

**REFRAMING PUBLIC GOODS: HUMAN RIGHTS, COMMUNITY  
AND GOVERNANCE IN THE THIRD WORLD**

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## ABSTRACT

The thesis takes as its starting point the importance of community in contemporary political societies across the world, most notably, for present purposes, the Third World. Community importantly determines questions of social inclusion, exclusion, identity, belonging and well-being. As is no surprise, the role and significance of community is well recognised in several academic disciplines today. Consider this one example. Recent literature on development has generally drawn attention to the potential benefits of participation in certain aspects of governance. More specifically, proposals for community participation have emerged in response to State failure, or now the pervasiveness of market exclusion. Community participation is motivated by several grievances, the most emphatic of which is the profound gap between the lived experiences of the poor and institutions that affect their lives. This gap between discourse and lived experience is more vividly evident in human rights practice, and this not only reflects the dominance, but also the inadequacies of State and market-based understandings alike. A fundamental aspect of this debate – largely overlooked by human rights discourse – is the role of community. Whilst there remain marginal references to community in certain aspects of human rights discourse, over all it has not sufficiently or comprehensively embraced community. More specifically, the Declaration of Right to Development, Rights-Based Approaches to Development and the World Bank's concept of good governance fail to offer an adequate role for community in human rights terms. Drawing from a range of literature in legal theory, political theory, philosophy and sociology, and developing its insights in the context of the supply of the – human right and – public good of electricity in Nigeria, the thesis offers a theory of community, which seeks to enable individuals, particularly, the poor and vulnerable, to organise themselves democratically, to claim ownership of the processes that determine their human rights.

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This thesis is dedicated to my parents Ochapa and Mikiya, and my siblings Ori, Adadu, Agbenu and Eru – I would not have completed it without their sacrifices, encouragement, love and affection. I will forever remain indebted for all their support.

## **DECLARATION**

I declare that the contents of this thesis have been composed by me and they have not been submitted for any other degree or professional qualification.

Oche Onazi: \_\_\_\_\_

Whenever a man cries inwardly: 'Why am I being hurt?' harm is being done to him. He is often mistaken when he tries to define the harm, and why and by whom it is being inflicted on him. But the cry itself is infallible.

The other cry, which we hear so often: Why has some-body else got more than I have?, refers to rights. We must learn to distinguish between the two cries and to do all that is possible, as gently as possible, to hush the second one, with the help of a code of justice, regular tribunals, and the police. Minds capable of solving problems of this kind can be formed in a law school.

But the cry 'Why am I being hurt?' raises quite different problems, for which the spirit of truth, justice, and love is indispensable.

Simone Weil, *Human Personality*, 1942.



## Chapter One

### INTRODUCTION: COMMUNITY IN HUMAN RIGHTS DISCOURSE

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#### 1. Introduction

Two fundamental characteristics of life in Nigeria have motivated this thesis. First is the relational effect of the lack of access to water, healthcare, education and electricity (hereinafter ‘public goods’), on poverty in the country. Daily life – for millions of Nigerians – is defined by the experience of unbearable levels of suffering due to unacceptable standards of access to public goods. By public goods, I do not just mean economic goods – that is, non-rival or non-excludable goods – which a person’s consumption does not prevent the consumption of others.<sup>1</sup> Whilst this is a plausible way to speak about public goods, there is more to the term than just how they are produced or consumed. They are not just economic goods, but also social and ethical goods. The idea of public goods is underpinned by important social and ethical connotations, for the simple reason that they are vital to human survival and well-being.<sup>2</sup> What this also implies is that public goods could be a range of things – including a general framework of human rights – in so far as their significance to human well-being and survival can be established.<sup>3</sup> This is particularly the case with access to water, healthcare, education, and – as I would argue – electricity, not because of their instrumental value, but because they are intrinsic to the

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<sup>1</sup> The classical economic idea of public goods is influenced by the seminal work of Paul Samuelson, see; Samuelson P. ‘The pure theory of public expenditure’, 36(4), *Review of Economics and Statistics*, 1954, at 387-389.

<sup>2</sup> See, Kaul I Grunberg and Stern (eds.), *Global Public Goods: International Cooperation in the 21st Century*, Oxford University Press, 1999, at xiii.

<sup>3</sup> Ibid.

quality of our lives.<sup>4</sup> It is because of their essential and ethical character that they are also recognised and protected as human rights. In particular, they are protected as economic and social rights by the Universal Declaration of Human Rights (UDHR), and the International Covenant of Economic, Social and Cultural Rights (ICESCR), which are applicable to everyone by virtue of their humanity. These documents enjoin States to take the necessary steps to enable acceptable levels of access to all individuals. It is the failure, amongst other things, of States to fulfil this basic requirement that can explain the suffering in Nigeria, and perhaps, other parts of the Third World.

More recently, States have looked to markets as alternatives, but they have also failed to ameliorate such problems. At one level, the State has either neglected, failed or is too weak to perform its primary functions. At another level, the market – the alternative to the State – is either too exclusive or only inclusive to those who can afford to participate, as many are too poor to afford to buy alternatives provided by the market. This point leads to the second fundamental experience of life that has inspired this thesis. It arises from the following question – how do Nigerians, especially the poor, survive without being able to access these essentials of life from either the State or market?

Two visible trends are evident – the second is developed into this thesis. The first concerns individual provisioning of public goods, especially through the opportunities offered by the market – that is, for those who can afford to do so. There is, however, a second trend which has immensely supported the poor. It arises from the different forms of solidarity, collaboration and cooperation that is often generated in the processes of trying to find solutions to such problems. One example is the different forms of community that

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<sup>4</sup> See, Deneulin S and Townsend N. 'Public Goods, Global Public Goods and Common Goods', *WED, Working Paper 18, ESRC Research Group on Well-being in Developing Countries*, 2006, at.3.

have emerged to fill the inadequacies of the State and market. This has ranged from the Church or Mosque to primordial communal associations, such as family, kinship, tribe, ethnic associations to work-based, non-governmental organisations (NGOs), and neighbourhood groups.<sup>5</sup> What is visible in many townships and villages is a strong sense and spirit of community, which continues to be the only source of hope, relief and comfort for the poor. It is this significance of community to individuals in Nigeria – as perhaps other parts of the Third World – that is really at the heart of this thesis. Whilst the thesis developed here is inspired by Nigerian experiences, it is also relevant for other societies in Africa, and the Third World in general, given the generalisable nature of the problems, experiences, and prospects. As will become clear below –and in chapter six – I take a local residential neighbourhood as a point of departure from other ways of defining community to illustrate what it means in a given context, and how the human rights framework can benefit, as well as contribute to building forms of solidarity within it, for different purposes, including for particular human rights claims. If public goods are more than just economic goods, but also ethical goods, such as human rights, then it is apparent from the perspective of this thesis that community has insufficiently been analysed in human rights discourse.

Before looking at the specific contribution in this respect, a brief attempt is made to understand how and why this thesis departs from current approaches. I then outline the approach in this thesis, and proceed with a discussion of its implications on human rights, especially how it deals with the tension between human rights and community, which has impeded a balanced understanding of both concepts. I will specifically argue that understanding human rights themselves as public goods can contribute to unlocking this

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<sup>5</sup> On the importance of community based organisations in Nigeria, see; Ayoola G. B et al. *Nigeria: Voices of the Poor*, Country synthesis report Nigeria, World Development Report, World Bank, 2000-2001, at 32 – 35.

deadlock. After this, I proceed to discuss the meaning and significance of human rights to this thesis, and follow on by providing a conception of human rights that not only supports this thesis, but also remedies of some of their inadequacies in this and other contexts. Following on from this, I discuss aspects of the application of the thesis, particularly the justification of the choice of electricity as a human right capable of explaining the problems of access, and furthermore, bringing out the value of the role of community. I conclude thereafter with an outline of the structure of the thesis.

## **2. Dominant Approaches**

Two dominant approaches can be deduced from human rights discourse – the approach through the State, and more recently, the role of the market. The first is the more traditional human rights approach. It is built on the existing State structures of the international order, particularly with the emergence of UDHR, and the accompanying international covenants. It is a discourse built on this framework, which has meant that matters of implementation are primarily a question of State action. Here individuals are seen as primary rights-holders, while the State is the main duty-bearer. Individual rights can only be claimed against the State, and law is the primary vehicle for enforcing human rights. Economic and social rights are designated to deal with the problems mentioned above, and they are dealt with as a question of justiciability.<sup>6</sup> Apart from attempting to clarify the specific content of the economic and social rights, the debates focus on the role of law and the judiciary as a means of enforcing these rights.<sup>7</sup> Without in any way limiting

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<sup>6</sup> For a general insight on the justiciability of economic and social rights debate, see; Ghai Y and Cottrell J. (eds.) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, Interights, 2004.

<sup>7</sup> See, Bilchitz D. *Poverty and Fundamental Rights, the justification and enforcement of socio-economic rights*, Oxford University Press, 2007. See also; Ferraz O. 'Poverty and Human Rights', 28(2) *Oxford Journal of Legal Studies*, 2008, at 585-603.

the significance of justiciability of economic and social rights debates, three limitations of the approach are noted below.

First, they do not engage with the question of State failure and how this impedes the State from effectively fulfilling its obligations.<sup>8</sup> The current State model – particularly in parts of the Third World – is engulfed in a structural crisis, and unable to meaningfully address such problems of human rights. This is not in any way to deny that there have been and continue to be benefits of the traditional State-centred human rights framework, but its limitations are such that they raise questions about whether it requires adaptation to enable, as it were, new ways of thinking about how certain human rights should be provided.

Secondly, the justiciability debates do not sufficiently address the problems of the State system owing to the emergence of economic globalisation, especially the problems, and paradoxically, new opportunities for participation that have accompanied it. Parallels here can be drawn with the literature in development discourse and political economy<sup>9</sup>, which have embraced these changes, particularly the movement beyond the State and

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<sup>8</sup> By State failure I simply mean the inability of institutions of the State to guarantee acceptable levels of access to economic and social rights as well as other functions like providing security. The arguments about State failure here are by no means universal. They are unique to the Third World and not necessarily applicable to First World country contexts. Even so, there are varying degrees of State failure in Third World countries; it is certainly more visible in certain countries than others. As such, I do not in any way also claim that the concerns expressed here are universal to all parts of the Third World. The concerns apply to specific conditions of State failure, such as where the State has failed or too weak or in countries like Nigeria, where the State has hardly kicked off.

<sup>9</sup> These questions are addressed in political economy in response to the transformations of the traditional State-centred framework mainly due to the phenomenon of economic globalisation. The *new governance* approaches (as illustrated in chapter two), suggest the inability of State centred, command and control systems to deal with the advent of economic globalisation. New governance marks a transition from regulation to dispersed and collaborative forms of participation in the economy. For a good overview on these developments in the United States (US), and the European Union (EU) see; Lobel O. 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', *Legal Studies Research Paper Series No. 07-27, School of Law, University of San Diego*, 2005. See also, de Burca G and Scott J. *Law and New Governance in the EU and the US*, Hart Publishing, 2006.

markets in processing social transformation.<sup>10</sup> Surprisingly, traditional human rights discourse, for all its claims and potential to address deep-rooted injustice, has failed to adapt to the changing situation. Human rights continue to operate as a State-centred discourse, as if the State exists without deficiencies.

Thirdly, the justiciability debates do not consider other forums for participation apart from courts in securing economic and social rights. This is perhaps more of general characteristic of human rights law than their specific manifestation as economic and social rights. Whilst human rights law generally offers an array of participatory rights to take part in different aspects of society, it is not clear if it encourages participation for securing specific rights claims. One cannot help but conclude that although participation is an inherent part of human rights law discourse, there appears to be no participation – apart from through courts – for particular human rights claims.

The second dominant approach is an emerging one – that is, the inclination towards markets. It is largely influenced by the Bretton Wood institutions (BWIs), especially the World Bank (the Bank), as a result of the increasing overlap between the fields of human rights and development. Though the approach emerges outside the traditional human rights reporting system, it can be understood as an attempt to give programmatic content to the international human rights texts, especially the ICESCR through the Bank's policies, practices and programmes. It has structured thinking about how economic and social rights are provided for the simple reason that there is hardly any Third World country that has not been on the Bank's (or its related institutions) lending programmes.

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<sup>10</sup> See, Hickey S and Mohan G, *Participation: From Tyranny to Transformation?* Zed Books, 2004. Also see the following, Cook B and Kothari U. *Participation: The New Tyranny*, Zed Books, 2001 and Chambers R. *Participatory Workshops: A source book of 21 ideas and activities*, Earthscan limited, 2002. Kapoor I. 'Participatory Development: Complicity and Desire', 26(8), *Third World Quarterly*, 2005, at 1203-1220.

The current policy initiatives are structured by the Bank's Comprehensive Development Strategy (CDF), the Poverty Reduction Strategy Papers (PRSPs), the World Development Report (WDR), *Making Service work for the Poor*,<sup>11</sup> and particularly, the Bank's concept of good governance. Problems with public goods, as with human rights in general, are diagnosed as a government problem, the solutions of which are in turn linked to the Bank's initiatives for good governance. This view can be implied from a reading of the WDR, the Bank's most comprehensive advisory statement on public goods.<sup>12</sup> The report – apart from reading the public goods of concern as human rights – makes the claim that they fail to reach the poor because States, amongst other things, lack competent institutions and mechanisms of governance. In short, the Bank suggests that the lack of public goods is a governance problem. Ironically, the main responsibility for resolving this problem, as proposed by the Bank, lies with the failed governments themselves.<sup>13</sup>

More specifically, the report suggests that the inability to access public goods is caused by regressive budgets, corruption and the failure of governments to act responsibly. Key recommendations to resolve these problems include a range of approaches to increase transparency, competition, citizen involvement in monitoring, and private market participation. They also include the introduction of suitable user fees, decentralising onto local governments and indeed community participation. The latter is indicated when the WDR notes that public goods and services can be expanded to reach the

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<sup>11</sup> World Bank, Comprehensive Development Framework, (Ongoing) accessed online at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTWEBARCHIVES/0,,MDK:22201409~menuPK:64654237~pagePK:64660187~piPK:64660180~theSitePK:2564958,00.html> 20<sup>th</sup> January 2010. World Bank, *Making Services work for Poor People*, World Development Report, 2004.

<sup>12</sup> With the exception of electricity and water, the WDR acknowledges that healthcare and education are human rights in which community involvement may be one way of ensuring access. *Ibid.*, at p.34.

<sup>13</sup> The report specifically mentions 'public responsibility' which lies on the State and citizens. But the State carries much of this responsibility towards resolving this problem.

poor by “putting poor people at the centre of service provision: by enabling them to monitor and discipline service providers, by amplifying their voice in policymaking, and by strengthening the incentives for providers to serve the poor.”<sup>14</sup> As such, participation is recognised as a key strategy for public goods. This is really no surprise since the WDR itself emerges under the auspices of the CDF and the Bank’s PRSPs, where country-ownership and citizenship participation are both considered as essential for the reduction of poverty. In spite this, as demonstrated in this thesis with the case study of electricity in Nigeria, the reform proposals still continue to be dominated by the so-called advantages of privatisation and other neoliberal market-based development strategies, to the exclusion of forms of participation that include the affected communities.<sup>15</sup>

### **3. Point of Departure**

Taking the significance of community in contemporary political societies, this thesis departs from the approaches above. In doing so, the thesis offers a theory of community (hereinafter, ‘the theory’) of three related components to enable access to particular economic and social rights or public goods, so to speak. The first component addresses definitional questions about community. As mentioned above and discussed below, it takes residential neighbourhoods as an example of community.<sup>16</sup> The second component

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<sup>14</sup> Ibid at 1.

<sup>15</sup> Nigeria’s PRSP addresses these questions, and it is unreservedly a market-oriented approach to development. For more details, see; National Planning Commission. *Meeting Everyone’s Needs: The National Economic Empowerment Development Strategy*, Abuja-Nigeria, 2004.

<sup>16</sup> We must appreciate that whilst recognising that the idea of community is generally desirable on the normative level of human rights discourse, its actual definition in every context must be open to local interpretation. This also has implications for the proposed theory of community, and not just how community is defined. It implies that the theory is not proposed as a ‘one-size fits all’ approach; rather it should be considered as one amongst a range of alternatives, one adaptable to local circumstance, especially if the situations permit it as such. What this means is that whilst the theory of community may be general, it is not general in its application. Indeed, if there is anything universal about the idea or theory of community proposed here, it is the importance of locality. It is the importance of encouraging people to work together to find solutions to their problems. It is the importance of one’s immediate surroundings, and how it forms a source of meaning, identity and belonging. Whilst communities will vary in context these attributes, it is argued, are universal to all communities.



proposes actual spaces for participation. In particular, Community Forums are proposed as deliberative decision-making bodies. They are bodies through which individuals collectively claim ownership of their human rights. However, the internal workings of Community Forums require a further component, one that anticipates the type of problems that can emerge from processes of participation. Accordingly, a third component is proposed in recognition that participation can be divisive even in the most tolerant or democratic societies. As problematic as these issues might be, it is argued that they are still reducible even though they cannot totally be eliminated. This component is called the deliberative theory of incompleteness, which places emphasis on ongoing dialogue and compromise. All three components must be seen as part of a comprehensive theory, which should work together for the purposes of human rights. They provide the philosophical and structural framework for understanding how community participation can be institutionalised. In proposing community as an alternative, this thesis does not by any means suggest that the approach through the judiciary, courts or State should somehow be dispensed with.<sup>17</sup> Rather, the suggestion is that community can offer an alternative forum for participation, one that is not currently available, and that can augment existing approaches. A detailed discussion of the theory is carried out in chapter six, but a little more is discussed below about community, given its centrality to the theory

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<sup>17</sup> An example of what I am talking about can be found in Charles Sabel and William Simon's seminal article on the emergence of a new type of public action litigation. Analysing the changes in public law litigation due to the shift from centralised to dispersed forms of governance in the US, Sabel and Simon have spoken of the existence of a new kind of democratic experimentation made possible by Roberto Unger's idea of destabilization rights. It is simply certain rights that allow courts to encourage collaboration between public institutions and members of the public affected by their services. If destabilization rights refers to "a right to disentrench or unsettle public institutions when, first, it is failing to satisfy minimum standards of adequate performance and, second, it's substantially immune from conventional political mechanisms of correction," then this is exactly what I am talking about in this thesis. Sabel C and Simon W. 'Destabilization Rights: How Public Law Litigation Succeeds' 117 (4), *Harvard Law Review*, 2004, at 1062.

### **3.1. Community**

Community, in this thesis, is defined as a given locality – that is, a neighbourhood composed of people joined together by accident of proximity. It is the social environment for a bundle of social practices and relationships that exist in the same space. It constitutes a significant part of everyday life, which often has both positive and negative connotations. It importantly determines questions of belonging in ways that can translate into either social inclusion or exclusion. Whilst chapter six discusses its potential, and offers some solutions to some of its problems, it is important from the outset to hold onto the idea that what is important about community in this thesis – particularly the metropolitan residential community – is the plurality of identities, and differences that exist within it, such that make it more open for inclusion, particularly more inclusive than other ways of defining the concept. It is true that one may belong to a residential community because of one's ethnic, religious or racial background, but one can also belong to such a community independent of such characteristics. What is more, amidst such differences lies a collective agency that can be nurtured or harnessed (where or when it does not exist) for different objectives. What is promoted is the intrinsic value of face to face relationships, which is in turn a way of building and sustaining the quality of individual lives. This may sound idealistic, but there is certainly value in seeing people who are accidentally joined together by space, not only cooperate and participate in trying to resolve common problems, but also how they show concern for each other, including those in other communities. As such, community is both an end in itself and a means to various ends.

The definition of community above is conspicuously sociological, mainly because it takes locality, amongst other things, as its defining feature.<sup>18</sup> Apart from local residential neighbourhoods, villages and townships have also been subject to sociological analysis, for the reason that “common residence is a congenial condition – perhaps the most congenial condition – for forming and sustaining communal life”.<sup>19</sup> This definition of community does not exclude the concept from being depicted or formed in different ways. Similarly, it does not exclude individuals within a community from belonging to others. This is, however, contingent – as the seminal work of Philip Selznick elaborates – on understanding the notion of community as a “variable aspect of group experience.”<sup>20</sup> What he means is that no single community, even the ones we live in, determine all of our social relationships.<sup>21</sup> Once community is proposed this way it means that it potentially would accommodate a variety of interests, including how the concept can be formed in different ways. It helps us understand that a variety of individuals that belong to different communities can also be united by a framework of shared beliefs, interests and commitments. The experience of community therefore becomes the experience of different opportunities for participation, in different ways and about different interests. If such opportunities do not exist within various neighbourhoods, it is difficult to conceive that the experience of community exists.

#### **4. Unlocking the Deadlock**

There are a number of implications of framing proposals for community within the existing human rights framework. The first is how the relationship between human rights and

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<sup>18</sup> See, Selznick P. *The Moral Commonwealth: Social Theory and the promise of Community*, University of California Press, 1994.

<sup>19</sup> *Ibid.*, at 359.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

community is to be understood given the contention that is often invited from attempts to collectively use both concepts. In the extreme view, both concepts invoke a profound tension between individual and collective autonomy. On the one-hand, collective will is aggressively asserted over that of the individual to the extent that his or her autonomy may be lost. On the other-hand, individuals, thanks to human rights become self-centred, over-individualistic, or even narcissistic – absolved from the collective duties and responsibilities. Whilst discussions about these concepts have proceeded along these general lines, human rights and community have not, and need not be proposed in such oppositional terms. As will be discussed, there is a middle ground approach. In chapter five, communitarian liberalism or liberal communitarian<sup>22</sup> – regardless of the noun or adjective – is indicative of this, so is the importance of dialogues discussed through the literature on deliberative democracy in chapter six.

From the perspective of this thesis, however, there is a further way of understanding the relationship between human rights and community. This requires a slight reversal of the relationship between human rights and public goods presented in the beginning of this chapter. It requires, not only understanding how specific public goods can be called human rights, but also how human rights can in turn be understood as public goods. This is the most helpful way of reframing the debate between human rights and community, and furthermore, bringing their relational dimension into attention. Not only does it significantly help unlock the deadlock between the concepts, or open new ways of overcoming this problem, it demonstrates the intrinsic value of human rights as well as

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<sup>22</sup> The work of Selznick indicates that even the stark defender of liberalism acknowledges the importance of community. It indicates how exaggerated the dichotomy between communitarian and liberalism really is, since communitarians exist both on the left and right. They include welfare liberals, anarchists, socialists, and conservatives. In fact, the literature on communitarian liberalism has its origins in the work of John Stuart Mill, who tried to accommodate ideas of the collective good within his liberal ideals. Others that have followed him include J.A. Hobson and L.T. Hobhouse. *Ibid.*, at 375.

their importance to the general ideas in this thesis. This is not a claim that it resolves all possible tensions that arise from questions of individual versus collective autonomy (such as problematic questions about the autonomy over reproductive rights). Rather, it has modest intentions in mind, and is framed for the general purposes of this thesis.

This argument arises from understanding the intrinsic value of human rights, particularly because of their relational and ethical effect on human survival. This is particularly – but not only – a characteristic of economic and social rights, as other human rights particularly those that guarantee liberty, equality, anti-discrimination are intrinsic in themselves. Once this point is appreciated, then a further argument can be made that such human rights can – but are not always – enjoyed independently. The point I am getting at is that the value of a human right is at times such that it generates externalities beyond the individual concerned. This argument blurs the distinction between the private and public by showing that individual rights – though enjoyed privately – have an important public effect.<sup>23</sup> Not only is the intrinsic value of a human right brought to light, it possibly explains why they can be goods to the public. From this perspective, understanding human rights as public goods, not only challenges how we traditionally think about human rights, but also connects the individual and community in a less antagonistic way.

To ground this argument further, I find support in Amartya Sen's seminal work on *Development and Freedom*.<sup>24</sup> It is mentioned briefly here because other aspects of Sen's work are discussed in chapter two and three. It comes from his attempt to encourage a shift of the focus of development from the pursuit of narrow values of incomes to wider social

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<sup>23</sup> For a philosophical discussion on the interface between public and private goods, see; Guess R. *Public, Private Goods*, Princeton University Press, 2001.

<sup>24</sup> Sen A. *Development as Freedom*, Oxford University Press, 1999.

values like human freedoms. A focus on human freedoms, he argues, requires attention to the ends of development – that is, the awareness of certain social and economic accomplishments like education or healthcare – that are vital to the quality of life. Using education<sup>25</sup> as an analogy, Sen demonstrates how the gains of enjoying the right to education always transcend the individual.<sup>26</sup> Sen’s argument is taken empirically from development initiatives that have stressed the transformative potential of women’s education in the Third World. They mark a shift from approaches that have only sought to give women equal rights with men to those that recognise that having such rights produce a wider effect on society. Such education and literacy programmes have placed women in a position, not only to transform their own lives, but also those of their children, husbands and communities. This has particularly had an effect on reducing infant mortality rates of children. It is possible to make similar arguments in favour of healthcare, water and – as justified later on – electricity.<sup>27</sup> Although they are enjoyed privately, their satisfaction is such that it generates externalities. It is such externalities that can be used to show the interdependencies between individuals and community. As such, individual rights like these can become collective aspirations for everyone in community.

Framed this way, much of the tension between individual rights and community can be circumvented, even if it is not totally eliminated. As with the definition of community proposed earlier on, it is possible for everyone to be recognised as a potential agent of social change, who can all contribute to the good of community. It is also possible to convince individuals that certain values are best protected as collective goods. This is implicated in the idea cooperation that underpins the concept of public goods itself –

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<sup>25</sup> See also, Sen A and Dreze J. *India: Economic Development and Social Opportunity*, Oxford University Press, 1996, at 14-15.

<sup>26</sup> Sen above n 23, at 128.

<sup>27</sup> Ibid.

particularly in its classical economic context. It draws attention to the importance of cooperation,<sup>28</sup> in that independent action – either by States or markets – for public goods is not always possible. This can be used to analogise that independent action cannot satisfactorily take care of the needs of the individual – an individual need also depends on cooperation with others. Once the discussion is pursued along these lines, it is possible to demonstrate that a lot more can be achieved by a community than by disaggregated individuals. The strength of this approach is showing the interdependencies that exist amongst individuals, including the less fortunate in community. But as with any arrangement that implies some sort of distribution or even cooperation, it is only likely that it would generate controversies, especially when there are scarce resources, or when some have more than others. Much will depend on opportunities for open public dialogue, where individuals in community can work out their grievances, and the arrangements for distribution no matter how difficult. This is a further indication of the need for Community Forums, as will be discussed in chapter six. Discussions in such Forums can focus on different things, including questions about human rights and other important values. Creating such opportunities for dialogue should be seen as a further way of bringing the relational dimension of human rights and community into light.

#### **4.1. Human Rights as Instrumental values**

There is a further way human rights are interpreted in the context of this thesis, and this leads to a broader point about another value of human rights to community. By proposing a role for community within the framework of human rights, the thesis is suggesting that there is something more about human rights than just their intrinsic value. It is suggesting

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<sup>28</sup> This point particularly comes out clear from idea of global public goods as championed by the UNDP, amongst others, who demonstrate how international cooperation amongst governments can be an important way of addressing some of the current problems – from HIV/AIDS to environmental problems – in the world today. See, Kaul I et al above n 2.

that human rights can also serve as a means to pursue certain objectives, including public goods. It is a call to understand that a specific claim for public goods cannot always succeed without an overarching framework of human rights at its background. It is possible to understand this argument irrespective of how public goods are proposed – either as economic goods or ethical goods, such as human rights themselves. For instance, as human rights, a background framework of human rights would always be necessary to guarantee other human rights. Put differently, certain civil and political rights, apart from their intrinsic value, would depend on certain economic and social rights. Similarly, certain economic and social rights would also depend on certain civil and political rights. This is one way of interpreting the Rights-Based Approaches to Development or the use of human rights to pursue goals such as global justice. This has made the importance of human rights quite remarkable today. Human rights have become a way in which many ills are addressed or sought to be addressed across the world.

This particular point leads to the question about the conception of human rights that underpins the whole approach in the thesis, especially the potential of community participation in human rights discourse. It comes from the understanding of why human rights have become so appealing or used to promote different goals. This is simply because of their moral appeal and the strength of moral persuasion they give to all sorts of claims. Because of this, I argue that even when human rights are invoked in an instrumental sense, there is still something ethical about such claims. When individuals or communities seek to advance their claims for water, healthcare or such other claims through the language of human rights, they are making ethical claims. It is not merely an ordinary claim for respect or for a certain kind of treatment; rather it is a powerful moral claim about something that



is owed to them because of their humanity. In this sense, human rights can be distinguished from other instrumental claims because of the underlying ethical nature of such claims.

To justify my argument, I turn once again to work of Amartya Sen. He also invites us to understand human rights as ethical claims, which every person, irrespective of citizenship is entitled to make, and which can motivate all sorts of things, including legislation.<sup>29</sup> It is this aspect of human rights – their moral force – that not only explains what they mean in this thesis, but also why they are important in contemporary political societies. Sen’s point of entry into this discussion is how he notes one of the most fundamental problems of human rights – that is, their lack of reasoned foundation. In spite of their importance to many struggles, or how they provide a means to resist different deprivations, they still suffer from a lack of reasoned foundation.<sup>30</sup> This accounts for a lot of scepticism of human rights by philosophers and legal theorist alike, who refer to them as “loose talk”.<sup>31</sup> Conceptual justification of human rights was overlooked at the period of their foundation, especially when the UDHR emerged. At the time of their birth, the universal truth of human rights was taken as self-evident without the need for proper justification. Sen sites Jeremy Bentham’s famous attack on rights, as “nonsense on stilts”<sup>32</sup>, as an example of the kind of scepticism that still hangs over them today. Bentham dismissed the idea that individuals could have natural rights because of their humanity, and without being supported by law. According to this view, human rights only make sense if they are backed up by legislation.

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<sup>29</sup> See, Sen above n 24 at 227-230. See, also, Sen A. *The idea of Justice*, Penguin Books, 2009. See also, Sen A. ‘Elements of a Theory of Human Rights’, 32(4) *Philosophy and Public Affairs*, Blackwell Publishing, 2004.

<sup>30</sup> *Ibid.*, at 355.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

Sen tries to rescue human rights from this particular criticism by suggesting that a plausible way of justifying the existence of human rights today is to consider them as ethical pronouncements which tell us what to do to achieve certain objectives. In other words, they are not just legislated law but ethical guides that we appeal to in order to understand “what should be done”,<sup>33</sup> and furthermore, how to achieve the freedoms enshrined in them. What is important from the standpoint of his argument – and for purposes of this thesis – is that human rights are proposed as a motivational instrument to encourage the reduction of deprivations. This motivational aspect of human rights may encourage many things, including legislation. They ought to be seen as an important motivation for legislation and not the other way round. According to him, this is what the framers of the UDHR anticipated when they proposed it as a model for domestic laws. Sen draws parallels between this idea of human rights as ethical pronouncements, and H. L. A. Hart’s idea of moral rights.<sup>34</sup> Hart similarly saw moral rights as “parents of law”<sup>35</sup>, which motivate specific legislation. It is this motivational element that is at the heart of Sen’s argument. However, they not only provide a motivation for law or for the respect of certain freedoms, but also for political agitation for other demands. The ethical force of human rights can be deployed in other ways to address different deprivations.

Two questions usually arise from proposing human rights as ethical claims; the first is the content of the claim, whilst the other is the viability of such claims when compared with others. With regards to the content, Sen argues that an ethical claim is concerned with securing certain freedoms embedded in rights. Sen here draws parallels between human rights and the idea of human freedoms mentioned above. The significance of an ethical claim for human rights is that it recognises and seeks to protect human freedoms, such as

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.,

<sup>35</sup> Ibid., at 363.

freedom from torture or starvation.<sup>36</sup> Secondly, the viability of human rights as ethical claims depends on the extent to which they along with other competing ethical claims can withstand open and informed scrutiny. As such, he argues that any framework of human rights ought to have interactive processes of “critical scrutiny and open argument, even if such reasoning leaves considerable areas of ambiguity and dissonance.”<sup>37</sup> Sen explains this point by drawing parallels between this interpretation of human rights and utilitarian ethics, with the latter seeking to maximise the sum total of individual utilities. Human rights on the other-hand are concerned with protecting certain freedoms and the social obligations necessary to guarantee them. Nevertheless, they are both ethical imperatives, one is geared towards freedoms, and the other towards happiness. Once it is recognised that they are both ethical values, interactive processes can be established to provide a means to determine which of these competing ethical claims would be prioritised at any given time – whether it is happiness, liberties or autonomy. This particular argument might even provide a formula through which much of the tension between human rights and community can be addressed, since the values they both represent are ethical, and can only be sustained through public debates.

The following point brings another aspect of Sen’s argument that further grounds the whole approach in this thesis – in other words, it offers a conception of human rights compatible with the goal of community participation. One consequence of recognising human rights as pre-legislated rights or ethical pronouncements is that it calls the dominance of the role of law in human right discourse into question. The legislative route or making new laws, according to Sen, should not be seen as the only way to achieve

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<sup>36</sup> Ibid., at 358

<sup>37</sup> Ibid., at 359.

human rights. It is a call to consider other ways of implementing human rights apart from through law:

The ways and means of advancing the ethics of human rights need not be confined to making new laws (even though sometimes legislation may turn out to be the right way to proceed); for example, social monitoring and other activist support provided by such organisations as Human Rights Watch, Amnesty International, OXFAM, Medecins Sans Frontieres, Save the Children, the Red Cross or Action Aid (to consider many types of NGOs) can help to acknowledge human rights. In many contexts, legislation may not, in fact, be involved.<sup>38</sup>

Sen here is, of course, speaking about NGOs, but this argument makes it possible to explore other avenues of contributing to human rights, such as the approach in this thesis. After all, the legislative route is not even open to many who seek to advance their claims for economic and social rights, as they remain non-justiciable. This point must not be glossed over – the possibility of dealing with such questions does not arise for many in the Third World.<sup>39</sup> The legislative route or agitating for new legislation is indeed an important way of achieving this objective, but it is not the only approach. This is even a more important reason for the approach in this thesis.

## **4.2. Are Human Rights Enough?**

The argument for human rights as ethical claims should not be confused as a suggestion that the language of human rights cannot be misused, abused or used to advance parochial claims. It is indeed because of the moral weight behind human rights claims that has made

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<sup>38</sup> Ibid., at 365.

<sup>39</sup> Nigeria is a good example. It is a signatory to the ICESCR but economic and social rights are non-justiciable. Nevertheless, economic and social rights can be read within the meaning of Chapter II of the Nigerian Constitution dealing with the ‘Fundamental Objectives and Directive Principles of State Policy’. Whilst not explicitly using the language of human rights, these principles are meant to guide the State to ensure the provision of minimum standards of welfare, healthcare and education. The absence of explicit provisions dealing with economic and social rights in the Nigerian Constitution originates from Nigeria’s colonial past. At the time of decolonisation, it is well known that the constitutions of the postcolonial States were modelled upon those of their colonisers. Nigeria was no exception, the Nigerian *Bill of Rights* of 1959/1960, was modelled on the *European Convention on Human Rights* owing to Britain’s ratification of same. It is well known that this document was not sympathetic to economic and social rights. For more details, see; Simpson, B. A. *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press, 2001, at 862–73.

them vulnerable to the pursuit of different ends, including unethical ones. This is certainly one explanation for their co-option by the various neoliberal market discourses, as will be discussed in chapter three. The ethics of human rights must be alive to such possibilities as well as the potential limitations of the language itself, the most important of which is whether actions in the name of human rights principles, not only tell us what to do, but the *right* thing to do. Much will depend on how well human rights – as well as other competing values – survive dialogues and public scrutiny, as Sen has suggested. But this also depends on opportunities for the internal critique of human rights, especially in such ways that can enable a better understanding of the kind of ethic implied. It requires an understanding of the epistemic resources they give us when we appeal to them to direct us to make the right decisions, particularly those which involve recognising and responding to deprivation and suffering.<sup>40</sup> It is a question that goes to the heart of human rights, one that questions their central objective or relevance in society. This can only be understood by critical scrutiny, and measuring the ethical quality of the language of human rights itself. There is something to be said about the complacency that often develops from leaving normative languages – not just human rights – unquestioned.<sup>41</sup> It could lead to indifference or that we take a lot for granted. It is only through such processes of questioning that the strengths and limitations of human rights can be made known. It is only with such knowledge that we can understand how their work can be improved by other ethical resources or if they are to be abandoned altogether.

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<sup>40</sup> Joseph Raz questions the appropriateness of human rights for collective claims like public goods, see; Raz J. 'Rights-Based Moralities', in Waldron J (ed.), *Theories of Rights*, Oxford University Press, 1984, at 189-190. On a more general criticism of human rights, see; Marx K. 'On the Jewish Question', in Waldron J (ed.), *Nonsense upon Stilts, Bentham, Burke and Marx on the Rights of Man*, Meuthuen, 1987.

<sup>41</sup> See, Del Mar M and Onazi O. 'The Moral Quality of Work: Resisting Complacency', 4 (4), *International Journal of Law in Context*, Cambridge University Press, 2008, at 352-353.

One way of questioning the ethical quality, strengths, limitations, and perhaps, how human rights work can be improved by other values is pursued here through the writings of modern mystic and Christian anarchist, Simone Weil.<sup>42</sup> It is explored through her engagement with human rights through her approach to justice, one which differs from contemporary approaches, particularly that influenced by John Rawls. Differences between approaches of both scholars are not explored here in detail, except to say that Weil's work departs from Rawls on the constitutive role of human rights in the pursuit of justice.<sup>43</sup> In other words, her work was sceptical about rights-based approaches to justice. According to Weil, when rights become the dominant moral discourse in any given society, it is a sign that the society itself has become commodified to the effect that rights become substitutes for justice. For her, rights are a materialist concept because they exude "commercial flavour",<sup>44</sup> and this was why she warned against the danger of replacing justice with human rights. This was also for the reason that she considered rights-based claims for justice as symptomatic of a contentious society. Indeed, she warned that "...[R]ights are always asserted in a tone of contention; and when this tone is adopted, it must rely upon force in the background, or else it will be laughed at".<sup>45</sup> For her, rights were inappropriate for problems that can better be resolved by the impulse of love and charity.

The point above comes out clearer when she offers another reason for her scepticism of rights. Her anxieties were also that rights were unable to intricately express the most silent cries of injustice. She argued that human rights claims were quite superficial and were akin to "the motive that prompts a little boy to watch jealously to see

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<sup>42</sup> See, Weil S. 'Human Personality', in Rees R (ed.), *Weil: Selected Essays 1934-1943*, Oxford University Press, 1962.

<sup>43</sup> For comparisons between Simone Weil and John Rawls on justice, see; Bell R. *Simone Weil: The way of justice as Compassion*, Rowman & Littlefield Publishers, Inc, at chapter three. See also, Winch P. *Simone Weil: The Just Balance*, Oxford University Press, at 181.

<sup>44</sup> Weil above n 42.

<sup>45</sup> *Ibid.*, at 18.

if his brother has a slightly bigger piece of cake”.<sup>46</sup> This is a different cry from one from the depth of the heart that asks, “Why am I being hurt?” This cry is more profound, and difficult to grasp, “it is a silent cry, which sounds in the secret heart”.<sup>47</sup> It is the sort of cry that is hardly expressed in any comprehensible language. It is often the case that those who express such cries are not able to articulate themselves audibly. In such situations, the heart which cries out is the only human faculty that is capable of freely and publicly expressing itself. For her, such cries can only be heard by the act of attentive silence and love.

To illustrate this point, she demonstrates that ancient Greece had no concept of rights, as it adequately made do with the concept of justice. Weil demonstrates this from Sophocles’ tragic play, *Antigone*.<sup>48</sup> To briefly summarise this story; it involved two brothers, Polyneices and Eteocles, who lost their lives after being embroiled in a fight over the kingdom of Thebes. Creon, the uncle of both men, and King of Thebes prohibited the burial of the aggressor of the fight, Polyneices. Their sister, Antigone disobeyed this injunction and went ahead to bury Polyneices. She was in turn punished by Creon, and was sentenced to death for her disobedience. Weil found nothing wrong with the fate that had befallen Antigone, especially for what she considered her foolish attempt to treat both brothers equally. Creon was justified to take the decision he reached, as Antigone simply was wrong to do what she did. At the same time, Antigone’s actions did find justifications in Weil’s thinking, especially when they are considered non-rationally. She was, as Weil says, overwhelmed by love, which seemed to take precedence over everything else. Antigone was not concerned with what each person had done, what they deserved or their personal qualities. Rather (as illustrated below), she was motivated by a type of love that is sacred and impersonal. This was simply because she considered it as a type of love that

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid. at p.10.

<sup>48</sup> Ibid.

circumvents all empirical qualities of humanity. It was a “foolish, unreasonable, absurd”<sup>49</sup> type of love. The point is that Antigone’s actions were not determined by rights.<sup>50</sup> They were motivated by justice, a kind of justice that “... dictated this surfeit of love”. It had nothing to do with rights, since for Weil they “... have no direct connection with love”.<sup>51</sup>

More fundamentally, Weil questioned rights for their close relationship with the concept of personality. By personality, as Christopher Hamilton<sup>52</sup> explains, she meant something derived from the concept of *personalism*. This simply refers to the metaphysical core in all human beings – that is, a way of understanding the dignity and inviolability of humanity. The problem for Weil is that personalism does not quite grasp what is sacred about human beings. It functions like a shield, which presumes that the destruction of humanity is impossible.<sup>53</sup> It assumes that each individual is indestructible, and thereby capable of withstanding the most abhorrent of circumstances. The metaphysical centre shields human beings from being afflicted, and by the same token, human beings are incapable of inflicting harm on others.

