation and Equity

The third normative improvement in environmental regulation has been the inclusion of various stakeholders affected in environmental decision making. Expanding the range of stakeholders to participate in environmental regulation is in line with the country's international commitments, which require that 'environmental issues are best handled with the participation of concerned citizens'.[653] Consequently, the EMA 2017 has further elaborated on the participation principle and requires that for purposes of effective public participation and the enforcement of rights and duties, every person has the right to access environmental information, to participate in environmental decision making and to be afforded adequate and effective administrative and judicial remedies.[654] It is worth noting that all these procedural rights are provided for under the Constitution,[655] hence the EMA 2017 merely elaborates and situates these in the environment context.

In addition, the concept of an EIA is a recognition of the need to ensure that those most affected by development decisions should have a say and input in the decision. Not only is the developer required to carry out an EIA, there is also requirement for public review and comment before approval is granted.[656]

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to the courts by reason of lack of resources, such redress may not be easy where the violation is by government institution or influential persons with political connections.

[651] There are promising provisions that can enhance MEPA professionalism and the better prospects for equity and justice in its handling of complaints under the Act. MEPA is managed by a professional board and though appointed by the President it is independent and can act with limited political interference: section 10 EMA 2017 provides for professional qualifications of board members who have a fixed tenure of at least five years.

[652] Section 9 (2) (l) EMA 2017.

[653] See Principle 10 of the Rio Declaration.

[654] See section 5 of the EMA 2017.

[655] See sections 37, 41 and 43 of the Constitution.

[656] See Part V of EMA 1996.

EMA 2017 has made certain improvements that enhance and broaden equity imperatives in EIA regulation. The first is the requirement for a SEIA where any institution plans to develop policy, legislation, programme or plan that may affect the environment.[657] This provision together with the requirement for public scrutiny of the assessment report[658] can provide opportunity for integrating cross-sector issues into the development process thereby ensuring that development policy or decisions are sensitive to other sector concerns. The second is revision of the nature of the assessment, in that while EMA 1996 provided for an EIA only, EMA 2017 requires an environmental and social impact assessment (ESIA).[659] This highlights the need and opportunity for assessing the social and therefore equity implications of proposed developments.

There are a few other environment and natural resources statutes that make provision for EIA that may limit the role of the EIA process to facilitate responsive environmental regulation. Firstly, under the Forestry Act 1997, where the Director of Forestry decides to de-gazette a forest reserve or protected forest area, a comprehensive EIA is required to assess the ecological consequences of such a decision. Unlike the EMA 2017, however, there is no requirement for a social impact assessment or the need for public scrutiny of the EIA report. The framework only entrusts the scientific and political actors as the decision makers, and may therefore compromise the social implications of such a decision. Secondly, the National Parks and Wildlife Act 1992 requires an EIA where any person is of the opinion that a proposed activity may have an adverse effect on any wildlife species or community. There is no reference to the EMA, but there is provision for public comment on an EIA report.[660] Thirdly, the Fisheries Conservation and Management Act 1997 does not require EIA for activities that affect the fisheries sector. This is a major gap considering that development activities can affect fish breeding grounds to the detriment of fishing communities and the fishing industry in general.[661] On the other hand, the Water Resources Act 2013[662] explicitly requires an EIA to be conducted in accordance with the EMA 2017 for purposes of an application for a water abstraction license;[663] or for an application for an effluent discharge

[657] Section 30 EMA 2017.
[658] See section 30 (6) EMA 2017. Admittedly, the fact that the decision to order a public scrutiny of the SEIA report lies with the Minister responsible for environment, may compromise the requirement for public input: see op cit note 138 above.
[659] See section 31 EMA 2017.
[660] See Part IV of the National Parks and Wildlife Act 1992.
[661] Interestingly, the Fisheries Conservation and Management Act 1997 requires an EIA to be conducted for purposes of establishing an aquaculture: see the Second Schedule to the Act. There is no provision for the department of forestry to conduct an EIA, consequently the procedure under the EMA will be applied.
[662] Act Number 2 of 2013: See http://extwprlegs1.fao.org/docs/pdf/mlw167598.pdf.
[663] See section 44 (3) (c) as read with section 112 (a) of the Water Resources Act 2012.

permit.[664] The reference to the EMA under the Water Resources Act 2013 provides a better approach and can enhance harmonisation across sectors and should be the framework to be adopted by all other sector statutes.

5.7.4 Access to Justice and Equity

The EMA 1996 made provision for formal redress mechanism to deal with disputes in environment and natural resources management. The EMA 2017 has repeated the requirement to establish an Environmental Tribunal, notwithstanding that a similar provision under the repealed EMA 1996 was not implemented. The Environmental Tribunal offers the opportunity to expand access to justice. It has specifically been charged with the responsibility to enforce the right to a clean and healthy environment; to deal with complaints relating to violations of the Act and any written law on environment and natural resources and to vary any decision made by the MEPA or a lead agency on environment and natural resources and substitute it with one which is just and equitable and which is in the interests of the environment.[665] In addition, unlike EMA 1996 which restricted the disputes the Tribunal could determine to those arising under the Act,[666] EMA 2017 has expanded the disputes to cover any relating to environment and natural resources and may be brought by any person or institution including sector institutions responsible for environment and natural resources.[667] This enhances the potential for the Tribunal to influence the development of environmental jurisprudence across the entire environment and natural resources landscape and thereby promote consistency and harmonisation. Finally, as pointed out earlier, the Environmental Tribunal can be given epistolary jurisdiction to enable the Tribunal to take action on its own based on a letter or media reports outlining complaints of violation of environment and climate change legislation[668].

5.8 Institutional Framework for Environment and Climate Change Regulation

5.8.1 Fragmentation in Institutional Mandates and its Equity Implications

The mandate for regulating environment and climate change is given to a number of government institutions, each mostly dealing with a specific sector using a regulatory instrument

[664] Section 96 (3) (c) of the Water Resources Act 2012.
[665] See section 4 as read with section 9 of EMA 2017.
[666] See section 69 EMA 1996.
[667] See section 107 EMA 2017.
[668] See op cit note 268.

for which that institution alone has the requisite authority. These include departments responsible for environment, forestry, fisheries, water, land, energy, mining, climate change, and agriculture. In addition, all local councils have local level and decentralised responsibilities pertaining to environment, natural resources and climate change.[669] The range of institutions and the policy and legislation for which they are responsible shows a fragmented policy landscape over environmental resources that are interconnected and largely dependent on each other.

There is a historical context to fragmentation. It has been observed that post-colonial economies such as Malawi 'inherited fragmented and uncoordinated legislation that paid little attention to sustainability and an integrated, ecosystem oriented legal regime that permits a holistic view of the ecosystem and of the interrelationships and interactions within it'.[670] This has roots in the political economy of the colonial state which, as earlier pointed out, was a device for exploitation of the colonies[671] with little regard to sustainability issues. On the other hand, fragmentation is not entirely negative since it arises from the segmentation of government functions along sector lines, which is mostly unavoidable. It is however the degree of fragmentation and its impact on legal and institutional coherence that can create efficiency and responsiveness concerns.[672] As pointed out by Jan Glazewski,[673] the very nature of environmental regulation encompassing a wide variety of resources and mandates such as natural and cultural resources, land use planning, pollution control, waste management and climate change makes it difficult to fit these mandates into the very narrowly defined government functional areas. Environmental institutions have not grown out of environmental needs, rather out of governmentality.

Fragmentation can negatively affect the efficiency of institutions in environmental governance.[674] It has been blamed for the turf wars between government departments and

[669] In addition to the functions of local councils provided for under section 6 of the Local Government Act 1998 as amended, which mostly pertain to democratic governance and development, the Second Schedule to the Act lists further functions, some of which address environment and natural resources management. The Second Schedule states that councils are responsible for, *inter alia*, public health, environmental protection including waste management, sanitation, forestry, nature reserves and woodland; and generally taking charge of all decentralized services and activities many of which relate to environment and climate change management.
[670] Louis Kotze', *A Legal Framework for Integrated Environmental Governance in South Africa and the North-West Province'* (2005) Unpublished PhD Thesis, University of North West, Potchefstroom, p. 86.
[671] See section 5.2 above.
[672] See Fariborz Zella and Harro van Asselt 'The Institutional Fragmentation of Global Environmental Governance: Causes, Consequences and Responses' (2013) *Global Environmental Politics*, 13:3.
[673] Jan Glazewski, *Environmental Law in South Africa*, (2002) LexisNexis South Africa, Durban, at page 108
[674] Louis Kotze', op cit note 670, pp. 23-25.

officials as well as administrative inefficiencies[675] that are particularly inimical to addressing the interests of marginalised and disadvantaged communities. However, as the new institutional approach to environmental governance stipulates, the choice of institutions is not a mere matter of efficiency; it is a matter of social justice in general and SD in particular.[676]

In Malawi, until the enactment of the EMA 2017, the EAD functioned as a coordinating agency for environment and climate change issues and its role was restricted to just providing guidance in environmental management. Furthermore, in terms of power relations in the government bureaucracy, EAD could not command political or policy influence over 'development' related and more powerful departments such as those responsible for finance, economic planning, infrastructure or agriculture.[677] As a result, the regulatory framework that EAD administers has had limited influence in the overall development framework. In addition, fragmentation generates gaps, inconsistencies and conflicts in mandates, functions, and institutional capacity that adversely affect the achievement of equity in the regulation of environment and natural resources. For example, the duplication of EIA mandates related to forestry in the Department of Forestry and EAD[678]can lead to different regulatory standards and inconsistency in decision making and ultimately inequitable development outcomes.

5.8.2 *Institutional Capacity: Collaboration and Decentralisation*

One of the main challenges in the regulation of the environment and natural resources is limited institutional capacity to enforce existing statutes. Cross-sector coordination, collaboration among sector agencies and decentralisation of functions are some of the concepts that have been promoted to address the capacity challenge. Many of these concepts are elaborated under various post-UNCED policy instruments.[679] The establishment of the MEPA

[675] Louis Kotze', op cit note 670, pp. 23-25.
[676] Jouni Paavola, 'Institutions and Environmental Governance: A Reconceptualization' (2007) *Ecological Economic*s, 63: 93-107.
[677] See William Chadza & Gracian Banda, op cit note 77.
[678] Section 17 (c) of the Forestry Act gives power to the Forestry Management Board to initiate, oversee and approve EIAs. Yet the same mandate was given to the EAD under section 24 of EMA 1996 and now to MEPA under the EMA 2017. See also section 5.7.3 above.
[679] See the NEP 1996 and NEP 2004. In particular sections 2 and 4 of the NEP 2004 provide detailed policy statements to enhance cross-sector coordination, the participation and empowerment of local communities, private sector and NGOs in environment management to enhance regulatory capacity. Similar policy statements are provided for under the National Forestry Policy (section 2.3 and 2.4); the NCCMP 2016 (sections 2.3 and 3); the National Fisheries Policy 2012 – 2017 (section 3.4); the National Water Policy 2005 (section 3.3).

as 'an environmental authority' is intended to provide some vertical power structure elevating the environmental institution to facilitate cross-sector coordination and accountability.[680] Thus EMA 2017 has provided specific mandates and responsibilities to MEPA to eliminate gaps and conflicts in regulation and enhance capacity in enforcement. Part IV of EMA 2017 in particular seeks to strengthen coordination, including reporting and accountability among sectors.[681] In relation to climate change, the EMA 2017 gives mandate to manage climate change to the MEPA. However, although the Act requires that this mandate is to be carried out in consultation with lead agencies,[682] there is no clarity on what inter-agency arrangements will be used to harmonise these mandates with the functions of the Department of Climate Change and Meteorological Services.[683] This exposes policy outcomes to inter-agency conflicts and turf wars, to the detriment of equity considerations for marginalised and vulnerable groups.

Some sector legislation promote collaboration in enforcement capacity by providing for shared mandates. The Fisheries Conservation and Management Act 1997[684] for example designates public officials from other sectors such as police officers, forest officers, wildlife officers and environmental officers as fisheries protection officers who are given mandate to enforce the Act.[685] There are however no corresponding provisions in the respective sector statutes to complement to this framework; hence in general the mechanism has not worked as intended and fisheries legislation enforcement continues to be the sole responsibility of the Department of Fisheries.[686] This requires elaboration of implementing regulations, guidelines or agreements to facilitate inter-agency cooperation.

There is also recognition of the importance of mobilising local communities staying close to or with the regulated environmental resources to actively participate in management

[680] Unlike the EAD, which was a government department and therefore at par with sector agencies, MEPA is managed by a board appointed by the President and its mandate is derived from the statute and professional independence. It is designed to command higher authority due to its autonomy and relative independence from political influence.
[681] Section 22 EMA 2017.
[682] Section 54 EMA 2017.
[683] It is worth pointing out that Malawi has no law providing for establishing and stipulating mandates of government ministries or departments. These are politically determined and, in line with the observation by Andrea J Nightingale, Power and Politics in Climate Change Adaptation Efforts: Struggles over Authority and Recognition in the context of Political Instability' (2017) *Geoforum*, 84: 11-20, will therefore reflect the struggle for authority and influence.
[684] See https://www.ecolex.org/details/legislation/fisheries-conservation-and-management-act-1997-cap-6605-lex-faoc018341/.
[685] Section 3 (7) of the Fisheries Conservation and Management Act 1997.
[686] See EAD, op cit note 613.

and enforcement functions. Local communities have been given mandate especially in forestry, fisheries and land issues. There are however concerns regarding organisation of local communities as well as the scale of devolution of mandates. In the first place, there is widespread confusion about what constitutes a 'local community'.[687] A community is not necessarily homogenous with a convergence of interests. Some NGOs or 'private sector' interests may qualify as local community members. Hence an attempt to confer these 'local communities' preferential treatment on the ground that they are vulnerable and consequently require government support may not meet the intended policy objective and put resources where they are not meant to be 2016A.