Part of the problem arises from its definition. It is difficult to know what it is let alone rely on it as a “standard of public morality”.<sup>54</sup> This is similar with the notion of rights, and to combine two inadequate concepts accounts for the latter’s limitations. According to Weil, understanding the sanctity of humanity lies in comprehending how the soul is lacerated by the thought of harm being done to them. It comes from the expectation that *good* not evil will be done to us. This is an expectation that exists in all human beings

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid., at p.20.

<sup>51</sup> Ibid., at p. 20

<sup>52</sup> See, Hamilton C. ‘Simone Weil’s ‘Human Personality: Between the Personal and Impersonal’, 98(2), *Harvard Theological Review*, 2005, at197-207.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., p. 10.



even the vilest. Paradoxically, the point Weil is getting at is that the “cry of sorrowful surprise”<sup>55</sup> resulting from the infliction of evil is not personal; rather they are impersonal protests. Whilst there are many important personal cries, they do not in any way violate what is sacred. According to Weil, it is “neither his person, nor personality in him, which is sacred. It is he. The whole of him”.<sup>56</sup> If it is down to his human personality, “I could easily pull out his eyes”.<sup>57</sup> After all, “as a blind man he would be exactly as much a human personality as before.”<sup>58</sup> Her point is that it is erroneous to justify morally abhorrent wrongs on some empirical quality of humanity. If this is done (as in most cases), it means that no individual is capable of harming the other. This is an unrealistic response to the question of why it is wrong to harm others.

Impersonality can only be understood through a form of solitude – that is, through what she called a form of *attention*. It is impersonality that draws obligations towards others, especially those with the weakest potentials. Antigone’s actions are important for another reason here. They revealed the power of impersonality, given that she was not concerned about what each of her brother’s had done, or what they deserved, or their personal qualities. Rather, she was motivated by a type of love that is sacred and impersonal.

#### **4.4. Human Rights Matter**

Simone Weil’s criticisms of human rights are very telling, and have certainly failed to attract an adequate response. But even on the strength of her criticisms, it can also be argued that they do not in any way reduce the continuing moral appeal for human rights

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<sup>55</sup> Weil above n 42, at 12.

<sup>56</sup> *Ibid.*, at 10.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

across the world today. Human rights may be hugely inadequate, but it must be recognised that in certain circumstances they may be the only source of inclusion or hope for the poor. Weil's criticisms at best point to the limits of human rights, especially how observing them will not always lead to the right thing to do. Much as she is owed huge debts for pointing out these problems, it does not necessarily mean that we should abandon them. Rather than reject them or replace them with something entirely new, what is needed is to rescue them from such imperfections. This can be achieved – as argued earlier on – by understanding human rights as ethical claims, and furthermore, the need to subject them to processes of internal critique. Human rights as ethical claims invite us to understand and question the sort of ethic involved. It entails understanding what standards they propose, and how to measure them. This entails understanding how well they function when they are called upon to assist in addressing many pressing problems, such as those that are related to forms of human suffering. This is, after all, why the contemporary discourse of human rights emerged after the Second-World War. The ethical significance of human rights today, no matter how much that they have been subsequently adapted and narrowed, cannot be appreciated without understanding how, and in what ways they can respond to various forms of human suffering.<sup>59</sup> Questioning human rights as proposed can help develop an ethic of responsiveness amongst individuals and institutions towards the alleviation of human suffering. This can be achieved exactly how Weil herself spoke about it – that is, through a system of public education that assists in hearing the faintest cries of suffering. She advocated for new regimes and institutions “... in which this faint and inept cry can make itself heard; and ...put[s] power into the hands men who are able and anxious to hear and understand it”.<sup>60</sup>

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<sup>59</sup> A recent attempt to propose a relationship between human rights and human suffering can be found in the work of Andrew Williams. It is discussed in chapter four, see; Williams A. ‘Human Rights and Law: Between Sufferance and Insufferability’, 123, *Law Quarterly Review*, 2006, at 132 – 157.

<sup>60</sup> Weil above n 43, at 12.

From this perspective, an internal critique of human rights, or measuring and understanding their ethical quality cannot be understood without the work of Weil, particularly through the lens of her concept of attention. It is a habit that individuals – particularly those in authority – need to cultivate to try to understand better, and address different problems around us, especially those that cause human suffering. To understand the significance of Weil’s idea of attention, it would appear that some clarification is firstly needed of her perceived opposition to human rights, or the degree to which she opposed them. On the surface, her criticisms might seem anti-human rights, and somewhat counter-productive from the perspective of this thesis. On closer inspection, however, Weil did not oppose human rights; rather she placed them at secondary place. She gave more priority to love, and it was not that she thought human rights had no value at all. Agreeing with this point Peter Winch writes that:

Although, as we see, she expresses herself strongly about the language of rights, it is important to realise that she is not rejecting it as always inappropriate. I think her discussion does not even rule out the possibility that injustice may, in some cases, actually take the violation of someone else’s rights...The *inspiration* for a demand for rights may well be a concern for justice; it may be in some circumstances to struggle for rights is the best way of struggling for justice. But that does not mean that the struggle for justice is the same thing as the struggle for rights; the one struggle may be successful and the other not – may be that is even more often than not the outcome.<sup>61</sup>

For Winch, it is important that this distinction is not lost – that is, that rights may not always lead us to justice or might sometimes mislead us to think that rights are equivalent to justice. With this point put to rest, there is nothing contradictory about trying to understand how Weil’s ideas can assist the framework of human rights, so that when we appeal to them as ethical guides, they can comprehensively tell us what to do to achieve development, economic and social rights, or alleviate the suffering that results from the failure to achieve such objectives. Attention is a powerful way of achieving this, for it is:

... a form of discernment of seeing what people are saying when they are hurt...Attention consists of suspending our thought, leaving it detached, empty and ready to be penetrated...Above all our

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<sup>61</sup> Winch above n 43, at 181.

thought should be empty, waiting, not seeking anything but ready to receive in its naked truth the object that is to penetrate it.<sup>62</sup>

Accordingly, attention is simply *seeing* that which we often ignore. It is an ability which exists or can be cultivated by all individuals. As the passage above reveals, this consists of an aptitude that includes a number of things; it consists of listening, looking, being still or patient and the willingness to embrace the *other* with compassion and help.<sup>63</sup> My reading of Weil's work here is shaped by one of her followers – that is, from the work of Zenon Bankowski.<sup>64</sup> He provides one of the most profound interpretations of attention, one that makes such a difficult concept rather easy to grasp. It is obvious that Weil's ideas are shaped by her Christian orientation, and also her mysticism. As Bankowski elaborates further, this influenced what she meant by attention, it was analogous to the way she thought one could experience the love of God. The unconditionality implied by God's love is key to grasping attention. In other words, individuals had an obligation to love one another. It was a kind of expectation that many Christians and non-Christians alike, might find absurd, as well as hard to observe. The Biblical account of the Good Samaritan was important in bringing this to light. The significance of the Samaritan assisting the man, who was possibly his enemy, and who had fallen amongst thieves, is exactly what attention entails. Building on the parable of the Good Samaritan, attention is not simply a question of understanding who one's neighbour is, but rather, "...a constitutive act of making the other a neighbour by the act of helping".<sup>65</sup> And the act of making one a neighbour is achieved through this unique act of compassion, where the non-afflicted takes on the pain of the afflicted with love.

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<sup>62</sup> See, Weil S. *Waiting on God*, Crawford E (Trans.), G.P Putman, 1951, at 59.

<sup>63</sup> *Ibid.*, at 96.

<sup>64</sup> See, Bankowski Z. 'The Space to See', presented at the *Beyond Text in Legal Education Workshop*, University of Edinburgh, 2009.

<sup>65</sup> *Ibid.*

What Weil is suggesting is not simple, especially if one considers the narcissistic nature of individuals. Even when we are genuinely motivated to assist the afflicted, our self-centred disposition only leads to condescension or we fail to connect with the depth of the other's suffering. Individuals either remain distant or their interventions are paternalistic – they are not often made from a position of equality. This is perhaps why Weil thought that the only way that one can sincerely assist the afflicted is when one takes part in the affliction. What she meant was that it was hardly possible to understand the afflicted from a privileged position; this was only possible if one embraced their affliction. She thought that our privileged position is more of an accident of fate than a natural position.<sup>66</sup>

Weil's concept of attention certainly cannot be understood without the concept of love at its background. Attention is undoubtedly an expression of love. Her reference to love – as with most of her thought – is distinctively Christian but it can be interpreted in a secular way. Love is sacred and impersonal as seen from the parable of the Good Samaritan, where the love of the neighbour was really about the love of the stranger.<sup>67</sup> Love is unreasonable, but yet does not totally exclude rationality. After all, attention – the act of stillness – is not absolutely a form of irrationality; it requires a certain degree of deliberation. Love certainly cannot be legislated – this should not be mistaken as the suggestion. What it can do though is provide a philosophy that guides our actions, or the way our laws, legal frameworks, and other institutions are designed to treat those in need

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<sup>66</sup> Winch above n at 43, at 182.

<sup>67</sup> See, Cabaud J. *Simone Weil: A Fellowship of Love*, Harvill Press Limited, 1964, at .213-214. A more recent attempt to propose love as a political concept can be found in the work of Michel Hardt and Antony Negri. In rescuing love, they offer a conception that is quite similar to Weil's, quite apart from the fact that they both originate from Christian and Judaic traditions. See, Hardt M and Negri A. *Multitude: War and Democracy in the Age of Empire*, Hamish Hamilton, 2004, at 351-352. Love for them refers to the forms of solidarity and social production between those who live in poverty. Love is "solidarity, care for others, creating community, and cooperating in common projects"[as] "an essential survival mechanism". See, Hardt and Negri A. *Commonwealth*, Harvard University Press, 2009, at 181.

with utmost priority. After all, no law, institution or intervention can exist without a background operating philosophy.

## **5. Electricity as a Case-Study**

In terms of its application – particularly to understand the problems, and to consequently build a theory of community– the thesis is developed in the context of access to electricity in Nigeria, a country where 40-70% of its population are estimated to lack electricity.<sup>68</sup> The choice of electricity as a means of illustrating the arguments in this thesis obviously needs justification since it is not traditionally considered as a human right. Unlike water, education and healthcare, electricity certainly rarely features in the justiciability debates of economic and social rights. This seems ironic given that the lack of access to electricity has far reaching consequences on the enjoyment of other human rights. Certainly, the ability to drink clean water or to access good education or healthcare would in one way or the other depend on electricity. In spite of these obvious connections, electricity has not been fully embraced by international human rights discourse. Electricity remains the subject of the attention of engineers and to some extent development economists, but it enjoys marginal responses from international human rights lawyers. Electricity is rarely discussed in the human rights literature in spite of its vital connection to other rights, as well as its importance to addressing poverty. This might be a consequence of the more recognised relationship between electricity and industrialisation to the effect that its social and ethical dimensions have not been properly established.<sup>69</sup>

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<sup>68</sup> This figure includes rural areas with only 10% of Nigerians there with access to electricity. See, Hall D. 'Water and Electricity in Nigeria', *Public Services International Research Unit publication*, 2006, at 10.

<sup>69</sup> See, Winther T. *The Impact of Electricity: Development, Desires and Dilemmas*, Beghahn Books, 2008, at 1.

One noticeable exception, and advocate of electricity as a human right is Stephen Tully.<sup>70</sup> His work is used here as a vehicle to justify why access to electricity ought to be a human right, and furthermore, a public good in light of earlier arguments in this chapter. Of course, a case can be made about electricity as a public good in the economic sense of the term, but this is not the argument I want to pursue. Tully convincingly argues that it exists as an attribute of a pre-existing right or in the context of eliminating discrimination against women.<sup>71</sup> To begin, the right to access electricity exists in international law as a subset of housing rights, and as recognised by the ICESCR. According to Tully, even the UN Special Rapporteur on housing has been on record to include electricity as a basic requirement for adequate housing. Similarly, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) makes it clear under Article 14(2) (h) that State parties are obligated to “take all appropriate measures to eliminate discrimination against women in rural areas...and, in particular, shall ensure to such women the right...to enjoy adequate living conditions, particularly in relation to...electricity”.<sup>72</sup> The reporting procedure that accompanies CEDAW also makes it a requirement to report on access to electricity amongst women.

On the domestic level, some States have gone on to recognise access to electricity as a human right in their law, one of which is the United Kingdom’s (UK) “people-approach to electricity”<sup>73</sup> which is a species of a rights based approach, and recognises “equity of access to basic energy services for cooking, space heating, and lighting, like

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<sup>70</sup> See, Tully S. ‘The contribution of Human Rights to Universal Access to Energy’, 4 (3), *North-western Journal of International Human Rights*, 2006. See also, Tully S. ‘The Human Right to Access to Electricity’, 19(3), *The Electricity Journal*, 2006, at 30-39.

<sup>71</sup> Ibid, at 30.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

access to water...as a human right”.<sup>74</sup> Other States like France and South Africa have similarly recognised electricity as a human right. In my analysis of the Nigerian electric sector reform in chapter four, I show that a right to electricity service now exists under Nigerian law but it is unclear if it is proposed as a human right or just – as it seems – a consumer right. Leaving that aside for now, Tully also expands on the content and the scope of the human right to access to electricity by trying to understand how it can function like other individual human rights claims. For this to happen, he argues that, it must be universal and justiciable. In addition, the ramifications of governmental obligation must be clearly demarcated. This, he acknowledges, is difficult, and not much work has been carried out in this respect. Nevertheless, this does not deter him from showing what this implies. It entails that all governments should provide equal supply of electricity to everyone within their jurisdiction. In other words, the scope and content of the right, “entitles everyone to access a reliable, adequate, and affordable electricity supply of sufficient quality for personal and household (domestic) use”.<sup>75</sup> He takes each of these concepts seriously, and spends time on elaborating on what those terms mean with great clarity, and in ways that can inform contemporary reform approaches. Unfortunately, this is yet to be fully accepted, not only amongst human rights lawyers, but also by the BWIs, especially the Bank, a key driver of electricity reform in the Third World. This argument is explored in more detail in chapter four when I provide a case study of the reform of the Nigerian electricity sector. Part of the general objective in this thesis, then, is to show how human rights – particularly the ethical language of human rights – might direct those in positions of authority to recognise the profound link between electricity, human rights and human suffering.

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<sup>74</sup> Ibid., at 31.

<sup>75</sup> Ibid.



It is acknowledged that the jury is still out on the relationship between electricity, human rights and human suffering. But the connections can easily be appreciated if we understand the implications of the following argument. Life without electricity is a constant struggle to cook food, power household appliances, support healthy temperature, whether by air conditioning or heating.<sup>76</sup> Electricity is essential to power pumps, and desalination treatment for access to clean water. It is essential for healthcare, especially refrigerating vaccines or for functioning life support systems, shock therapy or intensive care units.<sup>77</sup> We need electricity, not only for recreational activities, but also for educational aids, such as computers. These are all important, including the ways in which it can contribute to generating people's incomes as some economists would like to look at it. If history teaches us anything, it does reveal that from Lenin's electrification scheme in the old Soviet Union to the Tennessee Valley Authority Rural Electrification project in United States (US), electricity has been an important factor that has helped millions escape the clutches of poverty. Vladimir Lenin, in particular, considered electricity as a form of enlightenment, a means through which the poor can be educated to eradicate poverty.<sup>78</sup> He considered every power station as a centre of enlightenment, and one does not have to be a follower of Lenin to understand the significance of this argument.

## **6. Structure of Thesis**

The ideas in this thesis are presented through eight chapters. The next three chapters (two, three and four) offer a critique of the current market approach – the response to State failure – that now influences human rights in the Third World. This thesis, after all, cannot be appreciated without a discussion of the problems that arise from the current approach,

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<sup>76</sup> Ibid., at 34.

<sup>77</sup> Ibid.

<sup>78</sup> See, Lenin V. .I. *Collected Works*, Vol. 31, Katzer J (Trans), Lawrence & Wishart, 1920 at 516-518.

particularly the emphasis on the markets in human rights discourse, a theme that runs throughout those chapters. The chapters also instantiate the general claim in the thesis that the idea of community is not well recognised. Chapters five, six and seven also have a common theme; they outline the main argument in this thesis – that is, the theory of community. The thesis concludes in chapter eight.

The diagnosis for the general problems of human rights is often seen as a question of State failure. Good governance is the response to this problem. Chapter two provides an analysis of good governance – the concept that influences the market approach to human rights. This chapter is a prior step to understanding how it specifically relates to human rights by explaining what good governance really means, its inadequacies, where it originates from, its salient features, and its similarity and points of departure from governance in transnational discourses.

Chapter three focuses on how the market approach works. It explains reasons behind the embrace of markets by the approach, and tries to understand the role of the BWIs in such processes. In doing so, it demonstrates that part of the problem is also that little attention has been paid to alternative ways of thinking of markets, especially those that offer more potential for cooperation and collaboration amongst the poor. As such, the problem is not so much the question of markets; it is also of the kind of market involved. The chapter concludes by making a case for social markets, particularly the co-operative as a suitable model for human rights, and for encouraging participation and cooperation amongst individuals, within and between communities.

Chapter four demonstrates how the good governance approach translates into practice. In particular, it explores the way it encourages privatisation to the exclusion of both human rights and community. In doing so, the chapter offers a critique of the reform proposals for electricity in Nigeria, and concludes by arguing that some of the problems pointed out, especially those of poverty, human suffering and participation might better be brought to attention by the inclusion of an ethical framework of human rights in the reform. It might help shift the focus of the reforms away from more trivial concerns to embrace those that understand the kinds of suffering implied as a result of the inability to access and participation in electricity.

Chapter five starts to build the case for community by considering in general terms how the concept is used in human rights discourse. This is because one cannot understand the uniqueness of the proposals for community here without first of all understanding how it is currently used in the dominant approaches. It discusses the use of community, and points to the inadequacies relating to it. Partly responsible for the minimal use of community is a tension that arises from the conceptual differences between human rights and community. Such differences have generated a lot of debate, but the concepts have not always been proposed in oppositional terms. The chapter considers the work of certain theorists who have not seen them in such oppositional terms as a way forward, and concludes by showing the indispensability of dialogues in resolving any potential tensions that may arise. The chapter provides the groundwork for discussions of the theory of community in the remaining parts of the thesis.

Chapter six follows on from the above to explore how the whole approach to community might work. It outlines the substantive elements of the theory of community. First, it begins with a discussion of community – what it is, problems associated with it, and how they might be overcome by offering a vision of what it ought to be. It then proceeds to discuss potential spaces to encourage participation of individuals in community. Finally, the chapter offers a theory of deliberation for decision-making within such Community Forums.

Chapter seven takes the arguments in the previous chapter a lot further by trying to instantiate how a community might participate in relation to the proposed human right to electricity. It offers a hypothetical co-operative model as a potential end-product of discussions in Community Forums, and furthermore, how the aspirations for participation can be operationalised. This chapter is a continuation of discussions in chapter three about the potential role for social markets in human rights discourse. It offers a general discussion of the potential role for co-operatives in electricity, and how the existing legal and institutional framework of electricity in Nigeria, can be reformed to accommodate them.

The thesis concludes in chapter eight by offering a summary of the argument and reflects on the implications of the thesis on the traditional State-based human rights discourse by understanding how community and the Weilian approach align human rights horizontally.

## Chapter Two

### GOOD GOVERNANCE AS A METAPHOR FOR DEVELOPMENT

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*It is only with good governance that we can find solutions to poverty, inequality and insecurity.*<sup>79</sup>

#### 1. Introduction

Many problems of development in the Third World, including those relating to human rights, are often said to arise from a profound governance question. The concept of good governance is the response to such problems by the BWIs – particularly the Bank’s – inspired lending initiatives. It emerges in favour of the role of markets as a substitute for the State in processes of governance, including the governance of human rights. The chapter seeks to understand the concept that makes it all possible. In particular, it clarifies what good governance really means, its inadequacies, where it originates from, its similarities and differences with the more general use of governance in international relations and legal theory. This chapter as such lays the foundations for the discussions in the chapters that follow. The reason for this is simple. It is not possible to adequately understand the problems that the thesis attempts to address, and furthermore, the potential of community participation without first of all grasping the underlying premise that underpins the dominant approach.

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<sup>79</sup> See, United Nations Development Programme, *Governance Policy Paper*, United Nations Development Programme, 1997.

The chapter begins with a general discussion of the perception and changes to the traditional notion of governance in international relations. It explains how the perception of governance has shifted from centralised notions of economic and social regulation typical of the administration of the State to a new era of flexible, participatory, dialogic, complex forms of regulation. The chapter proceeds to discuss the changes from the perspective of the Third World, as facilitated by good governance. It offers a critique of the approach, which not only explains why it limits the possibility of multiple solutions to the different problems, but also the possibility of other ways of thinking of governance. The chapter proceeds to explain the emergence of good governance from a historical perspective, particularly through the influences of the seminal work of Max Weber and the first law and development movement. It concludes by noting some of the ways that good governance departs from those early influences as well as briefly highlighting its failure to meaningfully embrace community.

## **2. The rise of Governance**

The term governance often generates contradictory meanings, even though its definition can be reduced into two contexts. In its more traditional or older context, it implies attention to government, and the various ways in which political power is exercised. It refers to the exercise of powers or the coordination and administration of social, economic and political processes within a given territory. Governance, in this context, is more broadly concerned with the political role of the State in directing society through standard setting of objectives and priorities. More recent discussions about governance, however, now refer to it in the context of the State's adaptability to internal and external transformations of the late twentieth century. Governance now prioritises informal as

opposed to formal forms of authority, given the importance it attaches to hybrid forms of public and private co-operation.<sup>80</sup>

Economic globalisation has been responsible for most of these changes in the perception of governance. Globalisation has been symptomatic of the rise of neoliberal regimes across the world, the emergence of which is visible in many countries across the world. It manifests itself through the revival of classical economics or market liberalism, which take the form of monetarism, deregulation, privatisation and the down-sizing of the civil service. As one observer puts it, the current era is marked by “an ideological and cultural shift from collective solutions towards individualism and a heralding of private enterprise and the market as the superior resource allocating mechanism”.<sup>81</sup>

The State no longer has monopoly over governance, just as governance now emerges at multiple levels. Explaining the shift in the language of governance, a very comprehensive article by Orly Lobel<sup>82</sup> traces the origins of these developments to events in the United States (US) and the Europe Union (EU). In those contexts, as she illustrates, the State has embraced the vast potentials of new technologies, market innovation and civic engagement in ways that enable different stakeholders to participate in governance processes. This, of course, has been encouraged through the advent of globalisation, the problems of which have prompted self-reflection about the suitability of existing regulatory frameworks and categories within legal theory.<sup>83</sup> In other words, the inadequacies of the

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<sup>80</sup> On governance, see the following; Pierre J. ‘Introduction: Understanding Governance’, in Pierre, (ed.), *Debating Governance*, Oxford University Press, 2000. Kettl D. ‘The Transition of Governance: Globalization, Devolution, and the Role of Government’, 60, *Public Administration Review*, 2000, at .488-497. Rhodes R. *Understanding Governance*, Open University Press, 1997. Offe C. ‘Governance: An “Empty Signifier?”’ 16(4), *Constellations*, 2009, at 550-562.

<sup>81</sup> Lobel above n 9.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid., at .274.

command and control regulatory models as a result of globalisation have also called the existing legal theories, laws and legal frameworks into question.

Lobel explains further that proponents of governance argue that traditional ways of thinking about laws and legal theory have to be adaptable to changes in the economic, social and political climate. They suggest that globalisation has marked a new phase of modernity, and this has entailed rethinking traditional categories of legal theory, policy and practice to deal with the new complexity of contemporary societies. In this emerging environment of complexity, generalised or centralised rules are considered inadequate responses to the particularities of the new circumstances. The uncertainty and unpredictability produced by these conditions are such that have made the need for new laws to cope with the “radical indeterminacy” and “unintended consequences”<sup>84</sup> of the market framework. “New governance” (as it is often called) has been proposed as a substitute for regulation and an adjustment to the changes brought about by market rule. Consider the following explanation by Lobel:

A significant impediment for legal reform today is the diversity of the market and the wide range of social issues and problems, which require the adoption of a wide range of organizational forms and thus a unitary conception of the regulation of diverse social fields and context is impossible. There is no one size-fits-all solution to the challenges facing the regulatory state. No standard regulation can effectively govern the multiplicity of settings in which social action operates. The nature of the new economy requires legal institutions to be multiple and diverse.<sup>85</sup>

Part of the response to these developments has been provoked by what Lobel calls an ‘internal drive’ within legal theory. It simply refers to attempts to adjust and respond to these changes with more adequate legal theories. What this means is that the emergence of new governance has also been explained from a functional response within legal theory. Such perspectives have taken the inadequacies of centralised regulatory frameworks as

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<sup>84</sup> Ibid., at.278.

<sup>85</sup> Ibid.



their starting point, but they have also gone much further in recognising the dangers of exclusively depending on markets. Regardless of this, the internal response from legal theory has placed more emphasis on the limitations of command and control legislation, and consequently, its role in the production of the interventionist State.

The internal or functionalist dimension has been explained in evolutionary terms, thanks to Gunther Teubner's<sup>86</sup> work on reflexive law and autopoietic systems. Following on from Niklas Luhmann's<sup>87</sup> seminal work on systems theory, Teubner has proposed autopoiesis as an analytical framework to explain the complexity of the contemporary era. She is referring to Teubner's proposals for a reflexive approach to regulation, which functions in ways that enhance the self-referentiality of social systems, and as an answer to such complexity. Each social system is described as autonomous or radically closed but at the same time open to co-operate with one another. In the US, protagonists of governance have operated under this school of thought, quite apart from the fact that they have explained such changes through evolutionary theories of law, which in turn, explain the rise of modern law. On this view, modern law evolves according to a three stage linear progression. They have argued that modern law evolves from a system of autonomous private orders to centralised regulatory model, and finally, to the current approach, that is, the governance approach. The origins of modern law can be traced to a regime of private entitlements, which proceeds to a system of formal law. Modern law then progresses to a centrally coordinated system typical of Roosevelt's New Deal regulatory models, given that formal law was, at that time, considered an inadequate framework for markets to operate. The common view then was that markets needed to be regulated, a task that gave

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<sup>86</sup> See, Teubner G. 'Substantive and Reflexive Elements of Modern Law', 17(2), *Law and Society Review*, 2001, at 239 - 385. See also, Teubner G. 'Introduction to Autopoietic Law', in Teubner G (ed.), *Autopoietic: A New Approach to Law and Society*, de Gruyter, 1987.

<sup>87</sup> See generally, Luhmann N. *Law as a Social System*, Oxford University Press, 2004.

rise to the modern bureaucracy. This system eventually proved inadequate, quite apart from breeding an environment in which one system dominated the other. The New Deal regulatory framework was either open to capture by the more powerful systems, or merely became politicised. Governance has now emerged in the final stage of the progression to reinvent the approach to regulation. It has influenced the substitution of regulation with spatial and reflexive systems composed of self-regulatory sub-systems. Looking at the specific characteristics of the new governance model, Lobel illustrates how it resembles the market organisational model. Proposals for governance are replete with suggestions about how government bodies must also adopt such practices typical of market organisations. One consequence of such arguments is that government itself is urged to down-size or reduce its costs. This is often carried out through extensive programmes of privatisation or downsizing of bureaucracies, apart from contracting out State functions to private entities.

Another important feature of the new governance model is that it has encouraged participation at various levels of decision-making. This is one of the most visible differences with the regulatory model, where participation was monopolised by technocratic or bureaucratic experts. The new governance model has opened up decision-making to a whole range of actors. In doing so, it has encouraged a new kind of expertise, one unavailable in the past. Participation has now been extended to a wide range of activities, from legislation to the design and implementation of policies. Governance now offers a framework for everyone to participate – it has not been restricted to representatives of the market or State. The scope and processes of participation are equally open to members of civil society.<sup>88</sup> As a consequence, a third-sector of government has emerged creating a new regime of public sector management as well as new methods of delivering social services. New governance marks a spatial shift from the formal legal entities to an

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<sup>88</sup> Lobel above n 9, at 294.

era of private for profit as well as non-profit sector participation. Such kinds of participation not only take place at the domestic level, but also at the multi-national spheres leading to claims of the emergence of a global civil society. Apart from participation, new governance has also encouraged collaboration amongst different entities. Government – or the State’s – role has been transformed into one that facilitates collaboration of different entities. New governance now encourages shared responsibility between government, the private sector and civil society groups.<sup>89</sup> It is a commitment for dialogue at all levels of the public sector, one that now extends to local communities at national and transnational levels. There is a democratic element to new governance, in that it has sought to enhance the deliberative capabilities of members of the public, the limitation of which is that it has encouraged participation of communities through market exchanges. Even so, new governance does not totally rely on the market. New governance is to say the least a middle ground between State-based and market regulation. It seems to create flexible approach that seeks to build productive relationships from both administrative and private market mechanisms.

A further point that emerges from the following is what is the nature of the relationship between the old regulatory and new governance model? To answer this, new governance should not in any way be understood as a substitute for regulation. Both models have a more complementary relationship than often acknowledged in the governance literature.<sup>90</sup> New governance does not replace, but co-exists alongside the old regulatory model. They have a more balanced relationship than often conceived, even though this relationship is often taken for granted.

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<sup>89</sup> Ibid., at 298.

<sup>90</sup> See, Trubek D and Trubek G. ‘New Governance and Legal Regulation; Complementarily, Rivalry or Transformation’, *University of Wisconsin Legal Studies Research Paper No. 1022*, 2007. See generally, Walker N. and de Burca G. ‘Reconceiving Law and New Governance’, *European University Institute Working Paper No. 10*, 2007.

There are other fundamental problems with claims about new governance, one of which is the question of democratic legitimacy, which is made obvious, thanks to Paul Hirst's<sup>91</sup> important essay on this question. It sheds light on how new governance poses problems for traditional notions of political accountability. New modes of participation have created new problems of accountability. This, as will be seen in the subsequent chapter, has presented challenges for human rights. More importantly, although it disavows being a 'one-size fits all-approach', it is ironically promoted as such across the globe. Such ideas about governance have not only been transferred across disciplines, but also across boundaries. And when measured against the demands of the Third World, the claims of novelty about governance are questionable. As considered next, it is part and parcel of the paradigm of development.

## **2.1. Governance in the Third World**

Most presuppositions about new governance above are now replicated in the Third World through the Bank's concept of good governance, even though it must be appreciated that there are considerable differences on how it emerges in this context. Ideas about ('old' and 'new') governance have a more complementary relationship in the Third World in proposals for good governance.<sup>92</sup> It seems to encourage a more progressive relationship between legal regulation and governance. Unique to the Third World, however, is that good governance now represents one of the most influential concepts in development

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<sup>91</sup> Hirst P. 'Democracy and Governance', in Pierre J (ed.) above n 80.

<sup>92</sup> The focus, for obvious reasons, is on the notion of good governance as articulated by the Bretton Wood Institutions (BWIs). It is distinct from the perceptions of good governance that emerge from the United Nations and its inter-governmental agencies as well as the African Union. The similarities and differences between these conceptions are beyond the scope of this thesis.

discourse. It is often a phrase touted as the central development orthodoxy by the international development institutions.<sup>93</sup>

The Bank<sup>94</sup> is arguably the most influential proponent of good governance. For the Bank, governance is primarily the manner in which power is exercised in the management of a country's economic and social resources for development. The Bank here seems to be referring to 'old governance' – that is, the relationship between governance and the quality of government. This can be understood in at least three related contexts. First, governance refers to the “form of the political regime”,<sup>95</sup> which invokes the second dimension – that is, processes in which political “authority is exercised in the management of economic and social resources of a country”.<sup>96</sup> Thirdly, governance also refers to “the capacity of governments to design, formulate, and implement policies and discharge functions”.<sup>97</sup> Seen this way, good governance is basically concerned with the “system of national administration”<sup>98</sup> or, the “state of being governed”<sup>99</sup>, or thirdly, “the method of government or regulation”<sup>100</sup> within a given country. This perhaps explains the Bank's attention to bureaucratic and institutional improvements of government processes that relate to transparency and accountability of decision-making procedures, amongst other things. Put differently, the bank's concept of good governance is premised on “the creation of a government which is, amongst other things, democratic, open, accountable and transparent,

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<sup>93</sup> Certain arguments in this and the subsequent section have been published in; Onazi O. ‘Good Governance and the Marketization of Human Rights: A critique of the Neoliberal Normative Approach’, 2, *Law, Social Justice and Global Development*, 2009.

<sup>94</sup> World Bank, *Governance and Development*, World Bank, 1992.

<sup>95</sup> Weiss T. ‘Governance, Good governance and Global Governance: Conceptual and actual Challenges’, 21 (5), *Third World Quarterly*, 2002, at 795.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

and which respects and fosters human rights and the rule of law”.<sup>101</sup> Good governance attempts to achieve this under the auspices of international human right law, or more accurately, specific human rights norms that were privileged in after the Cold War.

Not surprisingly, the Bank also acknowledged the shift from the perception that only links governance with government by noting multiple processes that originate from non-State or private processes.<sup>102</sup> This is also mainly due to emergence of economic globalisation, which (as considered above) has encouraged multiple forms of authority, both from within and without societies. The global economic order is, after all, symptomatic of networks of global, regional institutions and transnational corporations (TNCs), which now challenge the ideals of State sovereignty. In other words, ideas about good governance cannot be separated from those about the need for Third World countries to participate in the global economy.<sup>103</sup> This has, in turn, encouraged proposals to reform State governance by creating the environment for “predictable, open and enlightened policy-making, [and] bureaucracy imbued with a professional ethos.”<sup>104</sup> It is obvious that the move to de-centre governance from the State coincides with the prevailing neoliberal economic development orthodoxy, which largely distrusts the State in economic affairs. It is no surprise then that good governance operates within this mindset, quite apart from being aware of the changing dynamics of an increasing globalised world. Partly in response to these developments, the Bank recognises another form of governance –that is, third sector governance. It embodies similar proposals with those about new governance

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<sup>101</sup> See, Anghie A. *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004 at 248.

<sup>102</sup> Weiss above n 95..

<sup>103</sup> See generally, Commission on Global Governance. *Our Global Neighbourhood*, Oxford University Press, 1995.

<sup>104</sup> Angie above n 101.

above, which also recognises models constituted by civil society. This aspect of good governance will be discussed in more detail in the final part of this chapter.

## 2.2. The Governance Fetish

One discernable consequence of the emergence of good governance is that, not only does it exclude other ways of imagining governance – particularly the role of community – but it also excludes other ways of imagining development. This explains why this chapter is entitled *Good governance as a Metaphor for Development* to capture its power of *naming* – that is, its power of ascription of what is, or what is not development. To understand this argument, good governance is described here as a fetish, one that reduces the multiple ways of understanding development into a single all embracing category. This mindset is captured by the quote at the beginning of this chapter – that is, I repeat, “[I]t is only with good governance that we can find solutions to poverty, inequality and insecurity” in the Third World. In this section (and indeed the chapter as a whole), I argue to the contrary, that a more plausible way of speaking or thinking of governance is to consider it as one amongst the many ways of constituting development. Good governance or any form of governance is only one and not the only way of constituting development.<sup>105</sup>

Good governance is presided over by a fetish similar to the one Karl Marx<sup>106</sup> famously discussed in his work. In his discussions on commodities, he spoke about how they gave rise to a fetish over them. For him, fetishism involved the propensity to reduce various aspects of social life into a single conceptual framework. More specifically, *commodity fetishism* has the effect of reducing multiple or vibrant forms of human activity

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<sup>105</sup> For a slightly different version of this argument, see; Onazi above n 93.

<sup>106</sup> Marx K. *Capital, Volume 1: A critique of Political Economy*, Penguin, 1992.

into the production and sale of commodities.<sup>107</sup> Similarly, the *governance fetish*, which I describe, works the same way; it takes the question of development for granted by reducing the multiple dimensions of constituting it into a question of the lack of governance. The fetish – which is mainly addressed in relation to government – has a moral appeal, given the pervasiveness of corruption and other problems with State governance in the Third World. Whilst the governance argument does offer a useful critique of the State, it paradoxically reduces the complexity of solutions to a single category. All it seems to achieve is to replace one form of governance with the other – in this case, the State with the market. True enough that there is a predilection towards such type of argument, but it is argued that there are other ways of thinking of these problems and solutions. Though many of these problems exist as a consequence of governance, the point is that they also occur through circumstances quite unrelated to it. All good governance achieves is to generalise the problems and solutions across the Third World to the extent that it excludes particularity.

Foucault's concept of governmentality is a useful way of understanding the arguments above.<sup>108</sup> On the one hand, governmentality refers to this power of naming – that is, the power of representation or the method of production of knowledge about the subject being governed. In this particular instance – and the point I am really concerned about – is governmentality as the power over production of truths – that is, truths about seeing and speaking about development. Foucault also refers to governmentality as the techniques of government, such that are not necessarily restricted to the State. Governmentality embraces the whole spectrum of society, including the ability of

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<sup>107</sup> See, Collins H. *Marxism and Law*, Oxford University Press, 1982, at 95-96.

<sup>108</sup> See, Burchell G et al (eds.) *The Foucault effect: Studies in Governmentality*, Harvester Wheatsheaf, 1991.



individuals to govern themselves.<sup>109</sup> It captures the current neoliberal mindset, in which governing power is dispersed onto market actors. My point is indeed very similar about good governance. It presides over the production and technique of truth or knowledge of development in the Third World. Good governance now determines what counts and what does not count as development. It is not only a criterion for validating the processes of establishing development, but also the manner in which Third World societies perceive it. The consequence of this is simple; it seems to exclude other possible ways of speaking and thinking about development. Problems of hunger, poverty, illiteracy, disease, democracy, human rights, corruption, war or inadequate social services are understood only in terms of the absence of good governance.

The good governance fetish can partially be explained through the work of Arturo Escobar.<sup>110</sup> It is a helpful way of showing how good governance – like development – functions as the main validating criteria for social reality in the Third World. This can be understood from the way Escobar speaks about development. He depicts it as the phenomenon that represents or even obscures all forms of social reality in the Third World. A useful way of understanding what Escobar means can be grasped from his use of the term ‘discourse’. Here he develops this from the work of Foucault and conceives it as a process where social reality is determined or shaped by expressions of “knowledge and power”.<sup>111</sup> What Escobar seems to suggest is that development is a particular kind of discourse that only serves the purpose of validating others. For Escobar, development is discursive because it has the effect of instantiating discourses or representations that

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<sup>109</sup> For an example of this point, see; Silungwe C. ‘The Rhetoric and Practice in Land Reform in Malawi: A Contextualized Governmentality Analysis’, 3 (1), *Malawi Law Journal*, 2009.

<sup>110</sup> See, Escobar A. *Encountering Development: The Making and Unmaking of the Third World*, Princeton University Press, 1995, at 5.

<sup>111</sup> *Ibid.*, at 39.

manage or circumscribe social reality, the effect of which is the exclusion of other possible representations of reality. Escobar's point is quite similar to Edward Said's notion of *orientalism*, which famously describes "the corporate institution of dealing with the Orient – dealing with it by making statements about it, authorizing views of it, [or even] describing it..."<sup>112</sup> amongst other things.

A further and more empirical illustration of the governance fetish can be developed through the work of Jeffery Sacks.<sup>113</sup> He expresses a similar view quite well, although his justification or purpose is quite different from mine. Sacks' takes a typical economic reading of governance, the absence of which is explained by comparisons between economic growth rates and the levels of governance. Looking specifically at Africa, he argues quite convincingly that good governance should not be seen as a means, but as the result of development. Sacks' thesis is developed in response to what I have described as the governance fetish. He confirms that it is a view that holds corruption and poor governance as "Africa's venal sin."<sup>114</sup> Most accounts of African poverty are expressed in such terms. And this view has an appeal amongst Africans and non-African social, economic and political commentators.

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<sup>112</sup> See, Said E. *Orientalism*, Vintage Books, 1978, at 3.

<sup>113</sup> See, Sacks J. *The End of Poverty*, Penguin Books, 2005, at 311-15. One can also draw similarities with Arthur Goldsmith, who following on from Adam Smith, argues that the good governance thesis is hugely exaggerated. For him, it overlooks other equally important factors that make a country's economy unproductive. For instance, it conflates factors, such as "[s]carcity of capital, backward technology, unequal trading relationships, harsh climate, lack of natural resource, remote location, anti-commercial cultures, and poor human capital", with the lack of governance. The point is that improvements in the quality of a country's governance must go hand-in-hand with changes in these factors. Whilst it may be relatively easy to alter the way in which a country is governed, the difficulty, however, is altering the landlocked nature, or other geographical factors that may also impede a country's development. See, Goldsmith A. 'Is Governance Reform a Catalyst for Development?' in 20(2), *Governance: An International Journal of Policy, Administration, and Institutions*, Blackwell Publishers, 2007, at 165-186.

<sup>114</sup> Ibid.

Whilst he does acknowledge that the quality of Africa's governance is undoubtedly lacking, "the focus on corruption and poor governance",<sup>115</sup> however, exaggerates its effect on "Africa's laggard growth".<sup>116</sup> His reasoning is influenced by an economic argument that suggests the level of a country's income often translates to the quality of its governance. According to this view, good governance would ordinarily correlate with improved levels of economic growth. This is for two simple but very contestable assumptions. First, the watchdog role of society is better enhanced by a literate and affluent populace. In other words, he is saying that a more enlightened society is more capable of keeping its government honest. Second, affluent societies are capable of making investments that can improve the quality of governance, such as a highly professionalised bureaucracy – that is, an educated civil service, freedom of information and a specialised public administration.

As plausible as this illustration seems, Sacks' argument still needs some unpacking. To begin with, Sacks' argument seems to misleadingly conflate economic growth with development, a point that is now well documented that this is not always the case. This is exactly the point of Amartya Sen's<sup>117</sup> influential thesis on *Development as Freedom*, which is now widely used in international development circles. Sen's work demonstrates that growth of gross national product (GNP), industrialisation or personal incomes should not to be considered as *ends* of development; rather they are a *means* through which people enhance the quality of their lives. As such, "[a]n adequate conception of development must go much beyond the accumulation of wealth and the growth of gross national product and other income-related variables"<sup>118</sup> to embrace the idea of human freedoms.

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<sup>115</sup> Ibid., at 312.

<sup>116</sup> Ibid.

<sup>117</sup> Sen above note 24, at 1-11. For a similar view on the effect of economic growth on development, see; Stiglitz S. *Globalization and its Discontents*, Norton and Company, 2003, at 78.

<sup>118</sup> Ibid., at 24.

For the sake of argument, if one accepts Sacks' view that economic growth will always translate into development, it is not clear how improvements in economic growth would in turn always translate into good governance. Sacks' view seems to be a better explanation of how governance will not lead to economic growth than how governance will itself be spurred by economic growth. Admittedly, Sacks acknowledges that the relationship between "growth rates and the quality of governance"<sup>119</sup> is not always precise. More specifically, comparing growth rates and governance in the context of Africa is not always helpful. For instance, the average African country grows at a lower rate in comparison with other Third World countries, especially those with the same level of income and quality of governance. This is even the case with similar countries with comparative levels of corruption. Other Third World countries simply do better than those of Africa. A more persuasive argument for understanding Africa's problems then is possibly its adverse geography or deficient infrastructure and these are not exclusively questions of governance.

Regardless of these limitations, good governance has come to dominate the legal, political and social landscape in much of the Third World. A question that might be asked at this point is how or why has the governance fetish come to be so easily accepted. Whilst it is by far the strongest attempt to establish a relationship between 'governance and development' today, such thinking in the Third World is not entirely new. There are very striking similarities between good governance and Max Weber's ideas about legal rationality and the bureaucratisation of development.<sup>120</sup> In the next part, the aim is to

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<sup>119</sup> Ibid.

<sup>120</sup> See, Botchway F. 'Good Governance: the Old, the New, the Principle and the Elements', 13, *Florida Journal International Law*, 2000-2001, at 139.

demonstrate how good governance draws its impetus from Weber on the value of law and the bureaucracy to development. Although, Weber's thought evolved in a distinctive period of history and under different social conditions, the argument here is that they are inseparable from the current ideas about the role of good governance in development. As such, they are best understood as mutually supporting moments of the same discourse. What I do next is to provide an account of the historical trajectory of governance in development discourse.

### **3. Max Weber, Legal Rationality, and the Bureaucratisation of Development**

One of the defining features of Max Weber's<sup>121</sup> work was his attempt to explain the rise and superiority of capitalism in Western societies. For Weber, this was simply because of the superiority of European law. European law possessed formal, structural and rational qualities that were superior to other forms of law. Specifically, European law was superior to the types of law that evolved from non-Western societies.<sup>122</sup> This was simply because European law was autonomous, differentiated, general and universally applicable. Non-European law on the other hand was incapable of enabling rational decisions without direct interference of religious or cultural influences. Decisions typical of European societies were always reached through the application of universal, clear, objective and determinate principles. For Weber, it was not that European political societies were not affected by other types of influences; rather these factors were always confined by generally acceptable legal rules suitable for the governance of society. The crucial point for Weber is that these

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<sup>121</sup> See, Weber M. 'The three types of Legitimate rule', Hans Gerth (Trans.), in Etzioni A. *A sociological Reader on Complex Organizations*, Holt, Rinehart and Winston, Inc, 1961, at 6-15. See generally, Roth G and Wittich (eds.); Ephriam Fischhoff et al, (trans.), Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Bedminister Press, 1968; reprinted Berkeley and Los Angeles: University of California, Press, 1978. See also, Mommsen W. *The Age of the Bureaucracy: Perspectives on the Political Sociology of Max Weber*, Blackwell, 1974.

<sup>122</sup> See, Trubek D. 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review*, 1972, at 720.

rules were oriented towards the market economy, and therefore, key to the progress of non-European societies.

The following ideas about the superiority of European law can be deciphered from Weber's tripartite classification of centralised forms of legitimate authority. It is clear that Weber's thesis founded ideas about centralised forms of legal authority within European societies. Authority stemmed from the obedience of commands, which was usually motivated by diverse intentions ranging from habit, routine behaviour, or "purely personal devotion of the governed".<sup>123</sup> For Weber, obedience to commands on such grounds had to be questioned since it had the tendency to be unpredictable. As a consequence, Weber advocated that the stability of authority of any ruling authority can only be maintained if the "rulers and rules uphold the internalised power structure as 'legitimate' by right".<sup>124</sup> This view was consistent with his belief in the governance of rules as the only stable grounds for authority.

The rational superiority of law was one of the cardinal features of Weber's classification of pure types of legitimate authority. For Weber, the nature or type of governance in any given society was a reflection of one of the following pure types of legitimate authority. It was often a reflection of either formal legal rationality, charismatic, or traditional forms of authority. To begin with, the formal rationality of law was consistent with Weber's ideas about European law, especially its influence on the rise of capitalism. Here Weber was suggesting that governance was founded on a legal code of rationally accepted norms, quite apart from a generalised system of consistent abstract rules. Such societies were always governed in accordance to clear, logical, predictable or certain rules.

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<sup>123</sup> Weber above n 121.

<sup>124</sup> Ibid.

Weber's thought – as might already be obvious – had an inclination towards legal positivism in contemporary legal theory. Comparative views of this can be drawn from the idea of legalism, as more recently espoused (and criticised) by Judith Sklar.<sup>125</sup> At the risk of undue simplicity, legalism refers to the view that all aspects of our “social and personal conduct”<sup>126</sup> are best explained by rule following. It is akin to a fetish over rules, which determine everything, including all our “rights and obligations”.<sup>127</sup> This is the point of legalism, the aim of which is to make law appear neutral, objective and fixed. It seems that Weber holds similar views about development; it can only be realised on the basis of the governance of law. This may appear logical but it also raises some problems. The inclination towards the rational and formal equality of the law often masks the social differences in society, especially those amongst the rich and poor. Moreover, it has the effect of reducing governance to questions of law, whilst excluding other questions of moral, ethical, social and political significance.

There was, however, a further argument, that is to say, there was the suggestion that for the rational legal order to exist, it had to be supported by a specialised administrative body. The body's main function was to provide clear and determinate rules for development. According to Weber, the bureaucracy represented the purest type of legal authority. It was always established in accordance to law which, of course, could be altered if the proper procedure was followed. The bureaucracy was constituted either by election or appointment.<sup>128</sup> Its superiority lay in its technical efficiency – that is, for being the most efficient form of organisation in society. Efficiency was usually guaranteed through the impersonal and specialised nature of its administration. This, in turn, was sustained by a

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<sup>125</sup> See, Sklar J. *Legalism*, Harvard University Press, 1986.

<sup>126</sup> See generally, Bankowski Z and Davis C. ‘Living In and Out of Law’, in *Faith in Law: Essays in Legal Theory*, Oliver P, Scott D, Tadros V ( eds.), 2000, Hart Publishing, at 33-52.

<sup>127</sup> *Ibid.*

<sup>128</sup> Weber above n 121, at 7.

system of obedience of enacted rules, which in turn prescribed, “to whom and to what rule people owe obedience”.<sup>129</sup> This impersonalised form of governance was further constituted by subjecting those in authority to the logic of obedience – that is, the obedience of law or rules.<sup>130</sup> Quite apart from that, the impersonality of the bureaucracy was always sustained through specialisation:

The typical official is a trained specialist whose terms of employment are contractual and provide a fixed salary scaled by rank of office, not the amount of work, and the right to a pension according to fixed rules of advancement. His administration represents vocational work by virtue of impersonal duties to office; ideally the administrator proceeds *sine ira et studio*, not allowing personal motive or temper to influence conduct, free of arbitrariness, and unpredictability; especially he proceeds “without regard to person”, following rational rules with strict formality. And where rules fail he adheres to functional considerations of expediency. Dutiful obedience is channelled through a hierarchy of offices which subordinates lower to higher offices and provides a regular procedure for lodging complaints. Technically, operation rests on organizational discipline.<sup>131</sup>

The description above marks the distinction between the legal type of governance from others. Ideally, the bureaucrat acts according to a moral code of behaviour, which not only implies political neutrality, but also objectivity, professionalism, honesty and partiality. The bureaucracy as a pure type of legal authority exercised superiority in carrying out the objectives of governance due to its special technical ability. Nonetheless, Weber acknowledged that the bureaucracy would not always exclude non-bureaucratic influences. There was always a tendency for him or her to be overwhelmed by the dictates of “self-government”. And this permitted other groups to participate in bureaucratic endeavours. On the other hand, the management of a bureaucracy was not closed to participation of elected presidents or monarchs. As will be seen later, these characteristics are quite similar to Weber’s traditional and charismatic forms of authority. Whilst the legal type of governance was symptomatic of the modern State structure, it could also be found in private capitalist enterprise, public corporations and voluntary organisations. This was because of the hierarchical and functional nature of staff within these bodies. What Weber

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.



may have been suggesting here is that governance was not always confined to government. Even though private enterprises existed, Weber recognised that they were ‘heteronomous’. Their powers were always constrained by the State which exercised authority over private enterprise. The only autonomy private entities possessed were the control over the internal management of its organisation. One explanation of the following view is that, Weber’s thought evolved in a period where the State exercised control over all forms of economic activity. The total bureaucratisation of all forms of economic activity was, however, not totally supported by Weber.<sup>132</sup> He warned against the impending dangers of a ubiquitous bureaucracy, that is, the possibilities that unlimited bureaucratic power would lead to corruption. Such ubiquitous bureaucracies, he argued, threatened the existence of private economic activity, and therefore, were inconsistent with capitalist economic development.

Given this brief overview, it is pertinent to note that Weber’s thesis on the rise of capitalist economic development is well recognised today. This is that capitalist development cannot exist without such centralised coordination, consistency, speed, precision, records, objectivity, secrecy and professional expertise. The major limitation of his ideas is perhaps its Eurocentric outlook, quite apart from its rigid inclination to legal formalism. A lot can also be said in the context of the morality and effectiveness of the bureaucracy, and as will be illustrated, many of these assertions have been questioned today by public choice theorists and others. In spite of this, the emergence of the contemporary governance discourse cannot be understood outside these ideals. The current governance discourse draws heavily from Weber’s concepts and ideas as well as his comparative studies on the role of law in the rise of capitalism. Before drawing attention to the relevance and distinction between Weber’s ideas on contemporary governance

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<sup>132</sup> Botchway above n 120.

discourse, a brief attempt is made to distinguish between legitimate authority from charismatic and traditional pure types of authority. This is indeed useful in understanding why Weber viewed legitimate authority as the superior form of governance.

### **3.1. Charismatic Governance**

This form of authority represents the unique qualities of individuality or leadership. It is a form of governance that is validated on the leader's distinctive motivational qualities. There are many examples of this type of governance in various parts of the world today. As Weber had put it, charismatic authority "rests on the affectual and personal devotion of the follower to the lord and his gifts of grace (charisma)".<sup>133</sup> In its purest form, charismatic authority is expressed through "the rule of a prophet, the warrior, the hero, the great demagogue",<sup>134</sup> who may in turn express these abilities through superior qualities of magic, heroism, speech or power.<sup>135</sup> Furthermore, he suggests that the political community from which obedience is expected is usually of the kind of a religious group. Such obedience was usually sustained by the leader's personality, and not by his "non-routine qualities", "enacted position" or "tradition dignity".<sup>136</sup> For this reason, charismatic authority depends on the leader's ability to consistently motivate obedience. Once he failed, this type of rule also automatically failed. Weber seemed to point to the existence of a bureaucracy in these kinds of systems, the kind of which that was based on charisma. The main difficulty for Weber was that the status of a person prevailed over competency, and more importantly, governance was never carried out according to clearly laid down rules or regulations. In contrast to legal authority, therefore, decisions were consistently irrational.

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<sup>133</sup> Ibid at 12-14.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

### 3.1.1. Traditional Governance

Following on closely from the above is the traditional form of authority. Traditional authority is expressed by patriarchal rule in its purest type. The father of a family or chief reflected a type of this rule. Like charismatic authority, this involved some form of affinity to individual qualities. In this case, however, it was based on tradition or custom, and not the exceptional qualities of the leader:

The body politic is based on communal relationships; the man in command is the "lord" ruling over obedient "subjects". People obey the lord personally since his dignity is hallowed by tradition; obedience rests on piety. Commands are substantially bound by tradition, and the lord's inconsiderate violation of tradition would endanger the legitimacy of his personal rule, which rests merely upon the sacredness of tradition.<sup>137</sup>

One of the effects of the above was that once norms were inconsistent with tradition, they were considered illegitimate. The rule of the lord was often characterised by the arbitrary application of rules according to pleasure, sympathy and antipathy. The problem for Weber was that disputes were settled here are only through unpredictable principles of equity or justice. For him, this was not as certain as the determinacy guaranteed by formal law. The administrative staff of the lord also functioned this way. The administration was composed of personnel who were relatives, friends or individuals of questionable neutrality. In other words, this system of governance lacked the neutrality and specialisation of the modern bureaucracy. Moreover, the administration lacked functional and jurisdictional competence. Instead, members of staff had to exhibit high standards of personal loyalty irrespective of their competence.

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<sup>137</sup> Ibid, at.9.

These arguments by Weber have contemporary significance. Disciples of Weber have used such arguments to explain reasons for the lack of economic development in non-Western societies such as those of East Asia. It was argued that China, amongst other countries, would not achieve the same economic progress as developed societies. The current realities of China's development indicate how these observations are well off the mark. Nonetheless, the "Asian Values"<sup>138</sup> arguments (which emerged later on), only succeeded in contradicting Weber and his followers. To simply recap this argument, it simply suggested that Asian countries had distinct set of political and cultural institutions, which owed much to the history and cultures of Asian peoples. These values were best suited for Asian people and explained the huge rise in development in the 1980s and 90s. These arguments in support of Asian values rejected Western liberal ideas that underpinned dominant capitalist development models. But the Asian values arguments lost most of its force during the economic crisis of 1997. As a consequence, it led to yet another round of arguments and counter-arguments about tradition and Asian values.

Similar arguments have been used to depict Islamic societies, even though empirical evidence seems to suggest otherwise. Again, I draw on the work of Jeffery Sacks to explain this viewpoint.<sup>139</sup> Sacks demonstrates that recent evidence from Islamic societies suggests that they have ranked amongst the fastest growing economies in the last two decades. For instance, countries like Malaysia, Bangladesh or Indonesia grew at an average of 2 to 3.9 percent between periods of 1990-2001. This leaves him to conclude that culture-based predictions of development are too fragile to be relied upon. Take the case of the Iranian revolution as another example. During this period, it was commonly thought that girls or women were massively discriminated against consequently causing delays in

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<sup>138</sup>See, Bauer J and Bell D (eds.) *The Asian Challenge for Human Rights*, Cambridge University Press, 1999.

<sup>139</sup> Sacks above n 113, at 316-317.

demographic transition or low fertility rates. But against conventional wisdom, Iran – between 1980-2000 – achieved one of the fastest transformations in low fertility. This was achieved through female literacy and participation of girls in schools. Quite apart from Iran, Islamic countries like Egypt, Jordan, Morocco and Tunisia have also had similar experiences. As such, Weber's followers are not convincing on the negative effect of tradition on development. Besides, as Sylvester Whitaker's <sup>140</sup> work in the context of traditional politics in Northern Nigeria illustrates, the typical Weberian perspectives on traditional forms of authority do not accommodate a balanced relationship between both concepts. The case of Northern Nigeria suggests that traditional systems were not opposed to imposition of modernity; they did not abandon their traditional or religious values in favour of received values of development.

### **3.1.2. The First Law and Development Movement**

The first law and development movement (the movement) followed on from Weber's thought above. The leading premise was not different from Weber; the emphasis was on the importance of law to social, economic and political change in the Third World. More specifically, the movement focused on the importance of law to the quality of government. Governance was synonymous with government, and the movement explored the extent to which the State – through the bureaucracy – could administer necessary rules of conduct for development. It was concerned with the extent to which law and legal institutions could replicate legal and developmental experiences of Western societies. Like Weber, these assumptions were premised on the inferiority of non-Western law. And the prescriptions were not surprising, they proposed the reform, codification and formalising of law for development. Despite the differences in the vast literature on law and development, the

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<sup>140</sup> See, Whitaker Jr C.S. *The Politics of Tradition: Continuity and Change in Northern Nigeria, 1946-1966*, Princeton University Press, 1963, at 14.

common element between these various strands was the recognition of the centrality of the State in economic development. The most important influential strand of the movement was arguably that pioneered by American legal scholars, most of whom were privileged beneficiaries of US foreign assistance to the Third World. The movement profited from professors from Harvard, Yale, Stanford, Wisconsin and other leading American law schools. These scholars were driven by perceptions of development that originated from Western liberal thought or “liberal legalism”<sup>141</sup> as it was described by the seminal work of Trubek and Galanter. Like Weber, the movement emphasised on the role of law in replicating capitalist type economic development in the Third World. Liberal legalism was premised on the view, “that development was an inevitable, evolutionary process of increasing societal differentiation that would ultimately produce economic political and social institutions identical to the West”.<sup>142</sup> Law was not only necessary to jump start the economy, but also to provide an intellectual class necessary for development. In this process, Third World societies were expected to expunge traditionalism in exchange for liberal democracy and capitalist development guided by the rule of law. In other words, the law and development movement sought to substitute the “localism, irregularity and particularism”<sup>143</sup> of Non-western law with the “unity, uniformity and universalism”<sup>144</sup> of Western law. For the movement, development was not only a question of creating new kinds of law, but also institutions as well. Development was about predictable, rigid, generalised and vibrant law as well as the right legal institutions.

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<sup>141</sup> See generally, Trubek D and Galanter M. ‘Scholars in Self-Estrangement: Some reflections on the Crisis in Law and Development Studies in the United States’, *Wisconsin Law Review*, 1974, at 1062.

<sup>142</sup> See, Bilder R and Tamanaha Z. B. ‘The Lessons of law and Development Studies’, 89, *American Journal of International Law*, 1995, at 470-471. See also, Adelman S and Paliwala A (eds.), *Law and crisis in the Third World*, Hans Zell, Publishers, 1993.

<sup>143</sup> See, Chua A. ‘Markets, Democracy, and Ethnicity: Towards a New Paradigm for Law and Development’, 1, *Yale Law Journal*, 1998-1999, at 108.

<sup>144</sup> *Ibid.*

Quite apart from that, a distinct type of lawyering was also promoted to give impetus to the processes of securing development. Lawyers served as the new bureaucrats typical of Weber's prescriptions about the exercise of bureaucratic authority. The movement espoused a State-directed bureaucratic approach to development with lawyers as the main driving force. Much of the theorising also emphasised on the role of the middle-class, which would in turn dominate economic and political spaces in the Third World. This led to a careful process of selection and identification of professional elites from Third World countries through scholarships and exchange programs. This was to equip them with the right skills to implement liberal ideas about the role of law in development. This was indeed essential, as the argument goes, to the process of transforming "the backward, impoverished, traditional, and dependent societies into modern, technologically advanced, and politically sophisticated industrial states".<sup>145</sup>

Quite apart from the above, law and development was also pursued on the basis of several important normative arguments. After all, development was also seen as a universal moral vision capable of creating a modern egalitarian global community. Many protagonists of this approach argued that:

Western and Third World alike applauded this manifestation because it transformed the correctness of the growing transcendent belief in humanity's capacity and shape for the good physical, moral, and political aspects of its environment, and it believed in the potential for a peaceful revolution where the excesses of poverty and bondage would be eviscerated, leaving modern humanity with a more egalitarian world.<sup>146</sup>

Barely a decade after the emergence of this moral vision, the movement seemed to lose much of its influence. And the fall law and development scholarship cannot be understood

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<sup>145</sup> See, Chibundu M. 'Law in Development: On Tapping, Gourding and Serving Palm-Wine', 29(1), *Case Western Reserve Journal of International Law*, 1997, at177.

<sup>146</sup> *Ibid.*

outside some of the points that emerged from Trubek and Galanter's criticisms above.<sup>147</sup> Whilst the demise of the movement was also associated with other factors, it is fair to say that Trubek and Galanter's criticisms hit the nail on the head. Liberal legalism was "ethnocentric and naive"<sup>148</sup>, quite apart from importantly ignoring the harsh "social stratification and class cleavage in most societies."<sup>149</sup> Liberal legalism failed to question the purpose of law itself, which seemed to exacerbate rather than mitigate the conditions of the poor.<sup>150</sup> More so, the emphasis on transplanting the Western type law seemed simply overzealous.

Apart from the nature of law itself, another source of discontent was arguably the huge responsibility placed on bureaucrats to constitute development. In doing this, theories of law and development seemed to exclude everyone, except bureaucrats from the processes of constituting development. Decision-making was undemocratic, quite apart from being only open to bureaucrats. Moreover, bureaucrats remained politically unaccountable for economic decisions; they were only indirectly accountable through elected political office holders. Furthermore, it turned out that bureaucrats in many Third World countries lacked the morality or competence desired of them.<sup>151</sup> For circumstances related to these and others reasons, the proposals of the first law and development movement seemed to fail to achieve its desirable objectives.

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<sup>147</sup> Trubek and Galanter above n 141.

<sup>148</sup> Chua above n 143.

<sup>149</sup> Ibid.

<sup>150</sup> Chibundu above n 140.

<sup>151</sup> See, Olowu D. 'Bureaucratic Morality in Africa', 9 (3), *International Political Science Review*, 1998, at 215-229.



## 4. Good Governance

From the early 1980s, markets and the neoliberal economics emerged to dominate debates about how to achieve development in the Third World. Since then, proposals for the role for law in development have been concerned with restricting the State from intervening in the economy. This shift in approach seems to be presented as a new paradigm, even though the importance of law to development is a product of an older discourse. Much of this shift has to do with the nature of development itself, and not necessarily the role of law.<sup>152</sup> There are at least five noticeable points of departure today from Weber and the early law and development movement. These points are illustrated below, but the last point is dealt with in more detail in the next chapter.

Firstly, it departs from giving the State a central role over governance or structuring the pursuit of development. Good governance departs in the sense that it now places emphasis on non-State processes of governance. It is here that it makes a more direct connection with the contemporary views about governance described in the early part of this chapter. More specifically, emphasis on governance in the Third World now prioritises the role of markets. It is fair to say that good governance – and the second generation reforms, in general – have been relentless in the promotion of “market friendly legal and institutional”<sup>153</sup> regimes, which focus on the “protection of property rights, the enforcement of contracts, and the provisions of other rules and institutions required to

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<sup>152</sup> See, Trubek D and Santos A (eds.), *The New Law and Economic Development: A critical Appraisal*, Cambridge University Press, 2006. See also; Trubek D. ‘The Political Economy of the Rule of Law: The Challenge of the New Development State’, 2009, 1, *Hague Journal on the Rule of Law*, at 28-32. See, Rittich K. ‘The Future of Law and Development: Second generation Reforms and the Incorporation of the Social’, 26, *Michigan Journal of International Law*, 2004, at 199-243. . For a perspective on these developments from international law, see; Koskenniemi M. ‘The Fate of Public International law: Between Technique and Politics’, 70(1), *The Modern Law Review*, 2007, at 1-30. See also, Anghie A. ‘Civilization and Commerce: The concept of governance in historical perspective’, 45, *Villanova Law Review*, 2000, at 887.

<sup>153</sup> *Ibid* (Rittich) at 208.

ensure a stable and attractive investment climate.”<sup>154</sup> The International Financial Institutions (IFIs) argue that the adoption of good governance – described as – “rules, norms and best practices”<sup>155</sup> will enable the “participation [of Third World countries] in the global economic order”.<sup>156</sup> Quite apart from that, it is also most importantly argued that Third World States, cannot achieve “growth and escape from poverty”<sup>157</sup> without constituting these reforms. This has led to sweeping privatisation exercises to give a more prominent role to markets, especially in tackling poverty. Unlike the past where markets were considered too weak, the current proposals ironically find centralised economic co-ordination quite problematic. It constitutes a radical change of approach as the State is now surprisingly considered antithetic to development.

Here, Max Weber’s thesis seems only to apply in relation to the continuing emphasis on rule of law in the process of development. The approach is neo-Weberian to borrow the term from Trubek<sup>158</sup>, in that the application of precise rules is considered necessary to restrict the State from intervening in the economy. One point that needs to be emphasised though is it is too often argued of the loss of State’s hegemony due to the rise of market policies. This is a generalisation that needs to be qualified. A more accurate description of these events is that certain functions of the State have been weakened, whilst other aspects have been strengthened. There is a shift in pattern in the way the State has traditionally participated in the economy. And this has seen the rise of new forms of interventions, which have led some observers to speak of the emergence of a ‘new developmental State’.<sup>159</sup> Trubek cites Brazil as a good example of the existence of the

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Trubek above n 152.

<sup>159</sup> Ibid.

‘new developmental State’. According to Trubek, its characteristics include the promotion of the private sector as investors and the role of the State is realigned to steering investment. It also consists of public private partnerships, export led trade, the openness to import, entrepreneurship, innovation, the promotion of productive foreign direct investment and social policies to reduce inequality, amongst other things. From the following characteristics, it is not clear how different the so-called new developmental State is from the previous one, especially that of East Asia. Whilst there seems to be a few noticeable differences, one can indeed question whether it constitutes a new paradigm or a re-invention of the old. Even if one agrees with Trubek and others that a ‘new developmental State’ is on the horizon, it is not clear if this is a precise reflection of developments in all States across the Third World. For instance, a better way of explaining the rise of the State in Brazil and other parts of the Third World is perhaps by noting the emergence of New Leftist parties in government.

Secondly, given the general orientation towards markets in good governance discourse, it is not surprising that not much emphasis is given to the role of bureaucrats, even though it is fair to say that like the State, bureaucrats have not been totally excluded from the processes of constituting development. On further qualification, there seems to be a new role conceived for a new kind of bureaucrat. Good governance has facilitated the emergence of specialised quangos, which apart from their expertise are also known for their insulation from traditional forms of political accountability.<sup>160</sup> Quangos seem to have emerged in hindsight – that is, as a result of lessons from the failures of initial neoliberal development approaches. Until then, there was a slightly less accommodating view of the

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<sup>160</sup> See, Paliwala A. ‘Privatisation in Developing Countries: the Governance Issue’, 1, *Law, Social Justice and Global Development*, 2000.

role of bureaucrats. That approach was influenced by “public choice”<sup>161</sup> theory, which also had an impact on the Bank’s work, and their famous study called “*Bureaucrats in Business*.”<sup>162</sup> This study provided theoretical underpinnings for the first wave of privatisation exercises in most of the Third World. According to this study, bureaucrats and politicians were not just inefficient, but also wasteful in their behaviour.

Such arguments share similarities with a particular strand of public choice theory, the *homo economicus*. It describes the decision-making behaviour of government officials.<sup>163</sup> *Homo economicus* provides an analytical framework for understanding how to maximise utility in both political and economic spheres. As such, public choice theory, amongst other things, sheds light on “the application of economic analysis to political decision-making including theories of State, voting rules and voter behaviour, apathy, party politics, logrolling, bureaucratic choice, policy analysis, and regulation”.<sup>164</sup> It arrived at the conclusion that government officials will always fail to act in public interest. Public choice theory sought to explain the economic costs of bureaucratic decision-making, among other things. Its main argument was to the effect that bureaucrats would always act inimically and devoid of legislation. This was because, “[v]arious models of bureaucracy postulate that power, prestige, the size of the bureau’s budget, job security, perquisites, future salary, and working conditions enter the utility function of bureaucrats.”<sup>165</sup> Apart from bureaucrats, politicians would always behave selfishly, quite apart from being over-

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<sup>161</sup> See, Mercurio N and Medema S. *Economics and the law: from Posner to Post-Modernism*, Princeton University Press, 1997, at 87. See generally, Buchanan J. *Liberty, Market and State*, Wheatshaft Books, 1986.

<sup>162</sup> See generally, World Bank. *Bureaucrats in Business: the Economics and Politics of Government Ownership*, World Bank, 1995. See, Chang H and Singh A. ‘Can large firms be run efficiently without being bureaucratic?’ (9)6, *Journal of International Development*, 1997, at 865-875.

<sup>163</sup> Ibid (Medema).

<sup>164</sup> Ibid., at 84.

<sup>165</sup> Ibid., at 93. See generally, Gwartney J and Wagner R. ‘Public Choice and the Conduct of Representative Government’, in Gwartney J and Wagner R (eds.), *Public Choice and Constitutional Economics*, JAI Press, 1998.

burdened with conflicting demands.<sup>166</sup> Above all, the following circumstances would generally tend to generate “government failure”<sup>167</sup> – that is, the consequence of the insufficiency of bureaucratic and political economic decision-making processes.

Good governance seems to depart to a certain extent from the above by now relying on insights from ‘*new institutional economics*’.<sup>168</sup> This has encouraged the shift of attention to formal institutional frameworks to assist secure property rights, and to minimise the transactional costs of parties. There is also a lot of emphasis on regulation in light of the emergence of new market processes. This is because the Bank has more recently come to terms with the limitations of markets. This is now acknowledged in the second-generation reforms in general, which acknowledges possibilities of market failures and externalities in the provisioning of public goods.<sup>169</sup> Barring such exceptions, the emphasis on regulation is to enhance the competitiveness and efficiency of markets.<sup>170</sup> In other words, outside public goods which constitute market failures, State regulation has a limited function. As previously noted, the significance of law departs from the previous era because of the current emphasis on enhancing the security of entitlements, quite apart from the efficiency of the economic transactions.<sup>171</sup>

Thirdly, the move to de-centralise governance also has an effect on formal legal and regulatory institutions. Unlike Weber – where the absence of formal law was symptomatic of unpredictability or outright anarchy – good governance is not opposed to non-formal

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<sup>166</sup> See, Walsh K. *Public Services and Market Mechanisms: Competition, Contracting and the New Public Management*, Macmillan Press Limited, 1995, at 18.

<sup>167</sup> See, Yarrow G. ‘A theory of privatisation: Or why bureaucrats are still in business’, (27)1, *World Development*, 1999, at 157-168. See also, Wolf M. *Markets or Government: Choosing between Imperfect Alternatives*, MIT Press, 1988.

<sup>168</sup> Paliwala above n 160.

<sup>169</sup> See generally, WDR 2004 above n 11.

<sup>170</sup> Paliwala above n 160.

<sup>171</sup> *Ibid.*, at 211. See also, Rittich above n 152.

legal institutions. More specifically, good governance places a lot of emphasis on various forms of private law, especially on various forms of commercial regulation. As such, there is a strong inclination towards private market actors to create their own normative regimes. In the same vein, there is also emphasis on alternative modes of securing compliance, through mechanisms like arbitration. More so, as Kerry Rittich reveals, there is also a corresponding attempt to embrace sources of normativity that emerge from “local practices and norms.”<sup>172</sup> This is because of at least three motivating factors. First, it is a response to anti-formalist critiques of Trubek and Galanter discussed above. Secondly, the interest in non-formal sources of law is influenced by the growing appreciation of the concept of legal pluralism made popular by many works in anthropology, sociology and philosophy of law.<sup>173</sup> It is only mentioned here since these debates are well known and have importantly brought to light the existence of other forms of law. Thirdly, there seems to be a belief that culture and society have themselves been transformed, and therefore, informal law may also be capable of fostering growth or efficiency. As such, the move beyond formal law is very much a departure from classical Weberian ideals, especially those that took a negative view of tradition.

The fourth distinction from Weber and the previous era’s is that governance not only moves beyond law, but also that it is interested in new forms of governance dispersed across society. The emphasis on multiple sites of governance is very much of a departure from centralised forms of governance, especially those of State government. As such, the current regime is predicated on dispersing governance amongst different sites, including different actors. In achieving this, governance has increasingly been transferred onto

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<sup>172</sup> Ibid

<sup>173</sup> It is still not certain to what extent the Bank has embraced legal pluralism, except in relation to its foray into access to justice, which is part of the good governance reforms. See, for instance, Penal Reform International, *Access to Justice in Sub-Saharan Africa: the role of Traditional and Informal Justice Systems*, Penal Reform International Report, 2000.

alternative spheres, especially those composed of at least two identifiable groups. First, governance is increasingly de-centred onto a wide array of market actors, who – as already noted – have not only become a source of governance, but also of law and normativity.<sup>174</sup> In this section, the focus is on the second distinguishable actors in the horizontal depiction of governance. There is a lot of attention given to a third sector or more specifically on the role of civil society. Similar to market actors, civil society groups are not only recognised as potential service providers, but also as sources of institutional change, given the wealth of social capital that exists within it. This is one of the unique features of the concept of civil society, which, for purposes of this thesis, may imply a role for community. Yet, as will be distinguished in chapter five, community and civil society are different concepts, and the former generally emerges in neoliberal discourse as a weak device.

Comparatively, good governance is replete with references to the term civil society. And by civil society, the Bank seems to refer to “citizen groups, nongovernmental organizations, trade unions, business associations, think tanks, academia, religious organizations and last but not least media”.<sup>175</sup> Civil society has become part of a wider initiative for good governance, which has in turn supported the emergence of market economies, liberal democracy and expanding political participation.<sup>176</sup> The interest in civil society has encouraged a lot of support for NGOs as one of the agents capable of ensuring

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<sup>174</sup> Rittich above n 152 at 218.

<sup>175</sup> See, World Bank, Civil Society Participation, accessed online at [http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,contentMDK:20222033~isCURL:Y~menuPK:384461~pagePK:148956~piPK:216618~theSitePK:384455,00.html#empowering\\_civil\\_society](http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,contentMDK:20222033~isCURL:Y~menuPK:384461~pagePK:148956~piPK:216618~theSitePK:384455,00.html#empowering_civil_society) on the 16<sup>th</sup> March 2009. There are obvious difficulties with the conception of civil society, one of which is the tendency for the space to be colonised by NGOs. This is what Rajagopal has described as the NGOization of civil society. See, Rajagopal B. *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press, 2003, at 260- 291.

<sup>176</sup> The interest in civil society is, amongst other things, based on generalised arguments about its significance to the promotion and sustenance liberal democracy around the globe. This has led to political projects dedicated to creating civil society even in situations where the cultural and political environments do not permit it as such. One example of such initiatives can be found here; CIVICUS, World Alliance for Citizen Participation <http://www.civicus.org/>

good governance. Of course, the interest in civil society in academic debates about politics is very old. Discussions on Habermas's public sphere in chapter six of this thesis form part of the civil society argument. It dates back to the period of classical European thought, which conceptualised the State as an entity dependent on a vibrant civil society. Civil society was in turn considered as a space inhabited by individuals, who would in turn interact with one another through free reciprocal exchanges. Their interactions were to help minimise the corruptions of the State.<sup>177</sup> The neoliberal development discourse seems to have embraced these arguments by noting that the minimal State cannot exist without the support of a liberal public sphere. As one observer describes it:

[e]ssential to governance is the civic realm, which is maintained by political actors from both the state and society, and in which 'access to participation in the public realm is built on respected and legitimate rules'. Therefore, 'governance is concerned with the regime which constitutes the set of fundamental rules for the organization of the public realm, and not with government...governance clearly embraces governments institutions, but it also subsumes informal, non-governmental institutions operating within the public realm'.<sup>178</sup>

These developments are encouraging but the difficulty, however, is that there is a strong connection made between civil society and the market. Civil society is, in other words, vital to the constitution of markets. These sorts of views can notably be found in the Bank's private sector development initiatives. Here the Bank seems to conflate the private sector with the process of revitalising civil society.

There are other notable factors that have sparked the Bank's interest in civil society, one of which is the emergence of the CDF.<sup>179</sup> The CDF has not only provided the umbrella for good governance, but has generally sought to encourage participation of the poor in the

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<sup>177</sup> See, Williams D and Young T. 'Governance, the World Bank and liberal theory', 42(1), *Political Studies*, 1994, at 93.

<sup>178</sup> Weiss above n 90, at p.800.

<sup>179</sup> The emergence of the CDF must be read in the context of shift of the BWIs approach to development, which now comprehensively considers political, legal and social factors in the various processes.



design of policies. On the general level, the CDF generates a more specific relationship between development, human rights and democratic discourse. It is often argued that the CDF is a response to post-Cold war events, which have allegedly brought to the fore demands for “political, social and economic participation... human rights and gender equity...by an emerging globalized economy”.<sup>180</sup> It is perhaps more adequately described as a response to agitations of new social movements as a result of exclusive nature of the failed Structural Adjustment Programs (SAPs). Participation emerges as a key concept here.<sup>181</sup> The approach relies on Albert Hirschman’s concept of “voice”<sup>182</sup>, which makes a case for participatory processes in government decisions, local and provincial councils, workplaces, capital markets and corporate governance. Participation in its broadest of terms moves beyond narrow liberal democratic perceptions of voting as implied in Schumpeter’s<sup>183</sup> political development theories. The CDF encourages this wider notion of democratic participation to amplify voices of the poor in processes of policy making. As a consequence, participation is now a component part of the WB’s PRSPs and these processes seem to have had some effects – though minimal – on increasing country-ownership and citizen participation in the design of PRSPs.

## 5. Conclusion

This chapter has outlined central propositions behind the concept, discourse and policy that now shapes problems of human rights in the Third World. It was an attempt to understand what good governance entails – including its historic and contemporary dimensions – as a springboard for subsequent arguments in this thesis. It entailed looking at its inadequacies,

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<sup>180</sup> Rajagopal, above n 175, at 147.

<sup>181</sup> Ibid. See generally, Stiglitz J. ‘Participation and Development: Perspectives from the Comprehensive Development Paradigm’, remarks at the International Conference on *Democracy, Market Economy and Development, South Korea*, 1999.

<sup>182</sup> Rajagopal above n 175, at 147 -150. See generally, Hirschman A. *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*, Harvard University Press, 1970.

<sup>183</sup> See generally, Schumpeter J. *Capitalism, Socialism and Democracy*, Harper and Brothers, 1942.

which invited the criticism that good governance doesn't accommodate multiple solutions, including multiple ways of conceiving governance itself. Most importantly, and as will be discussed in more detail in the next chapter, the emphasis on markets creates similar problems that has overwhelmed the State – that is, the lack of participation, and consequently, exclusion. It succeeds in generalising both the problems and solutions in the Third World to the extent that it excludes particularity. Whilst it would be naive to suggest that a lot of the problems do not arise from a governance question, one must not overlook that they may also arise from other problems, not necessarily governance related. Besides, governance can be conceived in different ways that might offer different solutions to such problems. From the perspective of this thesis, the role of community is one example of how it can be conceived differently. Whilst an inference on community can be drawn from proposals for civil society, that concept itself has been conceived quite narrowly. The arguments in chapter six can be understood as a way of encouraging both a change in thinking and practice in ways that embrace community as an alternative. To further lay the groundwork for those arguments, what follows is an attempt to understand more difficulties with the dominant governance approach, especially in the context of its relationship with human rights.

## Chapter Three

### GOOD GOVERNANCE AND THE MARKETISATION OF HUMAN RIGHTS

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The IFIs have embraced human rights...because they are now an official end of development; because they contribute directly to good economic outcomes; because they protect the interest of civil society groups and serve as a counterweight to the power of the State; and because they form part of the political climate necessary to attract investment and ensure growth.<sup>184</sup>

#### 1. Introduction

Human rights have become a very pervasive aspect of good governance. They have become so for at least two reasons. First, the normative language of human rights can arguably be seen as an instrument that nurtures, shapes, determines or validates governance, and ultimately, the practice of development. This is also evident from the Rights-Based Approaches to Development inspired by the United Nations (UN) system. Secondly – and the focus of attention in this chapter– is that the various initiatives and practices of governance have themselves sustained the plurality of meanings and values of human rights. Good governance is now an important vehicle for human rights, the effect of which is that the free-market economy – deregulation, devaluation and privatisation – is now considered as a key source of normativity for human rights. As such, the purpose of this chapter is to consider and explain how the market-based approach works, including reasons for its emergence, its philosophical underpinnings, its limitations, and the role of the BWIs in the processes of its diffusion.

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<sup>184</sup> Rittich above n 152, at 221.

In doing so, the chapter outlines and defends the general critique of markets in human rights discourse. It shows that the contemporary interest in markets – not only in human rights discourse – is a product of an older discourse which has similarly considered markets as the solution to all of society’s problems. Going much further than the dominant critique of markets, however, the chapter argues that part of the problem is very much of the kind of market involved. The dominant neoliberal market negates the possibility of solidarity, collaboration, cooperation and participation, which in turn creates its own questions of exclusion quite similar to that provoked by the State. Part of the problem, then, is that little attention has been paid to other ways of thinking of markets. The chapter responds to these inadequacies by discussing and explaining the potential of social markets in human rights discourse. Two organisational social market models are discussed, the second of which – the co-operative – is defended because of the potential it can offer to the problems affecting specific economic and social rights, and because it is suited for cooperation within and between communities. This is to lay the groundwork for discussions about the potential role of co-operatives in chapter seven, and for the general purposes of the theory of community.