The EMA 2017 on the other hand, defines a local community as a human population in a geographical area, which has control or custody over its biological or genetic resources as well as knowledge, innovations or practices governed by its own customs or laws.[688] The Act also establishes a local environment and natural resources committee at village or area development[689] level whose objective is to initiate, coordinate and mobilise local community participation in environment and natural resources management.[690] This is intended to integrate environment issues into development planning, which at that level is undertaken by village and area development committees established under the Local Government Act 1998 to facilitate local participation and representation that can enhance equitable environmental regulation.

However, there is fragmentation of environmental mandates that can adversely affect coordinated response to resource degradation. Each sector has its own local committee through which community participation in the management of its regulated resource is undertaken. These include the Beach Village Committees (BVCs) in fisheries,[691] VNRMCs in forestry,[692] and water users associations in the water sector[693]. In addition, these are elected

[687] Rule 2 of the Forestry (Community Participation) Rules 2001 made under the Forestry Act 1997 lists what institutions qualify to be a local community; these include VNRMCs, local authorities, by whatever name, NGOs, and the private sector. There is therefore no generic or conceptual definition.
[688] Section 2 EMA 2017.
[689] This seeks to harmonize with village development committees and area development committees established under the Local Government Act 1998.
[690] See section 2 EMA 2017.
[691] See the Fisheries Conservation and Management (Community Participation) Rules 2000 made under the Fisheries Conservation and Management Act 1997.
[692] See the Forestry (Community Participation) Rules 2001.
[693] Established under Part VIII of the Water Resources Act 2012.

bodies that operate parallel to traditional structures that have also been responsible for resource management[694]. The proliferation of local committees over the same ecosystem, albeit responsible for different resources, have had negative impacts on responsive management and ecological sustainability[695]. On the other hand, very little attention has been given to the relationship between these 'democratic' committees and traditional structures.[696] Conflicts have consequently been reported in certain instances where each institution feels the other is usurping its powers and functions.[697] Further, in some cases the conferment of rights and benefits on a community through these committees may give the impression the resources belong to the committee members where little or no attempt is made to directly link the community members and their representatives in the committees.[698] These gaps can affect the achievement of equitable development and environmental regulation.

5.9 Conclusions

The evolution of Malawi's environment and climate change regulatory framework reveals two major related influences. The colonial architecture, on which the main development paradigm and government institutions were built, was an exploitative regulatory framework. Because the country's economy was designed for and continues to focus on satisfying a foreign market to produce cash crops such as tobacco, tea, coffee and sugar, the policy and legal framework facilitates the production and marketing of these crops and has influenced the environmental profile of the country.

The regulatory framework for environment and climate change was overtly discriminatory during colonial rule and continued to be covertly oppressive to marginalised communities after political independence. This is mainly due to the dominant development paradigm that focuses on economic growth for the foreign market, whose benefits hardly trickle down to the majority of the population. Policies and legislation on environment and climate change have developed piecemeal and in sectors to deal with perceived environmental problems identified by specific interest groups. The institutions responding to the environmental

[694] See Gracian Banda & Thoko Ngwira, op cit note 67.
[695] Leo Zulu, 2008, 'Community Forest Management in Southern Malawi: Solution or Part of the Problem', *Society and Natural Resources*, 21:8; 687-703
[696] This is particularly problematic in relation to the Forestry Act 1997, under which village heads are given a mandate to establish village forest areas (VFAs) from customary land under their jurisdiction and VNRMCs are elected to manage these VFAs. The negotiation and separation of ownership from management of the resources has not been understood or appreciated and has led to conflicts. See Gracian Banda & Thoko Ngwira, op cit, note 67.
[697] See Gracian Banda & Thoko Ngwira, op cit note 67; and Blessing Chinsinga, 2006, 'The Interface between Tradition and Modernity', *Civilization*, LIV (1-2).
[698] For a thorough analysis of the dynamics of these local institutions and its impact on conservation policy, see Leo Zulu, op cit note 695.

threats also mirror these same interests. Thus, even when UNCED highlighted principles and approaches intended to broaden these interests and improve coordinated response, environmental governance institutions continue to reflect these old colonial and international development frameworks.

There are promising developments under the NEP 2004, the EMA 2017, the MGDS and Constitution for infusing equity considerations into development policy and environment and climate change regulation. In particular, the broadening of the *locus standi* rule will enable environmental rights litigation to protect rights of vulnerable and marginalised communities who can call upon civil society institutions to assist in planning and funding litigation. Access to information and justice provisions will also facilitate accountability for environmental rights litigation, while the implementation of the Environmental Appeals Tribunals can ensure more specialised and less cumbersome enforcement of environmental rights violations. These provisions have potential to facilitate equitable environment and climate change response.

It has however been pointed out that environmental governance still suffers from policy and institutional incoherence, which affects responsive and equitable regulation. The chapter has highlighted some of the weaknesses of the environmental governance framework in Malawi and the extent to which these affect equitable development and environmental regulation. This is especially the case with regard to policy influence that environmental institutions are able to command. It has been pointed out that environmental institutions such as departments responsible for forestry, water, fisheries, wildlife and environmental affairs were established not in line with equitable management or ecological principles, rather they were intended to provide the colonial authorities with a means of exploitation of resources for the metropolitan market. The structure of environmental institutions has remained as a tool for resource exploitation such that these institutions have limited contribution to development regulation other than to service the economic growth paradigm.

The next chapter argues that the cataclysmic and insidious nature of climate change impacts offers an opportunity to redirect the development paradigm which has historically muted the influence of environment sector in the development process. As climate change is considered a development issue, it has the potential to awaken the environment sector as an important development concern that can influence resource allocation, environmental governance and the need to focus on empowerment and access to resources to achieve equitable development.

CHAPTER 6
EQUITY IN CLIMATE CHANGE REGULATION AND DEVELOPMEN POLICY IN MALAWI

6.1 Introduction

Climate change has increased pressure on environmental resources and regulation, threatening development outcomes in all sectors of the economy. Climate change has also exposed and is exacerbating vulnerabilities and marginalisation created by inequitable development and environmental regulation and is putting in peril development gains and threatening business interests across the sector divide. The climate problem has consequently stimulated policy debates and interest in sectors that have hitherto not paid attention to environmental matters. In particular, there is increasing realisation that the climate problem requires a policy response that can address structural inequalities that drive vulnerabilities and marginalisation.

This chapter examines the role that the climate problem can play in the articulation of equitable environmental regulation and development policy. It examines how climate change has been problematised and its relationship with the development paradigms that have shaped the regulatory framework for environment and climate change. In particular, the analysis focusses on the role the neoliberal governance theory has played in the climate problem especially its support for the dominant (economic growth) development paradigm at the expense of human growth. It is observed that when the climate problem is considered in the context of addressing the epistemic injustices associated with the dominant development paradigm, there is potential for reimagining new approaches to facilitate a more responsive and equitable development policy and environment regulatory system.

6.2 The Equity Dimension of the Climate Change Problem

The UNFCCC defines climate change as a 'change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere which is in addition to the climate variability observed over comparable time periods'.[699] Although the UNFCCC does not define the word 'climate', the elements of climate can be discerned from the definition of 'climate system' which is the 'totality of the atmosphere, hydrosphere, biosphere, geosphere and their interaction'.[700] The warming is caused by increased concentration of greenhouse gases (GHG) such as carbon dioxide, methane and related gases which is

[699] Article 1.2 of the UNFCCC.
[700] Article 1.3 of the UNFCCC.

over and above that which is attributed to natural climate variability. This alters the composition of the atmosphere and affects the hydrosphere, biosphere and geosphere and the interaction amongst them.

According to the Intergovernmental Panel on Climate Change (IPCC), anthropogenic interference of the climate system is clear and recent emissions are at the highest in history with considerable impact on the human and natural systems.[701] The direct impacts of global warming include increased temperatures, rising sea levels as a result of melting glaciers, increased precipitation causing heavy rains and flooding, and the bouts of droughts and tropical cyclones. The indirect consequences include food and water insecurity especially in developing countries where sources and production systems are already under pressure and rudimentary; economic losses arising from secondary damage; loss of biodiversity and health risks arising from rising temperatures and heat waves; as well as increased pests and diseases due to rising temperature. These changes and impacts have a more direct and devastating impact on the poor who have fewer coping mechanisms[702].

On the other hand, although the causes and impacts of climate change are largely environmental and locally generated, they have transboundary impact and global ramifications. As observed by Esty the 'spill over of pollution from one country onto its neighbours or into the shared space of the global commons, as well as the overexploitation of shared natural resources, promise not just environmental degradation but also economic inefficiency, political instability, and diminished social welfare'.[703] The transboundary and developmental impact of the climate change problem makes it particularly difficult to address in view of the multitude of interests that need to be considered. As it happens, it is the more affluent parts of the globe such as the emerging economies of Asia and developed countries who have the largest share of GHG emissions.[704] Yet because of the scale and intensity of climate change impacts, it is the poor developing countries that disproportionately bear the impacts. This has significant implications on how the climate problem is framed in the development divide and highlights the need for equity in the climate response both within and among nation states.

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[701] IPCC, Climate Change 2014: *Synthesis Report, Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, (2014) [Core writing team: R K Pachauri and L A Meyer (Eds.)] IPCC, Geneva, Switzerland, pp. 2, 151.
[702] Ibid. See also IPCC, 'Impacts of 1.5 Degrees of Global Warming on Human and Natural Systems', accessed at: https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15_Chapter3_Low_Res.pdf.
[703] Daniel C Esty, 'Global Environmental Governance', (2008) *Global Governance*, 14: 111-118, at p. 111.
[704] UNFCCC, *United Nations Fact Sheet on Climate Change*, (2006) Nairobi, UNFCCC. Available at unfccc.int/files/press/bacgrounders/application/pdf/factsheet-africa/pdf. See also Hanna Ritchie and Max Roser, C02 and Greenhouse Gas Emissions, 2018. Available at http://ourworldindata.org.

In particular, the fact that the contribution of poor countries to global warming is negligible,[705] with Africa as a whole contributing no more than 3%[706], calls for more systematic equity considerations in the way developing countries respond to climate change. Further, climate change has a more direct causal connection to development gains and losses compared to the impacts of environmental degradation, which often take time to manifest. For example, studies show that emerging economies that have increased their GHG emissions by 200% have reduced their poverty levels; while Sub-Saharan Africa countries that have reduced their emissions, have increased poverty levels.[707] In addition, unlike the developed economies, the growing energy needs in the Africa region is attributed more to a rapidly growing urban population rather than industrialisation. [708] More importantly, recent studies suggest that climate change has over the last 50 years increased inequality between countries. Economic growth in poor economies in Africa has been lower than it would have been without climate change; while that of developed countries has increased as a result of climate change. The difference is attributed to rising temperatures negatively affecting agriculture in developing countries, especially in the tropics, while boosting production in the temperate regions of the North as a result of reduced winters.[709]

As earlier pointed out,[710] the Rio Declaration, the UNFCCC and the Paris Agreement have substantive principles promoting equity in climate change regulation. In all these instruments the general principles require state action to realise the equity obligations and the RBA frameworks that enhance equity and justice within and among states. However, the reluctance of developed countries[711] to translate their international commitments to meet financing and technology challenges faced by developing countries poses enormous challenges in implementation of climate actions that can transform developing economies in a manner that meets equity imperatives. On their part, developing countries have to contend

[705] Malawi's contribution to the overall global GHG emissions is merely 0.04%, see Malawi Government, *Intended Nationally Determined Contribution*, Lilongwe, Environmental Affairs Department.
[706] UNFCCC, op cit, note 704.
[707] Goldstein, A, *What is the link between carbon emission and poverty?* (2015) *World Economic Forum*.
[708] Wu, Y. et al., 'The impact of urbanization on carbon emissions in developing countries: A Chinese study based on U-Kaya method' (2016) *Journal of Cleaner Production*, 135:589-603.
[709] See Noah S Deffenbaugh & Marshall Burke, Global warming has increased global economic inequality' (2019) *Journal of National Academy of Sciences*, 116(20). Accessed at https://www.pnas.org/cgi/doi/10.1073/pnas.1816020116.
[710] See section 4.2 above.
[711] A prominent example is the United States' refusal to acknowledge the cost of historical emissions on developing countries that could have triggered reparations: op cit note, note 82. The commitments of developed countries in international instruments to support developing countries have also been relegated to voluntary contributions, see op cit note 76, making it difficult for developing countries to address the structural inequalities that facilitate vulnerabilities and marginalization.

not only with the resource constraints that limit their capacity to effectively respond to the impacts of climate change but also, more importantly, the structural inequalities inherent in the dominant development model that makes it difficult for developing countries to introduce reforms in the face of crippling debt and international development policy commitments.[712] These commitments have reduced development policy space and have affected how the environment and climate governance are problematised. In particular, the policy prescriptions of the SAPs severely reduced the capacity of the state to promote development equity and further exposed ecosystems and populations to the impacts of climate change[713].