The chapter begins by looking at markets in general philosophical terms by trying to understand the case for markets, and proceeds to consider some of its limitations. It proceeds to look at contemporary proposals for the use of markets in human rights, including the role of the BWIs in the processes of diffusion. It discusses the dominant critique of markets and proceeds to make a case for alternatives by looking at the social markets in general, and co-operatives, in particular. It defends the co-operative model as a more meaningful way of responding to the needs of the poor, especially in ways that can encourage participation. The chapter concludes thereafter.

## 2. The case for Markets

Markets are without doubt an important feature of contemporary political societies. It is now a commonplace argument that markets impact on the quality of life in such ways that other mechanisms (such as the State) are not capable of achieving. Dominant arguments about the significance of markets suggest that they are the best mechanism that can enhance individual autonomy, liberty, neutrality and welfare. This is because of their distinct epistemic qualities, which assists in seeing and determining the distribution of society's resources. The epistemic qualities of markets – that is, their ability to see and determine such situations – are closely related to their ability to increase freedom, autonomy or welfare. It is often said that in preserving individual autonomy, markets guarantee the equality of all individuals because they are the only mechanism that know best how society's resources should be distributed. Markets promote natural liberty as a result of spontaneous activities of individuals in society.

The work of Fredrick Hayek<sup>185</sup> has provided the strongest normative justifications for the role of markets. Such arguments are used in ways that continue to influence mainstream economic and development discourse. For him (and now his followers), markets are important not only because of their efficiency value, but also their morality as well as their ability to enhance individual liberty. Markets expand all sorts of liberties, be they political, economic or social. This is primarily because only markets *know* how best society's resources should be distributed.

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<sup>185</sup> See, Hayek F. 'The Use of Knowledge in Society', 4, (XXXV), *American Economic Review*, 1945, at 510-530. See also, Hayek F. *The Road to Serfdom*, Routledge and Keegan Paul, 1944.

Hayek's basic claim is premised on the idea that markets are the only mechanism that can effectively or sufficiently utilise the *dispersed knowledge* in society. The construction of rational economic orders, he argues, cannot simply imply how to distribute resources in society. There is a prior question, which depends on the knowledge of all circumstances necessary for the distribution of resources. This is a question of gathering all the information necessary for the distribution of resources. Hayek argues that centralised planning mechanisms have an epistemic weakness, and therefore, incapable of this attribute. The weakness of centralised economic systems is such that it reveals the limitations of establishing rational economic orders by conscious design. It is because of these limitations that Hayek finds the market – price mechanism and competition – as a sufficient framework that can equally distribute resources in society. This is, of course, because markets have the ability to co-ordinate spontaneous activities. One can see evidence of this from spontaneous ordered societies, which were different from structured societies. They were different because they evolved unintentionally through competing interactions between diverse social actors. Markets are synonymous with exchanges in spontaneous societies, which are geared towards the distribution of particular goods and services. These, in turn, would evolve through autonomous interactions between individuals. Moreover, unlike constructed orders, spontaneous ordered societies are not constituted by conscious design. More importantly, the significance of markets does not lie on only their ability to be efficient; it was also due to their ability to generate welfare. These values, Hayek argues, are all provoked by the market system, and which are communicated or utilised efficiently through the price mechanism. It follows that the market system rewards only productive actors who, in turn, make their commodities available at the best available price. The point is that these transactions are inherently benevolent in so far as one is party to such exchanges. The welfare attributes of markets is

by far the strongest link between markets and human rights.<sup>186</sup> One of the most important attributes of markets is their ability to maximise individual choices. This is not only achieved directly, but also indirectly as well.<sup>187</sup> The indirect exercise of independent choice seems to be the most influential argument about the welfare generating impact of markets. The argument is that irrespective of motivations of market actors, their actions have the ability to affect the well-being of others. Acts of narcissism or self-love are driven by a propensity to produce indirect benefits to others. Such are the type of arguments that have featured prominently in arguments for the moral justification of markets in political societies today.

The most prominent expression of the argument above originates from the timeless work of Adam Smith.<sup>188</sup> The arguments for markets are best understood in the context of Smith's ideas about the division of labour. He attached great value to the division of labour, which was described as one of the most important reasons for opulence and equality in political societies. Smith wrote that not only was the productive capacity of labour greatly enhanced by the division of labour, it also improved skill, dexterity and judgement. Individual tasks become highly specialised and thereby improved productivity since the productive circle benefited from more than one person. Not only was the division of labour likely to have an effect on production, it also affected distribution of resources within societies.

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<sup>186</sup> Human welfare and well-being are used interchangeably here. It is defined through the concept of utility as the satisfaction of preferences, which are measured by the ability to pay. It is a purely formal account of welfare, which excludes its actual contents, and the extent to which such preferences actually contribute to the quality of life. For more details see, O'Neill J. *The Market: Ethics, Knowledge and Politics*, Routledge, 1998, at 35-52.

<sup>187</sup> See, Javons S. *The theory of Political Economy*, Penguin, 1970.

<sup>188</sup> See, Smith A. *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776 -8 Vol. I, republished, Seligman E.R.A (ed.), Temple Press, 1950.

But the division of labour only functioned effectively if parties to it were capable of accurately determining what was best for others. Without such knowledge, participants would not have the ability to prioritise on specific tasks. The division of labour only functioned adequately through the following prior attribute – that is, the ability to “truck, barter, and exchange one thing for the other”.<sup>189</sup> Markets complement the division of labour in a way that increases the spread of commodities by making them available as well as affordable.

For Smith, the ability to truck and trade was an attribute only found in mankind, even though it was also possible to find other forms of cooperation and exchange amongst animals. Co-operation amongst animals was different; an animal sought favour from man or his fellow animal, it had no other means of persuasion except through sympathy. He said this was not only true with animals, but also the case with humans. Human beings often appealed to the sympathy of others when they had no other means of obtaining good will. Society cannot exist without the “co-operation or assistance of great multitudes”<sup>190</sup>, except for situations when one is mature and independent. But even at such stages of maturity, Smith says, “man always has almost constant occasion for the help of his brethren”.<sup>191</sup> In spite of this, Smith still warned against believing that sympathy alone will always satisfy our needs. Such needs are better met if individuals seeking favours simultaneously satisfy the benefactor’s self-interest. It is such kinds of reciprocity that led Smith to make one of the most influential moral arguments about the welfare generating effects of markets. This is what Smith meant when he said:

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<sup>189</sup> Ibid, at 12.

<sup>190</sup> Ibid at 13.

<sup>191</sup> Ibid.



It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages<sup>192</sup>

No one, argues Smith, except perhaps beggars absolutely depends on the benevolence of others for their survival. But even a beggar would sometimes find an instance to truck, trade or barter. Sympathy or compassion can never totally supply his or her need for nourishment, the beggar would still need to purchase food, find shelter or clothes through the market. The beggar would at times need to exchange his or her old clothes with others that suit him or her better, “or would find the need to exchange something for lodging or for food, or for money, with which he can better buy food, clothes, or lodging, as he has occasion”.<sup>193</sup>

These claims above are open to question. One can obviously think of many individuals who are incapable of existing without the generosity of others. Without doubt, the physically and mentally impaired would always fall into this category. But it would be misleading to read these ideas outside Smith’s early work on the *Theory of Moral Sentiments*.<sup>194</sup> This would paint a more comprehensive picture of what Smith was trying to suggest. He did not preclude sympathy and benevolence from social and economic contexts. This is (as shall be seen later) what more recent followers of his work seem to have done. Moving beyond these issues for the moment, it is, however, in relation to the importance of the market that Smith’s famous metaphor of the “invisible hand” becomes relevant. His point is this; market relations are not just the best, but also the most appropriate mechanism for benevolent exchanges between parties. This is because of the epistemic difficulty of impartially determining the consequences of others. The ‘invisible

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<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Smith A. *The theory of Moral Sentiments*, 1759, reprinted by Cosimo Classics, 2007.

hand' is the link between individual satisfaction and the distribution of society's resources on the one hand, and acts of vanity or self-interest, on the other. The 'invisible hand' works behind the superstructure to channel our propensities for sympathy, compassion, humanity, which are in turn cultivated through the pursuit of self-interest. Markets have an extraordinary value not necessarily by its direct consequences, but as the 'unintended consequences' of profit, gain or self-love. There is an overriding value of exchange and it is not just relevant to satisfy individual needs.

The following views explain why Hayek argued that authorities must at all times be restrained from directly intervening in the market. For him, interventions only lead to the misrepresentation of the facts of the very circumstances that need to be alleviated.<sup>195</sup> This is simply because attempts at intervening would only alter the information that enables markets function. These views, it would seem, were targeted at socialist countries where economic planning was either centralised or nationalised. Whilst he acknowledged that the complexity of modern industry sometimes justifies some form of centralised co-ordination; he, however, argued that the case for monopolies was not often justified on such basis.<sup>196</sup> Instead, it was justified on the basis of the complexity of knowledge.<sup>197</sup> Hayek strongly opposed centralisation. For him:

...[i]t is the very complexity of the division of labour under modern conditions which makes competition the only method by which such co-ordination can be adequately brought about. There would be no difficulty about efficient control or planning were conditions so simple that a simple person or board could effectively survey all the relevant facts. It is only as the factors which have to be taken into account become so numerous that it is impossible to gain a synoptic view of them, that decentralization becomes imperative.<sup>198</sup>

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<sup>195</sup> Hayek (1945) above n 185.

<sup>196</sup> Ibid., at 35.

<sup>197</sup> Ibid., at 36.

<sup>198</sup> Ibid.

For Hayek, once decentralisation becomes well-established, co-ordination then becomes essential. It becomes necessary for the appropriate balance between considerations or changes in conditions of demand and supply to be understood. Moreover, it becomes essential to understand the best means in which information can be identified, collated or disseminated. Again, he argued, no system is quite able to achieve this level of co-ordination, except the price mechanism in market competition. For him, the price mechanism regulates the comparative interaction between various commodities, all of which are subject to the prices of other commodities. The price mechanism only thrives in the course of competition, which in turn, creates a system of division of labour. The end product in this system is that it effectively transmits, regulates and co-ordinates all the knowledge in the society. This, of course, stems from the apparent difficulty of attaining “differentiation, complexity and flexibility”<sup>199</sup> of all the relevant factors necessary for the distribution of public goods.

Quite expectedly, the widespread privatisation exercises (in both contexts of the First and Third World) have been executed for similar reasons.<sup>200</sup> The inevitability of “government failure”<sup>201</sup> has shaped the argument on which privatisation is framed. The market – price system, exchange, choices and the interplay of these factors – emerge as responses to government failure. In the Third World, in particular, much of the good governance philosophy makes exactly this point. Unsurprisingly, these problems are resolved in favour of markets. Predisposed to these sorts of arguments, market enthusiasts have gone to the extent of advocating for wholesale privatisations to maximise productive use of resources, generate welfare, and more recently, to realise human rights. But, it is on the latter question that much of the moral argument for markets seems to lose much of its

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<sup>199</sup> Ibid.

<sup>200</sup> See also, Mercurio and Medema, above n 161, at 87.

<sup>201</sup> On government failure, see Yarrow above n 167.

force. It is arguably the question of access that arguably generates the utmost anxiety about markets.

## **2.1. Selective inclusion of Markets**

The difficulty with markets is not their ability to generate wealth or enhance incomes. Neither is it a doubt over their ability to expand freedom or guarantee individual autonomy. It is not about efficiency, even though the question of market failures or public goods may contest this assumption. Rather, the most immediate concern is about how markets pose challenges to welfare and distribution of resources. This is something that comes out strongly in terms of recent history and ideological thinking about markets. The gap between the rich and poor, or between First and Third World, or the recent manifestation of the phenomenon of the 'credit crunch' has raised question marks about the continuing emphasis on markets.

Taking a rigid view of markets would mean that the poor only benefit if they are able to participate, that is, if they offer some services in return. This is because the market is a system of mutual reciprocity and only rewarding to its participants. What this means is that the poor, children, elderly, deprived or those incapacitated by some sort of disability or the other, can only avail themselves with opportunities offered by markets, if they are able to participate. The point is, even if markets are not formulated with social exclusion in mind, there is a rationale of exclusiveness implicated in them. In other words, markets may include but only selectively. The selective inclusion of markets, as I have described it, is not necessarily a new phenomenon. It definitely has its historical antecedents. It is also something that cannot properly be appreciated outside Adam Smith's founding ideas, especially his theory of *unintended consequences*. This, of course, continues to influence

contemporary views (for and against) markets, particularly those that oppose placing limits on them. One example is Hayek above, who frowned at interventions because they would distort the facts of the circumstances needed to be alleviated. According to him, only the market had the epistemic qualities to know who gets what, why and how. Against this argument, it is true that one may not be able to predict all actions, but one can at least predict certain consequences of one's actions. If so, the questions then becomes should one always desist from intervening even when the circumstances of one's actions are likely to be harmful? Is it accurate to think that unintended consequences are always likely to produce good moral outcomes? A simple answer to these questions is, of course, no. And reasons for this can be teased out from the work of Amartya Sen, who apart from being an avid follower of Adam Smith, addresses such difficulties.

Amartya Sen engages with these and other questions in his seminal work previously mentioned on *Development as Freedom*.<sup>202</sup> One might recall from the previous chapter that Sen's thesis aims to offer a more inclusive or comprehensive account of development, one that goes beyond economic growth, Gross National Product (GNP) or technological and industrial progress to embrace human freedoms. To briefly recall his words, human "freedoms are not only the primary end of development, they are also among its principals means".<sup>203</sup> Understandably, markets play an important role in this process of enhancing freedoms. This is not because of the importance to income generation, but rather because they contribute to the quality of freedoms. And here Sen seems to be speaking about two related dimensions that markets contribute to freedoms. Firstly, he is speaking of the freedom to actually participate or, as it were, enter in the realm of markets. Once market entry is possible, there are always benefits that emerge from such admission. It is because

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<sup>202</sup> Sen above n 24.

<sup>203</sup> Ibid., at 112.

of this that he argues that, the inability to participate in the market is a symptom of the lack of freedom. As he puts it, “[T]o deny that freedom in general would be in itself a major failing in society”.<sup>204</sup> The second dimension of markets in his thinking is the more dominant one – that is, the unmatched quality of markets to expand people’s incomes and economic opportunity. This is well known and requires no further elaboration.

Admittedly, Sen also notes that in spite of this, there are circumstances in which markets are counter-productive. Even where markets work efficiently, they always raise concerns about equity and distribution. Markets always raise questions about inequality, not only of incomes or even, “in the distributions of freedoms”.<sup>205</sup> Locating this in context of his general thesis, markets will always raise questions about how to convert incomes into freedoms. For instance, “a person who is disabled, or ill or old, or otherwise handicapped may, one way or the other, also face greater difficulties in converting income into capabilities and into living well”.<sup>206</sup> Sen goes at length to demonstrate the distinction between “income-earning ability and income-using ability” which, for instance, Hayek’s work ignored. Under such circumstances, the demands of equity cannot be left to markets; they have to be substituted by non-market arrangements like government intervention and social security systems.

Furthermore, Sen reminds us that even Adam Smith recognised the limitations of markets in certain circumstances. To show this, he draws on Smith’s support for price controls on credit or usury as an example. Smith wasn’t advocating for a general ban on usury as such, but rather on the need for fixed maximum interest rates. The rationale

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<sup>204</sup> Ibid.

<sup>205</sup> Ibid., at 119.

<sup>206</sup> Ibid.

behind Smith's thinking was the result of the uncertain nature of market signals. Being generally malleable, markets were always capable of being overwhelmed by private interests. There was always a potential that this could slide into the waste of capital and social resources.<sup>207</sup> Smith used yet another metaphor to illustrate his thoughts in this context. The metaphor of 'prodigal' and 'projector' served to demonstrate this point. A brief explanation is that, the prodigal and projectors depicted those who manipulated capital. Prodigals and projectors were always driven by personal gain. They would always borrow money for their vested interests, even if such loans were at an exorbitant rate. He credited them for waste and the loss of productive capital. Smith backed legal restrictions on interest rates not because he wanted to proscribe loans, but rather to prevent the prodigals and projectors from abusing those loans. Smith's main anxiety was driven by the unfavourable effect of private gain. Sen reads these arguments in light of Smith's famous words on the benevolence of the butcher, brewer and baker. He reads it as such; whilst the butcher, brewer and baker may draw our attention to how self-interest might be beneficial – the metaphor of the prodigal and projector shows the danger of unintended consequences. He says "...[I]f the butcher-brewer-baker example points to a very common circumstance in which our complementary interests are mutually promoted by exchange, the prodigal-projector example illustrates the possibility that this may not work in quite that way in every case."<sup>208</sup> This is obviously a departure from Hayek's scepticism towards interventions. And there are still other ways of understanding why Hayek was wide of the mark. The famous work of Karl Polanyi, for instance, contests the natural spontaneity of markets. The point is that markets are presented as spontaneous institutions to the extent that this fails to account for the huge institutional effort to create and sustain it. For him, this is neither conceptually nor historically convincing. What was (and still is) quite

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<sup>207</sup> Ibid., at 124.

<sup>208</sup> Ibid., at 126.

convincing instead is the extensive planning and centralisation of authority to facilitate the free market.<sup>209</sup>

That question apart, Sen argues that the idea of unintended consequences should not in any way be seen as a defence, but an attack on the morals of the rich. For Sen, no philosopher – including Karl Marx – was as critical (as Smith was) of the economic activities of the rich, especially in relation to the poor. Quoting Smith, he argues, that the rich are often driven by selfish pursuits of “their vain and insatiable desires”.<sup>210</sup> Regardless of this, there was often a paradox generated by much of their actions. The pursuit of self-interest might sometimes unintentionally benefit others. It was not that these actions were not deliberately intended to benefit the poor, but rather that the pursuit of self-gain had an effect on them. The actions of the rich accidentally benefitted the poor. The ‘invisible hands’ of the market is what spurs the actions of the rich to benefit the poor. In other words, it was the market mechanism that channelled the unintentional acts of the rich to satisfy the interest of society at large. Without the market as such, actions of the rich would have no effect on the poor. The metaphor of the butcher, baker and brewer is yet again another way of understanding how the market system makes this possible. According to him, the butcher, baker and brewer are primarily driven by self-love, and not necessarily altruism. But in spite of the narrow motivation for their actions, they can indirectly satisfy the needs of others. This is also a similar way of thinking of how the buyer relates to the seller. The buyer is not interested in what good his or her money has to the baker or brewer. He or she is only interested in the meat or bread for nourishment.

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<sup>209</sup> See, Polanyi K. *Great Transformations*, Beacon Press, 1957, at 65- 67 and 68-76.

<sup>210</sup> Sen above n 24.



Be that as it may, there is often the tendency to equate unintended consequences with favourable consequences. This has to be put into perspective in order to appreciate the potentials and limits of the concept. It is true that unintended consequences can sometimes lead to favourable circumstances, but there is no reason to suggest that they would not produce adverse effects. Certain actions are likely to have both positive and negative consequences. Sen's alternative reading of unintended consequences provides a useful point of departure. For him, the various dimensions (negative or positive) of unintended consequences can be made known by predictable causal analysis. After all, it is not difficult to predict that the market exchange will benefit both parties. The outcomes of such transactions are not as unpredictable as they are made out to be. This is what Sen means when he suggests:

If this is the way the idea of unintended consequences is understood (in terms of anticipation of important but unintended consequences), it is in no way hostile to the possibility of rationalist reform. In fact, quite to the contrary. Economic social reasoning can take note of consequences that may not be intended, but which nevertheless results from institutional arrangements and the case for particular institutional arrangements can be better evaluated by noting the likelihood of various unintended consequences.<sup>211</sup>

This alternative reading of unintended consequences should begin by some kind of rationalisation of predictable consequences of actions as well as non-actions. Accordingly, harmful actions can become more predictable through deliberation and causal analysis. It contests that unintended consequences – especially unfavourable ones – are by no means unpredictable. It entails a kind of rationalisation that would at least provide some degree of insight for purposes of future policy designs. Such attempts should not be rigidly swayed (as Hayek was) into thinking that attempts at intervening would always have adverse effects. There is, of course, a distinction that has to be made between those circumstances

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<sup>211</sup> Ibid., at 255 – 257.

in which we can discern and those we cannot. But the point is that we ought not to refrain from intervening if we can at least predict negative outcomes.

Secondly, the assumption that the unintended consequences of markets will always be beneficial does not explain how non-parties to the exchange can benefit from markets. It should be clear now that the pursuit of vain and insatiable desires does not always translate into generosity to the poor. Such views silence a whole range of participants, such as children, the elderly, or disabled. This is perhaps something that the work of Eugene Pashukanis<sup>212</sup> invites us to understand. For him, market exchanges are immoral. They are not constrained by social or ethical goals. Not even the use value of goods has any important significance. All that matters for markets is the exchange value of goods. Markets are only concerned with the actual ‘exchange’; they are not concerned with the intrinsic or ‘use’ value of the goods implied. This point is well explained by Zenon Bankowski’s interpretation of Pashukanis’s work. Bankowski says what he meant is that, “bread, for example, is not produced because it is ‘the staff of life’ (its use value) but because people want to buy it (its exchange value)”.<sup>213</sup> One notable effect of this is that persons themselves become understood as commodities. Individuals are not appreciated because of their intrinsic value as human beings, but rather because of their ability to own and exchange property. As recalled from the previous chapter, this is what Karl Marx meant by *commodity fetishism* – that is, the reduction of the multiple or vibrant forms of human activity into the production and exchange of goods. In capitalist societies, the exchange of good takes precedence over people, and above all, ahead of life itself. The market system produces a false or formal system of equality. Markets are unconcerned

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<sup>212</sup> See, Pashukanis E. ‘The General Theory of Law and Marxism’, in H Babb and J N Hazard (eds.), *Soviet Legal Philosophy*. Cambridge Mass, 1951.

<sup>213</sup> See, Bankowski Z. *Living Lawfully: Law in love and Love in Law*, Dordrecht: Kluwer, 2001, at 85.

with existing asymmetries of ownership of wealth in society. Indeed, this leads one to ask – what is the use in suggesting that the market is free for all to participate when it only accommodates productive members of society?

These arguments above invite a distinction between market and non-market economies. The exchange value of goods – through money and property rights – is a distinguishing feature of market economies.<sup>214</sup> Decisions and functions of individuals within such entities are guided by the exchange of goods and services. The shift in exchange value is often the result of unintended consequences, many of which are devoid of ethical considerations. Market economies are – to use John O’Neill words – “disembedded economies.”<sup>215</sup> They are different from non-market economies, which are influenced by social custom, needs and the use value of goods.

Market protagonists reject such views. They argue that the difficulty is epistemic, which is the impossibility of accurately determining the needs of everyone, and in this sense, only the market can neutrally or effectively provide for everyone according to their needs. As such, the role of public policy is not to pre-determine the needs of everyone. Such stark defence of markets has resulted in the wide expansion of markets beyond imaginable limits.<sup>216</sup> Even human rights are now subject to the expansive influences of

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<sup>214</sup> See, O’Neill above n 186, at 5.

<sup>215</sup> *Ibid.*, at 5.

<sup>216</sup> One amongst the many difficulties with markets is that they seem to be justified beyond reasonable limits. The market rationality explored in previous sections appears to have spread increasingly into more spheres of contemporary life. The expansionist propensities of markets have had no boundaries, and it seems increasingly difficult to draw meaningful restrictions on its further expansion. Understanding the proper limits or the domain of markets around certain activities in society is something that Russell Keat’s work helpfully demonstrates. This is something that market protagonists rarely acknowledge – that is, whether markets should be kept within some manageable limits. Three standard arguments are often made about market boundaries, as Keat’s work points out. The first is from the point of view of needs-based claims of distributive justice. Under this category (and because of the significance of goods like healthcare and education); claims are often made that they should be insulated from market rationality. The second argument about market boundaries can be deciphered from arguments about market failures or public goods.

markets. A number of questions arise from the embrace of human rights by the market logic. For instance, what is the kind of mindset that has been inscribed into the structure of human rights? What kind of human rights have been moulded from the contemporary practice of market reform? It seems necessary at this point to consider the debates that have sought to reconcile human rights and markets.

### **3. Marketising Human Rights**

Human rights have been no exception to the continuous overwhelming expansion of markets. This may be because by their nature, human rights can selectively be deployed in ways that are not only compatible, but also supportive of markets. For instance, in neoliberal development discourse, the argument in favour of civil political rights is often used to promote different forms of market participation. It is not difficult to see how freedom of expression, religion or rights to association, equality, anti-discrimination can support market participation. Similarly, property and contractual rights are also a crucial element of the market framework and exist as an integral part of what might be called the neoliberal human rights discourse. The BWIs have adopted this type of language, the effect of which is the distortion of human rights from its true and proper intentions. This is a direct consequence of the malleable language of human rights. Apart from meaning different things to different people, it is also because, as already argued that, human rights

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This is, of course, a well known argument about the existence of externalities that make it impossible for market provisioning of public goods. The third sort of argument is a moral one; it is about the appropriateness of commodifying certain kinds of items, such as “blood, bodily organs, and both reproductive and sexual services”. Keat’s takes the need to protect such domains from the market logic as his point of departure. Keat also argues for the restriction of personal and traditional spheres from the grip of the market. The market should be restricted from what he calls social practices and institutions of cultural character, especially activities like broadcasting, journalism, museums, the arts, education, sports, academic research and such other areas that have continued to suffer from the expansionist tendencies of markets. Whilst being sympathetic with much of these criticisms, my concern here is not really the question of boundaries, but rather the dominance of one form of market over others. See, Keat R. ‘The Moral Boundaries of the Market’, in Crouch, C and Marquand, D (eds.) *Ethics and Markets: Co-operation within Capitalist Economies*, Blackwell Publishers, 1993, at 6-20.

<sup>216</sup> Ibid., at 8.

can serve a variety of interests, not the least the interest of markets. Because of this, as Andrew Williams has put it (though in a different context), human rights are increasingly becoming:

...an absurd collection of arguments deployed by anyone or any institution in pursuit of their own (often-monetary) interests, thus creating a dislocation between the language and 'feel' of human rights and people's experiences of their, apparently, indiscriminate use or abuse in practice.<sup>217</sup>

In the context of this chapter, it is possible to see that the malleability of human rights explains the co-option of human rights by many activities of the BWIs. Human rights are now embraced by everyone or every institution, whether it is in relation to questions of global justice, governance or development. A good illustration of this point can be found in the work of Ernst-Ulrich Petersmann, which attempts to draw a purposive relationship between human rights and international trade law.<sup>218</sup> More specifically, Petersmann has problematically made a case for the inclusion of human rights within the mandate of the World Trade Organisation (WTO), as a new global regime of justice. For him, a modern theory of justice can benefit from the co-operation between human rights, constitutional democracy and the international regime of markets. Accordingly, this should be understood as a theory of justice that takes into account the "globalization of human rights and the need for non-discriminatory rule-based market based competition coordinating the global division of labour among producers, investors, traders and consumers around the globe".<sup>219</sup> This can only emerge if the importance of markets to human rights is given much stronger recognition than currently the case in existing theories of justice. To ensure this, he argues, there is a need to constitutionalise foreign policy relations to provide a framework for international economic markets, as a way of enabling the creation of political markets for the production of collective goods. Personal autonomy and the diversity of investors,

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<sup>217</sup> Williams above n 59.

<sup>218</sup> See, Petersmann E. 'Theories of Justice, Human Rights and the Constitution of International Markets', 17, *EUI LAW*, 2003.

<sup>219</sup> *Ibid.*, at 1.

producers or consumers can only be guaranteed through such economic and political markets. Petersmann argues:

Effective protection of liberty rights, property rights, and other human rights protects also the “market forces” of individual demand and supply of scarce goods, services and job opportunities necessary for the enjoyment of human rights, and gives inevitably rise to spontaneous emergence of “equilibrium prices” coordinating demand and supply. Like families and other social institutions – in their diverse functions (e.g. as information mechanism, social dialogue about values, competition among suppliers and consumers) – are inevitable complements of human rights.<sup>220</sup>

Human rights and markets complement each other because they are all concerned with protecting individualism, quite apart from guaranteeing freedom of choice and consumer satisfaction. Petersmann argues that there is a link to the protection of dignity – a core objective of human rights – with markets. And conflicts between interests – e.g. between utility-maximising producers and consumers – can be prevented by constitutional mechanisms that constrain the abuse of power. As noted above, the language of constitutionalism here is not restricted to the political realm, but also extends to the economic realm. The protection of human rights and non-discriminatory market based competition needs to be established by an economic constitution as much as it needs a political constitution.

Petersmann argues that markets are not just important to human rights on the domestic sphere, but also on regional and transnational spheres, especially through various forms of economic co-operation. These forms of co-operation do not exist outside international constitutional rules, which guarantee non-discriminatory international trade and competition, amongst other things. Petersmann argues that the WTO ought to, or would protect human rights more effectively than other international constitutional-like arrangements. The WTO – through its dispute settlement panels and appellate body – is the most significant example of the constitutionalisation of non-discriminatory rules of

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<sup>220</sup> Ibid., at 20.

economic competition beyond territorial boundaries. The WTO, he argues, can follow the example of the EU, which has since recognised the relationship between human rights and markets through the European Community (EC) Treaty, which promotes free movement of goods, services, persons, capital and non-discriminatory competition.

Petersmann's thesis on the purported relationship between markets and human rights has understandably attracted a number of criticisms, especially from observers inside and outside the EU, which served as a basis for illustrating his arguments. Petersmann is both factually and historically incorrect according to Philip Alston's criticisms of his work.<sup>221</sup> According to Alston, the EU regime of human rights emerged in retrospect; it did not emerge at the same time or with the same objectives as the common European market. From the outset, the Treaty of Rome of 1957 made little or no reference to values like human rights, given that it emerged as an economic arrangement. Human rights provisions emerged through a gradual process and did not evolve as a comprehensive framework as Petersmann seems to suggest. Even when human rights started becoming recognised in a few decisions of the European Court of Justice (ECJ), they were referred to quite narrowly, either with respect to property rights or to pursue a trade or profession.<sup>222</sup> In short, there was a selective use of rights, which contributed to economic freedoms.

With respect to Petersmann's central claim that the WTO would promote human rights more effectively than other international institutions. What he seems to be suggesting here is that the EU type of economic and human rights regime can be replicated globally through the WTO. The argument against this is that, whilst it is true that the WTO

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<sup>221</sup> See, Alston P. 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A reply to Petersmann', 13 (4), *European Journal of International Law*, 2002, at 814-815.

<sup>222</sup> Alston's argument is quite familiar and has been made by others. See, for instance, Kyriakou T. 'The Impact of the EU Charter of Fundamental Rights on the EU system of protection of Rights: Much ado about nothing?' *Web Journal of Current Legal Issues*, Blackstone Press, 2001.

does deal with some human rights issues, it does not provide a comprehensive range of human rights. Alston again helps point out the limits of this argument. Alston begins by correcting Petersmann's misplaced assumption that the agreement establishing the WTO is constitutional, one capable of creating an international social and political community. Although the current mandate of WTO is much wider than its predecessor (that is, the General Agreement of Trade and Tariffs, GATT), it is still primarily an economic arrangement, one concerned with production and trade of goods and services. Indeed (with exception to inclusion of a regime of intellectual property rights), the whole structure of the international trade system remains the same in spite of these changes. Furthermore, the democratic deficit within the WTO makes it hardly the kind of institution suitable for the promotion and protection of human rights.

Frank Garcia<sup>223</sup> is more succinct in his criticisms of similar ideas, not necessarily Petersmann's. He suggests that the purported relationship between international human rights and international trade law generates a normative conflict, one hard to reconcile. Garcia's starting point is that the values of efficiency that underpins international economic law are inconsistent with those which constitute international human rights law. According to him, trade law has a distinct theory of justice structured by the exchange of goods and services.<sup>224</sup> Values of human rights seem to fall outside the domain of trade law because they are not only inconsistent, but might also impede trade. In other words, efficiency is the primary concern for trade and nothing else. The methodology of economic analysis determines trade and non-trade policy as well as its implementation is different from that implied in human rights. It tends to leave out other possible ways of analysing trade policy.

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<sup>223</sup> See, Garcia F. 'The Global Market and Human Rights: Trading away the Human Rights Principle', 25(51), *Boston Law Journal*, 1999.

<sup>224</sup> *Ibid.*, at 65.



Seen from the point of view of human rights, economic analysis does not offer the most suitable methodological approach for grasping the impact of trade on human rights, given that it has inconsistent values.

It would seem that the most significant difficulty with economics is its method of moral reasoning. Trade implies a different form of moral reasoning from human rights. Its reasoning is consequentialist, and it is only concerned with the outcomes of certain actions. What he means is that the normative content of trade law is utilitarian in nature and determines the morality of particular actions. This is according to its ability to aggregate individual preferences.<sup>225</sup> Most arguments for free trade are usually concerned with the ability of markets to maximise individual welfare, comparative advantage, lower prices, increased consumer choice or economies of scale. Comparatively, human rights have a different moral code. They are determined by the concept of human dignity and Western liberal theories, which prioritise equality ahead of utility. Human rights are deontological, given their concern for the equality of individuals.

A more pertinent question, for purposes of this thesis, is that the critique of trade above does not seem to question the ethos underlying markets, and furthermore, the effect this may have on human rights. After all, the current international trade system is determined by a distorted market framework, which will undoubtedly negatively affect human rights. The point is that there is a prior question that needs to be addressed before considering whether or not human rights should operate within the international market system. In other words, the nature of the market itself has to be called into question. This is, of course, something that can be understood through the critique of markets earlier on in

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<sup>225</sup> Ibid., at 67.

this chapter. One can repeat some of those observations onto the global sphere in light of the disproportionate nature of the international system of trade. The inequitable nature of international markets is exacerbated by the distorted rules of trade, which seem to make the market more suitable for some countries than others. The agitations for ‘fair’ as opposed to ‘free’ trade is one example of this difficulty, and a clear indication of the anxieties about markets on the transnational level. To be fair to him, Petersmann does partially acknowledge (although without explanation) that human rights need what he calls a ‘social market economy,’ which require “governments to promote ‘principles of justice’, like solidarity, equal opportunities and promotion of welfare-increasing competition without undermining human rights so that also the ‘losers’ in the market game retain effective access to the goods and services necessary for the enjoyment of human rights”.<sup>226</sup> Whilst this is a position which appeals to me, it is one which seems to contradict his overall thesis. Besides, Petersmann fails to expand upon what he actually means by the social market economy and whether it should co-exist or replace the capitalist market economy. Some of these questions will be considered in the final part of this chapter, but first I consider the marketisation of human rights from a more critical standpoint.

### **3.1. Trade-Related Market Friendly Human Rights**

Upendra Baxi has pursued some of the implications of Paternmann’s thesis above more vociferously than any scholar today. Upendra Baxi<sup>227</sup> describes such views as the evidence of an emergent and distinct ‘trade-related, market friendly’ (TRMF) human rights paradigm, which, he argues, is subtly replacing the paradigm of UDHR. It succeeds in the promotion and protection of collective rights of global capital in ways which justify their

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<sup>226</sup> Petersmann above n 218.

<sup>227</sup> See, Baxi U. *The Future of Human Rights*, Oxford University Press, 2002, at 132.

corporate well-being and dignity, but most importantly, against the human rights of individuals and communities:

The paradigm of the Universal Declaration of Human Rights is being steadily, but surely, supplanted by that of trade-related, market-friendly human rights. This new paradigm seeks to reverse the notion that universal human rights are designed for the attainment of the dignity and well-being of human beings and for enhancing the security and well-being of socially, economically and civilisationally vulnerable peoples and communities.<sup>228</sup>

Economic globalisation is perhaps the most significant factor for the rise of this TRMF human rights paradigm.<sup>229</sup> The subtle processes of substitution are intricately connected with the emergence of a borderless economy made possible by the free flow of finance, trade, production, and to some extent labour.<sup>230</sup> One of the more pervasive dimensions of economic globalisation is the emergence of a “new international division based on the globalization of production carried out by transnational corporations (TNCs), which are more prominently than ever, the agents of the new world economy.”<sup>231</sup> The TNCs have increasingly dominated various aspects of the economy. Human rights have been no exception from the influence of the TNCs, and economic globalisation in more general terms. The corporate appropriation of human rights arises from the fact that TNCs, not only enjoy legal personality, but also the capability to be bear contractual property and in some instances, constitutional rights. Quite apart from that, TNCs increasingly invoke the language of human rights in defence of their interests. Anna Grear’s<sup>232</sup> important analysis of Baxi’s work explains that the adoption of human rights by TNCs is similar to the invocation of humanity. After all, only humans can fully enjoy human rights. Following on

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<sup>228</sup> Ibid., at vii.

<sup>229</sup> Economic globalisation cannot be understood outside globalisation in generic terms, which according to Giddens is “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa”. See, Giddens A. *Sociology*, Oxford University Press, 1990, at 64.

<sup>230</sup> See, Sklair L. *Capitalist Globalisation and its Alternatives*, Oxford University Press, 2002, at 8.

<sup>231</sup> See, Santos BDS. *Towards a New Legal Commonsense: Law, Globalization and Emancipation*, Butterworths LexisNexis, 2002, at 167.

<sup>232</sup> See, Grear A. ‘Challenging Corporate Humanity: Legal Disembodiment, Embodiment and Human Rights’, 7(3), *Human Rights Law Review*, 2007, at 511-543.

from Baxi, she notes that there is a moral inscription of humanity that lie at the heart of all human rights claims.

The processes of the co-option of human rights are also made possible through the emergence of a distinct political economy often referred to as the “neoliberal development model”.<sup>233</sup> The influential impact of TNCs has a lot to do with this framework. Its distinctive features can be summed up as follows:

[...]national economies should be open to trade, and domestic prices should conform to international market prices; fiscal and monetary policy should be prudently directed to the maintenance of price and balance-of-payments stability; private property rights should be clear and inviolable; state-owned productive enterprises should be privatized; private decision making, guided by undistorted prices, should dictate national patterns of specialization, resource allocation and factor returns, with minimal government regulation or sectoral policy; the residual government budget should be directed to targeted education programmes and social policy.<sup>234</sup>

These are familiar prescriptions that those in the Third World have come to know so well. In most cases, the embrace of the neoliberal political economy is a direct consequence of the influence of the BWIs. And the neoliberal political economy is the link between TNCs, the BWIs, and the market-friendly view of human rights.<sup>235</sup> The entire Bretton framework composed of the IFIs – the Bank and the International Monetary Fund (IMF) including ( as Petersmann above had argued) WTO/ GATT treaty regimes have served as missionaries of this political economy and inevitably, the market view of human rights.<sup>236</sup> It is not surprising that the BWIs, for instance, have promoted this type of human rights. They are

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<sup>233</sup> Santos above n 231.

<sup>234</sup> Ibid.

<sup>235</sup> See; Garcia F. ‘Global Justice and The Bretton Woods Institutions’, 3, *Journal of International Economic Law*, 2007, at 461-481.

<sup>236</sup> The WTO's General Agreement on Trade in Services, or GATS facilitates about 160 potentially services capable of being privatised. These include elder and child care, sewage, garbage, park maintenance, telecommunications, construction, banking, insurance, transportation, shipping, postal services, and tourism, education, health care, energy and water. Also useful in this context is the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

quite sympathetic to the relationship between economic globalisation and human rights. They are sympathetic to the view that finds economic globalisation as one of the best means in which the conditions of human welfare and poverty can be reduced.<sup>237</sup> It is equally considered as one of the ways human rights can be realised. The Bank, in particular, seems to find human rights compatible with the policies associated with the political economy of globalisation.<sup>238</sup> Both discourses have a mutual supporting relationship. Human rights provide a framework for the pursuit of development, just as neoliberal development policies also provide a framework for the pursuit of human rights.

Economic globalisation and markets are increasingly proposed as a precondition for human rights.<sup>239</sup> As Baxi puts it, “the promotion and protection of human rights become possible only when the order of human rights for global capital is fully recognised”.<sup>240</sup> Human rights typical of the UDHR are not only subordinated, but are recognised as by-products of both markets and economic globalisation. One cannot help but agree with Baxi that the celebration of markets would be dangerous to human rights. Markets would remain ubiquitous and determine everything, including the resources for the promotion and protection of human rights. This is, of course, a reading of what Baxi describes as the emergence of “human rights markets.”<sup>241</sup> This is understood as the need by various activists or groups to operate within the market logic. The market metaphor is thus deployed to demonstrate how human rights groups compete for scarce resources. He uses terms such as human rights investors, producers and consumers in very imaginative ways to describe this process. Indeed, one can defend the arguments for social markets in the

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<sup>237</sup> See, Anghie A. ‘Time Present and Time Past: Globalization, International Financial Institutions, and the Third World’, 32, *New York University Journal of International Law and Politics*, 2003, at 243.

<sup>238</sup> World Bank, *Development and Human rights: The role of the World Bank*, World Bank, 1998.

<sup>239</sup> See, United Nations, *Globalization and its Impact on the Full Enjoyment of All Human Rights*, preliminary report of the Secretary-General, *UN GAOR, 55th Sess., 5, U.N. Doc. A/55/342*, 2000.

<sup>240</sup> *Ibid.*, at 148.

<sup>241</sup> *Ibid.*

final part of this chapter on the basis of this argument. To do this, one would need to take the phrase ‘human rights markets’ seriously, and not –as Baxi meant– as a metaphor. After all, human rights, whether through community, need a form of market to function.