6.3 Climate Change, Environmental Governance and Equity

At the heart of the quest for climate change justice are epistemic injustices[714] inherent in the discourse of development and environment. As pointed out earlier,[715] the term development hides political, economic, social and cultural interests of the actors that defined development. The dominant development trajectory to date is the pursuit of achieving economic growth using global resources irrespective of the marginalisation or vulnerability such growth creates in certain populations or ecosystems. The regulation of environment has routinely followed that dominant narrative.[716] This approach is reinforced by the neoliberal theory of governance which gained currency and pace in the 1980s and promoted scaling back the frontiers of the state.

SAPs were part of the neoliberal theory of governance was introduced at a time when the state was overstretched in its capacity to marshal resources for development. In developed countries the theory provided the answer to the apparent contradictions of market and state-centred approaches to development and environment regulation.[717] In developing countries that were reeling from the debt crisis of the 1970s, the SAPs focussed on cost cutting measures.[718] In Malawi the SAPs required privatisation of state enterprises, removal of government subsidies in sectors that provided support for the poor such as agriculture and

[712] See section 3.8 above.
[713] Sam Kefferstan, 'The Perfect Storm: Lasting Impacts of Structural Adjustment Programs and Pressures of Climate Change in Latin America and Ghana, Africa' (2017), *Student Showcase.20*. Accessed at: https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1021&context=sustainableumass_studentshowcase.
[714] The term 'epistemic injustice' was first used by Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing.* (2007) Oxford, Oxford University Press, to highlight the prejudices that underlie the discourse of justice and the difficulties of identifying the victims of injustice, by focusing on the negative space that is injustice: see Preface at pages vii to viii.
[715] See section 2.3.
[716] See sections 2.4, 2.5 and 5.4 above.
[717] Jessop, B. 'The new Dynamics of Partnership and Governance failure' in Stocker, G. (Ed) (1999) *The New Management of British Local Governance.* Basingstoke, Macmillan.
[718] See section 5.4 below.

social welfare and reduction of state capacity for stewardship over environmental resources such as forestry and wildlife reserves, among others[719]. These measures have had particularly debilitating impacts on poor communities and increased marginalisation and vulnerability which are still being felt to date. In addition, the neoliberal theory of governance required the creation of self-organising networks and the 'rescaling' of the state to facilitate a greater role for community, civil society and private interests to participate in policy making and implementation.[720] The theory promised democracy, consequently in Malawi and other developing countries good governance requiring, *inter alia*, multiparty systems of government was part of aid conditionalities in the early 1990s.[721]

A number of concerns have been raised on the equity implications of the neoliberal governance paradigm. Firstly, just like development discourse, the theory elevates the role of capital and experts and the technocratic and managerial requirements associated with these networks, thereby marginalising local knowledge and experience.[722] Secondly, because environment and development regulation has been influenced by diverse interests with different power configurations, [723] the exclusion or inclusion of competing interests is determined by the relative power of the actors[724], making it difficult for voiceless and marginalised people to effectively participate in good governance. Thirdly, the theory requires the state to lead the policy process while various interest groups make their respective demands and assume different spaces to accommodate their interests. The extent to which this can achieve equity depends on power dynamics and the question of whose interests the state serves is paramount. This is because the state is itself an amalgam of diverse interests and is not representative of all interests. Where stakeholders do not share goals and interests, the expectation that stakeholder participation can be democratic without addressing power asymmetries cannot be justified.

In addition, the neoliberal governance theory focuses on achieving consensus and consequently depoliticises social organisation such that those without policy influence are marginalised and if necessary repressed.[725] This is because the question as to who constitutes

[719] For a thorough analysis of the impact of privatisation on the poor, see Danwood M Chirwa, 'Privatisation and Freedom from Poverty' in Geraldine Van Bueren op cit note 54, p. 980.
[720] See R Rhodes, 'The New Governance: Governing without Government', (1996) *Political Studies*, XLIV: 652-667, at p. 653.
[721] See section 2.2.2, op cit note 137.
[722] See R Rhodes op cit note 720.
[723] See section 3.2 above.
[724] World Bank, *World Development Report 2017: Governance and the Law* (2017) Washington DC, World Bank, pp. 12-13 and 70-74.
[725] E Swyngedouw, *Where is the Political?* (2008) http//: socialsciences.manchester.ac.uk/disciplines/politics.

a stakeholder in the policy process is a deeply political one. It has therefore been argued that, although the theory promises radical democratisation of governance, including environmental equity, its articulation of power relations has not achieved the intended results. Instead of producing social, economic and environment decisions that are equitable across sectors, the theory reproduces existing power imbalances. This failure is inherent in the limitations of SD as conceived by the 1987 Brundtland Commission Report, as pointed out earlier in the thesis.[726]

The problematisation of the environment and climate change phenomena has widely taken on the principles of the neoliberal governance theory and market efficiency. This is primarily because the environment as a 'problem' rose to greater prominence after the 1987 Bruntland Commission Report and the 1992 UNCED, an era of particularly strong neoliberal principles. And since climate change is primarily an environmental problem, the neoliberal governance theory has also informed climate change regulation. Environment and climate change issues are said to correlate well with 'governance beyond the state' ideals especially because environmental processes can and do manifest beyond limitations of the nation state.[727]

As pointed out in chapter 5, Malawi's environment and climate change policies and legislation are replete with the principles of public participation and stakeholders' consultations in policy and legislation making and implementation as well as decentralisation and empowerment in resource management. However, the scale of mobilisation in policy and legislation making and the extent of decentralisation and empowerment have been limited and half-hearted across all sectors. The explanations offered by policy makers such as lack of technical competences and mistrust of local communities to sustainably manage natural resources, among others, mirror the neoliberal governance theory. The result has been limited implementation of devolution or decentralisation policy frameworks and a veneration of expert and state interests. This undermines the claim that the dominant environmental governance theory facilitates democratisation, since the state continues to dictate who participates and about what. In essence '…it is the state that plays a pivotal and often autocratic role in transferring competencies (and consequently in understanding the resulting changing power geometries) in arranging these new forms of governance'.[728] These concerns have

[726] See section 3.5 for a detailed analysis on the limitations of the sustainable development principle.
[727] Sayer, N.F. 'Ecological and geographical scale: parallels and potential for integration' (2005) *Progress in Human Geography* **29** (3):276-290.
[728] Swyngedouw, E. 'Governance, innovation and the citizen: The Janus face of governance-beyond-the-state' (2005) *Urban Studies* **42** (11):1991-2006, at p. 1999.

prompted some academic commentators to call for new approaches to dealing with the climate problem in a manner that reduces the scale of marginalisation and vulnerabilities associated with the neoliberal governance theory.[729] In particular, there is a specific need to change the paradigm of regulation so that it focusses on the geographies and histories of the marginalised, rather than the generalisation and consensus building associated with the neoliberal governance theory.

6.4 Climate Change, Sustainable Development and Equity in Malawi

The focus on SD since the 1980s was intended to balance competing economic, social and environmental concerns of the development process, but as already noted the attempt to meet the needs of all these competing interests has had limited success.[730] In particular, the SD concept has been heavily influenced by the dominant development paradigm that emphasises the primacy of economic growth and has not been able to accommodate the interests of the poor who are unable to meet the conditions for participation in the growth model.

In Malawi, as in most developing countries, the implementation of the SD model was incorporated in the MDGs which were introduced in 2000 by the global community to address increasing poverty and underdevelopment in developing economies. The MDGs highlighted and sought to uplift the 'needs' of the developing world for attention of and funding by the developed world. There are however a number of concerns pertaining to the manner in which the MDGs were designed and implemented and their outcomes, that shed some light on the extent to which these global goals can achieve SD and meet the challenges of the climate problem.

6.4.1 The Reach and Limits of MDGs and SDGs in Malawi

In the first place, the MDGs were only applicable to developing countries, and their targets clearly set the limits of and defined what could be achieved. The MDGs targets shows that the global community had low expectations for progress in developing countries.[731] This is clear from the definition of the international poverty line set by the World Bank, which only

[729] Ibid.
[730] This is mainly from the definition of sustainable development offered by the Bruntland Commission. For a detailed discussion, see section 3.5 above.
[731] For example, the achievement of some MDG targets in Malawi hardly put a dent in the country's poverty situation, even by the modest threshold of halving the proportion of people living on one dollar per day: Government of Malawi, *Malawi Millennium Development Goals Endline Report*, Lilongwe, Ministry of Finance, Economic Planning and Development, 2015, at p. 6.

applies to developing countries.[732] Commentators have observed that the international poverty line does not reflect the cost of actual human needs, as it is so low that it cannot even explain why over 3.5 billion people who live on more than $1.90 are still trapped in poverty. In addition, apart from the fact that the sum cannot even provide decent nutrition, the poverty line is curiously based not on what the sum can purchase in a poor developing country, rather what it can buy in the US where the poverty line is at least $15[733]. But, as arbitrary as the poverty line is, the definition is used to formulate and set targets for addressing global poverty, such as the MDGs and the SDGs.[734] Despite these low standards, however, Malawi still failed to achieve the modest targets set by the MDGs such that of the eight goals, the country only met four and missed one of the most important goals, namely, to eradicate extreme poverty and hunger.[735] This is a goal that sought to achieve income and food security issues and their effects on child development and women's health; hence the finding that both inequality and food insecurity worsened in some respects[736] is a major concern.

Secondly, while the reduction of the poverty rate from 52% in 2005 to 50.7% in 2012, during the MDGs implementation, demonstrates how deep poverty levels are in the Malawi's economy, the deepening inequality is a more worrying statistic. Recent figures show that the poorest 20% control only 5.5% of national consumption; the number of poor people in rural areas is significantly higher than in urban areas; and poverty is increasing in rural areas while that in urban areas remains static.[737] Considering that over 80% of the population live in rural areas and are dependent on environmental resources[738], these figures are a major concern for ecological sustainability.

Thirdly, although the MDGs goal of ensuring environmental sustainability was recorded as achieved,[739] the continued loss of forest cover from 41.4% in 1990 to 36.2% in

[732] See op cit, note 32 for the definition of the international poverty line.
[733] See Jason Hickel, The racist double standards of International Development, 13 July 2020: https://www.aljazeera.com/indepth/opinion/racist-double-standards-international-development-200707082924882.html.
[734] See World Bank, https://www.worldbank.org/en/topic/poverty/overview. The problems of defining poverty confirm the observation that poverty is a creation of civilisation. It has nothing to with a certain amount of money or goods anyone possesses: see Marshal Sahlins, op cit note 76.
[735] According to Malawi Government, op cit note 731, Malawi managed to achieve a reduction of mortality, HIV/ Aids, malaria and other diseases; ensuring environmental sustainability; and achieving the global partnership for development. On the other hand, reducing extreme poverty and hunger, achieving universal primary education, promoting gender equality and empowerment of women; and improving maternal health were not met.
[736] See Malawi Government, op cit note 731.
[737] Government of Malawi, op cit note 731, pp. 7-8.
[738] See World Bank, op cit note 35.
[739] The highlights being increased access to improved water sources from 47% in 1990 to 86.2% in 2014; while access to basic sanitation increased from 72% in 2012 to 95.1% in 2014.

2012 due mainly to increase in fuel wood demand by rural households[740] and a further evidence of erosion of the asset base on which a majority of the poor depend, casts doubt on the sustainability of the achievements. The overall assessment of the MDGs achievement shows that, despite impressive economic growth during the MDGs implementation, inequality has increased, as is the case with poverty, making it impossible for the country to achieve the target set by the MDGs to increase the share of the poorest in national consumption to 20%.[741]

The Malawi Government attributed its dismal performance to the country having started from a much lower base compared to other countries.[742] The question obviously is how Malawi identified her needs in relation to those reached by international consensus. It reflects the tendency by policy makers to uncritically domesticate global standards without reflecting on the national context. In the words of Wolfgang Sachs,[743] the question 'what' and 'whose' needs are embedded in the definition of SD and remains to be answered.

The SDGs signed in September 2015 provide an opportunity to revisit some of the approaches to development that have entrenched inequity and environmental degradation. Unlike the MDGs that applied only to developing countries, the SDGs are expressly designed to achieve 'geographically fair and balanced commitments[744] and in that regard, *inter alia*, call for reduction of inequality within and between countries,[745] promote environmental sustainability,[746] ensure sustainable production and consumption patterns[747] and promote gender equality and empowerment of women and girls.[748] In addition to focusing on the need to eradicate hunger and poverty, improve food and nutrition security,[749] the SDGs specifically 'promote sustained, inclusive and sustainable economic growth…'[750] It is however the means of implementing these lofty goals that have not changed. The SDGs only call for strengthening the means of implementation that have appeared across MEAs including revitalising the Global Partnership for Sustainable Development.[751] The call for financing, technology transfer, capacity building, or favourable trade terms from developed countries have

[740] Government of Malawi, Op cit note 731, at p. 1.
[741] Ibid, at p. 9.
[742] Ibid, at p. 1.
[743] Wolfgang Sachs, op cit note 1, at p. 27.
[744] See United Nations, The Future We Want, resolution 66/288, 27 July 2012. Unlike the MDGs, the SDGs commitments apply to both developing and developed countries.
[745] Goal Number 10.
[746] Goal Number 14 as read with 2, 6, 7, 11 and 13.
[747] Goals Number 12.
[748] Goal Number 5.
[749] Goal Number 1 and 2.
[750] Goal Number 8.
[751] Goal Number 17.

all been articulated in existing MEAs and related IEL but have not been delivered, mostly because they are voluntary on the part of developed nations. However, the absence of concrete actions to reduce inequality between nations, achieve sustainable consumption, or establishment of a mechanism for transfer of resources from developed to developing countries, suggest that the targets set in the SDGs will have the same fate as those of the MDGs. In the absence of these concrete actions, the targets for environmental sustainability may not achieve ecological sustainability, social justice or equity.[752] It will continue to be environmental sustainability for continued economic growth as observed under section 3.8. As Wolfgang Sachs points out, this approach ignores the fact that economic growth cannot go *ad infinitum*; it is subject to space and time as well as biophysical limits of growth, even for developed economies.[753] The climate change phenomenon has exposed and highlighted the biophysical limitations of the economic growth model and its impact in addressing inequity and injustice. In Malawi in particular, the vulnerability of the country to climate change risks together with deepening poverty levels require a policy response that is sensitive to geographical and historical sources of inequality.

6.4.2 Malawi's Climate Change Risk and Vulnerability

In addition to the governance and development weaknesses discussed in sections 6.3 and 6.4.1, Malawi is generally considered as particularly vulnerable to impacts of climate change, mainly due to its location in the African Great Rift Valley, rapid population growth, unsustainable urbanisation and environmental degradation. The country's dependence on agriculture makes it particularly susceptible to cyclical floods and droughts associated with climate change. This is because the predicted temperature rises will reach heat thresholds of some crops thereby threatening food security. On the other hand, changing precipitation patterns will result in erratic rainfall causing floods or droughts, to the detriment of food security and overall development outcomes. These have already manifested in the floods and droughts the country has encountered over the last five decades that have wrecked serious havoc to socio-economic development of the country.[754]

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[752] Sam Adelman, 'Sustainable Development Goals, Anthropocentrism and Neoliberalism'. In Duncan French and Louis Kotze' (Eds) (2017) *Global Goals, Law Theory and Neoliberalism*, Cheltenham, Edward & Edgars, pp. 16-19.

[753] Wolfgang Sachs, op cit note 1 at 26.

[754] Malawi has experienced 19 major floods and seven droughts over the past five decades. Over the years, consistent with the climate change phenomena globally, these have increased in intensity and frequency. See Malawi Government, op cit note 3.

In more recent times, the floods of 2015,[755] the droughts of 2016 and 2017, and the floods of 2019 caused by tropical cyclone Idai, have highlighted the debilitating impacts of changing weather patterns associated with climate change.[756] Cyclone Idai exposed the poverty and vulnerability not only of the rural economy but also the peri-urban one. Unplanned, rudimentary mud and grass thatched houses of poor communities were particularly hit hard causing displacement, loss of assets and injury. No less than 975, 600 people were affected, 60 of whom lost their lives while 672 were injured.[757] In total the value of loss was calculated at US$220.2 million, while US$370 million was needed to fund post disaster recovery and resilient needs.[758] But even before the 2019 floods, statistics showed that 60% of the population is chronically food insecure,[759] and that the changing weather patterns are exacerbating the situation.[760] This confirms the observation that poverty both induces and exacerbates vulnerability to climate risks and that vulnerability is a failure of development.[761] It follows that addressing vulnerabilities caused by climate risks not only provides coping mechanisms but also provides a development dividend that can be harnessed to improve responsive regulation.

The 2019 PDNA highlights climate change as an opportunity for new approaches and new ways of doing things to facilitate resilience building and disaster risk reduction in all sectors of the economy. In that regard, the PDNA proposes some measures towards harnessing climate change including diversification of agriculture so as to increase incomes for poor households most affected by climate shocks.[762] It also highlights the need for a multi-sectoral approach to legal and institutional response to disaster risk management.[763] It is clear however that the policy effort must move beyond the rhetoric of multi-sectoral approaches and improving the capacities of the poor and marginalised by addressing structural inequalities associated with the dominant development paradigms.

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[755] See section 1.2.1 above.
[756] See Malawi Government, op cit note 3, at pp. 3-4.
[757] Ibid, at p. xiii.
[758] Ibid, at p. xiv.
[759] National Statistical Office, Fourth Integrated Household Survey 2016/2017, (2018) Zomba, National Statistical Office.
[760] See Malawi Government, op cit note 731, at p. xiii.
[761] DFID, 'Disaster Risk reduction: A Development Concern', (2005) www.dfid.gov.uk, London: DFID.
[762] See Malawi Government, op cit note 3, at p. xix.
[763] Disaster risk management is regulated by the National Disaster Risk Management Policy 2015 and the Disaster Preparedness and Relief Act 1991. The latter Act is undergoing revision mainly to reflect current disaster risk management principles focusing on risk management, instead of relief as does the 1991 Act. The Disaster Risk Management Bill 2019 has been finalized and will be presented in the National Assembly in the near future. These instruments are based on the *Sendai Framework for Disaster Risk Management* agreed at international level.

6.5 Climate Change Regulation and Equity in Malawi

Malawi's climate change problem is highlighted in the country's medium-term development policy framework, which lists agriculture, water development and climate change management as one of the five key priority areas.[764] In particular, the MGDS III states that investment in climate change has the 'largest multiplier effect on poverty alleviation, education, health, agriculture and water development, economic growth, urbanisation and governance'.[765] Climate change has the single largest impact on survival, livelihoods and wellbeing across the various sectors of the economy. The MGDS therefore identifies adaptation and mitigation to climate change impacts as the tools to address the climate change problem.[766] According to the MGDS, adaptation and mitigation measures not only enhance preparedness for and negate the impacts of climate change, they also facilitate ecosystem resilience building, which positively impacts environment, forestry, water resources, parks and wild life, women and youth productivity, child development, health, education, energy, industrial production and transportation.[767] Many of these sectors are critical for addressing vulnerabilities and marginalisation associated with inequitable development and adverse impacts of climate change.

Adaptation has generally been the main focus of developing countries such as Malawi because of their negligible contribution to GHG emissions.[768] Nevertheless, the MGDS III highlights that implementing some mitigation measures can have economic, environmental and health benefits. For example, enforcement of vehicle emission standards can improve both energy efficiency and therefore reduce costs as well as reduce pollution levels thereby improving health.[769] In addition, climate change mitigation has the potential to facilitate the 'development' of sectors that vulnerable groups rely on for their livelihoods. The use of clean energy such as solar has potential to benefit off-grid communities with power that can improve food security through irrigation, apart from reducing emissions associated with other forms of energy. Climate change can galvanise development of policy responses that reduce reliance on large scale and capital-intensive production methods with high GHG

[764] The Malawi Growth and Development Strategy (2017-2022) (MGDS III) has five Key Priority Areas, namely: Agriculture, Water Development and Climate Change Management; Education and Skills Development; Energy Industry and Tourism Development; Transport and ICT Infrastructure; and Health and Population.
[765] MGDS III, at page xviii and section 6.2.
[766] Adaptation seeks to protect vulnerable communities and ecosystems against the impacts of climate change, while mitigation seeks to avoid the further accumulation of GHG emissions that exacerbate the climate problem: MGDS III, Ibid.
[767] Section 6.2 of the MGDS III.
[768] See, op cit note 704.
[769] See MGDS III, at p. 53.

emissions, which often marginalises vulnerable groups. The MGDS calls for a strengthened policy environment for climate change through harmonisation with other sectoral policies and development of a regulatory framework for climate change management.[770] The MGDS however does not go further to elaborate the manner in which the policy and legal framework should be developed and harmonised to better utilise the policy space provided by the climate change problem.

The National Adaptation Plan of Action 2006 (NAPA), adopted in accordance with the UNFCCC, outlines measures for adaptation actions to cope with climate change impacts. The NAPA evaluated the impacts of climate change on eight important sectors of economic growth, namely agriculture, water, human health, fisheries, forestry, energy, wildlife and gender. The NAPA then outlined 15 specific urgent and priority interventions for adaptation.[771] Although the priority adaptation needs are many, the overall framework focuses on rural vulnerable and marginalised communities especially women, children, child- headed households and the elderly. The interventions address the need to improve agriculture productivity, disease prevention, diversify energy sources to reduce deforestation and increasing capacity, improving access to water and safeguard fisheries and animal populations for food security, nutrition and boosting tourism. The adaptation measures are entirely designed as project or programmatic interventions dependent on state action, with no concrete actions for beneficiaries affected by climate change.

The NAPA is currently being reviewed and a road map for the National Adaptation Plan (NAP 2019)[772] to replace the NAPA has been produced. The difference lies primarily in the framework, in that while the NAPA focuses on evaluation of climate change impacts on sectors of economic growth and prescribing adaptation interventions, the NAP 2019 focuses on integrating climate change into the development framework. The NAP 2019 highlights the application of specific principles that are intended to address the challenges of cross-sector coordination in climate change response. In this regard, the objectives of the NAP are to 'reduce vulnerability to the impacts of climate change by building adaptive capacity and resilience; and facilitate the integration of climate change adaptation in a coherent

[770] See Table 3 in the MGDS III, at page 43.
[771] NAPA, 2006, at page ix.
[772] Environmental Affairs Department, *Malawi National Adaptation Plan Framework*, (2020), Lilongwe: EAD.

manner into relevant new and existing policies, programmes and activities of national development'[773]. This is underpinned by the three key principles, namely, sustainable development, uplifting the poor and the vulnerable, and incorporating traditional and indigenous knowledge. Again, like in the case of the NAPA 2006, the NAP 2019 glosses over the mechanisms for reducing vulnerability and building resilience or integrating climate change adaptation beyond project or programmatic interventions and provide capacity to cope while enhancing human wellbeing. It is therefore important for these adaptation interventions to find expression in national instruments that can be used by vulnerable and marginalised communities

6.5.1 Towards Equity in the Normative Climate Change Regulation

The Constitution has provided some direction along which a responsive regulatory framework for adaptation and mitigation to climate change can be developed. Although neither the principles of national policy nor the Bill of Rights directly addresses climate change, the environmental and development rights framework in the Constitution provide space for regulating the threats posed by climate change.[774] In addition, the fundamental principles of the Constitution provide a framework of what should be prioritised in the rights and equity framework. This thesis therefore argues that, because climate change threatens livelihoods, sustainable development as well as the intergenerational and intragenerational equity outlined in the principles of national policy,[775] it also threatens the right to life, the right to equality, the right to property and gender equity in the Bill of Rights. It is consequently a paramount constitutional duty of Government to take action in the interest of the people of Malawi as required by the Constitution[776].

This thesis has also argued that climate risks have been exacerbated by existing development failures. Consequently, the policy response to climate change must confront the discourse of development and environmental regulation and the epistemic injustices arising from received knowledge that has determined the policy response to local risks and harms. This requires the mobilisation of a plurality of actors, interests and influences, beyond the received knowledge and power relations bestowed by colonial policy and international development frameworks. The inclusive approach to climate change response recognises the complexity of the climate problem. It has been rightly pointed out that:

[773] NAP, p. iv.
[774] See section 4.5.2 above.
[775] Ibid.
[776] Section 12 (1) of the Constitution. See also section 4.5 of this thesis.

> (M)odern society is too pluralistic to tolerate imposed and artificial solutions. Social groups have important differences in attitudes and values that undermine the possibility of clear and agreed solutions…modern social problems are 'ill-defined', interlinked and relying on political judgments rather than scientific certitudes. [777]

The human rights approach with its anthropocentric approach has been hailed as a viable solution to regulate climate risks and harms and losses associated with it. This is particularly because impacts of climate change cause harm to persons, property and livelihoods which are areas in which human rights debates have focused for some time.[778] The promise of environmental human rights is much more poignant for developing countries whose livelihoods are directly and entirely dependent on environmental resources such as agriculture, fisheries, health, water and related infrastructure as highlighted in the NAPA. Consequently, because climate change impacts exacerbate threats to environmental resources, these threats are also environmental human rights concerns.[779] The human rights approach offers the opportunity to address the structural inequalities brought by these development paradigms.