One of the main limitations to the market approach is the exaggeration of its ability to deal with the extensive levels of poverty and inequality that has accompanied it. This is something that the market protagonists have failed to adequately address given the recent poverty indicators, which reveal that nearly three billion individuals worldwide are poor, with “more than one billion people” [living] “on less than one dollar a day. In total, 2.7 billion struggle to survive on less than two dollars per day”.<sup>242</sup> These grim figures obviously cast a shadow over the arguments in favour of markets and economic globalisation.

To return to human rights, part of the problem is that economic globalisation has influenced the rise of many private market actors<sup>243</sup> and inter-governmental organisations (including, the BWIs) who are unaccountable for most of their actions. This is perhaps the most critical challenge that economic globalisation and markets present to human rights. As Baxi notes, attempts to make these economic actors accountable are often rejected. For instance, TNCs have shown their ability to convert “human rights movements into human rights markets”.<sup>244</sup> Economic globalisation has presented numerous other challenges to human rights, but it is safe to say that the emergence of non-state actors has been one of its most pervasive consequences. The State-centred human rights discourse is rapidly

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<sup>242</sup>Fast facts: The faces of poverty, UN Millennium Project, 2006, accessed online at [http://www.unmillenniumproject.org/resources/fastfacts\\_e.htm](http://www.unmillenniumproject.org/resources/fastfacts_e.htm), 10<sup>th</sup> February 2010.

<sup>243</sup> Non-state actors range from individuals, scientific and academic associations, international criminal syndicates, corporations, religious bodies and human rights organisations to other international organisations. See, Steiner H and Alston P. *International Human Rights in Context; Law, Politics and Morals*, Oxford University Press, 2000, at 940.

<sup>244</sup> Baxi above n 227.

becoming obsolete in the face of economic globalisation, quite apart from the powers of the State being outsourced to non-State actors. This is one of the enormous problems that is still debated amongst many scholars, and activists, with most of them divided on how to deal with the role of non-state actors. TNCs have continued to resist attempts to operate within a framework of human rights as notably proposed by the UN.<sup>245</sup> Instead, TNCs have preferred to be bound by limited self-regulatory norms of Corporate Social Responsibility (CSR), as with the Ruggie framework.

### **3.1.2. State Failure**

The limitations of the State model have had a number of disastrous consequences. One such challenge is the inability of States to assert their economic sovereignty over their territory. Baxi's thesis partly explains the continuing loss of State control over its territorial and productive capacities. This is, in part, attributed to the significant powers wielded by "regional international economic arrangements, international financial institutions, multinational enterprises, and the network of NGOs."<sup>246</sup> These institutions have in various ways profoundly impacted on the overall achievement of human rights. Baxi argues that the combination of these factors have challenged the State's regulatory competence. No longer is the State the central organiser of "...national economic development, the owner of capital and other means of production, an active participant in the production of goods and services, and the proactive regulator of patterns of corporate behaviour",<sup>247</sup> the State now enthusiastically promotes the virtues of the free-market. Whilst the UDHR assigns responsibilities on States for the realisation of human rights – that is, "to construct,

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<sup>245</sup> One such example is the rejection of the failed 'UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights' by TNCs. For a helpful critique of the UN Norms, see; Baxi U. 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights', 5(1), *Human Rights Law Review*, 2000, at 1-26.

<sup>246</sup> Ibid, at p. 135.

<sup>247</sup> Ibid.

progressively and within the community of states, a just social order, national and global, that will at least meet the basic needs of human beings”.<sup>248</sup> The emerging paradigm, on the other hand, departs for the reason that it challenges this redistributive role or ethic of the State. Deregulation or again, privatisation facilitates the deliberate assault on the distributive capacity of the State.

In spite of the implications of the arguments above, there is perhaps another significant problem that seems to have been overlooked. Whilst it cannot be denied that markets have presented problems to human rights, it is equally true that human rights problems have also been generated by the State. One cannot deny that many of these problems have emerged as a result of the complicity of postcolonial States in the production of such harms. Baxi’s thesis doesn’t adequately highlight this problem – at least not in this context. Experiences with the State-centred human rights framework continue to raise serious doubts about its long term viability as the vanguard of rights.<sup>249</sup> These are for reasons for State failure especially in the postcolony where the usual stereotypical arguments about corruption, nepotism, poor governance, and elitism are well documented, and therefore, need not be restated here. In the African continent, for example, one of the most influential explanations of this is that the State emerged as an artificial construct, given that it evolved as the natural successor to the colonial State. Similar to the way that the colonial State “lacked any grounding in the expectations or concerns of the indigenous societies of the territories whom it imposed its order”,<sup>250</sup> the postcolonial State has similarly been distant from the lives of ordinary people. Whatever the reasons for State failure may be, very few would argue that the postcolonial African

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<sup>248</sup> Ibid.

<sup>249</sup> See, Chibundu above n 145.

<sup>250</sup> Ibid.



State has failed in its role in presiding over economic and political processes. There are, of course, differences between States on the extent of these problems. But, the point is that one must be cautious arguing in favour of the State-centred solutions. Like the market, the postcolonial State has its vast limitations. There is a danger in over-romanticising with the idea of the State and this is something Balakrishnan Rajagopal summarises quite well:

... [t]he crises over development in many countries has arisen largely because of the failure of the state to 'do development' in a socially and environmentally responsible manner. It would then be problematic to return to the state under the rubric of human rights, when it stands thoroughly discredited in the eyes of civil society in many developing countries.<sup>251</sup>

This position is unique not just because it lays emphasis on the nature of State failure, but also because it demonstrates the similarity between neoliberal protagonists and their critics. For protagonists and critics of neoliberalism alike, the State has been the problem for development and human rights. For critics of neoliberalism, like Rajagopal, however, quite apart from rejecting markets as the alternative, their grievances are structured around the way in which the State serves as an instrument of dominant interests, particularly, the way in which it reifies interests and values of global capital. The State is articulated as a mechanism for protecting the interests of the prevailing global political, economic and social climate. A useful explanation, here, is to recall the arguments by Karl Polanyi<sup>252</sup> about the significance of the enormous State efforts in the constitution of markets. This is a point that market enthusiasts often overlook. They not only ignore the intense institutional processes towards setting up market economies, but also the enforcement essential to preside and sustain markets. For Polanyi, markets themselves cannot emerge without extensive planning, centralisation and deliberate State action.

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<sup>251</sup> Rajagopal above n 175, at 230.

<sup>252</sup> Polanyi above n 209.

The role of the State brings to mind an important (but neglected) aspect of the work of Adam Smith.<sup>253</sup> It is not often acknowledged that he also spent a lot of time to write about the importance of the State. Smith believed that the State had an important role to play in enforcing tariffs, wage rates, and restrictions on trade. For him, the size of government would have to coincide with the growth of the market economy. Maintaining the market economy was indeed an expensive task, one that was dependent on ‘big’ government. The government had to continue playing a prominent role for purposes of defence, public facilities, civil justice and a functioning tax system. As such, the State was critical to the existence of liberty, reason and happiness in society. Though maintaining this State might be expensive, the wealth generated from a well-functioning market economy was considered capable of providing enough resources to sustain it. Parallels between these arguments can be drawn with the emergence of the second generation reforms. The market is now not treated with the kind of suspicion that was done in the past. Moreover, much of the mistrust of the State seems to have changed with the recent global financial crisis, which has seen the State take a leading role in economic affairs. It would seem that States would always step-in where there has been widespread market failure, as with the current global economic crisis. The crisis has provoked calls for a rethink of local and global market based economic models. Whilst we wait for new proposals, I rationalise the neoliberal articulation of the State from another school of thought – that is, from the work of Boaventura de Sousa Santos.<sup>254</sup>

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<sup>253</sup> For a discussion on Adam Smith’s thinking on the role of government, see Muller J. *The Mind of the Market: Capitalism in Modern European Thought*, Knoff, 2002, at 76-80.

<sup>254</sup> Santos above n 231, at 315.

Santos's thesis on the "weak state consensus"<sup>255</sup> may provide a useful explanation here. It is premised on the relationship between the 'state weakness' and 'neo-liberal economic consensus', which he argues resides in initiatives in favour of the market, and proposed against the State. Because of this, the State is articulated as an oppositional concept. And this is partly because it is held responsible for the regrettable condition of affairs. The State is conceived in dichotomous terms and not as a partner to civil society. Therefore, weakening of the State's functions is considered as the only justifiable basis for rejuvenating civil society. This generates a paradox as the task for weakening of the State's functions is placed within its boundaries. The State, in other words, is expected to organise its own demotion. It is paradoxical because the State must not only be weak, but also strong enough to facilitate and regulate the market. The point then is that it would be misleading to speak of loss of the centrality of the State. It is still possible to speak of the centrality of the State in a different way – that is, from a standpoint that suggests that the State is no longer the central agent of social change.<sup>256</sup>

The difficulty in the light of these and other arguments in this chapter is that the market pessimist is left with no other alternative but the State, so is the State sceptic left with no alternative but the market. One of the greatest fallacies – especially, in human rights discourse – has been the assumption that the State and market are the only alternatives. The thesis as such is an attempt to transcend this binary logic. Indeed, the case for community in this thesis is a reaction to these sorts of arguments. It is an attempt to transcend such dichotomous debates by proposing a different alternative. For purposes of this chapter, however, there is also a difficulty with the dominant way in which markets

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<sup>255</sup> Ibid.

<sup>256</sup> Trubek, as noted in chapter two, has articulated the existence of a 'new developmental State' to depict this. It marks yet another shift of the role of the State in the Third World. Trubek above n at 152.

are presented. The problem is not just a question of dichotomy between the State and market, but also the way markets are presented. Part of the problem is that markets are understood as systems that only allow for the pursuit of profit or self-gain, and leave out other understandings of the concept. As a consequence, what follows is an attempt to think of markets differently, and in this respect, how they may be a more suitable foundation for human rights.

#### **4.De-Marketising Human Rights**

As already argued, markets challenge human rights in several ways. Markets only function through self-interested persons, without which benevolent exchanges would not be possible. Markets are inclusive to those who participate but exclusive to those who, for one reason or the other, cannot benefit from this opportunity. Markets, as were described, are amoral and have no social or ethical ethos. If this is the way markets are understood, then it is not difficult to recognise that they pose an insurmountable challenge for the enjoyment of human rights. This is one of the important implications of the corporate capture of human rights by the nascent market friendly human rights discourse. The market friendly discourse creates a framework through which different economic actors appeal to the language of human rights, either as beneficiaries or to legitimise their activities. Markets prioritise certain human rights, which are directly connected to market participation. As a consequence, the promotion and protection of human rights typical of the UDHR can only be made possible by drawing a connection with certain basic market rights.

To remedy this problem, one alternative is how to think of markets from a different ethical standpoint. It is a suggestion that capitalist markets are only one form of market, and they are certainly not the only one. One initial doubt about this approach that needs to be overcome from the outset is that making a case for a different kind of market (or even the possibility of a relationship between this market and human rights) can be misconstrued as consenting to market capitalism. It might indeed be safer to discard the role of markets altogether. This is – as will be discussed particularly in chapter six – one way of interpreting the role of community in this thesis. It is in part a response to the problems generated by markets, and can itself be understood as an entirely different (non-market) framework. Even so, a plausible argument can be made that it is still necessary to understand that the community – like the State – needs markets or a certain kind of economy to function, even if it is proposed as an alternative for human rights. The point in raising this is to illustrate that dichotomous arguments are not particularly useful in this context. Indeed, the proposals in this chapter (or thesis in general) are an attempt to move away from dichotomous views about the plausibility or non-plausibility of markets. What is rejected is the underlying capitalist orientation of markets. The point is that if markets are detached from the worldview of profits or self-interest, then perhaps it is possible to understand how they might be useful to human rights. One way of achieving this is through what I call the ‘social market’. This is simply an attempt to provide human rights with an alternative market to function. The social market is a distinct economic model, one formulated by non-profit oriented principles. It is discussed in detail below.

## 4.1. Social Markets

This section pursues this line of reasoning above; it explains the potential of a type of market, which despite existing within the capitalist system, is also quite different. The social market, for want of a better term, is the umbrella phrase, which explains diverse models of economic organisation formulated by values of solidarity, democracy, equity and co-operation. The social market is a term used to describe the economic framework that allows a wide range of non-profit groupings to operate. One of the best ways of understanding the social market is through a range of businesses, which are influenced by ethics of solidarity, community, equity and democracy. There are several business models that are consistent with these values, and more so, those that are designed to meet special needs of the poor. The first of such considered here is the co-operative business model.<sup>257</sup>

For most part of this thesis, co-operatives are promoted as a form of social market. There are, of course, different types of co-operatives, which vary on the extent to which they engage or disengage with the capitalist economy. It is possible that some co-operatives might have a radical agenda that is at odds with capitalism, whilst others might be more accommodating to it. Even so, the potential of co-operatives invites the proverbial question of whether it is a variation of a capitalist business or something entirely different. Again, for the sake of emphasis, appreciating the potential of co-operatives has to be distanced from dichotomous arguments. It requires a less divisive approach, one which Boaventura de Sousa Santos suggests when he argues that rejecting co-operatives for lack of purity amounts to a kind of fundamentalism. Following on from Santos<sup>258</sup>, it constitutes a

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<sup>257</sup> There are different businesses which represent what has become known as the solidarity or informal economy. It is not possible to consider in great detail the huge experimentation that has gone on in this field. Co-operatives and social business are just a few amongst a wide range of solidarity oriented models in this context. For a good insight into what the solidarity economy entails, see; Castells M and Portes A. 'World Underneath: The origins, dynamics and effects of the informal economy', in Castells M and Benton (eds), *The Informal Economy*, John Hopkins University Press, 2003.

<sup>258</sup> Cited in Santos BDS (ed.), *Another Production is Possible: Beyond the Capitalist Canon*, Verso, 2006, at xxi.

fundamentalism because rejecting co-operatives may silence any potential for transformation or even the possibility of creating “pockets of solidarity within the heart of capitalism”.<sup>259</sup> A more progressive approach, as Santos suggests, can be influenced by Andre Gorz’s notion of “non-reformist reforms”.<sup>260</sup> This opens up the possibility of constituting reforms which do not necessarily contribute to the status quo, but rather disturb and transform it from the inside. They depart from reformist-reforms which contribute to upholding the structures of the system. This is always rather difficult but co-operatives offer the potential of achieving this.

It is possible from yet another standpoint to argue that co-operatives constitute a radical departure from the capitalist market economy. This is because of the distinctive values and principles that underpin both formation and operation. These values are not common to capitalist businesses. The uniqueness of the co-operative model is that they are democratic, self-help economic organisations. They may be specifically designed or formulated for the specific reason of assisting its members and the particular community in which they operate. Co-operatives achieve this by aggregating individual market power into a collective whole, so as to tackle certain problems in a particular community. Co-operatives provide a unique example of how specific problems are better resolved collectively than through independent action. This explains why co-operatives have not only appealed to people across the globe and have also been able to transform millions of lives.

It is no surprise then that even before the recent phenomenon of the credit crunch a co-operative-driven economy has featured in several proposals as an alternative to both the capitalist market and traditional command control economy. One good example of this

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

sort of argument comes from the work of David Miller,<sup>261</sup> whose idea of ‘market socialism’ captures this mindset. It simply refers to an economic model driven by worker co-operatives. Given the similarities – but also differences – with the central argument in this chapter, it would seem necessary, even if, briefly, to expand a little more on Miller’s thesis. Beginning with the idea of market socialism; it refers to a distinct economic model, which primarily responds to failures of command and control State-socialist economies, and subsequently, the neoliberal economic models that now prevail in most countries of the world. In doing so, the idea of market socialism does not constitute a complete departure from capitalist market economy; rather it thrives on its resources to achieve its objectives.

They include:

- (a) to obtain the efficiency advantages of markets in the production of most goods and services; (b) to confine the economic role of the state in a way that makes democratic government feasible; (c) to protect the autonomy of workers, both as individuals and as members of self-managed enterprises; (d) to bring about a much more equal distribution of primary income (rather than relying on secondary redistribution)<sup>262</sup>

In keeping with these aims, the market mechanism is relied upon for purposes of provisioning of goods and services. The major difference between market socialism and the typical capitalist economy is that ownership of capital is now socialised. Market socialism exists both in a pure and impure form. In the pure model, worker co-operatives are encouraged to source for capital from investment agencies according to reasonable terms and conditions. Such co-operatives will in turn democratically exercise autonomy over decisions on production, internal organisation of the business, or how it is generally run. Such co-operatives will operate and compete within a specific market sphere with the aim of generating income for its members, which is in turn distributed according to a

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<sup>261</sup> See, Miller D. *Markets, State and Community: Theoretical Foundations of Market Socialism*, Clarendon Press, 1991, at 5.

<sup>262</sup> *Ibid.*, at 9.



democratically agreed formula. The impure version of the market socialist model is simply a hybrid of a typical co-operative and capitalist organisation.

Irrespective of model, Miller allays general fears amongst followers of classical economics about the macroeconomic efficiency of co-operative enterprises. As a better alternative to centralised economic models, the co-operative model is capable of replicating the same competitive equilibrium, which is not only Pareto-optimal, but also similar to a typical capitalist firm<sup>263</sup>. Given the different orientation of co-operatives, they are always likely to react differently to changes in the market. For instance, their reaction to a sharp increase in price is predictably one that would lead to the reduction of production. This is usually not the same kind of reaction expected of a capitalist firm. Nevertheless, this is not a suggestion that all co-operatives will always react the same way to such developments. Even if they don't, there is always the possibility for new co-operatives to be formed in situations where others have failed (or are failing) to maintain the equilibrium of the economy. On the whole, even if these arguments sound speculative, there is really no reason why a co-operative business cannot function as efficiently as capitalist firms.

Looking at questions about the viability of an economic model driven by worker co-operatives, it is here that Miller's proposals depart from mine, especially in terms of our objectives. It is mainly because he places emphasis on workers co-operatives whilst I do not. It is not in doubt, as Miller convincingly argues that, worker co-operatives are quite capable of running an entire industrial economy. This is, of course, his response to questions raised about the suitability of worker co-operatives running an economy constituted of large complex businesses, given that cooperatives usually operate on the small scale. Miller rightly dismisses this objection on the grounds that large corporations

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<sup>263</sup> Ibid., at 13.

usually operate through small production units, and therefore, the economy itself is capable of being broken up to suit the co-operative structure.

It is, however, from this question that a number of reasons why Miller's proposals on the type of co-operative depart from mine. The first is that Miller's co-operative economic model is conceived for countries that have achieved some level of industrialisation like First World countries. It doesn't seem suitable for Third World countries, where such forms of industrial advancement have failed to take place. Understandably, Miller is reacting to the failures of State socialist economies, and because of this, he falls into the trap of privileging the working class as the primary agents of social transformation. He also doesn't acknowledge the questions of exclusion synonymous with the working class (industrial labour) concept. That is, it excludes all other labouring classes, especially those that do not work under a formal wage structure. Moreover, it automatically excludes the poor who are most likely unemployed from the domain of recognition. In some situations where the poor are recognised, they are placed under the leadership of the working class.

A further difficulty with is that Miller doesn't seem to appreciate the changing nature of working class itself. This has made it even more difficult to achieve this vision of a working class co-operative led economy. Traditional notions of working class no longer command control over the economy like it was in the past. Because of this, it is hardly likely that a proposal such as Miller's can provide an alternative. A new kind of working or labour class has emerged with the changes created by the phenomenon of globalisation. This has in turn paved way for highly dispersed forms of production. It is not in any way a suggestion that new forms of organisation are not possible today. The point is that Miller's proposals do not seem to consider how these changes might affect traditional collective

forms of organising. This, and the changing nature of the working class concept, is something that comes out from the work of Michael Hardt and Antonio Negri on the *multitude*.<sup>264</sup> It is not possible to provide a detailed analysis of their work, except to refer to their illustration of changes to traditional perceptions of labour for purposes of elaborating on the point that Miller doesn't consider in his thesis. Here's an explanation from Hardt and Negri:

In the final stages of the twentieth century, industrial labor has lost its hegemony and in its stead emerged "immaterial labor", that is, labor that creates immaterial products, such as knowledge, information, communication, a relationship, or emotional response. Conventional terms such as *service work*, *intellectual labor*, and *cognitive labor* all refer to aspects of immaterial labor, but none of them captures it generally.<sup>265</sup>

Economists have described these transformations as a transition from *Fordism* to *post-Fordism*. This has marked a shift from long-term stable employment typical of the industry to more short term flexible and highly mobile work.<sup>266</sup> Labour is "*flexible* because workers have to adapt to the different tasks, *mobile* because workers to move frequently between jobs".<sup>267</sup> It is also produced a degree of instability, given that there are hardly any long term jobs anymore. Miller's account pays hardly any attention to these developments which, as argued, do not necessarily impede collaboration, but they impede the kind of collaboration he envisages.

There is yet another difficulty with Miller's proposals for a worker co-operative led economy; it fails to recognise other types of co-operatives in his framework of economic participation. Miller's proposals seem to leave out scope for the operation of what might be called *social co-operatives*, such as those that might exist in poor remote communities, and

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<sup>264</sup> Hardt and Negri above n 67, at 108.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid., at 112.

<sup>267</sup> Ibid.

which might be more responsive to the particularities of their problems. The uniqueness lies in the fact they are businesses formed for one purpose, that is, to resolve a wide range of social problems. This is an important feature of co-operatives, even though it is not always visible. As such, it will usually depend on the type of co-operative involved. Even so, there is no reason why co-operatives cannot be formulated with a specific community with social problems in mind, especially problems in relation to specific human rights. As will be considered later, social co-operatives seem to be more suitable for purposes of theory of community in this thesis. Given its potential, I shall return to this issue in chapter seven, to consider the application of co-operatives.

What is considered next, however, is another business model that has become recently popular, and is another example of the social market. It is Muhammad Yunus's idea of social businesses, which share some resemblance with co-operatives but yet quite different. Whilst the co-operative may itself be considered as a social business, the distinction between them lies on the emphasis on the role of the individual above others in this model. Of course, there is nothing to prevent a group of individuals from engaging in social businesses collectively. This has certainly been the practice as will be illustrated below. However, the similarities and differences can only be understood in light of an explanation of what the social business entails. The purpose of the social business:

...is to address and solve social problems, not to make money for its investors. It is a non-loss, non-dividend-paying company. The investors can recoup his investment capital, but beyond that, no profit is to be taken out as dividends by investors... [I]n effect, social business will represent a third economy sector alongside the free markets and government.<sup>268</sup>

There are several implications from the statement above in light of earlier discussions. First, a social business functions within the existing market framework to achieve its

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<sup>268</sup> See, Yunus M. *Banker to the Poor: Micro-lending and the battle against World Poverty*, Public Affairs, 1999. Yunus M and Weber K. *Creating a World without Poverty*, Public Affairs, 2008. See also, Yunus M. 'Economic Security for a World in Crisis', *World Policy Journal*, 2009.

objectives. Its conditions of existence as such, do not require a re-design of the existing economic architecture. This is similar with co-operatives which do not operate outside the market economy. It relies on the unrivalled ability of markets to create wealth and opportunity. Even so, Yunus acknowledges that recent developments – especially the phenomenon of economic globalisation, and now the global financial crisis – have called this alleged ability of markets into question. On the global scale, markets seem to have exacerbated rather than resolved conditions of poverty, disease, pollution, corruption and inequality. Yunus argues (quite persuasively too) that the main reason for the current problems is the incomplete nature of the current economic framework. It contains one type of market, which is primarily geared to maximise profits. It is the only market or, as it were, type of business model available under the current climate, one that is only concerned with the pursuit of profits. It is a business model ill-suited and adaptable to the diverse conditions of poverty in the world. It is because of this that he argues that what is needed therefore are a range of social businesses designed to cope with such problems.

Yunus finds justification for this reasoning in the work of Adam Smith. The current economic framework is incomplete because of a half-way reading of Adam Smith's works. *The Wealth of Nations* is usually read apart from *The Theory of Moral Sentiments*. According to him, if these books are read together then perhaps one would find the need for a second market or preferably, (in my terms) a social market. Reading *Wealth of Nations* in light of the *Theory of Moral Sentiments* reveals that Smith did acknowledge the narcissistic nature of individuals. This made it important for society to have other forms of relations apart from those generated by markets. Societies needed something a lot more, and these were acts of compassion and benevolence. Smith argued that although individuals are inclined to selfishness, they still have a propensity of compassion for misfortunes of others. The important point is that these emotions are expressed without

conditions attached. Individuals do not expect anything in return when they show compassion towards predicaments of others. For Smith, empathy or compassion for the other is a common human sentiment. It is common to either expect compassion or to express grief for the pain of others. Even the most hardened criminal is capable of this moral comportment; this is not necessarily an attribute for the most compassionate in society. For him, all humans have an innate sense of morality and this is because of our conscience. The sense of right and wrong together with the comportment towards others is the important value that makes human co-existence possible.

In spite of this, one must not forget that, even though Smith recognised the extreme importance for compassion, he was also aware of its limitations. To recall from earlier analysis of his work, Smith noted that even a beggar cannot totally depend on charity for survival. He or she will sometimes find need to convert his gifts into actual functionings. Although, Smith recognised this, he was by no means saying that acts of charity had no place in society. Unfortunately, market protagonists (even those who claim to be followers of Smith) take the nub of his arguments for markets a bit too far. As earlier seen, markets become the all important defining factor of relations in society. It has become so to the extent that the exercise of compassion is hardly visible. Such narrow perceptions in society ignore that Smith's views on the multi-dimensional nature of human beings who are "driven by conscience and sympathy as well as the desire for profit."<sup>269</sup> Smith seemed to be attaching a condition to the market economy, in that it ought to exist only in situations where moral virtues can be called upon to mitigate the hardship of the pursuit of self-interest.

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<sup>269</sup> See, Yunus M. Adam Smith Lecture, University of Glasgow, 2008, accessed online at <http://muhammadyunus.org/content/view/178/127/lang.en/> 25<sup>th</sup> May 2009.

Because of this, and for other reasons outlined, Yunus sees that the only way of applying Smith's thesis is by creating "special types of businesses specifically designed to improve the lot of humanity in general."<sup>270</sup> Social businesses are an example of such. They have a potential that can be channelled towards resolving many problems, especially those that can contribute to cure malnutrition, provide shelter, eradicate disease<sup>271</sup> and such other problems that affect particular communities. The question still remains, how do we push this vision a little further to think of proposals or strategies which can specifically help realise economic and social rights?

Yunus provides a number of practical strategies, which point to that direction. Most of these examples are accounts of his personal experiences – and successes – as founder of the Grameen Bank<sup>272</sup> and subsequently, other social businesses that have grown from it. It is clear that the conceptual underpinnings of the social business model have their origins in the practical experience of the Grameen Bank. It is possible to think of it as sort of a grounded theory that works its way to the top. The Grameen Bank began as a micro-credit institution in Bangladesh in response to some of these types of problems, especially the inability of the poor to access (formal or informal) credit. It has had a tremendous impact of women, who constitute most of its borrowers. Since its emergence, it has disbursed an estimated \$4 billion with nearly 90% success rates. Because of its significant impact, it has not only earned its founder Muhammad Yunus a Nobel Prize for Economics, but has also led to the spread of the Grameen Bank to places like the US.

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<sup>270</sup> Ibid.

<sup>271</sup> Ibid.

<sup>272</sup> See, Yunus M. *Banker to the Poor: Micro-lending and the Battle against World Poverty*, Public Affairs, 1999.

One reason for its appeal – and perhaps success rate – is the ease at which loans are accessed by the poor. Unlike commercial lending institutions, it has no requirements for collateral or interest. Consider the following arrangements:  $x$  amount of money is disbursed to  $x$  group of women for purposes of setting up a certain micro-business. The women use this money to execute their business plan by competing in the same market with the aim of paying back loans over a flexible period. The objective is to transform the poor into entrepreneurs by giving the right tools or placing them in control of their own transformation. As such, the Grameen Bank (or social business) in general has sought to “unleash [the poor’s] energy and creativity”,<sup>273</sup> especially in ways that enable them become self-sufficient.

Whilst it has been potentially successful, the main reasons for its high success rate are nevertheless questionable. Does its success depend on its ability to transform individuals to entrepreneurs, or does it have to do with social capital, or the fact that it encourages individuals to build the habit of savings? These are questions that remain contestable but Yunus seems to take the first reason above as more significant. As a consequence, it seems to ignore the impact of group liability, which has also been a key factor to high return rates of such loans. It is not always acknowledged that the success of the Grameen Bank can be explained from the perspective of the existence of social capital and solidarities generated within many groups. The standard account of the success of the Grameen Bank seems to exaggerate the ability of the individual to be transformed into a successful *homo economicus*. At the same time, it downplays the importance or habit of saving and group solidarity.

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<sup>273</sup> Yunus above n 255, at 247. For the importance of savings to poverty alleviation, see; Sacks above n 113, at 52.



Furthermore, the Grameen Bank may be a good example of a good micro-credit institution but it is hardly a perfect illustration of a social business. It is not clear how a micro-credit institution can deal with a wide range of social problems such as access to the basic necessities of life like water, healthcare and education. It is not clear how individuals can directly provide these economic and social rights through autonomous entrepreneurial activity. A better explanation is perhaps that such other problems have been dealt with by an outgrowth of other businesses from the Grameen Bank. It has not been a direct responsibility of the bank itself to provide these goods. Of course, its unique ownership structure has allowed this to happen. It is owned by the poor, who are both depositors and borrowers. It is also structured in a way that its owners get a return on their investments, whilst surpluses are re-invested into other pressing areas.<sup>274</sup> This is a logical explanation why other specially designed businesses have emerged from the surpluses generated from the Grameen Bank. Several social businesses have emerged providing very cheap essential goods and services for the poor. These include Grameen Shaki (renewable energy), Grameen Health Care, Grameen Fisheries, and Grameen-Danone, a joint venture with the French dairy giant, which provides cheap yogurt for poor children and families in Bangladesh. There is also the Grameen-Viola, a joint venture with a French water company to provide clean drinking water to rural villages.<sup>275</sup> There is indeed a rich account in Yunus recent work on how these social businesses are transforming the lives of many. That said, there is still very little knowledge about the potential problems of social business on a wider scale. This is something Yunus's account hardly mentions; questions must be asked about why social businesses are not more visible across the world. As such, the jury is still out on Yunus's social business models. From the standpoint of this thesis, Grameen social businesses are not the only way social markets can be conceived. There are obviously other

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<sup>274</sup> Ibid., at 10.

<sup>275</sup> Ibid.

models that can also perform this job. Co-operatives are one such model, and their potential in relation to electricity will be explored in more detail in chapter seven.

## **5. Conclusion**

The chapter has generally demonstrated the argument about the dominance of markets in human rights discourse. It has discussed the philosophical roots of the market argument and explained why they now resonate in the Third World. It showed that quite apart from exclusion and participation, the market ironically needs a strong State to function. The chapter has argued that part of the problem has been the kind of market involved. An attempt has been made to show another version of markets that lies at the margins of the dominant model. Such markets open up more possibility for dealing with some of the problems of human rights through forms of cooperation and participation, attributes missing from the dominant model. Chapter seven will take these arguments much further by sketching out a co-operative model that can encourage such forms of participation. Such opportunities would, however, only be effective if they are preceded by opportunities for participation within particular communities. This entails understanding and creating structures for participation where they do not exist. Where they do exist, it entails nurturing them into more inclusive forms of participation. This entails understanding the constitutive role of human rights in enabling and nurturing such forms of participation. Whilst chapter six discusses the implications of community involvement, what follows is an attempt to understand the kind of role human rights can play. This is pursued by embedding the analysis in this and the previous chapters in a case study of the reform proposals for electricity in Nigeria.

## Chapter Four

### CONTEXTUALISING GOOD GOVERNANCE: ELECTRICITY REFORM IN NIGERIA

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#### 1. Introduction

The main aim of this chapter is to demonstrate how the good governance inspired reforms in Nigeria have translated into practice by offering a case study of the reform proposals for electricity. Not only are the reforms carried out at the expense of community participation, they are also carried out at the expense of human rights. Leaving questions of community for subsequent chapters, the focus here is on understanding the implications of excluding human rights from the reform of electricity. The reform, as with other neoliberal inspired development approaches, fail to either recognise electricity as a human right or the language of human rights as a philosophy that can underpin their objectives, the most important of which is enabling access to electricity to all. As such, the chapter embeds human rights in the analysis of the reform proposals for electricity in Nigeria. In particular, it builds on discussions in chapter one about the implications of understanding human rights as ethical claims. Those discussions have lead to the hypothesis in this chapter that an ethical framework of human rights potentially offers a philosophy that can underpin current and future designs of institutions, laws or reform policies. Specifically, such an ethic can equally help avoid, or bring significant problems encountered by the reform of electricity to greater attention. In particular, the relational dimension of privatisation, the lack of electricity, poverty and human suffering.

It is admitted that human rights cannot achieve this task independently; they need to be strengthened with other ethical resources, which not only point to problems, but also how to avoid and resolve them. Simone Weil's concept of attention is one example of how to achieve this. It is potentially an important way of developing what can be called a *listening* ethic to those most affected by such reforms. This ethic, however, can only be nurtured in communication, and with their participation. Attention is, after all, how we embrace, and participate in the affliction of others. Put this way, this chapter prepares grounds for the arguments in subsequent chapters about the significance of encouraging the participation of communities affected by such problems.

The chapter begins with a background of the problems of electricity in Nigeria. It proceeds to discuss and offer a critique of the current reform approach, particularly the legal and regulation framework, as well as other salient aspects, such as access of the poor to electricity, rural electrification and consumer rights protection, amongst other features. It points to some of the problems with the reform, the most important of which is the neglect of human rights – either as a substantive right or philosophy – that underpins the reform. In conclusion, the chapter builds on earlier discussions about understanding human rights as ethical claims, and how this might meaningfully point to the problems of the lack of access to electricity, and the resultant human suffering it provokes.

## 2. Electricity in Nigeria

I have not known 24 hours of uninterrupted power supply for countless years now. As I write this piece, I have not had power for the past three days! Nigerians depend largely on their generators for their primary source of power and the public power utility as backup.<sup>276</sup>

The following words describe the familiar sentiment shared amongst millions of Nigerians, many of whom survive under constant hardship of lack of electricity. The failure of public sector electricity is self-evident and needs very little elaboration. It is well known that the only consistent thing about electricity in Nigeria is its inconsistency, as 40 - 70% of Nigerians survive without electricity.<sup>277</sup> A brief history of the electricity sector is a helpful way of putting this into perspective. Prior to the current reforms, Nigeria's electric sector operated as a vertically integrated national monopoly with combined elements of generation, transmission and distribution of electricity. At that period, the electric sector was not different from others in different parts of the world. Electricity was considered as a public good in the classical economic sense, which could only be managed by a centrally controlled monopoly. This duty was placed on the now defunct National Electric Power Authority (NEPA).<sup>278</sup> It operated under the now repealed Electricity Act as well as its establishing Act. Not surprisingly, one notable feature of the law was the exclusion of private market participation in the electricity sector.<sup>279</sup>

Reasons for the appalling levels of access to electricity have been credited to lack of private participation and the centralised nature of the redundant State-owned enterprise. Most observers have blamed the monopolistic nature of the sector for electricity failure in

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<sup>276</sup> Anthony, Lagos, Nigeria, cited in BBC Report entitled 'Why are we plagued by power cuts?' accessed online at <http://news.bbc.co.uk/1/hi/world/africa/4338306.stm> 10<sup>th</sup> February 2009.

<sup>277</sup> See, Hall above n 68, at 10.

<sup>278</sup> See, Arowolo S. 'Nigeria Power Sector Reform, Why Distribution Requires A Clear Strategy', 7, *International Energy Law And Tax Review*, 2005, at 163.

<sup>279</sup> See, Part I, Electric Power Sector Reform (EPSR) Act, *Federal Republic of Nigeria Official Gazette*, 2005.

Nigeria.<sup>280</sup> True enough that centralised electricity may be an outdated system today, but rationalising the problems only from this perspective appears to be an over-simplification of the multiple causes for electricity failure in Nigeria. Lack of competition may have accounted for most of the problems but there are certainly other reasons for such problems. Beyond questions of competition several operational problems have a causal relationship with the lack of electricity. Despite huge amounts of hydro, oil and gas resources, the generation capacity of the electricity sector has never peaked beyond 3500- 4000 MW of an installed capacity of 6000 MW.<sup>281</sup> Transmission has equally been very poor; it has either been unreliable or not capable of transmitting to various destinations. Transmission losses of 30-35 % have also been commonly reported. Distribution has not been very different in a clearly malfunctioning system.<sup>282</sup> A considerable amount of these problems can be attributed to neglect or a long history of the failure to perform maintenance operations. For example:

- No new power stations were built between 1990 and 1999.
- No major overhaul of plants was carried out between 1990 and 1999.
- Only 19 out of 79 generating units were in operation in 1999.
- Actual daily generating units fell less than 200 megawatts (MW) in 1999.
- No transition lines have been built since 1987.<sup>283</sup>

Other factors include rising consumer debts, inadequate gas supply, devaluation of the local currency, low tariffs,<sup>284</sup> funding and Nigeria's typical problem of corruption can also be attributed to such problems. Corruption has been widespread both within the electricity sector and even in recent efforts at reform. For instance, a recent Parliamentary

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<sup>280</sup> For a good example of this type of argument, see; Ikeme J and Ebohon J. 'Nigeria Electric Power Sector Reform: what should form the key objectives?' 33(9), *Energy Policy*, 2005, at 1213-1221. Amobi M. 'Deregulating the Electricity Industry in Nigeria: Lessons from the British Reform', 41(4), *Socio-Economic Planning Services*, 2007, at 291-304. See, Adaralegbe A. 'Are The Electricity Laws in Nigeria Sufficient To Promote and Preserve Competition', 9, *International Energy Law and Tax Review*, 2003, at 254.

<sup>281</sup> Hall above n 68.

<sup>282</sup> Ibid.

<sup>283</sup> See, National Planning Commission above n 15, at 70.

<sup>284</sup> Ibid.

investigation<sup>285</sup> has revealed the misappropriation of an estimated sum of \$10 – 15 billion during the current process of reform. The Nigerian Parliamentary hearings have also disclosed that the money was allegedly disbursed to fund new (fictitious) power stations. This was proposed to augment the existing power stations prior to privatisation.<sup>286</sup> The outrageous sums involved call the processes leading up to privatisation into question. Apart from being corrupt, there seems to be some sense in measuring the comparative cost of establishing privatisation on the one hand, and the operational costs of the failed State electricity sector, on the other. A further similarity between the old and new processes is their inability to deliver electricity, the effect of which is the perverse effects it has had on the poor. Unlike the rich, the poor can ill-afford to provide other means of electricity. They cannot afford what has become the general practice of relying on small stand-by generators for electricity.<sup>287</sup> As already noted, the importance of electricity has consequences that make the questions of access even more important for Nigerians. Lack of electricity aggravates their ability to access the already poor conditions of water, sanitation, healthcare, education and other essential social services. It is perhaps on the strength of these problems, and of course, due to other external factors that have encouraged the Nigerian government to concretise a legal and regulatory framework for electric sector reform.<sup>288</sup> The reforms are modelled on core elements of the BWIs policy on electricity reform – that is, unbundling and privatisation of the State electricity company as well as a new law to accelerate transformation of the electricity sector.

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<sup>285</sup> Parliamentary investigations by Nigeria's Legislative House of Representatives reveal that the previous Nigerian government of President O. Obasanjo made investments worth \$16 billion on electricity. See, Bretton Woods Project, 'Facilitating whose power?: IFI policy influence on Nigeria's energy sector', *Bretton Woods Project*, 2008.

<sup>286</sup> The Nigerian government has recently attempted to construct 12 new power stations, the most notable of which is the Mambilla hydropower project expected to generate 2000MW, see Hall, above 68, at 12.

<sup>287</sup> Ariyo A and Jerome A. 'Utility Privatisation and the Poor: Nigeria in Focus', *Heinrich Boll Foundation*, 2004, at 2, accessed online at [http://www.boell.de/downloads/global/GIP%2012%20Nigeria\\_Engl.pdf](http://www.boell.de/downloads/global/GIP%2012%20Nigeria_Engl.pdf) 10<sup>th</sup> February 2009.

<sup>288</sup> See, generally, EPSR Act above n 279.

### 3. The Electric Sector Reform Policy

Electric sector reforms can be understood in light of the climate above, and also, in light of the Bank's CDF and Nigeria's PRSP, NEEDS.<sup>289</sup> Access to electricity emerges within this broad agenda for poverty reduction with the reform public goods being a focal point, given its relationship with the persistence of poverty. A valuable background into the profound nature of the problems can be understood from a glimpse at Nigeria's the latest Human Development Index (HDI) prepared by the United Nations Development Programme (UNDP). For instance, Nigeria has an adult literacy rate of 72.0.1%.<sup>290</sup> The combined gross enrolment ratio for primary, secondary and tertiary schools is estimated at 53.0%. Life expectancy currently averages at about 47. 7 years. Similarly, the infant mortality rate is quite high, and ranks between 107 - 269 deaths (per 1,000 live births).<sup>291</sup> The reasons for this are vast, not the least because of lack of access to facilities, medicines and doctors. Other recent estimates suggest that only an average of about 30 doctors is available to 100,000 citizens.<sup>292</sup> As many as 67% Nigerians depend on private healthcare providers for their medical needs, given the failure of the public healthcare system.<sup>293</sup> Even in doing so, only about 10% of Nigerians have access to essential drugs – a figure that presumably includes the over 2.7 million people living with HIV/AIDS. Lack of access to water is also quite perverse with as much as 40 -70% of Nigerians without any healthy alternatives.<sup>294</sup> According the HDI, 53% of the population do not have access to improved water.<sup>295</sup>

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<sup>289</sup> National Planning Commission above n 15.