However environmental human rights have limits that may not serve climate change claims well. Firstly, they are primarily related to ESCR discussed earlier, hence the challenges to their implementation remain when addressing climate change risks. The rights that environmental degradation and climate change violate, such as the right to subsistence, access to resources, right to development, right to food, have consequently received less enthusiastic enforcement by the courts on the basis of justiciability or competence of the courts to design and allocate resources.[780] Secondly, there is a jurisprudential dissonance between environmental human rights and climate change induced human rights claims, primarily because the former addresses threats generated from a domestic context while the latter involve transboundary claims. Consequently, it is conceptually difficult to use environmental law to regulate roughly over 200 sovereign states emitting considerably differing amounts of GHG whose impacts are markedly different.[781] The polluter pays principle, the participation principle, or the precautionary principles, as stipulated under the Rio Declaration[782] cannot apply with equal force or ease to violations by and between entities in different states. This *lacuna* exposes human development and wellbeing to the deleterious effects of climate change with

[777] Brian Head, 'Wicked Problems in Public Policy' (2008) *Public Policy*, 3 (2), at p. 102.
[778] For an early comprehensive discussion, see ICHRP, *Climate Change and Human Rights: A Rough Guide* (2008) International Council for Human Rights Policy, Versoix, Switzerland.
[779] Wolfgang Sachs, 'Climate Change and Human Rights', *Development*, 2008: 51, 332-337.
[780] For a discussion on the development promise of socio-economic rights, see sections 3.4.2 and 4.5.4 above.
[781] John Knox, 'Climate Change and Human Rights Law' (2010) *Virginia Journal of International Law*, 50:37.
[782] See section 4.3.

no prospect of a remedy. Thirdly, the human rights approach has faced serious hurdles when confronting neo-colonial and international development paradigms, which have influenced underdevelopment across the developing world, as the opposition to the RTD has demonstrated.[783] Fourthly, as a result of the dominance of the economic growth development paradigm, environmental law faces the challenge of conflicting imperatives of conservation and commodification of nature, which it has to balance and in which the market reigns supreme. In particular, the market-driven response to environment and climate change management such as 'financialisaton, technification and managerialism' , which fuelled policy responses such as the clean development mechanism or the Reduced Emissions from Deforestation and Forest Degradation (REDD +) programmes, do no render themselves to justice-based systems of governance.[784]

However, if human rights are considered as primarily ethical demands and not 'confined to the juridical model' in which they are 'often incarcerated'[785], as Amartya Sen has argued, there are opportunities to use human freedoms as tools for building resilience to climate risks. This formulation can be supported by the principles of constitutional interpretation, which requires broad, purposeful and holistic reading of constitutional texts. In the case of Malawi, the overriding fundamental principle of promoting and protecting the interest of the people of Malawi can be utilised to evaluate every policy, programme, plan or legislation of Government as valid only if it meets this overriding interest. The same approach must be employed in evaluating customary law or living customary law. The requirement for a nuanced analysis of customary norms as outlined in *Shilubana v. Namitwa*,[786] have similar objectives. The aim should be to consider individual, community and national interest and weigh which one best protects the interest of the people of Malawi in a given policy, plan, programme or legislation. It follows therefore that in determining the validity or utility of customary norms as outlined in section 4.6.3, the focus must be what best protects the interest of the community in general and in meeting the sustainable development objectives in particular. In particular, the implementation of the communitarian property

[783] The use of the HDR promoted by the UNDP and the capability approach espoused by Amartya Sen, see section 3.4 above, provide space for advancing equity. However, these formulations have not addressed structural inequality within and between states as the cause of the development and climate crisis.
[784] Anna Grear, 'Crisis, Injustice and Response', (2017) *Journal of Human Rights and the Environment*, 8(2):177-180, at p. 178.
[785] Amartya Sen, 'Elements of a Theory of Human Rights', (2004) *Philosophy and Public Affairs*, 32(4): 315-356, at 319.
[786] See op cit note 465.

rights in customary law has the potential to support more vulnerable groups than individualistic entitlements which focusses on individual achievements.

Further, as argued by Amartya Sen, the incorporation of human rights in legislation should not be considered as constitutive of human rights; it is merely one of recognition and one of the means of implementation. There are other ways of effectuating human rights such as through advocacy and lobbying to remove barriers to opportunities and responsive regulation.[787] In that regard, the human rights approach can utilise the equity provisions under the UNFCCC, the Rio Declaration and so-called non-justiciable constitutional principles of national policy as moral and ethical imperatives to achieve climate justice. It is also worth highlighting that living customary law has the potential to situate human rights content as well as procedures within lived experiences of local communities. Legislation therefore needs to provide space for customary norms to recognise, to evolve and to serve as the basis for decision making at local level. In the case of Malawi, it is important to go beyond the constitutional recognition of customary law as a source of law to entrench the equal status of customary law to the common law in the Courts Act 1958.

It is also worth emphasising that 'climate change represents a crisis of human hierarchies, fraught with uneven distribution of vulnerabilities.'[788] To address these vulnerabilities and marginalisation requires non-western ways of seeing the world, in which humans and multiple living beings are 'co-situated in the dilemmas of injustice'.[789] The dominant environmental human rights approaches are largely framed in the anthropocentric understanding of nature as a commodity. This elevates human value in the problematisation of climate change, development and environmental regulation.[790] These approaches do not highlight existing inequities that serve certain interests at the expense of alternative formulations and fail to place human rights in the political realm where policy is contested, rather than instrumental. In particular, the solutions provided by the dominant human rights approaches are not sensitive to the geography and history of the communities or their lived experience. Consequently, many of the rights are limited to serving urban and elite communities who have the means to advocate and enforce them. This excludes and marginalises

[787] Amartya Sen, op cit note 785.
[788] Kristen Davis, et al, op cit note 226, at p. 248.
[789] Anna Grear, op cit note 784.
[790] For a thorough review of the arguments on the merits and limitations of the dominant anthropocentric paradigm of regulation see Helen Kopnina, Haydn Washington, Brown Taylor and John Piccolo 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) *Journal of Agriculture Environmental Ethics* 31(1).

communities on the fringe of society and a majority in rural areas, who survive by informal regulation.

As argued in section 4.6, living customary law, which is born out of lived experiences, has the potential for evolving African jurisprudence that can address the epistemic and ontological injustices associated with western jurisprudence. In particular, promoting human solidarity and dignity through communitarian values has the potential to infuse ethical principles in legislation and official decision making.[791] This approach acknowledges local geographies, histories and vulnerabilities to facilitate equitable development, and a responsive environment and climate change regulation in the Malawian context. There must be a deliberate attempt to situate decision making at the location of harm and loss. This means both the law and institutions must bear resemblance to the lived experiences of those affected by climate change. The dominance of the common law and statutory regulation must be addressed by encouraging evolution of norms arising from practices, experiences and community interests in the context of the Constitution. The use of local by-laws and customary law should be encouraged and facilitated in accordance with the Constitution. As pointed out earlier, the power to make legislation is given to Parliament which is required to represent constituency interests and ultimately the interests of all the people of the people of Malawi[792]. This framework however may not provide adequate representation of marginalised and vulnerable interest groups, especially if the aim is to situate policy solutions at the location of risk. In this regard, national legislation can provide for broad principles and guidelines, leaving details to local by-laws under the Local Government Act 1998 or sector legislation such as forestry, fisheries, water, and wildlife[793].

Finally, the various adaptation and mitigation measures stipulated in the NAPA, the NAP or the Mitigation Actions adopted by Government provide important response or policy measures that can enhance preparedness as well as build resilience in different sectors against the vagaries of climate change. The expression of these measures however has mainly been incorporated in policy instruments and rarely in legislation. For example, the EMA 2017 only provides generic powers to the MEPA to identify activities, practices or substances that cause climate change and prescribe measures to reduce or eliminate climate

[791] See section 2.5.2 above.
[792] See section 4.5, note 370.
[793] See sections 5.4 and 5.8.2 above.

changing activities or substances.[794] In addition, the Act provides for promotion of renewable energy as well as energy conservation measures;[795] and fiscal incentives for protection and management of the environment.[796] These measures and incentives can be used to encourage the development of technologies, practices that can support both mitigation and adaptation measures. The incentives may be in the form of tax waivers, while higher taxes can be imposed for failure to comply.

The adaptation and mitigation measures in the policy instruments or the EMA 2017 invariably require state action to develop projects, programmes or plans. The form the measures take and the language used have a bearing on how effective these measures will be. Where the state fails to take the measures, the policy measures may not mean much since policy is not generally binding. In either case, however, the development of norms and entitlements can be facilitated through the principles of equity in the Constitution discussed in section 4.5 above and, where appropriate, public interest litigation can be considered. In addition, the development projects and programmes through policy instruments as is the case with FISP or the CBLDP discussed earlier cannot provide a sustainable model for uplifting the needs of vulnerable or marginalised communities as it is subject to the whims of politics. It is important that these be anchored in a legislative framework, both at national and local context. This approach can enhance the capability enhancing functions of policy instruments by ensuring the sustainability of interventions especially where these support vulnerable groups.

6.5.2 Towards Equity in the Institutional Regulation

There are a number of conflicts and policy uncertainties arising from the interface of environment and development institutions that affect equity diffusion in environment and climate change regulation. As competition for and conflict over environmental resources increases, the pressure on the regulatory institutions has also increased. The dominance of the economic growth paradigm and the neoliberal theory of environmental governance have weakened the capacity of environmental institutions to be responsive in regulation. The impact of institutional failure is born by the vulnerable and marginalised sections of the community who are unable to cope with the unintended consequences mainly because of lack of resources, poor institutions and inadequate infrastructure, amongst other factors. This makes it difficult to

[794] Section 54 of the EMA 2017
[795] Section 52 of the EMA 2017.
[796] Section 65 of the EMA 2017.

harness opportunities brought about by the climate change problem to facilitate regulatory capacity building.

The mitigation and adaptation measures for climate change have significant equity implications that can enhance institutional capacity and facilitate equitable development and environmental regulation. It has been argued, for example, that the policy response to adaptation to climate change should not be limited to addressing vulnerability in times of extreme weather conditions, instead it should address core development concerns associated with vulnerability.[797] This is because institutional arrangements can structure risks and sensitivity to climate hazards, facilitate or impede individual and collective responses, and shape the outcomes of such responses.[798] It follows that the manner in which institutions respond or are able to respond to threats of climate change may in itself determine whether climate risks can be addressed or even made worse. In addition, the jurisdiction conflicts arising from fragmented mandates may impede or delay response actions, thereby exacerbating the impact of climate risks. For example, in Malawi the separation of mandates between the environmental affairs institution, which is responsible for climate change policy in general and the NAPA in particular, and the institutions responsible for development planning, finance and infrastructure may make it difficult to implement adaptation measures that require construction to meet the impacts of climate change. The fact that the departments responsible for environment, climate change or disaster preparedness have no policy influence over institutions responsible for finance, development or infrastructure poses a challenge to adaptation and resilience building.[799] This calls for collaboration between these institutions through memorandum of understanding or agreements to implement specific programmes as coping measures for climate risks but which also meet core development mandates. Such collaboration can transform what are essentially relief functions performed by disaster risk management institutions into core development gains as well as tools to empower affected communities, especially if the mechanisms are anchored in legislative framework, rather than purely policy statements.

In addition, because adaptation is intended to enhance coping and resilient building mechanisms, it must provide communities with the means to be and do what they aspire to

[797] Terry Cannon, 'Vulnerability, Resilience and Development Discourses in the Context of Climate Change', (2010) *Natural Hazards*.
[798] Agrawal, S. and M. van Aalst 'Bridging the gap between climate change and development' in *Bridge over Troubled Waters—Linking Climate Change and Development,* S. Agrawal (Ed.). (2005) Paris, Organization for Economic Cooperation and Development, pp. 133–146.
[799] See section 5.9.1.

achieve, as in Amartya Sen's capability approach to development.[800] A capability enhancing institutional framework is more likely to reduce risks and hazards suffered by poor and vulnerable members of the community, while weak institutions are more likely to increase the risks and inequality of the vulnerable groups. Since adaptation is essentially a local intervention, its effectiveness depends on local institutions through which incentives for individual and collective action are structured. [801] In this regard, local government legislation needs to move towards more inclusive regulation to target and involve vulnerable populations in developing land use, sanitation and waste management legislation. Although the Local Government Act 1998 provides for powers of councils to make policy[802], there is no express climate change mandate. This can be addressed by amendment to the Act. However, because of the localised nature of climate risks, it is important for the Act to be generic and should leave details to local by-laws or regulations that can reflect local knowledge and experiences.

In Malawi adaptation measures often focus on agricultural-related measures because of the dominance of agriculture as a source of livelihoods and do not highlight vulnerabilities from urban poverty.[803] However, the country's recent experience, including the impacts of cyclone Idai,[804] suggests that urban authorities should pay specific attention to climate risks, especially in informal settlements. In this regard, as part of land reform,[805] Malawi has revised legislation dealing with land-use planning with the major change being that, unlike under the repealed Town and Country Planning Act 1988 where rural development control had to be specified by declaration of the responsible minister, the Physical Planning Act

[800] See section 3.5.2 above.
[801] Agrawal et al, op cit note 798.
[802] Section 6 of the Local Government Act 1998.
[803] Malawi's National Adaptation Plan of Action is heavily tilted towards agricultural-related coping mechanisms: for a thorough review, see section 6.5.1 above.
[804] See section 6.3.2 above.
[805] Malawi has carried out land reform in the past starting with a number of legislative changes effected in 1967, the major focus of which was conversion of customary land to leasehold land to facilitate agriculture commercialization. For a thorough review see Clement Ng'ong'ola,, op cit note 512. The country embarked on another major land reform with the establishment of a Presidential Commission of Inquiry on Land Policy Reform whose report was published in 199, followed by the adoption of the National Land Policy in 2002 on the basis of which a raft of legislation were passed in 2015 and 2016 including the Land Act 2015, Customary Land Act 2016, the Physical Planning Act 2016, Land Survey Act 2016, Land Acquisition Act 2016 and amendment to the Registered Land Act 1967, Forestry Act 1997 and the Public Roads Act 1962. For a thorough discussion see Malawi Law Commission, *Report of the Law Commission on the Review of the Land-Related Laws*, Law Commission Report Number 15, Malawi Gazette Supplement dated 9th April, 2010: https://www.lawcom.gov.mw/sites/default/files/Law%20Commission%20Report%20on%20the%20Review%20of%20the%20Land%20Related%20Laws.pdf.

2016 now requires planning for the whole country.[806] There are exceptions, where the development is of a traditional nature or that which requires a simple layout plan.[807] Although these exceptions can ensure that poor rural communities are not burdened with planning permission logistics, the Act fails to specify standards that can be used at local level to ensure rural housing infrastructure can address climate risks.

In addition, urban authorities need to ensure that the urban poor, who are often excluded, effectively participate in decision-making processes thereby enhance their adaptive capacity.[808] Informal settlements operate outside planning legislation and are particularly vulnerable because of the congestion and lack of sanitation. These are also areas of rampant poverty and marginalisation that structure risks and vulnerability to climate change.[809] Consequently, urban policies and legislation addressing land use, sanitation, public health or housing need to put in place measures to address inequity, empower the marginalised and vulnerable and equip institutions to target these various population segments. The power to make by-laws under local government legislation provides opportunity to structure locally relevant and responsive regulation to address environment and climate risks.[810] However this requires a more inclusive process in which the informal settlement dwellers are considered critical to urban resilience rather than the cause of risk[811] and are therefore included in the making of the by-laws based on their experiences. The by-laws themselves need to be sensitive to the

[806] This is the recommendation of the National Land Policy 2002, at page 9. The Policy requires that 'Land use planning will be extended to all rural and urban land, including freehold, leasehold and customary estates. However, the declaration of a planning area will not automatically require the conversion of all customary land to public land, as has been the practice prior to this Land Policy. Instead, all landowners in such planning areas will be required to comply with approved planning and development regulations.'

[807] Section 43 of the Physical Planning Act 2016 provides for exemptions from development control for:
the erection of a building of a traditional nature within the recognized boundaries of a village; the erection of a traditional house outside the generally recognized boundaries of a village, however, this shall not authorize or render the lawful erection of such a house within a road reservation or on land where all development is prohibited; the erection of a house made with non-permanent materials but in such case the provisions of the Public Health (Minimum Building Standards for Traditional Housing Areas) Rules or any rules replacing those rules shall apply to such a house; the erection of houses and other buildings in accordance with a simple layout plan prepared by or approved by the Planning Committee for use by a Traditional Authority and land committees in the authorization of the use and occupation of customary land in a Traditional Land Management Area; the use of customary land in accordance with a layout plan approved by the Planning Committee for use by a Traditional Authority and land committees in the authorization for small-scale commercial and manufacturing purposes in buildings made with non-permanent materials.

[808] See David Satterthwaite, Patricia Linkao et. Al, *Adapting to Climate Change in Urban Areas: The Possibilities and Constraints in Low- and Middle-Income Nations*. (2007) London, International Institute for Environment and Development.

[809] See Diana Mitlin, 'Reshaping Local Democracy' (2004) *Sage Journals*.

[810] See Second Schedule to the Local Government Act 1998 which provides a comprehensive list of development and environment mandates for local authorities which can be infused with equity considerations. See note 668 above.

[811] David Satterthwaite et al, op cit note 808; and Dianna Mitlin, op cit note 809.

people and their ecosystem. The outcome of these proposals are dependent on a decentralisation of mandates from the central bureaucracy to local entities.

The process of decentralisation is intended to transfer governance responsibility to local authorities, however in practice the resources and capacities to fulfil these functions continue to be controlled from the centre and agreed transfers are often not met.[812] In addition, in a number of countries including Malawi following SAPs, the provision of transport, health, education, water and sanitation or extension services have been 'decentralised' to the private sector, civil society, or to local authorities in the name of enhancing efficiency or cost cutting measures.[813] The retreat of the state has contributed to increase in poverty, inequality and vulnerability resulting in the weakening of mechanisms for the redirection of income and the social integration of poor sectors. These mechanisms are key in enhancing poor sectors' adaptive capacity and resilience to climate-related and other stresses. The decentralisation of what has been 'privatised' into development planning requires better policy mobilisation for which governments in developing countries are not as well equipped to handle.[814]

The foregoing observations demonstrate that infusing equity into development and environmental regulation is a highly political process, especially because of the diverse institutional interests and constraints that need to be negotiated. While climate change can provide the opportunity to galvanise stakeholders support and raise the platform for environment to increase policy influence in the development sector, the process is fraught with numerous hurdles and requires further research on how to engage the vested institutional interests that often structure climate risks, how to enhance capabilities of the marginalised in the policy space in directing development resources and how to balance the reach and limits of the state in a process that has been dictated from elsewhere.

6.6 Conclusions

Climate change presents a number of challenges that affect development interventions and outcomes. It also adversely affects environmental resources on which a majority of the population directly depend through agriculture, energy, food security, housing, water and other livelihoods. Climate change has therefore been described both as an environment and development problem. Because of the many sectors and stakeholders that it affects, climate change

[812] See Nelson Jagero, Hardson Kwandayi & Annie Longwe, 'The Challenges of Decentralization in Malawi', (2014) International Journal of Human Sciences, 2(7): 315-322, at p. 320.
[813] See Patricia Romero Linkao, 'Paradoxes of Decentralization: Water reform and Social Implications in Mexico', (2004) *World Development*, 34 (11):1977-1995.
[814] Ibid

has been described as a 'wicked problem'[815]. As such it requires new ways of addressing its impacts which can add significant benefit to equitable development and environment regulation by mobilising various interests in response measures that can make development policy and environmental governance inclusive and equitable.

Malawi's policy instruments have recognised this observation. The task at hand remains how this new thinking and new ways of doing things can be brought to bear in the context of a development paradigm that increases climate risks for a majority of the population and makes it difficult to enhance capabilities of marginalised and vulnerable groups. This chapter has argued that a major consideration in structuring a responsive regulatory framework to the many challenges and opportunities associated with climate change is to highlight the epistemic and ontological foundations of development, environment and climate change and the injustices embedded in these concepts. In particular, it has been observed that the dominant human rights jurisprudence in various constitutional and international instruments that regulate climate change and the environment are framed to serve the dominant development paradigm which is the source of marginalisation and vulnerabilities. The focus should be on a human rights jurisprudence that addresses the epistemic injustices of marginalisation that structure and increase climate risks. The legal response to this marginalisation should be a framework that recognises the differences in opportunities and access to resources based on history and geography of the affected communities. It must address the existing institutional frameworks that have structured climate risks and fostered marginalisation and vulnerabilities and made adaptation to climate risks difficult.

The chapter has recommended the need to situate policy response at the location of risk and harm to take advantage of local knowledge and governance systems relating to climate change and environmental regulation. It has been recommended that legislation should be designed so as to be informed by broad national principles, leaving details to by-laws and regulations at local government authority level or based on a specific resource.

[815] Brian Head, op cit, note 777. See also John Fitzgibbon, & Kenneth Mensah, 'Climate Change as a wicked problem: An evaluation of the institutional context for rural water management in Ghana', (2012) SAGE Open 2. Accessed at https://journals.sagepub.com/doi/pdf/10.1177/2158244012448487.

CHAPTER 7
CONCLUSIONS AND PROPOSALS FOR REFORM

7.1 Summary of research findings

This thesis set out to investigate and examine the role and potential of equity in enhancing responsiveness of environment and climate change regulation in developing countries with a focus on Malawi. In answering the research question outlined under section 1.5, the thesis has examined the development paradigm in which the regulation of the environment and climate change has evolved. The research has analysed the evolution of the dominant development discourse which determined and set the boundaries of what can be perceived as progress and therefore development, to the exclusion of all other experiences or narratives elsewhere. The aim of the research, as Amartya Sen has urged[816], is to contribute to an agenda for policy and legislation development in a certain direction of legal theory. In the case of Malawi, this thesis argues that the constitutional imperative to promote the interests of the people of Malawi, which is the basis for the exercise of state power, requires equity considerations as the primary consideration for policy and law making in environment and climate change regulation.

The thesis has observed that the post-war Truman declaration of international development set the tone for the West to intervene and enforce the development mission across the globe based on the supremacy of western knowledge and the concern that underdevelopment elsewhere threatens progress in the western world. This doctrine ushered international development which has been championed by developed countries, the UN and the Bretton Woods institutions with considerable influence on the legal systems of developing countries. In essence, both the colonial and international development interventions provided the platform for integration of developing nations into the global economy.[817] This included imposition of knowledge and power relations that have informed the structure and content of development policy and legal systems including environment and climate change regulation.

The dominant development paradigm is essentially premised on infinite economic growth using finite environmental resources and, as pointed out by Wolfgang Sachs, this has created a crisis of development, nature and justice.[818] The principle of SD intended to balance economic growth to avert the crisis of nature ran into conceptual difficulty precisely

[816] Amartya Sen, op cit note 98.
[817] See Chapter 2.
[818] Wolfgang Sachs, op cit note 1.

because it is contradictory to continue unrestrained economic growth while championing the role of finite nature.[819] Balancing the economic, social and environmental pillars of SD requires major compromises in the context of power relations in which economic considerations invariably dominate. Consequently, the regulatory mechanism for maintaining the balance through statute, the RBA to development, empowerment and good governance have not succeeded in averting the crises of nature and justice. The controversies surrounding the implementation and enforcement of ESCR, the role of the RTD in international law and the dominance of economic governance models championed by the Bretton Woods institutions, illustrate the influence of dominant interests in development policy and the implications this has on environment and climate change regulation in developing economies[820].

The dominance of statute, especially in environment and climate change regulation, mirror the structure and content of IEL in general and MEAs in particular which, as Louis Kotze et el observe, have been complicit in supporting the structural paradigm that perpetuate the crises of justice and nature.[821] Even the dominant human rights jurisprudence elevates individual entitlements from the benefits of nature and pays limited attention to the struggles marginalised and vulnerable communities face to meet their development interests. The challenges of enforceability of ESCR or equity principles stipulated in principles of national policy in some constitutions perpetuates the dominance of state interests and those of its allies in international development.

This thesis has argued that the crisis of development policy has been exacerbated by the climate change problem which has highlighted the limits of the economic growth model. The climate crisis has also highlighted the opportunity to use policy response to climate risks and harms that threaten development gains to strengthen environmental regulation. This approach has the potential to attract a lot more stakeholders and interests towards the environment problem. The climate problem has also highlighted the need to locate the centres of policy and action to local levels and to facilitate policy contestation at that level. There is therefore opportunity to redesign policy making to focus on the geographies and histories of vulnerability.[822] This in turn challenges the post-political approach of environment and climate governance with its emphasis on facilitating consensus, even when the stakeholders' interests are starkly different.[823] A more responsive regulatory framework must therefore

[819] See chapter 3.
[820] See chapter 4.
[821] Louis Kotze, et al, op cit note 10.
[822] See chapter 6.
[823] See R Rhodes, op cit note 708.

facilitate contestation of ideas at the location of risk and harm which will provide space to accommodate the differentiated interests in the policy process. This approach can accommodate the development and use of living customary law as a tool for regulating environment and climate change issues at local level.[824] It also requires policy and legislation differentiation and targeting based on the location of risk and harm where rural, urban and gender roles and experiences become important considerations.[825]

In Malawi, the Constitution prioritises the need to promote the interests of the people of Malawi as the basis for policy making. The thesis however argues that, in the context of the dominant development paradigm, the policy and legal space provided by the Constitution requires more than just the instrumentalist response in which human rights are perceived as what the state provides. The thesis has argued that constitutional interpretation requiring a broad, purposeful and holistic reading of the text of the Constitution adopted by the Malawi Supreme Court of Appeal[826] has the potential to amplify the balancing of diverse interests that are embedded in the concepts of development, environment and climate change.

The thesis has consequently argued that whilst an RBA to development and environmental regulation can remedy some of the impacts of inequitable development, the approach has a number of limitations which require equity norms to ameliorate the influence of the common law. Firstly, the RBA relies on the ability of the marginalised and vulnerable populations to claim their entitlements, even when their capacity and circumstances do not allow this. Moreover, the RBA is based on the express entitlements in the Constitution or legislation. Invariably the approach assumes the same institutions that have marginalised and perpetuated vulnerability to serve the interests of such communities.[827] The thesis therefore adopts an understanding of human rights as moral and ethical demands, irrespective of their juridical or legislative presentation.[828] When so defined, human rights have the potential to remedy epistemic and ontological assumptions of the dominant development paradigm that structure injustices and inequities inherent in existing development and environmental regulatory frameworks.