<sup>290</sup> Nigeria's Human Development Index, *United Nations Development Programme (UNDP)*, 2009, accessed online at [http://hdrstats.undp.org/en/countries/country\\_fact\\_sheets/cty\\_fs\\_NGA.html](http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_NGA.html) 10<sup>th</sup> February 2010.

<sup>291</sup> Del Mar and Onazi 0 above n 41, at 364.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Nigeria's HDI above n 290.



Lack of access to electricity is equally puzzling, apart from also being an important source of poverty, even though it is not recognised in the index as a human development question. As noted in chapter one, as many as 40-70% Nigerians survive without access to public electricity. The reform of the sector emerges at the backdrop of such negative public sector record and the nature or shape of the reform is structured by several policy initiatives of the BWIs. For example, quite apart from the Bank's CDF or good governance, the choice of reform has also been shaped by Nigeria's adoption of the International Monetary Fund's (IMF) policy support instrument (PSI). This is simply a non lending instrument, which prescribes the conditions attached to the country's attainment of debt relief.<sup>296</sup> Such commitments have made the deregulation, liberalisation and privatisation of the power sector the only reform alternatives to follow. But the most significant influential factor is Nigeria's PRSP, NEEDS, which is itself developed under auspices of the CDF. NEEDS is driven by four main objectives: "poverty reduction, wealth creation, employment generation and value orientation".<sup>297</sup> It has as its main objective the empowerment of people, improvement of social service delivery; encouraging private sector participation, and changing the way government works. Not surprisingly, it seeks to achieve these objectives through the market friendly language of good governance.<sup>298</sup>

It would appear that the language of good governance is significant in at least two related contexts. The first is, of course, the relationship between governance and government. NEEDS offers a number of proposals on how to reform government activity, through standard neoliberal prescriptions of "restructuring, right-sizing, re-

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<sup>296</sup> Bretton Woods Project above n 285. On the IMF's PSI, see; European Network for Debt and Development, 'Nigeria's Debt Deal Close UP', 2005, accessed online at <http://www.eurodad.org/debt/article.aspx?id=0&item=370> 10<sup>th</sup> February 2009. See also, Odiadi A. 'Paris Club and Debt Relief', *Social Science Research Network, Working Paper Series*, 2008.

<sup>297</sup> National Planning Commission above n 15.

<sup>298</sup> Ibid.

professionalizing and strengthening government and public institutions.”<sup>299</sup> At the same time, it also seeks to tackle “corruption”, promote “transparency, rule of law” and eliminate “rent seeking”<sup>300</sup> within government realms through the introduction of a broad regime of privatisation. This brings to mind the second dimension of good governance here. NEEDS aims to free up some responsibilities traditionally held by the State, and in this respect, transfer them onto the private sector. The role of market-based, self regulatory forms of governance earlier discussed is also constitutive of this agenda.<sup>301</sup> Without question, the importance of markets and private sector is something distinct about NEEDS such that its concerns for empowerment and poverty-reduction, amongst others, are dependent on these institutions. NEEDS is, in no uncertain terms, celebrated as a market-based development policy.

The resort to markets can be questioned for several reasons, one of which is the extent to which the ethos of the private sector can inspire hard-work, reduce corruption, or invest in education, as it claims. These are beliefs that are proposed simplistically with a lot taken for granted. The point in raising this is to show that similar permutations lie behind the choice, nature and shape of the electric sector reforms. NEEDS is succinct about this; its introductory remarks begin with the assertion of the significance of electricity to the private sector. It even goes further to note that ensuring access for the poor is predicated on private sector participation.

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<sup>299</sup> Ibid., at 214.

<sup>300</sup> Ibid. See, Gradstein, M. ‘Rent Seeking and the Provisioning of Public Goods’, 103 (420), *The Economic Journal*, 1993, at 1236-1243.

<sup>301</sup> National Planning Commission, above n 15, at 214.

Regardless of this, the choice of market reform in Nigeria can be justified for other reasons – that is, it is the result of the proverbial nature of State failure. Without doubt, State failure has been a major factor for the nature of reform, since government capital has continued to dwindle over a period of time. Because of this, stimulating private participation in the electricity sector has been considered as an alternative means of generating investment. Private sector participation is regarded as the only way of freeing up large amounts of public funds for other priorities, or the promotion of accountability, better customer service, or perhaps, it is seen as just a way of reducing government deficits or debts. Each of these presuppositions can, of course, be contested but this is not the objective here. Rather, the point in raising it is to show the priorities of dominant thinking in this context. Like most Third World countries, electric sector reforms in Nigeria have concentrated on attracting private investment to address the critical challenges of the sector. Generation, transmission and distribution of electricity through the private sector have been an integral part of electricity reforms. It is then no surprise that electricity liberalisation is the underlying philosophy behind the reform of Nigerian electricity. It is true that the arguments for privatisation have their merits given the reality of the near or total collapse of the State-led electric sector. But, resolving these problems in favour of privatisation still has its problems. Specifically, it is not clear how privatisation will expand access to electricity to the poor, especially those in the rural areas. It is not clear how markets would resolve this without any special mechanism to ensure affordability. One must not forget that the ethos of the private sector is about profits and not social welfare.

These observations and anxieties aside, privatisation has become a regrettable necessity in light of the exceptional Nigerian circumstances, the legal and institutional framework of which is set out by the National Electric Power Policy, the National Energy

Policy and the Electric Power Sector Reform (EPSR) Act of 2005.<sup>302</sup> In terms of its content, the core proposals for reform include unbundling and the subsequent privatisation of the electricity national monopoly. The legal framework now enables private companies to participate in the generation, distribution and transmission of electricity in Nigeria. Other features of the burgeoning electric sector include the creation of a regulatory commission, power consumer assistance and rural electrification agency.

At present, almost a decade of part-privatisation in Nigeria <sup>303</sup>the results are far from convincing. Blackouts still are the norm rather than the exception. Electricity has been increasingly expensive, if and when it is available. There is no remarkable difference with the period when electricity operated as a State monopoly and the current era of part privatisation. A plausible defence is often given that the privatisation process is still at a premature stage but it is fair to argue that this is far from convincing. There seems to be some partial acknowledgement by the current Nigerian government that the electric sector reform has failed to attract the kind of foreign direct investment (FDI) anticipated. Such arguments have attributed reasons for such failure to the Nigerian question of corruption. They seem to overlook the unprofitable nature of the dilapidated electric infrastructure as the main causal factor. Firms have always been known to selectively choose successful entities, whilst ignoring the more depleted ones. Apart from that, the global climate for electricity investments seems to be unfavourable to privatisation at present. Historically, on the global scale, electricity has transited from nationalisation to private ownership and now re-nationalisation, given the extent of global economic crisis.<sup>304</sup> Without in any way

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<sup>302</sup> See, Energy Commission of Nigeria, *National Energy Policy*, Nigeria, 2003. See, EPSR Act 2005 above n.279.

<sup>303</sup> Ibid.

<sup>304</sup> See, Beder S. *Power Play: the fight for control of the world's electricity*, Scribe Publications, 2003. See also, Stiglitz J. *The Roaring Nineties: a new history of the world's most prosperous decade*, Norton and Company, 2003.

acknowledging these possible causal factors, the Nigerian government<sup>305</sup> has recently admitted the failure of privatisation for other reasons mentioned above – that is, the failure of privatisation is simply rationalised by corruption.<sup>306</sup> Be that as it may, the government seems to be committed to the reform of the sector, but the strategy of privatisation remains unchanged, as with the reform law and policy. The prevalence of the reform agenda only underscores the advantages of the critique here. It might provide a helpful foundation for rethinking the reform strategy. As a result, the critique of the EPSR Act in the next part cannot be more timely. It is important to note that certain observations here may be a bit speculative, given the incomplete nature of the electricity sector reforms.

#### **4. Legal and Regulatory Framework**

The role of law and institutions is also pivotal to the electric sector reform, as it generally is the case with law and development-type reforms. In keeping with this tradition, Nigeria's electric sector reform law, the EPSR Act creates an environment for a wholesale and retail competitive market by vertically and horizontally separating elements of generation, transmission and distribution. Other key aspects of the reform law consist of the creation of the following: an electricity market, electricity regulatory commission, power consumer assistance, rural electrification agency and the protection of consumer rights. As already suggested, the process of reform has already been initiated with the formation of an initial holding company, the Power Holding Company of Nigeria (PHCN). Part of the preliminary processes also includes the formation of a new market structure, which consists of 6 generating companies, 1 transmission company and 11 distribution companies. As noted in

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<sup>305</sup> President Musa Yar'adua (now deceased) succeeded President Olusegun Obasanjo as President of Nigeria for a term of four years which began on the 29<sup>th</sup> of May 2007. His deputy Jonathan Goodluck has since been sworn-in as President. At present, it is still unclear if, or what changes he seeks to make to the reform.

<sup>306</sup> See, BBC Report, 'Nigeria power shortage persists', accessed online at <http://news.bbc.co.uk/1/hi/world/7426593.stm> 25<sup>th</sup> February 2009.

the previous section, a partial privatisation process is now in place; it is expected to be concluded by the full divestiture of all component firms.

Generally speaking, electric sector reforms have embraced different designs and models across the globe, with the Nigerian approach above being a reflection of one of them. Electric sector reforms have varied on the degree of competition either permitted or prohibited in the process, or by the sale of the sector to single, or different buyers.<sup>307</sup> Whilst the choice of reform model has comparatively been different in Europe and the United States (US), in Nigeria, as with other Third World countries, electric reform has been a replica of the model indicated above. This is, of course, as a result of the influence of the BWIs.<sup>308</sup> But, a further reason for the model of reform is that privatisation is considered as the only way of reducing costs of production as well as the only means of generating finance for new power stations, through a division of labour between the various components of the electric sector. The starting point for such reforms is usually the break-up of the State-owned monopoly into component units of generation, transmission and supply. The predictable end-point is an electricity market in which electricity is expected to be procured from the wholesale market and supplied to end-users. The supply aspect usually consists of customer services of billing, collection and maintenance. These new privately owned firms usually function autonomously with power of budgets, borrowing, procurement and employment. They are required to pay taxes on the basis of markets interest rates and with the hope of receiving returns on equity capital. To achieve this objective, it becomes necessary to create an environment for competition to thrive.

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<sup>307</sup> See generally, Bacon R.W and Beasant-Jones J. *'Global Electric Power Reform: Privatization and Liberalization of the Electric Power Industry in Developing Countries'*, World Bank, 2001.

<sup>308</sup> Ibid.

## 4.1. Electricity Market

The creation of an electricity market – through the introduction of competition – is undoubtedly the most important aspect of the budding electric sector. The responsibility of ensuring competition is almost exclusively placed in the market, which is in turn complemented by the creation of the National Electric Regulatory Authority (NERC), the aim of which is to ensure the effective functioning of the market framework.<sup>309</sup> Expectedly, its primary responsibilities consist of creating, promoting and preserving efficient market structures; it also includes maximising resources for the provision of electricity services.<sup>310</sup> Its other functions consist of ensuring access to electricity in rural and urban areas.<sup>311</sup> To perform all these tasks, its duties include ascertaining reasonable pricing of electricity, safety, security and ensuring the quality of service.<sup>312</sup> The regulatory commission is a crucial part of the objective dealing with the potential difficulties of promoting and regulating the competitive electricity market.<sup>313</sup> In an ideal situation NERC ought to be an independent body, autonomous from government, electricity suppliers and consumers. This is partially the case, as NERC only seems independent of electricity suppliers and consumers. It is not so autonomous from government, which inevitably determines the appointment and accountability of the electricity commissioners.<sup>314</sup>

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<sup>310</sup> EPSR Act above n 279, at S.32 (1).

<sup>311</sup> *Ibid.*, at S. 32(1) b.

<sup>312</sup> *Ibid.*, at S. 32(1)c.

<sup>313</sup> *Ibid.*, at S. 32(2) a.

<sup>314</sup> *Ibid.*, at S.32(1).

The most daunting responsibility of the regulatory commission is undoubtedly to contrive an electricity market by stimulating competition,<sup>315</sup> a task no doubt difficult given the inherent monopolistic nature of electricity. The competitive market framework seems compatible with certain retail aspects of electricity, but not quite suitable for elements of the sector. To explain further, competition is only achievable in the “generation – and supply service-segments”<sup>316</sup> of electricity, but it is difficult to achieve in the “network segments”<sup>317</sup> of electricity – that is, “transmission, distribution and system control”.<sup>318</sup> Furthermore, electric sector competition is more suitable for large users, but not as suitable for small users. This is because the demands or cost of competition for large users is usually minimal.<sup>319</sup> Because of this, retail suppliers have been known to target large consumers. On the other hand, small consumers are better served by a regulated monopoly, and not a competitive market.<sup>320</sup> Electricity supply to small consumers is usually a monopoly practice partly “because the profits per customer are too small to stimulate competition”.<sup>321</sup> Due to economies of scale supply activities are better served by a single firm.<sup>322</sup> This perceived problem can, of course, be overcome by the vertical integration of elements of distribution and supply. Those problems apart, other special qualities of electricity that make it unsuitable for the competitive market include, amongst other things, its unsuitability for storage, which may expose consumers to the precariousness of the market. Given this development, a well know fact with electricity is that its supply must always match demand otherwise the system will totally collapse. Questions have equally been raised about the plausibility of wholesale electricity competition. The point is that, if

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<sup>315</sup> Ibid., at part II.

<sup>316</sup> Bacon R.W and Beasant-Jones J above n 307, at 5.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> See, Thomas S. ‘Why Retail Electricity Competition is Bad for Small Consumers: British Experience’, *Public Services International Unit Publication*, 2002, at 2, accessed online at <http://www.psir.org/reports/2002-09-E-UKRetailElec.doc> 10<sup>th</sup> February 2009.

<sup>320</sup> Ibid at p.3

<sup>321</sup> Bacon R. W and Beasant-Jones J above n 307, at 5.

<sup>322</sup> Thomas above n 319, at 7.



markets are efficient or regulated properly, the price of electricity would not differ much, since costs of generation to distribution of firms are likely to be similar. The only predictable disparity of costs is likely to emerge from retail services, that is, meter reading, data processing and billing. In spite of these anxieties, wholesale and retail competition are important components of the electric sector reform in Nigeria. The practice – as promoted by the Bank – is usually to prevent the purchase of the monopolistic aspects of the electricity market by a single firm by placing limits on ownership or regulating the activities of generators and distributors.<sup>323</sup> Such market framework ought to be composed of independent electricity suppliers and distributors who compete for patronage from large consumers. The Bank, however, recommends that the competitive process could be postponed in countries where distribution and supply systems are so run down that new owners need time or certainty to recover their investment.

Given the above, it would seem imperative to protect the monopoly aspects of electricity through specific legal mechanisms and initiatives, such as restricting the kinds of ownership in the market. Surprisingly, the provision of EPSR Act on licensing does not prohibit the transfer of licenses.<sup>324</sup> It only contains a caveat that any sale, mortgage, lease or exchange must be authorised by the regulatory commission. This calls several presumptions about competition into question and it is obvious that not much attention has been given to these anxieties. On a more positive note, however, it seems the ESPR Act does take the plight of the poor seriously with specific proposals for a Power Consumer Assistance Fund (PCAF).

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<sup>323</sup> Bacon R. W and Beasant-Jones J above n 307, at 5.

<sup>324</sup> EPSR Act above n 279, at S.69(1).

#### 4.1.1. Electricity for the Poor

One of the novelties of the reform law is the directive given to the regulatory commission to establish a special fund specifically for the needs of the poor.<sup>325</sup> NERC is responsible for managing both money and assets of the fund, quite apart from setting up procedures for disbursement of such funds by the PCAF. According to the reform law, the fund will be financed through contributions of all liable consumers, who are differentiated by the fact that they are not underprivileged consumers. Similarly, funds will also be sourced from eligible customers and the Nigerian government.<sup>326</sup> The creation of this fund is commendable, given its attempts to take the plight of the poor into equation. Nonetheless, a few anxieties may be raised about it, especially the decision not to give the NERC direct responsibility over affairs of the poor. This is, of course, a task delegated to PCAF. There are positive and negative implications of this development. To start with the negative side of things, it could simply mean a lack of concern for the poor by not directly seeing to their needs, given that such needs are left to a less influential body with very limited strengths or funding. On a more positive note, however, although the PCAF may not be as powerful; the needs of the poor seem to be prioritised, given that the poor have been given attention by a specialist body.

An argument can still be made that, although NERC is not directly responsible for the poor, it still has the ability to take a more proactive role in favour of the poor. It can achieve this either through its oversight functions or by adopting a pro-poor approach to regulation.<sup>327</sup> There are indeed several ways in which regulation can be designed to meet

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<sup>325</sup> Ibid., at S.83(1).

<sup>326</sup> Ibid., S.84(3).

<sup>327</sup> See, Parker D, KirkPatrick C and Figueira-Theodorakopoulou. 'Infrastructure Regulation and Poverty Reduction in Developing Countries: A review of Evidence and A Research Agenda', *Centre on Regulation and Competition, Institute for Developing Policy and Management, University of Manchester and Centre for*

the needs of the poor. This is either by encouraging competent governance regimes or other initiatives that might assist in stimulating poverty reduction. More specifically, it can ensure affordability as a way of guaranteeing access of electricity for the poor. Because competition is no guarantee for low electricity prices, regulation is vital to ensure affordable prices for the poor. Regulatory mechanisms can specifically be directed at promoting social objectives as well as human rights. Such activities could range from promoting services in deprived areas to reducing risks to public health and safety. This can only be achieved if the regulators have deep insights into the conditions and special needs of the poor. The ethical framework of human rights (and the role of public institutions in paying attention to human suffering) discussed in the concluding parts of this chapter is one way of making this possible. As will also be seen in the subsequent chapters, concerns of the poor can be taken into account by decentring regulation onto communities.

The commission can also play a forceful role in reducing poverty by the choice of tariff system it proposes. One main function of NERC is to balance the interests of both electricity consumers and producers by ensuring reasonable pricing.<sup>328</sup> Recent evidence of how the commission has carried out this function seems to suggest that it is more interested in ensuring the attractiveness of the industry to the private sector than anything else. This is one interpretation of its choice the Multi-Year Tariff Order (MYTO) – the new tariff regime.<sup>329</sup> The MYTO is a way of calculating electricity prices on the basis of the cumulative revenue requirements of the entire sector. This approach in no uncertain terms is an attempt to make the sector commercially viable for private firms, quite apart from

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*Cranfield Centre for Competition and Regulation Research, School of Management, Cranfield University, UK, 2005.*

<sup>328</sup> See, EPSR Act above n 279, at S. 32(1).

<sup>329</sup> See, Nigerian Electricity Regulatory Commission, *Multi-Year Tariff Order (MYTO) for the determination of charges and Tariffs for electricity generation, transmission and retail tariffs*, Nigerian Electricity Regulatory Commission, 2008, at 3.

creating enough revenue for such businesses to recover the operating costs. This observation is legitimate given that the current tariffs paid by customers are not true reflections of the cost of production. The commission concedes, however, that in order to balance the needs of private investors and ordinary citizens, government must subsidise electricity needs of Nigerians.<sup>330</sup> This claim seems to contradict commonly held myths about the benefits of privatisation. These are arguments that have often suggested that privatisation will reduce the burden on government, so as to enable it to channel its funds to other pressing needs, like healthcare and education. As the current circumstances attest, this is not the case in practice. Apart from that, there is usually a degree to which a government can subsidise. What this means is that there is always a danger that electricity prices cannot be kept affordable. After all, privatisation can only succeed if the prices are kept right for the so-called investors. Most often, the primary way of achieving this is by increasing the tariffs. In the case of Nigeria, a sharp increase of electricity prices has already been experienced.

These concerns apart, it is important to look more closely at the responsibilities of PCAF. The importance of the fund cannot be over-emphasised in light of the relational effect of electricity pricing on poverty. There are perhaps two notable difficulties with the way its objectives are spelt out by the reform law. First, in dealing with the so-called underprivileged consumers, the EPSR Act fails to specifically identify or point to sources where beneficiaries of such interventions can be identified. A definition of poverty or more specifically, 'electricity poverty' is conspicuously absent, even though this is crucial in determining the level of electricity consumption which ought to be allocated to different

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<sup>330</sup>Recent reports have suggested that the Nigerian government is about to release the sum of N177billion to subsidise electricity for the next three years, the period in which it expects the privatisation of the sector to be fully established. See, ThisDay Online newspapers, 'N177bn Subsidy Unsettles Power Sector', 2008, accessed online at <http://www.thisdayonline.com/nview.php?id=137197> 4<sup>th</sup> March 2009.

persons. The inability to include such a definition is not surprising, given that this is uncharacteristic of legal documents. Yet, this seems important for allocating or enforcing amounts of electricity to the poor. This is also important for other reasons, such as the contestable nature of resource allocation, which is arguably one of the main functions of the fund. Such kinds of activities are always bound to be riddled with controversy, that is to say, debates surrounding why certain individuals should or should not benefit from such mechanism. The best way of making such difficult determinations is by providing a certain criteria to guide such judgements.

An understanding of the general situation of poverty is an inescapable starting point for determining the minimum levels of electricity which should be distributed. There are different ways of understanding poverty, the dominant of which are both income based analysis of poverty and the “HDI”<sup>331</sup> of the UNDP. For present purposes, the economic indicators seem more useful in determining how electricity should be distributed, even if they fail to comprehensively capture the wider social factors of poverty. The tragic fact that nearly 70 % of Nigerians currently live beneath one dollar (US\$) a day gives some indication of the inability of the poor to buy electricity without at least some form of assistance.<sup>332</sup>

In the same vein, a definition of electricity poverty is also important in this context. There is really no standard definition of poverty for present purposes, and it is likely to vary in different circumstances. An understanding of electricity poverty will depend on how the quantity of electricity supplies corresponds with national poverty levels. A minimum threshold can be drawn when the amount of electricity consumption falls below

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<sup>331</sup> See, HDI above n 290.

<sup>332</sup> National Planning Commission above n 15.

an acceptable level or a certain criteria of one's basic needs. In Brazil, for instance, a minimum threshold of (80 kilowatt per hour (kWh) per month) was fixed to give an indication of electricity poverty.<sup>333</sup> As such, consumers faced with those conditions are permitted to consume up to 220 kWh per month. Furthermore, there are other ways to stimulate access of the poor which fall out of the contemplation of the EPSR Act. For instance, community participation or the involvement of poor through co-operatives or some other similar mechanisms to enable participation in electricity is something that can prove quite useful.<sup>334</sup> Furthermore, the fund can also extend lifeline rates to marginalised consumers. It can also cross-subsidise prices or, abandon upfront connection fees. Unfortunately, none of these options seem to be considered by the EPSR Act. One specific policy though, which can indeed enhance access to electricity for the poor is a rural electrification strategy. Experts have often argued that rural electrification should coincide or where possible, precede privatisation.<sup>335</sup> Rural electrification is, of course, part of the Nigerian reform, but it is fair to say its sequencing is questionable.

#### **4.1.2. Rural Electrification**

At present – a decade after the commencement of the law and policy – a comprehensive rural electrification programme is still being expected. This has made commenting on this aspect of the reform rather difficult. In spite of this, some indication of the overall direction of the rural electrification drive can still be deciphered from the National Energy Policy, National Electric Power Policy and the EPSR Act. Broadly speaking, rural electrification is partly connected with poverty reduction and economic development objectives of NEEDS, which encourages grid and off-grid, as well as thermal and renewable energy

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<sup>333</sup> Tully above n 70, at 520.

<sup>334</sup> The absence of the role of community in electricity reforms and more generally human rights is addressed in the next chapter.

<sup>335</sup> Tully above n 70.

technologies. The potentials renewable energy sources like solar, wind, biomass and moving water have to poverty alleviation and the environment are also taken into consideration. Apart from being sustainable, they are not subject to price fluctuations that occur with non-renewable sources.

In keeping with the broad objectives of Nigeria's electricity and energy policy, a Rural Electrification Agency and Fund (REAF) is proposed to facilitate electrification in the rural areas.<sup>336</sup> The REAF is mandated to promote, support and provide rural electrification through public and private sector participation for at least three distinct but related purposes. Its first aim is to increase universal and equitable access of electricity and secondly, to maximise the economic, social and environmental benefits of rural electrification subsidies. Thirdly, it is specifically created for purposes of expansion of off-grid electrification and to encourage new approaches to rural electrification. So far, the Nigerian government is yet to make its rural electrification strategy public, even though it has designated the responsibility for designing one to a committee of experts. Part of its mandate is the specific design of the REAF as well as a low cost distribution system.

Uniquely, the reform law makes provisions for both grid and off grid electrification,<sup>337</sup> which includes the generation of electricity from renewable sources.<sup>338</sup> Despite what can be regarded as positive developments, there appear to be some predictable anxieties with the proposals for rural electrification. These can be summarised as follows: First, the market orientation of the entire reform calls the ability to perform

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<sup>336</sup> EPSR Act above n 279, at S.88(4).

<sup>337</sup> Ibid., at S. 88 (1).

<sup>338</sup> Ibid., at S.88(13) d. See also S.89(9)c.

these functions into question.<sup>339</sup> Secondly, funding – a crucial aspect of rural electrification – seems insufficient addressed, if not unsustainable from the proposals contained in the law. For example, the source of funding for REAF is to come from surplus funds<sup>340</sup> and fines<sup>341</sup> from the regulatory commission, donations, gifts, loans from institutions,<sup>342</sup> and furthermore, contributions from consumers and eligible consumers.<sup>343</sup> The potential impact of rural electrification needs a more certain source of funding to make any meaningful impact in Nigeria. For example, a well thought out micro-credit strategy may be a more sustainable way of achieving the goals of rural electrification. Off-grid technologies, for instance, are more suitable for dispersed forms of governance like village or community-based cooperatives as discussed in chapter seven. In spite of premises about dispersed governance or participatory development in the Bretton Woods agenda, it appears that the role of ‘community’ (as opposed to the private sector) is still not completely accepted in practice in electricity – at least not in the case of Nigeria. As already noted, this specific issue will be addressed in chapters five, six and seven. Before considering this, I consider other innovations of the reform law.

### **4.1.3. Consumer Rights**

The need to protect Nigerians – especially the poor – from exploitative effects of the electricity market is further guaranteed by creating a regime of consumer rights.<sup>344</sup> This is consistent with market reform strategies, which depend on consumer rights to ensure that products always satisfy the needs of consumers. These are needs that can obviously have

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<sup>339</sup> See; World Bank, *Lighting Africa 1: Progress and Plans, Annual Report, September 1, 2007 – August 31, 2008*, World Bank, 2008.

<sup>340</sup> EPSR Act above n 279, at S. 88(12)a.

<sup>341</sup> *Ibid.*, at S.88(12) b.

<sup>342</sup> *Ibid.*, at S.88(12)c.

<sup>343</sup> *Ibid.*, at S.88(12)d.

<sup>344</sup> *Ibid.*, at S. 82(1).



effects on the quality of life, the effect of which is that consumer rights can be understood as a basic step for enjoying of human rights, including the right to life. Even so, a claim can be made that consumer rights are not the most appropriate mechanism to perform this task. Consumer rights, after all, seem to draw their inference from the ideology of consumerism, the implication of which is that it promotes the instrumental value of electricity. In other words, electricity is promoted as a material good and not as a prerequisite for the quality of life.

Looking more specifically at the proposals for consumer rights contained in the EPSR Act; NERC is empowered with the responsibility of protecting the rights of consumers,<sup>345</sup> who are in turn defined as end-users of electricity. They are consumers of either the distribution licensee or such other entity that NERC deems as appropriate. NERC is to secure the rights of consumers by specifically ensuring the availability and adequate supply of electricity to consumers.<sup>346</sup> It is to ensure fair pricing by licensees as long as it takes their operating costs into account.<sup>347</sup> NERC is generally responsible for ensuring safety, security, reliability and the quality of service to consumers.<sup>348</sup> In protecting the rights of consumers, NERC has already developed several industry codes – the Grid Code, Distribution Code, Metering Code and Health and Safety standards– to ensure compliance to its mandate.<sup>349</sup> Similarly, NERC has duly established customer safety standards and customer complaint and handling procedures in compliance with section 80 (1) of the EPSR Act. It is also responsible for establishing codes of practice to attend to special customers, such as the blind or disabled, the elderly or severely ill<sup>350</sup>, and it also has

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<sup>345</sup> Ibid., at S. 32(1).

<sup>346</sup> Ibid., at S. 32(1) c.

<sup>347</sup> Ibid., at S. 32(1) d.

<sup>348</sup> Ibid., at S. 32 (1)e.

<sup>349</sup> Ibid., at S. 81(1) b.

<sup>350</sup> Ibid S. 80 (1)d.

procedures for dealing with customers who have difficulties paying their bills,<sup>351</sup> amongst other things.

NERC spells out the consumer rights as the ‘right to electric service,’<sup>352</sup> amongst other rights, which also consist of billing, metering and rights to file complaints. These rights seem to be developed from what NERC calls individual consumer rights, which include the right to safety, basic needs, information, choice or rights to be heard, seek redress, consumer education and the right to a healthy environment. To ensure compliance with the following rights, private electricity companies are required to set up customer complaints units within their premises and other locations of their operations. In addition, NERC has established what it calls ‘Forums’ in all operational areas of all distribution companies. Membership of such Forums comprise of representatives of business and NGOs of different persuasions. The Forums functions as Ombudspersons, part of the objective being the enforcement of consumer rights with the responsibility of final appeals from such Forums placed in NERC.

The emergence of Ombudsperson Forums is consistent with the Bank’s source book on the good governance of the electric sector.<sup>353</sup> Drawing reform experiences of various countries, the Bank recommends that electricity governance can be enhanced by creating mechanisms for access to information and accountability, such as consumer welfare desks, surveys, consumer meetings, and as in this case, ensuring the role of the Ombudsperson in maintaining consumer rights. It specifically draws on the experience of Latin American countries like Peru, Argentina and El-Salvador, where the introduction of

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<sup>351</sup> Ibid. S. 80 (1)e.

<sup>352</sup> Government and Consumer Affairs Division, *Customer Complaints Handling Procedure*, Nigerian Electricity Regulatory Commission, 2006, at 8.

<sup>353</sup> World Bank, *Strengthening Electric Sector Governance to Promote Probity*, World Bank, accessed online at <http://siteresources.worldbank.org/INTENERGY2/Resources/electricitysourcebookch12.pdf> 12 June 2008.

Ombudspersons has proved successful. In the case of Nigeria, it is still rather early to assess the impact of such Forums since they have only recently been proposed. One usual way of ensuring consumer rights but conspicuously missing from the Nigerian reforms is consumer participation in regulatory decision-making.<sup>354</sup> This can obviously prove a useful resource for improving the quality of services or reducing costs through the review of tariffs. It seems that the Nigerian authorities are not quite enthused by this prospect.

Regardless of this short-coming, the inclusion of consumer rights or more specifically, the 'right to electric service' is significant to ensure access of electricity to the poor. It can be argued that consumer rights can serve as a basis for the satisfaction of a range of human rights. It is not difficult to see that the breach of consumer rights can inevitably affect the quality of life. But the question remains, do consumer rights adequately protect such aspects of life? A simple answer is no. They might be a step towards achieving certain human rights, but they are not the best language to achieve this objective. Besides, consumer rights seem to instinctively draw some inference from the ideology consumerism, a term which may imply an instrumental or material nature of electricity. It has the effect of making electricity an object of material desires and not in any way connected to our natural needs.<sup>355</sup> There have been several effects of the ideology of consumerism, the most significant of which is the recognition of human beings as consumers, and overlooking their attributes of humanity. The point is that this could very well mean that we consume electricity not because of our characteristics of humanity but because of our artificial desires. It is true that one cannot avoid thinking of electricity in

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<sup>354</sup> *Ibid.*, at p. 165.

<sup>355</sup> This suggestion is influenced by Leslie Sklair's thesis on the culture-ideology of consumerism. It depicts how the introduction of a value system of consumerism has been part of the globalisation project. The implication is that if societies like Nigeria want to transform into market economies, they not only have to replicate political and economic institutions of First World, but also adopt similar value systems. The point here is that one cannot separate the reform of electricity and others from globalisation and by extension its value-system. See, Sklair above n 230, at Chapter Seven.

such instrumental terms, but the point in raising this is that there are other more important ways of the use value of electricity. It is because of this and for other reasons that I propose in the next part that the language of human rights needs to play a central role in reforms of this nature.

## **5. What is hidden from view?**

Consumer rights may be a regrettable necessity (especially in the absence of an alternative means of protection), but they are ill-equipped to embody the kind of values that might orient the necessary behaviour capable of meaningfully connecting to the needs of the poor. Besides, there is also an implication that consumer rights only apply to those that can afford the status of consumers – sadly, the vast majority of Nigerians can ill-afford this position.<sup>356</sup> Another difficulty is that consumer rights assume a false equality of access to electricity, since one can only enjoy protection as a consumer. Those that fail to achieve this are automatically excluded from the domain of recognition. Consumer rights are not the best way to deal with other pressing problems that arise from the reform. For instance, they cannot deal with the huge loss of jobs as a result of privatising the defunct State-owned electricity service. Whilst the EPSR Act makes provisions for the movement of employees from the defunct State monopoly onto the transitional private electric companies, it is silent on what happens when those firms are fully privatised.<sup>357</sup> Are these private firms obliged to keep the services of these employees? While privatisation is expected to create a number of new jobs, it is quite apparent that old jobs will be lost.

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<sup>356</sup> Siphoning electricity is perhaps the only alternative open to the poor if and when electricity is available. Siphoning electricity is a common phenomenon in many Third World countries. There is a lively debate about whether this activity crosses the boundary of legality or illegality, see; Da Silva N and Rosa, L. 'Irregular Access to the Power Distribution Network in Brazil's Residential Sector: A Delinquent Payment Problem, or the quest for a Right beyond the Law?' 21 (7), *The Electricity Journal*, 2008, at 30-90.

<sup>357</sup> EPSR Act above n 279, at S. 5(1).

What is lacking from the proposals on the whole is an overarching philosophy, which underpins the electric sector reform, and which would trigger responses appropriate to the needs of the poor. This is something (in light of arguments in the previous and present chapter) that cannot be left to markets. Without a stronger ethical or moral code, such as human rights, it would seem difficult, if not impossible, to sufficiently achieve the social objectives of these kinds of reform. And such reforms would be meaningless if they are not able to affect those at the bottom of society.

The question then becomes how exactly can human rights contribute to increase access to electricity in Nigeria? Possible answers to this question can best be understood by expanding on earlier arguments about the significance of an ethic of human rights that can see and respond to human suffering as discussed in chapter one. It is argued that this sort of language of human rights ought to be inscribed as a central element of the Nigerian electric sector reform law and policy. In order to understand the value of argument, some more justification is needed to show why human rights need to embrace human suffering. After all, sceptics might say that invoking human rights should be sufficient enough to deal with those sorts of problems. Human rights are, after all, the most dominant theory of justice, and they do not need a deeper understanding of human suffering to perform this task, since this is the role they already play in society. These sorts of arguments imply that simply invoking the language of human rights is sufficient on its own. Human rights are invoked as if they are perfect or the best way of alleviating the cries of the poor. But, a counter-argument here is that they are not and these sorts of arguments only run the risk of leading to complacency. And the only way of understanding the limitations of rights is by subjecting them to critical scrutiny; otherwise they will easily lose their power to bind

effectively.<sup>358</sup> This is perhaps, as discussed in chapter one, the scepticism Simone Weil maintained about human rights. She was drawing our attention to the fact that human rights suffer from a profound epistemic weakness, which prevent them from sufficiently grasping silent cries of injustice. It was not really an argument against human rights; rather it was against prioritising them ahead of other moral languages, especially the language of love and compassion.

Putting Weil's arguments about the epistemic weakness of rights into the context of some of the arguments in this thesis only goes to validate that human rights discourse seems to have missed some of the anxieties that have been raised. The question of electricity and its relationship to human suffering and human rights is only one example of this point. The question then becomes – in light of the value attached to human rights here – how can human rights be rescued from such weaknesses? As already indicated in this thesis, these sorts of problems can only be made more visible if human suffering serves as a way of drawing obligations to human rights.

Possible answers can be found in Andrew Williams' important essay, which is one of the more recent attempts to recover the moral dimension of human rights by equipping them with the tools to become more responsive. Part of what a deepened engagement with human suffering achieves is that it increases our capacity to embrace responsibility, even if suffering itself is not easy to define. It is a relative concept, one that varies from individual, place and culture. Regardless of this, it is still possible to understand what might constitute human suffering in certain situations. Following on from Emmanuel Levinas, who argues

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<sup>358</sup> Del Mar and Onazi above n 41, at 352.

that “[s]uffering is surely a *given* in consciousness”,<sup>359</sup> Williams shows that suffering might be understood in two related dimensions – that is, the subjective (psychological) and objective dimension. Both aspects of suffering are intricately linked; it is not always possible to distinguish them, quite apart from their being vague or open to various cultural readings. The psychological dimension can be understood in the sense of personal pain and suffering. It refers to emotional feelings which are universal but obviously experienced differently amongst different individuals. There are many examples of this, which range from the experience of physical to mental violence to experiences of oppression, exclusion, discrimination or experiences of repression of individual humanity.<sup>360</sup> This sort of pain invites us to understand what the sufferer experiences. It is only by psychologically imagining the scope of such pain that we draw near – though not exhaustively – to its effects. According to Williams, no concept of human rights that seeks to transform lives can succeed without at least trying to connect with such type of suffering.

The second aspect of suffering is what Williams’ calls the objectivist dimension. It is the type of suffering occasioned by very visible catastrophic acts, which are often difficult to disguise. He says it is what Luc Boltanski has called “distant suffering”,<sup>361</sup> to illustrate this objectivist dimension of suffering. This is indeed, as was also considered, similar to Weil’s idea of attention. It simply refers to manifestations of actual physical or psychological pain that are easily (or not so easily) noticeable by others. “Death, injury, disease, malnutrition, torture”,<sup>362</sup> are some useful examples, which may where possible provoke an urgent response. The fact is that such kinds of suffering are recognised because

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<sup>359</sup> Cited in Williams above n 59.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid. See, Boltanski L. *Distant Suffering; Morality, Media and Politics*, Cambridge University Press, 1999.

<sup>362</sup> Ibid.

we can easily identify with such, even if we don't experience it ourselves. Williams argues that these elements of suffering have over the years been built-into human rights discourse through the concept of human dignity.<sup>363</sup> For instance, dignity (which includes individual and collective rights) is pivotal to transcending suffering.<sup>364</sup> Williams argues that the alleviation of suffering features amongst more recent theoretical and practical proposals to deal with questions of poverty in society. For instance, the alleviation of suffering underpins current approaches to human flourishing as depicted more recently in the capability approach of both Amartya Sen and Martha Nussbaum.<sup>365</sup> Williams is correct; take Nussbaum's more recent writings on the relationship between capability and disability as a good example. Nussbaum's approach is far too complex to discuss in detail, except to say that it concerns the question of disability in light of the failure of social contractual theories to adequately deal with it. Theories of justice are modelled on the social contract, which tie the distribution of resources to cooperation amongst free, able-bodied and equal citizens. Societies organised around this model only seem to recognise productive individuals. The social contract does not conceive those who cannot participate for whatever reason. For instance, individuals with disabilities are automatically excluded from contractual definitions of citizenship.<sup>366</sup> For Nussbaum, it is important that we understand the obligations we owe to our children, future generations, the elderly, non-humans, the environment, and most importantly, the physical or mentally disabled. She notes rather controversially that we owe obligations to those who suffer from a range of disability to the degree that it might constitute a loss of humanity. These are those that

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<sup>363</sup> Ibid.

<sup>364</sup> Ibid.

<sup>365</sup> See, Nussbaum M. *Frontiers of Justice: Disability, Nationality, Species-Membership*, Belknap Press, 2006.

<sup>366</sup> There are parallels with Nussbaum's views here and Kenneth Kaunda's concept of African humanism. It was an attempt to elaborate on the distinct nature of traditional African communalism in which less productive members of community were always looked after. See, Kaunda K and Collins M. *A Humanist Africa: Letters to Collin Morris from Kenneth Kaunda*, Longmans, 1966, at 19-40.



suffer extreme cases of mental illness or those that are in vegetative condition that they no longer have the ability to think, reason or express emotional comportment. Regardless of this, we are obliged to assist them.

Nussbaum's point is that the obligations that society owes such individuals can only be understood by appreciating the concept of human dignity. This is because human dignity is not tied to an instrumental value or productive capacity of the individual; rather it places human need at the core of its objective.<sup>367</sup> It is through the concept of human dignity that unites the capability approach with human rights. The rationale behind Nussbaum's list of capabilities<sup>368</sup> is that it seeks to provide an indication of what it means to live a life worthy of human dignity, and this is also what human rights are all about. This is what Nussbaum means when she suggests that the capability approach is "one species of a human rights approach and human rights are often linked in a similar way to the idea of human dignity".<sup>369</sup> Like human rights, it is possible to generate cross-cultural agreement on what these capabilities ought to be, and the processes of definition should always be left to open-ended processes that will always be subjected to constant revision

It is the link between human rights and human dignity that provides a further link to human suffering. According to Williams, it is this vital need to improve the quality of life and alleviate human suffering – through the protection of human dignity. And this is what underpins the three generations of human rights – that is, the civil and political rights,

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<sup>367</sup> Ibid., at 160.

<sup>368</sup> Unlike Sen, Nussbaum provides a list of capabilities from which judgements of what constitutes humanity can be made. The list of capabilities are influenced by Aristotelian perspectives on human flourishing, the observance of which helps determine what constitutes humanity itself. The list has generated a bit of controversy, and for reasons of space cannot adequately be dealt with here. The main difficulty is the equivalence she draws between the loss of some essential capabilities and the loss of humanity. Amartya Sen's account of capabilities seems less controversial and perhaps an easier approach to follow. Sen neither provides a list nor conditions for determinations of humanity. Rather, his concern is how to improve the quality of life of the poor or disabled. In so doing, he demonstrates how suffering can be alleviated.

<sup>369</sup> Ibid., at 78.

social, economic and cultural rights and solidarity or group rights. The alleviation of suffering from the loss of human dignity is, for him, the rationale behind the various discourses that make up human rights. Beginning with the first generation of human rights (civil and political rights); the need to alleviate human suffering was the key rationale behind the emergence of the current human rights discourse, as it was provoked by the French and American revolutions. Even so, these revolutions were founded on a weak conception of humanity, in that it was not inclusive to all human beings. In response to this, Williams insists that the failure to embrace all human beings is not the same with the failure to understand suffering as constitutive of human rights. As exclusive as the concept of humanity may have been, the recognition of suffering was still one of the founding ideals of human rights.

Even if one accepts Williams' argument, it is difficult to understand the distinction between the denials of humanity from denials of suffering. The implication is that the misery of slaves, ex-colonies or those one considers not fully human today does not amount to suffering because their humanity was, or is questionable.<sup>370</sup> A more plausible defence of the first generation of human rights is perhaps considered when Williams suggests that it is usually the application, "or lack of it, of those human rights that betrayed the connection (to suffering) not the conception or its widespread allure".<sup>371</sup> Human rights are simply not human rights, says Williams, if they are conceptualised with the aim

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<sup>370</sup> Judith Butler makes a similar argument in her essay on universality. For her, universality cannot be grasped except in a particular historical context. For example, today gay and lesbians are struggling for inclusion into the universality of humanity; this is something which slaves, blacks and Jews historically aspired for. Apart from being culturally relative, universality generates articulations that more often than not contradict themselves. Such claims generate a paradox in that articulations of universality will always produce other competing claims of universality. Universality is relative, and what is universal in one society would produce not only different expressions in another, but also the rejection of such assertions. This is exactly played out in the divisive issue of gay and lesbian rights. Whilst in some societies, gay and lesbians are included in the scope of "humanity"; in others such attempts are outwardly rejected or even penalised. See, Judith B. 'Universality in Culture', in Nussbaum, M and Cohen C. *For Love of Country: Debating the Limits of Patriotism*, Beacon Press, 1996.

<sup>371</sup> Williams above n 59.

of endorsing suffering. Although certain human beings were not capable of bearing human rights, this should not deter us from understanding that human suffering was the core theme behind the birth of human rights.

A much easier connection between human rights and human suffering can be seen from the second generation of rights (economic, social and cultural rights). Williams develops much of his arguments here from the work of Upendra Baxi,<sup>372</sup> who has for long been a passionate advocate of the importance of human suffering in human rights discourse. Picking up from Baxi, Williams argues that second generation rights were designed to address multiple forms of “deliberate cruelty to ‘indirect’ oppression of both individuals and communities”.<sup>373</sup> This, of course, includes the deprivation of food or housing, which ought to be given utmost priority or great urgency. It also includes the third generation (collective or group rights) human rights, which have been defined by the need to alleviate human suffering. It consists of the elimination of different kinds of harms from groups who lack development or those who suffer from one form of discrimination or the other. The protection of the environment is also implicit here, quite apart from suffering or poverty occasioned by the world economic order.

Such arguments are all good, but this perspective to human rights is not really appreciated in mainstream discourse. This anxiety is perhaps what underpins Baxi’s seminal critique of human rights discourse for not taking human suffering seriously. It is what Baxi’s critique brings to light, that is, human suffering is what human rights discourse importantly misses today. In fact he even goes further in showing how human suffering is sometimes entrenched in human rights discourse. This is facilitated by international law,

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<sup>372</sup> Baxi above n 227.

<sup>373</sup> Williams above n 59.

which is not only complicit, but also disavows the significance of human suffering. Baxi says international law achieves this through distinctions between law of war and law of peace, the effect of which is that they restrict the language of suffering to war times. Obligations to ameliorate suffering are by far stronger in conditions of war than they are in peacetime situations, even in situations which may bear a family resemblance. Similarly, whilst the notion ‘violation’ is implicit in human rights, the consequences of violations, however, are not the same in times of peace-times as they are in times of war. Yet, “conditions of extreme impoverishment, forced labour, systematically organised rape through sex trafficking, child labour, planned displacement of peoples in the name of development”<sup>374</sup>, are all grave enough to warrant war-like obligations and penalties for their breach. This is not helped by notions of “sovereign self-determination”<sup>375</sup>, which at times fail to guarantee people’s rights to self-determination by “shielding acts of fraud, force, tyranny and terror”<sup>376</sup>.

As a more specific example of how international law is complicit in this respect is how international human rights law has itself contributed to the disavowal of human suffering. This is, of course, a huge claim, which can only be understood from Baxi’s distinction between modern and contemporary human rights discourse. What he means is that there are two distinct human rights discourses – that is, the modern and contemporary human rights discourse. For Baxi, it is the modern human rights discourse that has failed to take suffering seriously. And modern human rights discourse is rooted in the “modern liberal ideology”<sup>377</sup> which not only justified but sustained the invisibility of human pain and suffering. Except for the strong prohibition of suffering in situations of war, modern

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<sup>374</sup> Baxi above n 227, at vii.

<sup>375</sup> Ibid.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid., at 33.

human rights discourse permitted the imposition of great dimensions of suffering as “*just* and *right* in the pursuit of a Eurocentric notion of *human progress*.”<sup>378</sup> At the heart of this logic was the exclusion of millions from human rights at the stages of its formation:

Making human suffering invisible was the hallmark of modern human rights formations. Suffering was invisible because of the large masses of colonised peoples were not regarded as human or because a considerable number of human beings were regarded as not fully human, the need of tutelage. Although sentient objects of conquest and subjects of European property rights regimes, the colonial subject was closer to the order of things or beasts whose suffering was not sufficiently important to trump the career of the Enlightenment project. Indeed their suffering had no voice, no language, and knew no rights.<sup>379</sup>

Fortunately, there is a more recent and inclusive human rights discourse. Contemporary human rights discourse emerges from different sources; it is not restricted to articulations of domestic or international law. It privileges lived experiences of ‘communities in struggle and resistance’ as its main authors. It does not deny the juridical origins of human rights, but at the same time, challenges dominant State centred human rights discourse as being the only source of authorship. Human rights, in his formulation are conceived as articulations of the ‘voices of the suffering’, which are variegated and to say the least, not “*gifts of the West to the Rest*.”<sup>380</sup> Pivotal to this vision of human rights are ways an ethic of power can be built around thwarting the potential of oppression and suffering.<sup>381</sup>

But moving back to Williams, he suggests further that, not only is the alleviation of suffering a necessity, it is also something implicit in the human rights texts. It is however not something that is always grasped through law. This is why Williams suggests that texts can only tell us so much, and because of this, we must endeavour to look beyond text into actual practices to see how they can take suffering seriously. He is saying that we must also

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<sup>378</sup> Ibid., at 35.

<sup>379</sup> Ibid., at 33.

<sup>380</sup> Ibid., at vi.

<sup>381</sup> Ibid., at 35.

not relent from subjecting human rights practice to critical scrutiny, especially when actions are taken in the name of suffering.<sup>382</sup> After all, it is the actual practices of alleviating suffering, not simply the language in human rights texts that establish the connection between human rights and suffering. The ability of human rights texts can only be determined by the way in which they concretely respond in practice. This is the only way we can understand the potential or limits of such texts.<sup>383</sup>

These insights are undoubtedly a useful way of understanding how the role of human rights can facilitate recognition and responses to various kinds of suffering. The following analysis illustrates just how human rights thinking might come to broaden its concerns to suffering. It demonstrates how this ought to be taken into account if human rights are to provide the moral authority for the reform of electricity in the Third World. The attention paid to the relief of suffering as the central theme of human rights is likely to be more effective in connecting to the lives of the poor. If suffering is taken seriously then human rights might help draw attention to the value of electricity due to our distinct characteristics of humanity.

If we accept that the nature and content of the reforms are a regrettable necessity, it is then difficult to imagine how the post-reform matters of regulation and consumer protection can be performed without an ethical language of human rights to underpin such activities. It is implausible to think of how decisions on ensuring affordability of electricity can be sensitively taken without the goal of alleviating suffering in mind, especially

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<sup>382</sup> Williams above n 59, at 8.

<sup>383</sup> Human rights practice is usually structured or shaped through the language of law. This approach through law, as Williams sees it, has a probable crippling effect. Legal processes, of course, have an important function. They provide a forum for holding a wide range of actors accountable for causing suffering. Nevertheless, they also have an effect on creating conditions that are either '*insufferable*', (meriting responses), and conditions of '*sufferance*', which remain invisible or worthy of no response at all. Ibid.

because of its relational effect on poverty. It is only then that regulatory mechanisms can improve the provision of electricity to the poor as well as address other social objectives, such as reducing risks to public health and safety.

One does not require a distinct right to electricity to appreciate the value of this argument, even if – as discussed in chapter one – there is a plausible argument of the existence of such right.<sup>384</sup> Even in the absence of such right, it is still possible to make a claim for electricity through human rights. This is from the understanding of human rights as a moral language that presides over electric sector or other reforms. Seen this way, electricity might not just be understood as a material good, but as a precondition for human survival. It is not something that we gain when we qualify as consumers. As such, human suffering provides the virtuous link with how thinking about human rights can be much more rewarding if it serves as the cause for action.

## **5.1. Human Suffering**

Proposing a deeper engagement with the concept of human suffering is only the first step towards understanding how human rights can enable electricity, and other essential economic and social rights. A further approach that orients and directs either our moral vision or behavioural capacity needs to be introduced to support the arguments above. This is both important and difficult if one is to understand how human suffering can better be appreciated in human rights discourse. As noted from the outset of this thesis, it especially requires something that assists us to recognise what is not readily obvious. It is true that cases of extreme suffering can easily become aware to us, but there are many situations that we often fail to see. It is perhaps what Williams' has called *sufferance* – conditions of

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<sup>384</sup> See generally, Tully above n 70.

suffering which are permissible or not visible to the keen observer. As such, it is not enough to say that human rights should pay attention to human suffering without at least equipping them with the proper tools to achieve this. There is a hint of this possibility from the work of Simone Weil, even though she attached ethical importance to the language of love and compassion in dealing with such questions. For her, the power of love possessed superior epistemic qualities to help us see and respond to different forms of human suffering. This superiority of love is uniquely demonstrated by her concept of attention – that is, the act of embracing the pain of the afflicted. Her concept of attention is something that helps us remain detached, not preconceiving a particular situation, so as to understand it on its own terms. In doing so, it encourages us to understand our obligations to the afflicted in ways that are unmatched by other moral discourses.

To recall, Weil does not reject human rights *per se*, but placed them in a secondary place. Human rights, for her, had less significance than compassion and love. The main point of departure from Weil is that the approach here does not prioritise one of these concepts over the other; rather it makes a case for a more balanced relationship between human rights and love. Most importantly, it makes a case for love in human rights. My reasoning for this is simple. It is misleading to think that a framework of justice founded on love alone is sufficient enough to deal with many of the current problems in the world today. It is fair to say that love or compassion does not in any way challenge or upset the system that creates poverty or suffering, even though it might importantly assist provide relief to those affected by such deprivations. But it is fair to say that the nature of certain problems is such that they also need be challenged through a language of resistance. Human rights as such, are better equipped for this task than the language of love.



A similar point about the limitations of ethical languages in general is made by Emiliios Christodoulidis in his provocative essay entitled, *Strategies of Rapture*.<sup>385</sup> Without engaging a detailed analysis of this essay, this related point – in rather simplistic terms – is made through his attempt to grapple with how critical legal and political strategies can defy that which they are against in ways that resist co-option. In doing so, he challenges certain so-called contemporary legal and political theorists for their tendency to reify dominant positions through strategies proposed. One specific criticism he addresses is the use of ‘ethics, mysticism and escapism’ in certain strands of critical legal and political thought. Sally Wheeler’s<sup>386</sup> article on the ‘Ethics in the Workplace’ is a case in point for Christodoulidis. Wheeler focuses on creating a purposive relationship between employee and management in such a way that the individuality of the employee assumes priority. Wheeler’s article is developed in light of the contradictions of post-Fordism and changes in the workplace, some of which – considered in the previous chapter – have affected traditional collective bargaining structures and ways of organising. To resolve this shortcoming, Wheeler proposes ‘ethically constructed dialogues’ between the employees and management, which in her view will help recognise the value of the employee’s individuality. As such, Wheeler develops the idea of ethical dialogues from the philosophy of Levinas. This ethical turn, Christodoulidis argues, not only weakens the ability of workers to protect the dignity of their labour, but it also implies conformity to the violence of market capitalism:

In responding to the main sources of private vulnerability under market conditions, the insecurity of everyday life, the precariousness of employment, the hazards of flexible labour markets, the abuses of managerial discretion, there is nothing the ethics of the ‘other’ can offer to refuse the market, except offer up association to accumulation. Just as there is nothing that the language of ‘apora’, ‘diremptia’ or the ‘broken middle’ can offer legal strategy. Nothing except humility and humility is perhaps not the appropriate response to global wretchedness; to a capitalism that, in Negri’s terms, ‘reigns idiotic and triumphant’ corrupt, arrogant and incapable of self-criticism.<sup>387</sup>

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<sup>385</sup> See, Christodoulidis E. ‘Strategies of Rapture’, 20, *Law and Critique*, 2009, at 3-26.

<sup>386</sup> See, Wheeler S. ‘Ethics in the workplace’, 18, *Law and Critique*, 2007, at 1-28.

<sup>387</sup> Christodoulidis above note 386, at 17. For a similar example of this characteristic of law, see; Fitzpatrick, P. “‘New constitutionalism’: Globalism and the constitution(s) of nations”, 10(2), *Law*,

Provocative words, without doubt, but what does he propose as the alternative? First, Christodoulidis sees more potential for law to address these questions in light of what he suggests as its potential for emancipation. Christodoulidis seems to be suggesting that there is something paradoxical about law. It is multi-dimensional, and this is what Christodoulidis means when he suggests, “what law has silenced will return in the modalities of responsiveness and questionability”.<sup>388</sup> It leaves a remainder which offers potential for emancipation, especially from other possible but harmful interpretations. What he is speaking about is also a feature of human rights. There is always a multiple dimension to human rights, so, whilst they may function as part of a hegemonic discourse, they also offer scope for inclusion by providing the tools to challenge exclusions. This is because human rights “cannot be contained or exhausted in one determinate content”.<sup>389</sup>

Again, this is what Christodoulidis means when he suggests:

...even in the most successful co-option of human rights, and impetus in the aspiration – to protect dignity, personality, speech, whatever – that disturbs every actualisation and thus, intriguingly, leaves the right standing above (beyond) and against its institutionalisation.<sup>390</sup>

The point is that, even if human rights create determinate effects, those determinations can never be complete. They leave something open to be inferred, which in turn provoke other potential responses. What Christodoulidis is saying is well-known. In rather simple terms, he is speaking about the counter-hegemonic character of human rights. It is how they serve to empower vulnerable individual, groups or communities, in ways that assist them resist violations, as well as enable dialogues about future claims. It is this appeal that makes

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*Democracy and Development*, 2006, at 1–20.

<sup>388</sup> Ibid.

<sup>389</sup> Ibid.

<sup>390</sup> Ibid.

human rights give legitimacy to our moral, political or legal claims in the strongest possible terms today.

It must be emphasised though that both authors seem to target different problems, in different time frames, and it would be wrong, as a consequence, to juxtapose their positions as if they were in opposition to each other. Weil's criticisms are quite profound in this respect, as they question the ability of human rights to adequately recognise what is ordinarily invisible. Christodoulidis's concerns are quite different on the other hand; they are concerned with strategies – including rights – that can confront or disturb deprivations in the world. It is a different concern from Weil and perhaps the one in this chapter as a whole – that is, of the epistemic and ethical quality of human rights.

The question from the point of view of this thesis then becomes; are human rights inclusive enough – either as a strategic or moral language – to speak for communities of suffering?<sup>391</sup> Do human rights have sufficient resources to recognise all forms of exclusion or invisibility in society? This is, of course, a prior question to the one Christodoulidis is concerned about – that is, the question of strategy. Put this way, then recognising the value of human rights does not necessarily preclude the importance of love, compassion or charity or other ethical resources. Human rights and love can indeed have a mutually supporting relationship. The point is that there might be a place for love in human rights. A useful way of bringing this possibility can be illustrated from the work of Raimond Gaita,

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<sup>391</sup> What I am talking about is perhaps the question of 'standing' – something that Christodoulidis also appreciates. In rather simple terms, it is the inability of different victims of harms to make their claims in law or human rights law. It refers to their inability to find a language or forum to express their claims. There are several examples of this, including most notably the victims of the Bhopal disaster. For an expansion of this argument, see; Baxi U. 'Book Review: Looking Back at Law's century', 14(1), *Socio-Legal Studies*, 2005, at 143-145.

particularly his attempt to understand the commonality of humanity.<sup>392</sup> Broadly speaking, Gaita seeks to offer a theory of justice based on what he calls equality of respect. Gaita is responding to common practices that render human beings “invisible, or partially visible, to one another”<sup>393</sup>, the consequence of which is that they fall out of our moral radar. It is because of this that he insists that questions of justice cannot be addressed outside deep insight into the value of humanity. Individuals cannot get their just deserts or opportunities if the value of their humanity is not recognised. Equality of respect as such is a claim that exists in all struggles for justice; it underlies all struggles by women, men, blacks or whites against different forms of inequity. Equality of respect is an appeal that all victims of discrimination either make or seek to make. And the struggle for social justice is no more than a struggle for the equal recognition of the preciousness of one’s humanity. It is a “struggle to make our institutions reveal rather than obscure, and then enhance rather than diminish, the full humanity of our fellow citizens”<sup>394</sup> It is only in the background of equality of respect that one’s humanity can fully be recognised. It is only then that appeals for equal access of goods can be equally and sufficiently recognised.

If almost all injustices in society are rooted in the lack of respect of one’s humanity, then the question that follows on from this is how can we strive to achieve such standards of equality or recognise the fullness of individual humanity? This is a difficult question, one Gaita dedicates the entire book to address. Not surprisingly, Gaita turns to the work of Simone Weil in developing this thesis – that is, her emphasis on love as the ultimate source of grasping the preciousness of humanity. This is the point of powerful story of the nun working in a mental hospital, a narrative in which the book began. The nun demonstrated what Weil meant by attention in the most inspiring way. She embraced the affliction of the

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<sup>392</sup> Gaita R. *A Common Humanity: Thinking about Love and Truth and Justice*, Routledge, 2000.

<sup>393</sup> *Ibid.*, at xvi.

<sup>394</sup> *Ibid.*

patients in ways that recognised the fullness of their humanity. This was because of the kind of love she expressed towards the afflicted. It was the type of love:

[...] of saints, which builds on and transforms that sense of individuality, and in doing so, deepening the language of love which compels us to affirm that even those who suffer affliction so severe that they have irrecoverably lost everything that gives sense to our lives, and the most radical evil-doers, are fully our fellow human beings.<sup>395</sup>

There are obviously different ways of understanding this type of love, one of which is parental love, for it is usually – but not always – defined by its unconditionality.<sup>396</sup> The love that parents have for their children is certainly one that cannot rationally be explained. Gaita describes it as such, but this can apply to other forms of love:

The power of human beings to affect one another in ways beyond reason and beyond merit has offended rationalists and moralists since the dawn of thought, but it is partly what yields to us that sense of human individuality which we express when we say that human beings are unique and irreplaceable. Such attachments, and the joy and the grief which they may cause, condition our sense of preciousness of human beings. Love is the most important of them.<sup>397</sup>

As Gaita goes on to argue, even human rights, as with the social and political institutions in our societies, are (or should be) founded on such notions of love. The point is that we can't appreciate what humanity really is, that is, the preciousness of individuals, without such language of love. Gaita is suggesting that if we lose the ability to love, through our inability to cultivate it, then it is only likely that we would fail to value human rights. Human rights are, after all, about the sanctity of humanity. Gaita's argument is importantly that love powerfully draws our attention to the richness of human rights:

...On credit, so [to] speak, from this language of love, we have built a more tractable structure of rights and obligations. If the language of love goes dead on us, however, if there are no examples to nourish it, either because they do not exist or because they are no longer visible to us, then talk of inalienable natural rights or of the unconditional respect owed to rational human beings will seem lame and improbable to us.<sup>398</sup>

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<sup>395</sup> Ibid., at xix.

<sup>396</sup> Ibid., at 22.

<sup>397</sup> Ibid., at 27.

<sup>398</sup> Ibid., xix.

It is easy to see that the principle of reciprocity implied in human rights would only make sense if we are able to grasp the preciousness of individuals. If we are unable to then it would be difficult to understand why we should refrain from breaching others rights. This is only possible through the type of love Gaita speaks about. It not only makes this possible, but also our obligations to those outside this circle of reciprocity. This is, of course, an explanation of why we are obliged to assist children, the elderly or disabled or such others incapable of reciprocating. This possibility would only arise if love is interpreted in the sense that Weil herself meant it – that is, as something impersonal, and includes strangers. Gaita, however, offers a different explanation. This is indeed the most important but yet difficult aspects of Gaita's argument. The difficulty is this; how does one understand his or her obligations to those one does not love? After all, we cannot be expected to love everyone or even if we do, we do not have the ability to love everyone equally. Gaita does acknowledge this point when he refers to Kant's insistence on having obligations to people we do not love. But Gaita demonstrates that even in such situations love is central to obligations to those we do not love. The point is that such obligations cannot be appreciated directly but indirectly through someone else's affection. Those whom we do not love can readily become objects of our love if we see them through the eyes of their loved ones. There is no better way of understanding this than through referring to parental love again. It is the way our emotions are – positively or negatively – provoked at the sight of a parent, who laughs or cries as a result of the fortunes or misfortunes of her child. Once again, although Gaita's point is to show how love is the ultimate source of our moral obligations in which the language of rights themselves are built upon, his thesis is used here to emphasise the relationship between both concepts in current social and political contexts.

## **6. Conclusion**

In considering the challenges presented by the electricity reform in Nigeria, the chapter has argued for the inclusion of human rights within the proposals for reform. This should not be misunderstood as a suggestion that human rights would solve all the problems encountered by the reform. Rather, human rights can reframe, or better still, shift the attention of the reformers to more pertinent questions of exclusion. They can assist to draw attention to the relational effect of the lack of electricity, poverty and human suffering. From the perspective of this thesis, human rights can – with the help of Simone Weil’s work – encourage reformers to listen – with love – to those most affected, and to develop solutions in cooperation, and with their participation. In the subsequent chapters, I would state the case for community participation as a way of building more understanding and solutions to such problems. This is, after all, an ethos behind community. Gaita’s work above is important for another reason here. It can be used to demonstrate that the ethos of community itself cannot be understood without a background concept of love.





## Chapter Five

### BRINGING HUMAN RIGHTS CLOSER TO THE POOR: THE CASE FOR COMMUNITY

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#### 1. Introduction

The main objective of this chapter is to examine and consider how the concept of community has featured in human rights discourse. In particular, it explains the inadequacies of references to community in both the traditional and more recent market-based human rights approach. The chapter is a step towards distinguishing and clarifying the use of community in this thesis, including how it can contribute to resolving problems of electricity and possibly other economic and social rights.

This chapter explains that part of the reason for the inadequate use of community is the dichotomy that both concepts invite in attempts to propose them together. This may explain the general apathy towards community in human rights discourse,<sup>399</sup> even though certain exceptions exist as indicated above. The use of community – however minimal it might be – implies that a relationship with human rights exists, even if it seems to exist without proper conceptual justification. It is perhaps best to explain this relationship in ontological and sociological terms. Ontologically, the relationship is now self-evident and

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<sup>399</sup> To put this point differently, do human rights endorse a normative model of community from which other human rights or public goods can be realised? The answer to this is quite simple but this also the initial difficulty. Traditional human rights discourse has not concerned itself with the role of community within its normative framework. This is, in spite of the fact that many, if not, most individuals live in a community – international, national or local – that shape or are at the same time shaped by human rights.

doesn't need further justification. Both concepts should be embraced and not questioned about their origins, or which value should be prioritised over the other. On the other-hand, the relationship can be established empirically, for instance, through sociological analysis of every instantiation of the Rights-Based Approaches to Development to explore the extent to which it exists in practice, and how it might be improved. Similarly, where it does not exist, empirical studies can reveal the possibility of knowing how and when to propose it from scratch. Having said that, and also discussed in this chapter, not everyone has considered human rights and community in such opposing terms. There is indeed a middle ground approach which can provide sufficient conceptual justification for a relationship between human rights and community.

The chapter begins with a critique of the existing use of community in human rights discourse. It follows on with a discussion of the conceptual differences that have prevented more meaningful interaction between both concepts. What follows is a discussion of the less dichotomous ways in which both concepts have been proposed. It concludes by noting that whilst it may be impossible to eliminate the tension surrounding both concepts, they can be reduced by creating avenues for dialogue, such as the proposals for Community Forums in the following chapter. This chapter concludes thereafter.

## **2. Tales of invisibility**

Human rights (have and continue to) operate as a State-oriented discourse, which privileges the rational capacity of individuals to construct and re-construct their reality through claims against the State. Human rights are built on a relationship between the State as primary duty-holder, and individuals as rights-holders. What this has meant is that the possibilities of realising human rights are placed within the potential and limits of State

action. Consider the debate on economic and social rights as an example. Such discussions are exclusively structured or determined by questions of justiciability. Most discussions are preoccupied with attempts to clarify the content of economic and social rights, and furthermore, the role of the judiciary in holding the State accountable for those rights.<sup>400</sup> The focus on economic and social rights has almost exclusively been on formal legal sources, judicial opinions and treaties in the attempt to determine the particular levels of access, and in this respect, individual entitlement to them. Such discussions have almost exclusively focused on litigation, some of which have celebrated the judiciary or judicial activism as champions or the only hope for the poor.

Other discussions about economic and social rights raise questions about democratic legitimacy, in other words, they question the legitimacy of the judiciary in dealing with such problems. Closely related to this are questions of the technical competence of the judiciary in carrying out these objectives, such as the allocation of resources, setting priorities, or initiating policies to enable access to economic and social rights. These debates have different variations; nevertheless, they concentrate on the role of law in enforcing economic and social rights against the State. Law and the State are the only avenues available for the impoverished and vulnerable. The debate neglects other possible ways of achieving economic and social rights, especially those that fall out of such formal institutional arenas. There is a failure to constitute other avenues in which these rights can be achieved. In circumstances where economic and social rights are non-justiciable (like the case of Nigeria, for instance) the obvious agitations have been the need to legally formalise these rights through various domestic constitutional and legal initiatives. It is often argued that the fact that there are numerous problems with enforcing

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<sup>400</sup> See, Bilchitz above n 7. See also, Ferraz above n 7, at 585-603.

economic and social rights (as in the case of India, South Africa and Brazil) should not be a detraction from realising that making such rights justiciable may provide the only hope for the poor to enable them enjoy basic standards of life.

More recently, markets are now considered as alternative means of transformation in human rights discourse. Economic-globalisation – and the challenges it has mounted on the State-oriented human rights system – has been key to this development. The effects are well-known and globalisation has contested the centrality of the State in providing economic and social rights. These developments are mainly facilitated through the set of policy formulations owing to the financial or economic obligations of States arising from the Bretton Woods framework. Whilst the BWIs are outside the authority of the current human rights normative order, they, nevertheless, programmatically structure human rights through their role over development. The Rights-Based Approaches – as will be seen in the next section – now normatively structure this relationship by integrating norms and principles of human rights in plans, policies and processes of development.

The BWIs on their own part have increasingly encouraged the privatisation of economic and social rights or, as it were, public goods. As already seen from earlier chapters, neoliberal policies like the concept of good governance have continued to reconcile roles for markets and human rights, the effect of which is that markets are often considered as an alternative means through which certain economic and social rights can be realised. The market is considered as a legitimate alternative framework, given that human rights discourse generally takes a neutral view of markets.<sup>401</sup> To recall, the most

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<sup>401</sup> See, Graham C. 'Human Rights and the Privatisation of public Utilities and Essential Services', in De Feyter K, and Gomez F., (ed.), *Privatisation and Human Rights in the age of globalisation*, Intersentia, 2005, at 33.

visible threat to human rights in this respect emerges from the advent of national and transnational private actors, i.e., TNCs. TNCs have continued to profit from the absence of any meaningful legal means to hold them accountable for human rights violations. It is obvious that the current State oriented human rights system is no longer sufficient to grapple with the threats to the system. Such distortions have taken many forms and provoked calls to re-think the contemporary human rights obligations systems. Even the more recent trend towards the privatisation of human rights has not altered its State-centred outlook. It fails to impose duties and obligations on private or non-State actors for the breach of human rights. Instead, it places obligations on the part of States to prevent private actors from committing such harms.

## **2.2. Development's turn to human rights**

As stated from the outset, the foremost attempt to establish a role for community within the human rights normative framework emerges from the protracted declaration of the Right to Development (DRD).<sup>402</sup> The DRD emerged from a view that equates the lack of development to a violation of human rights, and more so, as a contravention of the universality of human rights. The DRD is considered as both an individual and collective right, which seeks to facilitate equal access to natural resources, goods and services in different Third World societies. The Right to Development affirms the indivisibility of human rights, as it recognises the importance of civil and political rights in simultaneous terms with economic and social rights. The DRD emerged, in part, as an attempt to assert a right of all to participate and contribute to their own development. At the period it

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<sup>402</sup> The Declaration on the Right to Development, (DRD) adopted 4 Dec. 1986, G.A. Res. 41/128 U.N. GAOR, 41st Sess., at 3, Annex, U.N. Doc. A/Res/41/128 Annex (1987) (hereinafter Declaration on the Right to Development). On the Right to Development, see; Sengupta A. 'On the theory and practice of the Right to Development', 24, *Human Rights Quarterly*, 2002, at 837-839. For a more recent critique of the Right to Development, see, Cornwall A and Nyamu-Musembi C. 'Putting the Rights-Based Approach to Development into perspective', 25(8), *Third World Quarterly*, 2004, at 1415. See also, Baxi U. *Human rights in a Post- Human World: Critical essays*, Oxford University Press, 2009.

emerged, it was considered ground-breaking, given its unique attempt to assert a right of peoples to self-determination, which also implied peoples' entitlements to their natural wealth and resources. Rajagopal captures the optimism that greeted the emergence of the DRD:

...[I]t powerfully introduced the right of communities into the human rights-corpus, which remained focused on individuals. This had an immediate resonance among grassroots movements in the Third World, as it enabled them to use the language of human rights to protest against violence against their communities....it opened up the entire meaning of development, which had heretofore meant economic growth, national development, and individual entitlements. Now, communities would define what kind of development they wanted [...]<sup>403</sup>

As enthusiastic as these words may sound, they remain at best an aspiration, given that the Right to Development has never really materialised beyond its declaratory status. Moreover, beyond mentioning the right of peoples over their natural resources, the notion of community itself has not really been expanded upon. Beyond occasional references to community, the right does not articulate any definition, scope, nature or the level of community involvement implied.<sup>404</sup> Whilst the DRD can be considered as a foundation for the role of community in human rights discourse, it still does not go far enough to properly establish this.

Quite apart from that, the emergence of the Right to Development raised more questions than answers. It excluded questions of the enforcement of this right, given that the obligations for 'rights of peoples' are vested in the international community. The controversial issue of rights vis-à-vis duty-holders also re-emerges in this context, which still remain unsettled today. In other-words, who is the right-holder or duty-bearer of the

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<sup>403</sup> Rajagopal above n 175, at 221.

<sup>404</sup> Article 1 says that the Right to Development is a right of individuals, groups, people and States to participate and benefit from the process of development. It is aimed at realising the full potentials of each person in harmony with community. DRD above n 403.

Right to Development? The right has been open to several other criticisms,<sup>405</sup> including from the Third World where it received the greatest support. For example, Issa Shivji<sup>406</sup> has questioned the conceptual basis of this right – that is, its failure to clarify what is actually meant by development. At the risk of simplifying Shivji’s position, he argues that the Right to Development reinforces the traditional State centred approach to human rights, and thereby reinforcing the hegemony of the State.

Much of the principles that underpin the DRD have now been accommodated under the framework of the Rights Based Approaches to Development. As earlier mentioned, the Rights Based Approaches provide the legal framework to operationalise development by integrating it with norms and principles of human rights. In other words, it has been proposed to provide a “conceptual framework for the process of human development that is normatively based on the international human rights standards and operationally directed to promoting and protecting human rights”.<sup>407</sup> The Rights-Based Approaches draw from the wide array of international human rights treaties and declarations, as a way operationalising, planning and programming development. It is underpinned by principles of equality, equity, accountability, empowerment and participation. The last two principles give some indication of the recognition of the role of community. Even so, the Rights-Based Approaches do not clearly articulate a theory of community. Like the Right to Development, the Right-Based Approaches are at best an inspiration for, and not an actual theory of community. Nevertheless, there is more implicit acceptance of community when the Rights-Based Approaches propose that they seek to empower people with the “capacities, capabilities and access needed to own lives, improve their own *communities*

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<sup>405</sup> See, Donnelly J. ‘In Search of the Unicorn: the Jurisprudence and Politics of the Right to Development’, 15, (473), *California Western International Law Journal*, 1985, at 482.

<sup>406</sup> See, Shivji I. *The concept of Human Rights in Africa*, CODESRIA Book Series, 1989, at p. 20.

<sup>407</sup> See, Office of the United Nations Commissioner for Human Rights (OHCHR) accessed online <http://www.unhcr.ch/development/approaches-04.html> 18<sup>th</sup> June 2009.

and influence their own destinies”.<sup>408</sup> Furthermore, the Rights-Based Approaches suggest that empowerment is only possible in an atmosphere where “*communities*, civil society, minorities, indigenous peoples, women and others”<sup>409</sup> can participate in an “active, free and meaningful”<sup>410</sup> way. As such, the role of community must not be “formal”<sup>411</sup> or “ceremonial”,<sup>412</sup> it must be substantive.

In terms of the application of these principles, international development institutions (including the Bank), have interpreted the Rights-Based Approaches quite differently. Given that much of this thesis has been concerned with the role of the Bank, the focus here is on how it has embraced the Rights-Based Approaches. Not surprisingly, the Bank has interpreted this through its market-friendly approach to human rights. With particular reference to community, it has only recently been recognised by the emergence of the CDF. To briefly recall its emergence, it features as part of the broad approach to civil society. Grievances for inclusion and participation were part of the reasons for the emergence of the CDF. It emerged as a result of the effects of the SAPs, which were quite diverse and also well-documented today. Participation in its broadest of senses became the main grievance, especially as a means of bringing the main decision-making processes closer to the poor.<sup>413</sup>

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<sup>408</sup> OHCHR above.

<sup>409</sup> Ibid., italics mine.

<sup>410</sup> Ibid., (italics mine).

<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> One can draw parallels with this and the way participation has been embraced by the UN normative framework and its development agencies. Participatory decision-making has been a core feature of the UN’s development work.



The Bank's CDF or the second-generation reforms are all part of the response to these questions. With the introduction of ideas about dispersed forms of governance, the BWIs have attempted to create a new order which includes the State, market and civil society. It is an attempt to create a non-hierarchical ordered society, which entails the participation of all. Regardless of this, the approach – as discussed in chapter two – can be criticised for constraining claims for inclusive participation by privileging market oriented forms of participation, particularly through a narrow conceptualisation of civil society. The neoliberal concept of civil society is quite distinct from other ways of thinking of the concept, for instance, like the republication concept of civil society. Unsurprisingly, participation is selective as opposed to inclusive.<sup>414</sup> It is based on a principle of selection, which selects certain actors, interests or voices, and leaves out the most excluded of voices. It is to say the least an instrumentalised version of participation; it is not far-reaching in its articulation.

The role – and definition – of community in the Bank's development framework is best understood within the climate described above. Not surprisingly, the neoliberal argument almost exclusively draws compatibility between community and the market economy.<sup>415</sup> The primary objective for the promotion of community is to draw upon its normative resources to achieve economic growth and profit. The values of community are not promoted on their own merit; they are promoted because they add value to the market. For the Bank, markets do not impede but complement community. Whilst it is impossible to rule out instrumental relationships in community, there is obviously a difference

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<sup>414</sup> For a useful critique of participation, see; Santos BDS. 'Beyond Neo-liberal Governance: the World Social Forum as Subaltern Cosmopolitan Politics and Legality', in Santos BDS and Rodriguez Garatino C.A. (eds.) *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge University Press, 2005, at 35-37.

<sup>415</sup> See, World Bank: Community Driven Development, accessed online at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTCDD/0,,menuPK:430167~pagePK:149018~piPK:149093~theSitePK:430161,00.html> 18 June 2009.

between instrumental and exploitative relationships. The problem with the neoliberal view is the danger that instrumental relationships of the market would overwhelm members of community and thus, translate into exploitative relationships. This explains why the community is not merely an association. A community is distinct from an association because it is not formulated to pursue an instrumental agenda.<sup>416</sup> Most common interest associations are defined by instrumental gain and exclusive to those who are allowed to participate. Membership of an association is never open to all and participation is tied to a precondition. It is in certain cases tied to the payment of a membership fee. For the idea of community promoted in chapter six, the only condition for participation is being resident in a given local neighbourhood. The organising principle for this community is not determined by instrumentality nor race, religion, ethnicity, colour or gender. It starts from exactly opposite premise; it is not (and should not) be about the pursuit of profit.

The origins of this instrumental view of community can be traced to Robert Putman's ideas about social capital. This refers to the networks of trust and co-operation within and between communities, which might have an effect on improving societal problems.<sup>417</sup> It refers to the ability of individuals to create relationships both within and between other communities. In neoliberal development discourse, social capital is the bundle of values from which people can draw to improve their incomes, and which can be 'built' to facilitate economic growth and development. The work of Francis Fukuyama<sup>418</sup> has expanded on these perspectives by trying to show how social capital can be a source for building trust in society, a prerequisite, in turn, for economic growth. Social capital

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<sup>416</sup> For a distinction between community and association, see, Little A. *The Politics of Community: Theory and Practice*, Edinburgh University Press, 2002, at 61-62.

<sup>417</sup> Putman R. *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton University Press, 1993, at 167. Putman R. 'Bowling Alone: America's Declining Social Capital', 6, *Journal of Democracy*, 1995, at 65-78. See, Putman R (ed.), *Democracy in Flux; The evolution of social capital in Contemporary Society*, Oxford University Press, 2002.

<sup>418</sup> Fukuyama F. *Trust: The Social Virtues and the Creation of Prosperity*, Penguin, 1996.

and trust are defined by the traditional values of cooperation, integrity, and reciprocity that exists within community. Social capital depends on trust in a society and is created through cultural mechanisms like religion, culture or tradition. These are indeed very persuasive arguments that cannot simply be dismissed. The problem however begins with the unproblematic conflation of social capital, trust and the market economy, on the other hand. In doing this, Fukuyama succeeds in instrumentalising community by recognising it only as a means to achieve economic growth. The market becomes compatible and not a source of distortion of communal values. This view doesn't seem to recognise any problems between the ethos of market and community. It even goes to the extent to suggest that markets can extend community values. The market economy is considered a source for trust and social capital in community. There is something normative about markets, which extends beyond its traditional function of the distribution and redistribution of goods.

The unhealthy market-friendly conceptualisation of community is not the only difficulty with the Bretton Woods approach. A different but equally important difficulty is that very little has been done to expand what the community really means. The concept of community is arguably the most weakly defined concept within the agenda; it has certainly not received the same attention as the market or State. This is perhaps because the role for community has not been thought out in a programmatic way and circumscribed to *projects*, which are not only limited in scope, but also in time scale. The only attempt to define community in the entire Bretton framework emerges from the series of Community-Based Development (CDB) and Community Driven Development (CDD)<sup>419</sup> projects, the aim of

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<sup>419</sup> The CBD are projects that involve the beneficiaries at the stages of design, whilst the CDD are projects that beneficiaries have control more control over key decisions, such as the management and investment of funds. For more details, see; Masuri G and Rao V. *Community-Based and Driven- Development: A critical Review*, World Bank Policy Research Paper 3209, 2004.

which is allegedly to give the poor more control over their aspirations for development. As the Bank has claimed, the CDD and CBD projects are underpinned by “principles of local empowerment, participatory governance, demand-responsiveness, administrative autonomy, greater downward accountability, and enhanced local capacity”.<sup>420</sup> In terms of its definition, the community is described as a culturally or politically homogeneous entity – a village or urban neighbourhood – or an administratively defined territory. Quite apart from that, the Bank also recognises “specific common interest group, such as herder’s associations, irrigation associations, or associations of street vendors”<sup>421</sup> as community. An initial difficulty with the above is that it seems to conflate the understanding of association with community, which (as already discussed) are quite distinct concepts. Associations can, of course, become communities constituted of groups unaffected by instrumentality.<sup>422</sup> But this is not the case with all associations and it is difficult to see how associations would be constituted by the same sort of virtues that exist in community. Individuals are often members of associations to pursue their parochial interests. For purposes of the broad objective of this thesis (and as will become clearer in the next chapter), it is problematic to conceive a regime of ownership or management of public goods on the basis of common interest groups, and more specifically, outside a given locality. Without appreciating this, the sphere of participation would itself be characterised by groups who are driven by their parochial interests, quite apart from strong bonds of association which have the tendency to exclude others.