In particular, the thesis observes that Malawi's environmental policy instruments and legislation have grown piecemeal since the colonial encounter and primarily support the

[824] See section 4.6 above.
[825] See section 4.5.2.
[826] *Attorney General v Nseula*, op cit note 473.
[827] Andrew Jordan & Tim O'Riordan, 'Social Institutions and Climate Change: Applying Cultural Theory to Practice' CSERGE Working Paper GEC 97-15, at p. 2.
[828] See section 6.4 above.

economic growth model. Those with the means and capacity to exploit environmental resources have an almost unassailable licence to exploit these resources. Mainly because of the space they occupy in relation to policy makers, those with means can get licences and permits to exploit environmental resources with little or no consideration of the needs of those on the fringes of society. Consequently, environmental regulation has had limited influence in stemming the tide of environmental degradation or shaping development policy. Invariably, the commodification of environmental resources takes precedence over the conservation ethic. The adoption of more modern environmental governance frameworks including the principles established under UNCED processes provided a ray of hope in environmental regulation. In practice, these principles have had limited influence in changing the structure and content of the regulatory framework built around enhancing economic growth. Thus, although equity principles have been incorporated under various development policies such as the MGDS and various environment and natural resources sector policies, implementation has been limited. The marginalisation of those expected to benefit from the policy process is manifested in the absence of procedural and substantive entitlements that reflect the interests and struggles of these communities.

Recent legislation reforms such enactment of the EMA 2017 have introduced normative entitlements and institutional frameworks that have the potential to facilitate responsive environment and climate change regulation. There is a more robust RBA and an enhanced institutional capacity and coordination framework that can utilise the range of stakeholders in responding to environment and climate change issues. The legislation however remains largely technocratic and provides limited opportunity to engage with local communities unless the dominance of received knowledge and power relations are tempered with equity norms to use local knowledge, including living customary norms. As argued below, the glaring omission remains how to challenge or address the impacts of the dominant development paradigm on the basis of which environment regulation is premised. The climate crisis has brought additional pressure on the normative and institutional regulatory frameworks, but it is also important to examine some of the opportunities that the crisis has highlighted and the manner these can be harnessed to improve the responsiveness of environment and development regulation.

7.2 The Challenges and Opportunities of the Climate Change Problem

The cataclysmic and insidious nature of harms and losses associated with impacts of climate change have highlighted new risks and presented new opportunities for a more responsive environment and development regulatory framework. The scale and ferocity of climate harms have the potential to galvanise stakeholders in ways that environmental issues have not been able to. Further, especially in the context of developing countries, the recognition that climate change presents more of a development problem than just an environmental one, offers the opportunity to elicit support from more powerful interests in the development sector and place the environment firmly at development policy table. In particular, because environmental law has long grappled with the need to balance its conservation mission with the commodification of environmental resources and largely compromised the former primarily because more powerful interests opted for the latter, climate change provides a platform to elevate and galvanise environmental consciousness through climate change lens. This can enhance the influence and visibility of public institutions responsible for environmental issues in development policy, thereby positively influence environmental regulation.

In addition, unlike environmental human rights, climate change human rights are transboundary and therefore not constrained by the limitations associated with application of domestic norms at international level. The equity principles such as the common but differentiated responsibilities, the polluter pays, climate justice principle and the right to SD stipulated under the UNFCCC and the Paris Agreement on Climate Change have a better chance to provide relief from global polluters than would be the case using environmental rights jurisprudence. In addition, despite protests from developed countries,[829] it is quite clear that responsibilities for historical emissions should attract reparation or compensation under the common but differentiated responsibilities principle, instead of the voluntary commitments made under the various MEAs. Such compensation can be utilised to build resilience and adapt to the impacts of climate change.

In the same vein, climate change offers better prospects to reimagine the RBA infused with ethical, social justice and equity imperatives based on the geographies and histories of marginalised and vulnerable communities. Although globally induced, climate risks are area specific and therefore must be addressed with the participation and involvement of those most affected communities. This calls for a more engaged response from local stakeholders

[829] See op cit, note 82.

than the usual post-political consensus building that has defined environment and climate change regulation in the context of the dominant development paradigm.

7.3 Recommendations

The crisis of development that Malawi faces is largely a result of inequity that has been structured and facilitated by a development paradigm based on exploitation of environmental resources for the benefit of the few and resulting in marginalisation of many. Not only has Malawi one of the highest poverty rates in the world, it is also one of the most inequitable societies. Environmental resources are facing unprecedented pressure from a growing population and the threats from climate change impacts. The policy process is also in crisis in that it relies on a paradigm that exacerbates inequitable resource extraction and marginalises those who are least able to.

In addition, the manner in which legislation is formulated, adopted and implemented amplifies the interests of those close to the centres of power. The thesis has demonstrated the challenges associated with infusion of an ethical and social justice approach to environmental regulation in the face of the dominance of the positivist approach to law making in the environmental sector. It has also observed that a more engaged judicial response and promoting living customary law provides a better chance to ameliorate the rigours of the positivist method. The thesis therefore recommends that considerable attention should be paid to make the policy process and legislation making more inclusive and sensitive to the lived experiences of those most affected by the regulatory process. It is also important to encourage the development of common law jurisprudence that addresses local environment and climate change risks, to broaden the diffusion of voices and interests of stakeholders in environmental regulation. It is also important to facilitate the development of living customary law in the environment and climate change sector to ensure that the lived realities of those affected by development policy inform environment and climate change regulation. In addition, improvements under the EMA 2017 have the potential to mobilise public participation in environment and development regulation through access to environmental information and justice, including through public interest litigation. The establishment of the Environmental Tribunal can expand environmental remedies. Nevertheless, for this framework to benefit the broad interests it is meant for, there is need to strengthen the mechanisms for community participation through better coordination of community-based organisations in various sector statutes to enhance capacity to enforce environment and climate change legislation at local level.

In view of the above observations, the thesis makes the following recommendations to improve environment and climate change regulation in Malawi.

7.3.1 Provide a mechanism for a more inclusive and accountable policy process

The Constitution provides for equity as the overriding principle as it declares that the basis of state authority is to promote the interests of the people of Malawi. The Executive branch is given the mandate to formulate policy while the National Assembly has overall supervisory authority. On the other hand, legislation making is the mandate of the National Assembly but the Executive initiates and drafts and therefore controls the language and form of all legislation and therefore has a far bigger say than members of the National Assembly[830]. This limits the incorporation of views of constituents who are directly affected by the policies or legislation in question[831]. In addition, the thesis has observed that the dominance of the positivist approach to law making disempowers and alienates a majority of the people. The concentration substantive law-making power in the Executive encourages adoption of statutes from elsewhere which have no resonance with lived realities of the people of Malawi. This limits the extent to which the interests of these communities are reflected in the legislation making process.[832]

The preferable approach is to enhance the capacity of members of the National Assembly to propose and draft legislation based on engagement with their constituents. In addition, local communities need to be engaged at village, traditional authority and town hall level before these can feed into the national process. It is also important that the policy process be sensitive to what can be accepted as contributing to the national policy and what can be used to develop local policy response either through community by-laws or living customary law. This would facilitate more responsive, representative and equitable development and environmental regulation.

Further policy instruments such as the Vision 2020, the MGDS and sector policies do not provide for duties and responsibilities of the policy makers and implementing agencies. There is therefore no benchmarks or obligations against which stakeholders can hold the responsible institutions or agencies to account. Policy instruments should invariably be

[830] Section 8 of the Constitution gives power to the National Assembly to enact legislation, while section 7 gives the Executive responsibility of initiating policy and legislation, including implementation of laws and policies.
[831] Section 66 of the Constitution provides for Private members Bill to be enacted as legislation by the National Assembly. Members of Parliament can take advantage of this to initiate legislation that addresses their constituency interests.
[832] See section 4.5.1 above.

translated into legislation so that they can bind state institutions. This can be done by ensuring that policy adoption is formalised by legislation, which lays down certain obligations. Policy and legislation must also create space for continued engagement at local level, so that policy instruments can remain relevant and also be evaluated at that level. To ensure continued and meaningful engagement between local communities and the centres of power, it is important that decentralisation and devolution of mandates be driven by binding and accountable duties and responsibilities of institutions at central government level.

7.3.2 Focus on the histories and geographies of marginalisation and vulnerability

As argued in chapter 2 and chapter 5, the evolution of development policies and environment legislation have grown independent of and with little or no consideration of the impact they have on each other. Invariably, development policies have had more influence than environmental legislation. In addition, the evolution of development and environment regulation has promoted the interests of the few who are privileged to take advantage of the global market, rather than the interest of the majority as required under the Constitution. Consequently, environmental regulation has not been internalised by these communities not because, as alleged by western theorists, of a lack of an environmental ethic in developing societies, rather because environmental regulation has been used by powerful groups to serve their own interest and mute development aspirations of the marginalised. The same observation applies in relation to climate governance in which the response focuses on perpetuating the same development conditions that created the climate problem.

It follows therefore that in order to address the existing development and environmental inequity, it is important to confront the system that methodically allocates the benefits of the global commons to serve the interests of the few. Environmental law needs to reconcile the concepts of conservation and commodification of nature, which is essentially predicated on the muting of the former to promote the latter. Environmental legislation should take responsibility for development control, not as an outside check such as through ESIA or SEIA which are essentially technical and provide limited opportunity for local communities to provide meaningful inputs. Rather, development interventions must prioritise vulnerable groups who have been marginalised by inequitable development interventions. This requires legislation crafting that target these communities based on their lived experiences.

In particular, because of the location specific distribution of climate harms, the drafting of national legislation needs to focus on generic principles and guidelines and, where

necessary, provide priority locations, populations and ecosystems. The details for implementation should then be provided in community by-laws for specific resources, local government by-laws or ecosystem-based regulations depending on the nature of the resources or threats to them. The responsibility for implementation and enforcement should be devolved to these locations in more meaningful ways than the decentralisation process has done to date.[833] In particular, it is necessary to encourage the use of local knowledge systems in these regulatory systems, including customary norms, so that policy response is informed by lived realities[834].

7.3.3 *Provide for guidance for domestication of IEL and MEAs*

Regional and international instruments that regulate development, environment and climate change regulation provide a wealth of resources for enhancing the regulatory architecture. They also have serious limitation in failing to provide specific response to the structural paradigms that have perpetuated inequitable development. The general language MEAs use also requires reflection when applying to the national context in order to ensure the principles can be aligned to local context. This requires a more engaged policy process to prevent uncritical implementation of MEAs or IEL.[835]

The thesis has observed that there is no guidance in the procedures for domestication of MEAs, consequently vested interests decide what and how to domesticate in these instruments. In particular, there is need for guidance in identifying the national interest to guide negotiation, adoption, ratification and domestication of these instruments. This has significant implications for addressing the interests of the people of Malawi and the incorporation of equity norms in the subject matters these instruments address. The process of adopting international instruments need to be coordinated and harmonised to ensure that it is not captured by certain vested interests. Malawi must consider adopting legislation providing guidance in the adoption of international instruments instead of relying on state practices bestowed by colonial policy that did not consider the interest of the majority.

7.3.4 Promote common law environmentalism

The rise of statist and positivist approach to law making has skewed the regulatory framework in favour of the state and its allies. The marginalised and the vulnerable who have no policy influence bear the burden of regulation without contributing to its development. This

[833] See section 6.5.2 above.
[834] See section 4.6.3.
[835] See sections 4.4.3 and 6.4.1 above.

limits the responsiveness and internalisation of the regulatory framework. This thesis has highlighted the need to amplify common law environmentalism which provides opportunity for alternative narratives through environment and climate change litigation.

The EMA 2017 has opened new opportunities for various interests to safeguard their environmental interests by taking action such as through the complaints procedure or litigation. There are capacity challenges in the judicial branch and the legal profession to articulate scientific and other concepts that define environment and climate change regulatory disciplines. These can be addressed with systematic capacity building at various levels. In addition, relaxing *locus standi* rules, establishing specialist environmental courts and tribunals as provided for under EMA 2017 is a good starting point to improve the development of common law environmentalism that can expand the space for infusing equity. In this regard, the thesis recommends that in view of the constraints that those who face environmental harms may have to use public interest litigation, regulations can be made under EMA 2017 to introduce epistolary jurisdiction[836] to empower the proposed Environmental Tribunal to take action on its own motion based on verified media reports or just by letter written to the Tribunal without the formalism of the usual court process.

7.3.5 Promote living customary law

Environmental law making should be guided by ethical and social justice imperatives of development, environment and climate change regulation. This requires that the epistemologies and ontologies of these concepts be aligned with the lived experiences of affected communities. Consequently, the use of living customary law should be promoted so that the voices and realities of those affected by development initiatives, environmental degradation and climate harms inform the regulatory process. This will require a major revision of the manner that regulation is designed. The need to target the historical and geographical marginalisation and vulnerabilities associated with development, environment and climate change harms necessitates a more local level law making and enforcement mechanism. The use of local level or community by-laws can facilitate community participation and improve the application of living customary norms enhance stewardship over environmental resources and thereby improve equitable development and environment and climate change regulation.

7.3.6 Address institutional fragmentation and capacity constraints

[836] See op cit note 268.

The establishment of an environmental authority under the EMA 2017 provides an opportunity to deal with jurisdiction conflicts in environmental regulation. In addition, EMA specifically mandates MEPA to mainstream environmental management in the overall national development context.[837] In addition to the mandate to conduct ESIA, this provides space for ensuring that development activities do not adversely affect the social and environment pillars of SD.

However, for the MEPA to effectively discharge its functions, it requires both political will and engagement with stakeholders in a manner that can inspire confidence at various levels. In particular, the authority needs to take the lead in facilitating a more engaging policy and legislative process as well as decentralisation as proposed under sections 7.3.1 and 7.3.2 above. One approach is to use its mandate of coordinating climate change response to raise the platform for environment and climate change issues as development concerns. Opening policy space for the authority has the potential to amplify the process of balancing the social, economic and environmental concerns of development policy.

7.4 Conclusions

In conclusion, the thesis observes that the role and impact of development policy on environment and climate change regulation has generally been muted. The thesis has demonstrated that the prevailing regulatory framework is primarily informed by the knowledge and power relations embedded in the discourse of development. The dominant development paradigm hides the motivations, interests and influences that underpin the dominance of the statutory method in environment and climate change regulation. The statutory regime marginalises and alienates the interests of the majority of the people in the developing world and has consequently affected the effectiveness of that regime to protect ecosystems, and largely serves as a tool for resource exploitation for the few who can take advantage of its coercive dominance.

The massive exploitation of environmental resources and resulting social dislocation has caused a crisis of nature and a crisis of justice for which the prevailing environment and climate change regulatory framework is ill suited. The climate change problem has exacerbated the crisis, but it has also provided an opportunity for policy makers to harness the fact that the climate change problem is both an environment and development problem and consequently, the urgent need to protect development gains from climate risks will also protect

[837] Section 9 EMA 2017.

environmental resources. Because there is more interest in protecting and safeguarding development gains, there is the window to mobilise more stakeholders and resources and expand policy influence necessary to improve the regulation of the environment and development. In addition, because climate change governance requires diverse interests there is more urgent need to incorporate equity norms to address the historical imbalance in development policy and environmental regulation interface.

The thesis has observed that the Constitution of Malawi requires the state to promote the interests of the people of Malawi, as the basis of exercise of state power. The thesis argues that this entails the need to promote equity in development policy as well as environment and climate change regulation as the tool for arbitrating the competing interests of the people of Malawi. The thesis recommends that policy and legislation making needs to be inclusive and go beyond the confines of constituency representation to address the geographies and histories of marginalisation and vulnerability. In addition, attention must be paid to using local knowledge and structures, including promoting living customary norms to address the lived experiences of affected communities. The thesis also recommends that legislation must differentiate and target its response based on the location of risk and harm. This necessarily entails bringing governance close to where resources, users and governors are situated.

The proposals in this thesis can guide a reform process for integrating equity in environment and climate change in Malawi. However, the proposals are mostly based on a qualitative examination of reports, policy instruments, legislation and literature. The research is limited to the extent it has not examined specific perceptions and lived experiences of policy makers, communities and civil society stakeholders in environment, climate change and development sectors to understand what policy elements need to be introduced to improve the responsiveness of environment and climate change regulation. This can be subject for further research.

8. REFERENCES

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Statute Law

Title	Year Enacted	Source
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Constitution of Malawi	1994	https://www.malawi.gov.mw › images › Publications › act › Constituti...
Courts Act	1958	https://www.ecolex.org › legislation › courts-act-cap-0302-lex-faoc121399
Environment Management Act (repealed)	1996	https://malawilii.org/mw/legislation/act/1996/6
Environment Management Act	2017	https://www.ecolex.org › details › legislation › environment-management-a...
Disaster Preparedness Act	1991	https://dodma.gov.mw › index.php › downloads › download=12:the-...
Town and Country Planning Act (repealed)	1988	https://malawilii.org › legislation › act › 1988
Physical Planning Act	2016	https://www.ecolex.org/details/legislation/physical-planning-act-2016-no-17-of-2016-lex-faoc170909/
Fisheries Conservation and Management Act	1997	https://www.ecolex.org/details/legislation/fisheries-conservation-and-management-act-1997-cap-6605-lex-faoc018341/
Forestry Act	1997	http://ex-twprlegs1.fao.org/docs/pdf/mlw10025.pdf
Local Government Act	1998	https://www.localgovt.gov.mw/publications/other-documents/8-local-government-act-1998
Water Resources Act	2013	https://www.ecolex.org › details › legislation › water-resources-act-2013-n...
Land Act 2016	2016	https://malawilii.org › legislation › act
Customary Land Act	2016	https://malawilii.org › legislation › act › 2016

Title	Year Enacted	Source
National Parks and Wildlife Act	1992	https://www.ecolex.org/details/legislation/national-parks-and-wildlife-amendment-act-2017-no-11-of-2017-lex-faoc169263/
Political Parties Act	2018	https://malawilii.org › legislation › act
Plant Breeders Rights Act	2018	Copy with the author
Parliamentary and Presidential Elections Act	1993	[PDF] Malawi Electoral Laws - Malawi Electoral Commission https://mec.org.mw › wp-content › uploads › 2018/11 › electoral-laws...
Gender Equality Act	2013	https://malawi.unfpa.org › news › 2016-2020-gender-equality-act-impleme...
Prevention of Domestic Violence Act	2007	https://malawilaws.com › alphabetical-list-of-statutes › chapter-7-05prevent...

Regional and International Instruments

Title	Year adopted	Source
African Union Constitutive Act	2000	https://au.int › constitutive-act
African Charter on Human and Peoples' Rights	1981	https://au.int › treaties › african-charter-human-and-peoples-rights
Common Market for Eastern and Southern Africa Treaty		https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf
Convention on the Elimination of All Forms of Discrimination Against Women	1979	https://www.un.org › womenwatch › daw › cedaw
Universal Declaration of Human Rights	1948	https://www.un.org › udhrbook › pdf › udhr_booklet_en_web
International Covenant on Civil and Political Rights	1967	https://treaties.un.org › doc › unts › volume-999-i-14668-english

Title	Year adopted	Source
International Covenant on Economic Social and Cultural Rights	1967	https://treaties.un.org › Pages › ViewDetails
Stockholm Declaration on the Human Environment	1972	https://legal.un.org › avl › pdf › dunche › dunche_e
Southern Africa Development Community Treaty	1992	https://www.sadc.int › documents-publications › sadc-treaty
Rio Declaration on Environment and Development	1992	https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf
World Conservation Strategy: Living Resources Conservation for Sustainable Development	1980	https://portals.iucn.org › library › efiles › documents › wcs-004
United Nations Sustainable Development Goals	2015	https://sustainabledevelopment.un.org › content › documents › 21252...
Charter of the United Nations	1945	https://www.un.org/en/about-us/un-charter/full-text
United Nations Framework Convention on Climate Change	1992	https://unfccc.int/resource/docs/convkp/conveng.pdf
Vienna Convention for the Protection of the Ozone Layer	1987	https://ozone.unep.org/treaties/vienna-convention
Stockholm Convention on Persistent Organic Pollutants	2001	UNEP-POPS-COP-CONVTEXT-2017.English.pdf
International Treaty on Plant Genetic Resources for Food and Agriculture	2001	http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-001346.txt.

National Policies

Title	Year adopted	Source
Malawi Vision 2020	1998	www.sdnp.org.mw › malawi › vision-2020
Malawi Poverty Reduction Strategy Paper		https://www.imf.org/External/NP/prsp/2002/mwi/01/043002.pdf
National Environmental Policy	2004	faolex.fao.org › docs › pdf › mlw169499
National Environmental Action Plan	1994	https://cepa.rmportal.net › Library › government-publications › view
Malawi Growth and Development Strategy 2006-2011	2006	https://mitc.mw › images › downloads › other-documents › Malawi-G...
Malawi Growth and Development Strategy 2011-2016	2011	https://cepa.rmportal.net › Library › government-publications › view
Malawi Growth and Development Strategy 2017-2022	2017	https://www.undp.org › malawi › docs › UNDP_Malawi_MGDS) III
National Forestry Policy	1996	
National Disaster Risk Management Policy	2015	www.dodma.org.mw
National Water Policy	2006	faolex.fao.org › docs › pdf › mlw165858
National Decentralisation Policy	1998	
National Climate Change Management Policy	2012	www.ead.gov.mw › storage › app › media › Resources › Policies › Cl...
National Adaptation Plan of Action	2006	https://unfccc.int/resource/docs/napa/mwi01.pdf
National Adaptation Plan Framework	2019	Department of Environmental Affairs, Lilongwe
National Land Policy	2002	https://www.malawi.gov.mw/images/Publications/policy/Malawi%20National%20Land%20Policy.pdf

Malawi Case Authorities

Title	Citation
Attorney General of Nyasaland v Jackson	(1923-60) 1 ALR. Mal. 488.
Kamchacha v Nkhota	(1966-168) ALR Mal. 518
Matimati v Chimwala	[1964-66] ALR. Mal, p. 34.
Magombo v Nelson	[1964-66] ALR. Mal
Ribeiro v Martins	(168-70) 5 ALR. Mal. 151
Cynamid Co v Ethicon Limited	(1975) A C 396
Mwangobola v Mwangobola	Civil Appeal Case Number 4 of 1989
Chihana v Republic	MSC Civil Appeal Number 9 of 1992
Democratic Alliance v Thom Chiumia & Others	High Court of Malawi Civil Cause Number 58 of 2003
Zoba Jere v Attorney General & Masabane Jere	Civil Cause Number 155 of 2013
Gondwe v Attorney General	(1996) MLR 492.
Mungomo v Mungomo	(1997) MLR 447.
Administrator of Deceased Estate v Attorney General,	Civil Cause Number 1839/1997, HC 2004.
Attorney General v Nseula and Malawi Congress Party	(1999) MLR 313.
Akimu v Republic	Revision Case Number 9 of 2003
The State and The Malawi Electoral Commission, *ex parte* Rington Nzima,	MSCA Civil Appeal Number 17 of 2004.
In re the matter of the Adoption of Children Act (cap: 26:01) and in the matter of David Banda (a Male Infant)	MSCA Civil Appeal Number 28 of 2009.
Chinyama Phiri v Martina Kachere	High Court of Malawi Civil Cause Number 282 of 2016
Symon Kuwedyo & Another v Africa Parks (Malawi) Ltd & Attorney General,	Personal Injury Number 113 of 2017

Prof Arthur Peter Mutharika & The Electoral Commission v Dr. Saulos Klaus Chilima & Dr. Lazarus McCarthy Chakwera,	MSCA Constitutional Appeal Number 1 of 2020

Foreign and International Case Materials

Name of Case	Source/Citation	Country/Institution
The Minors Oposa v Secretary of State of the Department of Environment and Natural Resources	33 ILM (1994) 73	Philippines
MS Shehla Zia and others v WAPDA, in	UNEP Compendium: Vol.1 (1998) p.323	Pakistan
Building Owners and Managers Association (Aus) Ltd v Sydney City Council	55 R.G.LA. 44	Australia
Amoti Godfrey Nyakaana v National Environmental Management Authority & Others	Constitutional Appeal Number 5 of 2011	Uganda
S v Makwanyane and Another	1995 (3) SA 391 (CC)	South Africa
Alexcor v Richtersveld Community	2003 (5) SA (CC).	South Africa
Gongqose v Minister of Agriculture Forestry and Fisheries.	Case Number 1340/17	South Africa
Government of Republic of South Africa –vs- Grootboom.	(case CCT 11/00)	South Africa
Christian Education South Africa v Minister of Education.	(1998) 12 BCRL 1449 (CC)	South Africa
Minister of Health –vs-Treatment Action Campaign	(case CCT 8/02)	South Africa
Shilubana & Others v Namitwa	(2008) ZACC 9	South Africa
Minister of Public Works and Others –vs- Kyalami Ridge Environmental Association	(Case No CCT 55/00.	South Africa
Corfu Channel Case	(1949) ICJ Rep. 4	ICJ

Name of Case	Source/Citation	Country/Institution
South West Africa Case	(1966) ICJ Rep. 3	ICJ
North Sea Continental Shelf Case	(1969) ICJ Rep. 3	ICJ
Fisheries Jurisdiction Case	(1974) ICJ Rep. 3	ICJ
Media Rights Agenda v Nigeria & Others	Communication Numbers 105/93. 128/94 and 152/96 (1998)	African Commission on Human and Peoples' Rights
Centre for Minority Rights Development (Kenya and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya issued in May of 2009	Communication 276 / 2003 African Commission for Human and People's Rights)	African Commission on Human and Peoples' Rights
The Guiana Boundary Arbitration	RIAA, (1904) Vol XI, pp. 11-23.	International Arbitration Tribunal
Shufeldt Arbitration	RIAA (1930), Vol II, pp. 1079-1102.	International Arbitration Tribunal

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