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<sup>420</sup> Ibid.

<sup>421</sup> See, Binswanger-Mkhize H.P et al (eds.) *Scaling up Local and Community Driven Development: A real world guide to its theory and practice*, World Bank Group, 2009, at 3.

<sup>422</sup> Paul Hirst’s thesis on ‘communities of choice’ is an illustration of how an association can become of a community. See, Hirst P. *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994, at 49-59.

This difficulty highlighted above leads to a further problem with the Bank's view of community. There is quite a visible attempt to describe the community in terms of homogeneity. Apart from common interest associations, the community is defined as an internally cohesive administrative unit in a village or urban community. It is true that a village may be constituted by groups with very similar identities – that is, ethnicity, tribe, language or culture. A metropolitan neighbourhood or community, however, cannot be understood as such. On the contrary, it is constituted by members with multiple or overlapping communal identities. A more detailed discussion of this is provided in chapter six.<sup>423</sup> The internally cohesive community the Bank imagines does not make sense where relationships within such boundaries do not reflect homogeneity. The point in raising this is not to suggest that rural communities are not important. Far from it, the point is to show that the Bank's practice of community development creates a cleavage between rural and urban communities. The difficulty is that it has an effect of excluding the poor in urban communities from egalitarian solutions. There is a further point about metropolitan communities, which will be emphasised in the next chapter. It is that the complexity and multiplicity of identities within metropolitan communities is a useful way of moving away from problematic single based definitions of community. Be that as it may, there may be a logical explanation why the Bank defends this view. This seems implicit in the Bank's application and practice of community development, even though it is stated otherwise at the policy level. Most references to community in a recent review of the Bank's the CBD/CDD projects seem to give emphasis to villages or rural communities.<sup>424</sup> The Bank's practice of community is best understood through the famous distinction between

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<sup>423</sup> Etzioni describes these as contemporary communities, not only composed by a network of communities, but also where membership is not restricted to one type of community. See, Etzioni A. 'Old Chestnuts and New Spurs' in Etzioni A. (ed.) *New Communitarian Thinking: Persons, Virtues, Institutions, and Communities*, University of Virginia Press, 1995.

<sup>424</sup> See Binswanger above n 422.

*Gemeinschaft* (community) and *Gessellschaft* (society).<sup>425</sup> *Gemeinschaft* refers to a rural or village community defined by its specific of tradition or family values. This is distinct from *Gessellshchaft*, which offers a broader spectrum for a wider range of relationships typical of urbanisation and modernisation. Modernisation is often criticised because it is believed to destroy the values of kinship and co-operation that makes *Gemeinschaft* distinct. The advent of modernity and the accompanying processes of urbanisation are considered as a threat to community.

In theory, whilst the Bank's good governance reforms are purportedly shaped by the Rights-Based Approaches to Development, this is, however, not very visible at the level of practice. This leads to a more profound problem from the perspective of this thesis – that is, there are no concerted attempts to make a connection with community within debates about human rights. This difficulty can be traced from the origins of human rights as none of the foundational documents, declarations, treaties or theories that underpin human rights, formulate or propose a role for community. As noted from the outset, other disciplines have paid more attention to the potential of community, one of which is development discourse. Given its continuing overlap with human rights, it is possible to argue that it applies to the former. Even then, questions of inadequacies of definition of what the community in development discourse still have to be addressed, as this seems to have been taken for granted.

It is argued that no approach, either in human rights or development discourse, that seeks to transform lives in the Third World, can successfully achieve their objectives, without properly addressing what goes on in spaces that constitute part of everyday life. At

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<sup>425</sup> See, Ferdinand T. *Community and Civil Society*, Cambridge University Press, 2001.

the risk of generalisation, a great range of problems are connected to the lack of a comprehensive approach to community. The need for theoretical and practical reconsideration of community is more urgent than it ever has been before. In Nigeria, for instance, the current violence in the Niger-delta region or the over 10,000 deaths since 1999 due to ethno-religious and communal violence, or the poor service delivery due to the undemocratic nature of the country's social, economic and political institutions are all indications of the need for, or the break-down of community. A large number of these problems can be dealt with if the State loosens its grip on society. Before looking at the conditions of *possibility* in chapter six, it is important to understand the debates that have prevented a balanced understanding of community and human rights. These debates help explain the failure to theoretically and practically establish community in human rights discourse.

### **3. Balancing**

Although the main objective of this thesis is to show how community can strengthen the pursuit of human rights, it is equally necessary to understand the constitutive role human rights can have on community. It is fair to say that, without some form of basic rights, it would seem impossible to maximise diverse opinions within or between individuals in community. Minority voices need access to a broad range of rights to articulate their positions without fear of intimidation. Without being exhaustive, these rights would include the classical civil and political rights like political participation, freedoms of expression, association or rights against discrimination in order to achieve socio-economic rights. The difficulty with this proposal is the dichotomy between both concepts. These observations are succinct with regards international human rights legal discourse. Comparatively speaking, this situation is quite different from the human rights literature in

other disciplines like in sociology<sup>426</sup> and political theory,<sup>427</sup> where the importance of community – either for or against human rights – has received some attention. This apathy towards community is indeed not surprising in light of debates which have traditionally conceived these concepts in oppositional terms. On the one hand, human rights, thanks to liberalism, are often said to be at odds with community. This is because they increasingly instrumentalise relationships by fuelling vested interests, narcissism or separating individuals from all social ties – be it family, community or the society as a whole.<sup>428</sup> Rights presuppose conflict since they encourage selfish competition amongst individuals in society.<sup>429</sup> The point is that if rights are constitutive of individual interests, it only follows that it not only distorts the values of community, but also the reciprocal moral responsibility that makes community distinct.

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<sup>426</sup> See generally, Howard R. *Human Rights and the search for Community*, Westview Press, 1995.

<sup>427</sup> See generally, Gewirth A. *The Community of Rights*, University of Chicago Press, 1996.

<sup>428</sup> These views originate from criticisms of John Rawls *Theory of Justice* by Michael Sandel, Alasdair MacIntyre and Charles Taylor. Such criticisms have become a reference point for communitarian thought in political theory and philosophy. In its original formulation, these writers questioned Rawls depiction of the individual by suggesting he/she could only be socially constituted. Their claims can be understood ontologically, methodologically and normatively. See, Rawls J. *Theory of Justice*, Oxford University Press, 1971. See also, Sandel M. *Liberalism and the Limits of Justice*, Cambridge University Press, 1982; MacIntyre A. *After Virtue*, Notre Dame, 1984; Taylor C. ‘Cross Purposes: The Liberal Communitarian Debate’, in Rosenblum N (ed.) *Liberalism and the Moral Life*, Harvard University Press, 1989. See also, Taylor C. Atomism, in *Philosophy and the Human Sciences*, Cambridge University Press, 1985.

<sup>429</sup> A very recent example of this argument can be found in the justifications for the new British Bill of Rights and Responsibilities in the United Kingdom. The Bill raises a lot of comparable concerns about individualism in the context of terrorism laws and security. The proposed British Bill of Rights and Responsibilities seeks to balance individual rights vis-a-vis responsibilities to community. The bill suggests that it seeks to “end the me society in which an unbridled focus on our individual rights and liberties overtaking our collective security”. According to the green paper, responsibilities have always existed within British law, but they are usually never emphasised. The effect of this is that it has led to “a selfish and aggressive assertion of rights in a way which may damage others enjoyment of their own rights”. The point in raising the UK bill of rights and responsibilities runs much deeper than pointing out the compatibility of rights and responsibility. It is also useful in showing the compatibility between rights and community. The green paper traces this relationship between both concepts to a number of sources, including ideas of Aristotle in ancient Greek philosophy on individual responsibility, virtue, community and civic friendship. The green paper also makes references to contemporary political communitarian thought, especially the work of Amitai Etzioni who characterises individual responsibility to community as a civic virtue. Interestingly, it makes passing reference to African philosophy, where the fulfilment of duties to community is not only a condition of membership, but also critical to the attainment of human dignity. For details, see; Ministry of Justice. *Rights and Responsibilities: developing our constitutional framework*, Ministry of Justice, 2009, at 14-15. See also, *The Guardian*, 24<sup>th</sup> March 2009.



Community can also be criticised for being at odds with individual rights. Whilst there are many ways of defining community – either as a political, ethnic, religious or cultural community – individual rights are inexplicable from communal values. As such, community and its social institutions often take precedence over the individual. With values of trust, reciprocity, solidarity and tradition, it is often said that individual rights have less importance in community. This is because the emphasis on individual rights can detract individuals from recognising reciprocal duties one owes others in community. There are, of course, dangerous consequences of the undeniable tension between individual and collective autonomy, especially profound implications of the lack of differentiation within community. One of the profound limitations of the concept of community is that it tends to exclude plurality, amongst other things. It tends to totalise differences, and reduce them into some form of unconditional homogeneity.<sup>430</sup> It is a commonplace theme that the individual within such communities is more often unintelligible from outside this framework; individuals are only recognisable as a constitutive part of the group. This, of course, has far reaching implications on the plurality and diversity of our humanity itself. Moreover, these implications seem even further reaching as individuals are not only capable of becoming invisible, but also of the reverse effect. It is indeed very often the experience that community tends to collapse into the individual.<sup>431</sup> This is often witnessed in patriarchal societies, religious sects or political parties, where the plurality within the community is reduced into the leader's individuality and charismatic qualities. A further anxiety over community is that it is often characterised by extremely closed bonds of unity such that it fails to be open itself to inclusion. There is a great deal that can be said in this context about the difficulty of ethnic, tribal, kinship or religious tribal affiliations in

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<sup>430</sup> Hardt and Negri's concept of the multitude is also a partial reaction to the limitations of community as well as concepts of people, which generally often connote moral homogeneity. As such, the multitude is different from these because it comprises of multiplicity, which individuality or singularities cannot be reduced to a single identity. See, Hardt and Negri above n 67, at 204.

<sup>431</sup> See; Bankowski above n 213, at 18-22.

various Third and non-Third World country contexts. Community is celebrated in ways that understates the sense of complexity that lies within it, which often makes it vulnerable to exclusion. Quite apart from that, communities have not been able to disassociate themselves from unhealthy class structures, which inevitably thwart possibilities of substantive equality.

One must understand that both arguments above are correct; human rights and community are concepts that will always contradict each other. At the same time, it is also true that social intercourse is not possible without human rights or some form of community. If this is the case, then it seems to present a paradox, as neither concepts (nor the institutions that represent them) can exist in society without each other. Unfortunately, too often in discussions about these concepts is it assumed that each of these values can exist independently. It must be understood that human rights are as important to community as community is to human rights. As such, compartmentalising these concepts – that is, either human rights or community – ought to be rejected. A more productive approach is thinking of rights and community as mutually supporting and interdependent concepts. There is a considerable amount of work along these lines, some of the most important of these will be considered in the next part. But before considering them, it will be important to emphasise that the recognition of the limits of community should not be a diversion from acknowledging the potential it offers to human rights. The community and values it represents can create social harmony to encourage the most deprived in society face up to their difficulties. These are, of course, as a result of the constitutive values of common interests, co-operation, friendship, trust and mutual sympathy found in community. This may explain why questions of human rights are not prioritised in communal societies, which gives more priority to values of love, compassion and care for

others.<sup>432</sup> Duties of care for the less privileged always serve as the organising principle of community. These duties may be understood as the services, conducts or functions that we are morally obligated to perform to others. Duties and responsibility to others arise from an appreciation of our shared humanity, which enables us recognise our responsibility to assist others in misery. In other words, we have an obligation not to harm them. It is not difficult to see how the proposals for a human rights framework with the alleviation of suffering at its core can benefit from community, given the centrality of love to how we see and recognise human suffering. Love is indeed one way of recognising the solidarities and relationships in community. But, to understand this further, a stronger case for integrating human rights and community needs to be made.

### **3.1. Bridging the divide**

An inescapable step towards understanding the interdependence of values of human rights and community is achieved by rejecting traditional arguments which have obscured the possibility of such a relationship. It is a rejection of arguments that have historically considered both concepts in contradictory terms. It is not difficult to understand the limitations of such arguments even from this rather simplistic argument. Human rights and community are both constitutive of everyday life in any given society. Whilst societies vary on the degree to which they are influenced by these concepts, individuals are in one way or the other affected by either community or rights. Community – especially as it is used in this thesis – exists in every society, whether it is liberal or non-liberal, Third World or First World societies. The definition of community will obviously vary in every society, so will the degree to which individuals are affected by community. Some individuals are

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<sup>432</sup> See; Gyekye K. 'Person and Community in African Thought', in Wiredu and Gyekye K (eds) *Person and Community: Ghanaian Philosophical Studies*, New York Council for Research in Values and Philosophy, 1992.

more likely to be affected by communal ties or relationships than others. But this is not to suggest that they are not affected at all by community.

The same point can be made about human rights. They are also an inescapable reality in most societies of the world, even if a noticeable gap may exist between their rhetoric and reality. The point is that like community, human rights are constitutive of everyday life. They affect us, even if the degree to which they do so may be relative. Once this point is appreciated, it is possible to recognise why both concepts should be embraced rather than rejected. After all, many commentators rather innocently make references to community in speaking about human rights. It is common place to speak about the ‘international’ or ‘national’ or ‘local’ human rights community.<sup>433</sup> Yet, the use of the term community or its relationship with human rights remains largely unanalysed.

From the above, it is wrong to imagine the individual as an isolated rational being, disconnected from family, community and society. The autonomous liberal individual with formal rights cannot deal with social, economic and cultural structures of power, inequality or dominance in society. Protagonists of liberalism fail to recognise structurally constructed hierarchies and divisions, which in turn prevent the enjoyment of human rights. Furthermore, the distinction between private and public spheres made popular by feminist theory<sup>434</sup> illustrates another difficulty with liberal individualism. Specifically, it de-politicises and de-moralises personal or social relationships by hiding them from the public sphere.

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<sup>433</sup> One exception here can be found in an article by Maxwell Chibundu, which argues that we cannot understand the significance of the international legal order without the notion of community. See, Chibundu M. ‘The Other in International Law: Community and International Legal Order’, *Working Paper, School of Law, University of Maryland*, 2004.

<sup>434</sup> For more insights into these issues, see; Frazer E. *The problems of Communitarian Politics: Unity and Conflict*, Oxford University Press, 1999. See also, Frazer E and Lacey N. *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate*, Harvester, 1993.

On the other-hand, as the famous feminist slogan – the ‘personal is political’ – also helps point to the limitations of the communitarian alternative. The dichotomy between public and private conceals the political nature of oppression in the private sphere. This, for many feminist, takes place in the realms defended by communitarians. Kinship and social structures also constitute sites of oppression. It is equally wrong to imagine individual as wholly defined by community. This is a point that advocates of community fail to recognise. They fail to see the multiple ways in which individuals are socially constructed which includes overlapping forms of communal identity, or as Frazer puts it, the transition from one community to the other. More so, very little recognition is given by communitarians of the importance of power in constructing and reconstructing conditions of domination.

### **3.2. Conceptual and Practical Interdependence**

Beyond rejecting those debates that reinforce differences between community and human rights, it is also necessary to understand how the relationship between these concepts can also be constituted. As such, an affirmative statement of reconciliation between human rights and community needs to be established by showing how both concepts can be theoretically and practically interdependent. Beginning with questions of conceptual interdependence; there are perhaps several ways of seeing this but, in this context, the focus is on seeing how this might exist through a mutual relationship between rights and duties. One must be aware that the right versus duties argument opens up a number of other questions, the most notable of which is the extent to which non-human entities, children or future generations are capable of bearing rights, since they have no ability to bear duties. Regardless of this limitation, it is argued that it is still an important way of establishing the conceptual link between human rights and community. One of the most influential ways of

showing this is through Alan Gewirth's thesis on the "community of rights".<sup>435</sup> Amongst other things, Gewirth shares the same optimism here that the relationship between rights and duties can provide a foundation for a similar relationship between rights and community. The community of rights not only aims to reconcile rights and community, but also show how this relationship would lead to assisting the poor to satisfy their basic economic and social rights.<sup>436</sup> The idea of community and values of reciprocity are used to emphasise the need for strong governmental intervention to assist the deprived in society. What Gewirth is concerned about is exclusively placing such rights within the boundaries of the market. The community of rights is framed to provide the "moral justification of economic and social policies, and institutions, as they help alleviate human suffering".<sup>437</sup> It is such policies and institutions embodied in the State that in turn constitute what he calls the community of rights. Gewirth argues that human rights (either positive or negative) are held by all individuals by virtue of their humanity. Positive rights require strong governmental intervention to remove such harms like poverty or disease. The interventionist government does not preclude the possibility of individual action and it must also facilitate the creation of what he calls productive individuals with agency. After all, many individuals lack this ability, or the conditions in society do not allow individuals to act for themselves. The community of rights refers to the role of the State in assisting the poor or vulnerable to attain a certain degree of well-being. State action in this context is justified on the basis of human rights. Since rights have positive and negative components, this will mean that governments must refrain from executing certain acts that cause harm. It may very well mean that positive action on the part of governments in social and economic contexts is justified. The community of rights justifies State intervention not

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<sup>435</sup> Gewirth above n 428.

<sup>436</sup> Ibid., at 4.

<sup>437</sup> Ibid., at 1.

only to remove suffering, but also to increase the abilities of individuals to develop capacities of agency.

Whilst he argues that human rights are primarily targeted at protecting individual interests, there is a perquisite that in the process of enjoying their rights individuals must also act in consideration of others. Although rights are essentially framed with the protection of individuals in mind, they also entail certain responsibility towards others. Each human being is considered as both a rights-holder and duty-bearer. All human beings must be able to claim their rights against others. An individual must respect the rights of others to earn the respect of his or her rights from others. A principle of social solidarity based on a further requirement for mutual respect is inscribed in human rights. Human rights are – not as often regarded – merely concerned with personal interests. It is this element of mutuality that establishes the link between human rights and community. Moreover, the adherence to the principle of mutuality has a transformative effect on society; it converts society into a community of individuals whose relationships are defined by the mutual recognition of the rights of others. This principle of solidarity inscribed in human rights is what constitutes the moral structure of the community of rights.

There is however a further dimension to this principle of solidarity in human rights discourse. It implies the need to create institutions through which individuals can attain higher standards of equality. For Gewirth, human rights are primarily moral rights and it is this principle of reciprocity that helps individuals build amity with others. To have human rights means that we are inclined to act in certain ways and this only means that we must be virtuous to others. Given that all humans are primarily prospective agents, the purpose of human rights ought to be to strengthen the capacity of individual agency. What Gewirth

means here is that all individuals, including the underprivileged need a supportive community to fulfil their human potentials, and this is a further argument for a stronger reconciliation between human rights and community.

There is a lot of value in Gewirth's arguments, especially on the importance of community to attain standards of reciprocity or compassion towards others. This is indeed consistent with the arguments in this thesis for institutional frameworks like community that can potentially see and respond to human suffering. Aspects of Gewirth's points about the importance of encouraging self-sufficiency are, of course, very relevant for purposes of proposals about the role of community in claiming economic and social rights or, as it were, public goods. It must be noted, however, that the reasons for community participation that I am concerned about has to be distinguished from the one Gewirth himself makes. In no uncertain terms, Gewirth suggests that community is primarily a place where the pursuit of self-interest should be achieved. This is perhaps a contradiction of his position about the role of community in developing capacities of altruism and reciprocity. It begs the question of how mutual recognition can be achieved when the starting point of relations are instrumental. This seems to undo the purpose of articulating community in the first place, since all it seems to reassert is the primacy of the individual above everything else.

Looking more generally at the community of rights thesis, although it speaks of the importance of enhancing the human agency of the poor in improving the quality of life, it seems to exaggerate the role of the State in making this possible. It seems to achieve this to the extent that it fails to espouse a theory of community, what it does rather paradoxically is that it provides a theory of State. Of course, Gewirth is referring to a political



community, which is indeed descriptive of a State or national community. Gewirth does not offer a vision for small units within the State, i.e., local communities, which can play a role in their own self-definition. Apart from being an important means through which the dichotomy between human rights and community can be reconciled, the community of rights is only a partial resource for the objective of this chapter and furthermore, the thesis as a whole.

Alan Gewirth has not been the only one to attempt to bridge the divide between human rights and community. Similar attempts have been made to establish this from societies with histories and realities outside liberalism. To take one specific example; African societies are commonly described as those in which duties to community are the only thing that matter.<sup>438</sup> This view is a partial depiction of the African worldview, if the work of African philosopher, Kwame Gyekye<sup>439</sup> is taken into consideration. Gyekye's main aim is to respond to views that present African communalism in hostile terms to human rights. For him, communal values do not preclude the importance of rights for three related reasons. First, human rights are the only tools in which individuals can assess their status and challenge practices of community. These evaluations no doubt entail rights for self-determination, which allow individuals to make determinations of what is favourable or harmful from the perspective of human potential. More recent arguments have been made along these lines that human rights are ways through which communities can preserve their common heritage, language, culture or their own visions of development.

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<sup>438</sup> See also; Donnelly J. *Universal Human Rights in Theory and Practice*, Cornell University Press, 1989, at 50.

<sup>439</sup> Gyekye above n 433.

Secondly, Gyekye argues that the importance of human rights in the African community can be established from the concept of human dignity. This is framed against views that suggest that human dignity is something to be earned after the performance of certain duties. For Gyekye, human dignity is not solely dependent on the communal structure; it is something intrinsically embedded in every individual, and not something that can be taken away by community. Whilst it is true that duties to community are salient aspects of African societies, it does not necessarily mean that the attainment of dignity is conditional on the performance of duties. Accordingly, human dignity is something that can be established in a theistic and non-theistic sense – and this is not constrained by duties. In the theistic sense, human dignity is derived from God as the creator of all humankind. He illustrates this point from an Akan maxim from Ghana; “[A]ll persons are children of God; no person is a child of the earth”.<sup>440</sup> If all are created by God, it then follows that they are worthy of dignity and respect. Parallels of this theistic view of human dignity can be drawn with preamble of the American Declaration of Independence (1776), which in similar terms holds that.... “all men are created equal, they are endowed by their creator with certain inalienable rights...”<sup>441</sup> The non-theistic conception of dignity is similar to the natural rights thesis; it is dependent on human nature, reason and the individual qualities of rational judgement, which in turn makes it possible for individuals to flourish. In other words, they are not dependent on duties to community.

Gyekye’s third point shows that human rights and community are not really conflicting concepts. Similar to the view expressed in this thesis, Gyekye argues that this is something that can be established conceptually and practically. Conceptual analysis, he argues, can help show the dual nature of individuality. Individuals are both self-

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<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

autonomous and communal beings. In the same way, individuals must be allowed to freely express their rights, which may include their talents and dispositions, and which enable them contribute to their cultural development and values of community. In defending this view, Gyekye importantly notes that too much emphasis on rights would only promote possessive individualism, and the lack of concern for others. He says, “if I insist on my right to all my possessions or to all that has resulted from the exercise of my endowments, I may not be able to show sensitivity to the needs and welfare of others, even though showing sensitivity to the needs of others is an important plank in the ethical platform of communitarianism”.<sup>442</sup> As such, one must be aware of the danger of transcending into self-centredness as a negative consequence of rights. Placing too much emphasis on human rights can detract us from correlating duties we owe to others. Although he doesn’t go as far as suggesting this, he is not saying that rights are not important. He seems to allude to the need to understand the proper balance between both concepts. It is not a question of choosing one value over the other. Instead, rights and duties should be appreciated as mutually interdependent concepts.

At the level of practice – or moving onto questions of practical interdependence – the work of Thomas Spragens Jr.<sup>443</sup> is a useful way of showing how human rights and community can mutually support each other. His work is generally framed within the liberalism versus communitarianism debate, to which he offers a middle ground solution. It is a view that recognises the importance of community without excluding insights or contributions from liberalism. Spragens Jr. articulates what is called ‘communitarian liberalism’ or rather a ‘communitarian version of liberalism’. It is a view both committed to values of liberalism but at the same time sympathetic with communitarianism. Spragens

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<sup>442</sup> Ibid.

<sup>443</sup> Spragens, Jr, T. ‘Communitarian Liberalism’ in Etzioni above n 424.

Jr. is not the only one with this view. It is now widely accepted that the divisions between the so called liberals and communitarians have largely been embellished. This is a sympathetic view of many communitarians like McIntyre, Sandel and Taylor, who are, after all, liberals of sorts.

To reconcile the values of liberalism and communitarianism, Spragens, Jr. starts by reinstating the normative ideals of liberalism. These include liberty, equality and most importantly, fraternity, which have their origins in the period of the Enlightenment. With regards to fraternity, Spragens, Jr. notes the most difficult problem with contemporary liberalism is that it tends to ignore this value. To use his words contemporary liberalism ignores the importance of “civic friendship within a flourishing community”<sup>444</sup> in society. This is what fraternity makes possible; it makes it possible to look beyond the morally autonomous individual, which is prioritised by liberalism. Rather, fraternity helps the individual live a more fulfilled life, especially as a social being actively participating in society along with others. It is from an appreciation of the value of fraternity that the distance between liberalism and communitarianism can be narrowed. As Spragens Jr. suggests:

For that reason, my preferred version of liberalism is quite properly characterizable as communitarian. But what makes this normative theory genuinely liberal at the same time is the insistence that civic friendship cannot be attained without extensive equality and those communities cannot flourish without extensive liberties.<sup>445</sup>

Seen in this way, it is not difficult to understand how human rights and community can exist as mutually reinforcing discourses. This is something that can easily be established at the level of practice by a framework in which vigorous institutions of civil society can be

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<sup>444</sup> Ibid, at 47.

<sup>445</sup> Ibid. Chantal Mouffe offers a similar but slightly different view. She looks at this from the point of view of the dichotomy of liberal and republican ideals of citizenship. She argues that the task is not to replace one concept with the other but to draw on their strengths, whilst discarding their weaknesses in building a new concept of the citizen. Mouffe C. ‘Democratic Citizenship and the Political Community’, in Mouffe C (ed.) *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, Verso Books, 1992.

nurtured within the wider body politic. In contrast with views that insist on institutions of State and market, civil society is the most important sphere for this idea of ‘communitarian liberalism’. It seeks to empower “local communities, families, neighbourhoods, churches, educational institutions, and civic associations”<sup>446</sup> to participate for the common good of society. Whilst not being opposed to the market and State, communitarian liberalism acknowledges the detrimental effects they can have on the health of society. This is why the design of social institutions to nurture civic friendship and common purpose is pertinent here. Finally and also important, for present purposes, communitarian liberalism recognises the importance of individual rights, especially for the protection of minorities in society. For Spragens Jr., the design of institutions alone is not sufficient enough to protect individuals from the possibilities of domination. As such, subjective rights are needed to a large extent in event of such circumstances. Moreover, communitarian liberalism seeks to avoid the possible acrimony, which might emerge from the juridification of society by creating alternative mechanisms for mediation and reconciliation. Seen this way, there is a strong affinity between communitarian liberalism and theories of deliberative democracy. Indeed, protagonists of deliberative democracy, such as Habermas emphasise the complementary nature of concepts of human rights and community, even if this is not the original aim of his theory. Without really going in to detail here, Habermas’s<sup>447</sup> theory of deliberative democracy succeeds in reconciling the liberal ideals of rights and popular sovereignty, which by implication points to some notion of community. For this purpose, it presupposes a constitutional State at the hierarchy of society to guarantee rights of individuals to participate in political decision making processes. Some of these insights

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<sup>446</sup> Ibid. Most communitarians like Etzioni hold a similar view. For him, communities must be empowered constitutionally to deal with problems within their neighbourhoods. See, also, Etzioni A. *The Spirit of Community; Rights, Responsibilities and the Communitarian Agenda*, Crown Publishers, 1993.

<sup>447</sup> See, Habermas J. *Theory of Communicative Action*, Beacon Press, 1984; Habermas J. *Between Facts and Norms*, MA MIT Press, 1995.

will be explored in the next chapter, especially the relationship between theories of human rights, deliberative democracy and community.

### **3.3. Beyond Paternalism**

Let there be no doubt that reconciling differences of values between human rights and community will not be easy to achieve. Conflicts between rights and community are expected and there is certainly a need for trade-offs about what values should prevail. This requires an atmosphere of negotiation, re-negotiation and compromise, given that it cannot be achieved paternalistically. No compromise can be achieved by insisting that one value should conform to the other. There are definitely several ways of understanding how this is possible, but the focus here is on Boaventura de Sousa Santos's<sup>448</sup> idea of translation or dialogues amongst those with opposing values or between antagonistic viewpoints. Whilst it is framed for a very different objective, it is, nonetheless, one of the most helpful ways the differences within values that underpin human rights and community can be reconciled.

Santos's objective is to understand the plurality of groups and perspectives within the World Social Forum (WSF) often composed of local movements and organisations from First and Third World countries, with different orientations, practices and objectives. Santos begins by asking – what are the possibilities of sustaining truly authentic global coalitions, given the multiplicity within the WSF? In Santos's well-known work, these movements are what he calls subaltern cosmopolitanism, a normative framework proposed to capture the diversity of the movements of globalisation from below. Analytically, this cannot be understood through a general theory. A general theory cannot capture the richness and diversity of the groups or practices that constitutes the WSF. A general theory

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<sup>448</sup> Sousa Santos BDS. 'The Future of the World Social Forum: The work of Translation', 48(2), *Development*, 2005, at 15-22. For a similar formulation, see; Santos above n 218, at 132-139.

presupposes the existence of universality or homogeneity between the diversity of movements.<sup>449</sup> The multiplicity or heterogeneity of groups within the WSF has to be taken into consideration. And this calls for new epistemological categories to try to understand the pluralism that defines such relationships. The only way a general theory can respond to this problem is if it is a “general theory on the impossibility of a general theory”.<sup>450</sup> He calls this “negative universalism”<sup>451</sup>, which he finds a more realistic way of understanding the nature of this question. Instead of a general theory, Santos proposes the idea of translation. This is:

... a process of mutual intelligibility among the experiences of the world, both available and possible, as revealed by the sociology of absences and sociology of emergences, without jeopardizing their identity and autonomy, without, in other words, reducing them to homogeneous entities”.<sup>452</sup>

Powerful words no doubt, but they can also profit from further explanation. The groups within the WSF are not only motivated by different goals, but also have different sources of identity, which distinguish one group from the other. Hypothetically, feminists have a different agenda from labour movements, which in turn have a different agenda from the indigenous peoples’ movements. Speculatively, these differences would no doubt translate into practical differences, some of which may provoke disagreement, factions and acrimonious relationships within the WSF itself. Failure to address this particular issue might have adverse effects on the WSF, especially in pursuing its basic founding principles – that is, to formulate alternatives to globalisation. This is something that can only be achieved by mutual recognition or what he calls the translation of differences. It is a way of understanding what divides and unites groups at the same time. It is from such processes that coalitions can be fostered on the basis of what they share in common. It is not difficult

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<sup>449</sup> Santos offered a similar view in a presentation entitled ‘Towards a Legal Theory of the Global South’, at a Workshop on *Legal Theory and the Third World*, School of Law, University of Edinburgh, 2009.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid.

<sup>452</sup> Ibid.

to see how this idea of translation can assist in reconciling similarities and differences between human rights and community. Protagonists of each view can hold onto their principles by translating them through processes of mutual intelligibility. It is a process of identifying common values, whilst discarding inconsistent values. It is the celebration of diversity and not understanding it as a source of conflict or division. This is something that must be done at the abstract level, but also at the level of practice.

To see how this can work, a more abstract example of Santos's 'translation of knowledges' is used here. In rather simple terms, it refers to how different groups have different interpretations on a particular concept. The concept of human dignity is an ideal example of how the translation of knowledges can work, given that it is a concept open to different cultural interpretations. This is an important example for another reason since human dignity is often at the centre of debates about the universality of human rights. It is not possible to exhaustively deal with debates about the universality of human rights, except to say that this debate is a different way of understanding the controversy between human rights and community. For this reason, Santos's theory of translation of knowledges is even more important from the perspective of this thesis. The controversy has always been that human rights are expressed only through western (liberal) interpretations of human dignity. It is different from other concepts of human dignity like the Islamic concept of *umma* (community) or Hindu concept of *dharma* (cosmic harmony between all beings).<sup>453</sup> The different concepts of human dignity are perhaps reasons why human rights are usually not emphasised within the WSF, since the groups within it have different understandings of human dignity.

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<sup>453</sup> Ibid at 17.



How does the idea of translations help reduce differences without reinforcing conflict between parties? This is, of course, difficult but the purpose of translation is that it points to shortcomings of the concept of human dignity from the perspective of other interpretations of the concept. Consider this example; by showing the superiority of my concept of human dignity, I in turn point to the weakness of yours. Translation opens-up spaces for critical dialogue by pointing out the limitations of internal viewpoints. At the same time, it also has the effect of creating a better understanding between competing view points. Take the concept of *dharma* as an example. Human rights would be a weak concept because it fails to establish a link between the individual and his or her cosmic world. This is usually not a concern for human rights. For *dharma*, the conceptual relationship between rights and duties is not sufficient enough to achieve this. Perhaps, as already seen, it leaves out many from its scope of application. In the same way, looking at *dharma* through the lens of human rights will reveal its weaknesses from its own point of view or standards. The fundamental weakness of *dharma* lies in the neglect for injustice in the pursuit of religious and social status. In pursuing social harmony, *dharma* neglects that plausibility of conflict towards achieving agreement. Moreover, *dharma* pays little attention to values of democracy, individual freedom and autonomy. *Dharma* is unconcerned with the fact that “without primordial rights, the individual is too fragile an entity to avoid being overrun by powerful economic and political institutions”.<sup>454</sup> It fails to recognise the irreducible nature of suffering, which is unique to the individual. Santos draws another example from the Islamic concept of *umma*, but it is possible to understand the value of translation without expanding on this concept.<sup>455</sup> The point of translations is that the success of any kind of dialogue must begin from the acknowledgment of reciprocal

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<sup>454</sup> Ibid at 18.

<sup>455</sup> For a good insight into the debate about human rights and Islam, see; An Naim A. ‘Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives’, 3, *Harvard International Law Journal*, 1990, at 13-52.

incompleteness. The enormous potentials of human rights and human dignity in any given context rest on the ability of these concepts to be appropriated in local cultural contexts. Framed as such, the attempts to reconcile human rights and community can no doubt benefit from the idea of translation. What is certain is that compromise cannot be achieved by insisting on replacing one value with the other. If this is appreciated then it is possible to see how community might play a role in human rights discourse. Santos's ideas in general points to the indispensability of dialogue in resolving such tensions, and this is something, in the context of this thesis, that can be achieved through the discussions about Community Forums in the following chapter.

#### **4. Conclusion**

This chapter has mainly been concerned about the relationship between human rights and community. This chapter, as with the thesis in general, is an important part of understanding how to increase the role of community in human rights discourse, for it involves mutually understanding how the values of each concept can contribute to each other. Whilst it is impossible to eliminate tensions that may arise from the need to maintain individual autonomy and the pursuit of the collective good, such tensions can be reduced by creating opportunities for open public dialogues about the strengths and limitations of the values that each concept represents. Most importantly, understanding human rights as ethical claims – discussed in earlier chapters – opens up the possibility of subjecting them – along with other ethical values – to processes of dialogue. From the perspective of this thesis, such dialogues can provide an opportunity to show that the benefit of having a human right can actually transcend the individual. It is also important to see that the

discussions of Community Forums in the following chapter as a contribution towards this possibility.

## Chapter Six

### RECLAIMING HUMAN RIGHTS: A VIEW FROM A NIGERIAN COMMUNITY

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#### 1. Introduction

How should community be defined, operationalised or programmed, particularly in ways that contribute to the pursuit of particular human rights? How exactly would community make human rights more effective in their task of shaping the pursuit of development in normative terms? Is community participation possible under existing social and political institutions or do new spaces have to be created to give more scope for participation? What sort of problems can be predicted with the introduction of community participation, and how can they be addressed? These are among the underlying concerns that motivate the analysis in this chapter. The chapter seeks to expand on the substantive aspects of the theory of community, which it is argued can enable individuals to take part in processes that determine their human rights.<sup>456</sup> It outlines the philosophical, structural and procedural requirements for community participation. This is, after all, because the substantive aspects of participation can only succeed if the structural framework is clear and right from the outset. Community participation as such, cannot succeed or precede philosophical and structural underpinning. This is in essence what the theory of community outlined in this chapter seeks to achieve. In doing so, the chapter expands on the three comprehensive components of the theory, which include what community is, or what it ought to be, the

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<sup>456</sup> It is recognised that such questions are better dealt with in specific national and local contexts, even though general principles of community are anticipated on the normative level of human rights discourse. It is appreciated that irrespective of how community is defined it is a relative term.

actual spaces of participation, and thirdly, a theory of deliberation for community participation.

The discussions in this chapter proceed as follows. It begins by offering a definition of community and proceeds to justify why it is unique for present purposes. It stresses the importance of harnessing the ethical and social resources within local residential communities in townships or villages, as a way of encouraging supporting relationships, and furthermore, assisting the most deprived in society to develop abilities of democratic organisation, ownership and autonomy over the processes of securing their human rights. The chapter then proceeds to discuss how participation can be institutionalised. It proposes the actual spaces of participation as a further component of the theory. This is in anticipation that such forms of participation may have to be created by institutional design, since it is not expected that participation or community will always exist spontaneously. In particular, Community Forums are proposed as a new space from which decisions relating to particular human rights can be reached. But the work of Community Forums requires a third component, one that anticipates the kind of problems which participation may create. Participation can be divisive even in the most egalitarian or democratic societies. But as troublesome as these problems may be, it is argued that they are still reducible, even if they cannot totally be eliminated. What this requires is a component that understands the value of dialogue and compromise. To understand this possibility, a theory of deliberation is proposed to support the work of Community Forums, as the third component of the theory of community. After a discussion of this component, the chapter concludes thereafter.

## 2. Setting the Scene

I begin with a story to help analogise what I mean by community, and in this respect, how it might function through the kind of values that might exist within it. The story is about a residential community in a metropolitan Nigerian city. It is the city of Jos, the capital of one of Nigeria's 36 states. The city is known for its beautiful scenery and moderate temperatures, and it is made up of an estimated population of about one million. Its moderate temperatures and scenery have been an attraction to many from across the world, who now consider Jos their home. Over the years, the city has witnessed a lot of migration, which has included members of Nigeria's dominant ethnic groups<sup>457</sup> and also, Europeans and Americans, who constitute part of the population of the city. As such, the city is well known for its pluralism of race, gender, ethnicity and religion, thus making it one of the most cosmopolitan cities in Nigeria. More recently, and since 2001, violent conflicts have threatened the peaceful coexistence and appeal of this city, as it has divided the population along ethnic and religious lines. A recent conflict between indigenous Christians and Muslims occurred in 2008, and more recently in 2010, respectively provoked by democratic elections into one of the local city councils, and later on for unknown reasons. Sceptics would argue that this points to the weakness of any proposals that prioritise community, but it is as argued here that the recent conflicts in Jos are really a manifestation of a breakdown of community. As such, more and not less community is needed in this context.

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<sup>457</sup> Nigeria has an estimated number of three hundred ethnic groups, three of which the Hausa, Yoruba and Igbo are the largest. The city of Jos is also composed of a host of indigenous tribes from the surrounding villages. Plateau State, of which Jos is the capital is composed of over 60 ethno-linguistic groups, two of which, the Berom and Angas constitute the largest in number.

The conflicts have not necessarily changed the living patterns in the city, which have usually had ethnic, multi-ethnic, religious or multi-religious dimensions to it. Historically, living patterns have been mixed, even though there have been a few noticeable changes as a result of the conflicts. Two dominant trends are quite evident; first, residential communities have often been inhabited by groups of virtually the same ethnic or religious background and second, it is possible to find residential communities (like the one described below) composed of different primordial or religious identities. Similar living patterns are usually found in densely populated inner-city and suburban residential areas.

The experience of this particular community in Jos in dealing with a particular problem is used here as a point of entry into some of the main arguments in this chapter. It is a community that I have lived in, experienced, apart from being a problem that I have also participated in trying to resolve. The community itself is unique and not representative of all communities around the city or Nigeria. But, the problem is not unique to this community; it is one that exists across Nigeria as a whole. It is the question of robbery, and other forms of crime that threaten the security of lives across the country. The high rate of crime is a reflection of the breakdown of institutions of the State in the country, a similar reason for the concerns here – the lack of access to water, electricity or healthcare and education. Members of this community (as elsewhere in Nigeria) have continued to spend anxious days and nights in fear of impending robbery attacks. This is further exacerbated by the level of policing in the country, and not surprisingly, the inability of the police to contain the situation. At a certain period in the life of this community, especially after exhausting all possible options, something drastic had to be done. Such alternatives ranged from appeals to the State for more policing to private security solutions (i.e. barbed

wired fences, gates and guard dogs) offered by the market, which all eventually proved insufficient.

Before looking at what was done to address this problem, it will be important to pause for a moment to understand the internal composition of the community. It consisted then, as it does now, of a wide range of people from different ethnic, religious backgrounds – Nigerians and non-Nigerians alike. This community is a mix of individuals and families with different levels of wealth and occupation. The community also mirrors the wicked social stratification which exists in Nigeria as a whole. It reflects the perverse gap between the poor, extremely poor, working class, rich and extremely rich. It is common to find that members of relatively poor families providing domestic services in the homes of the rich or extremely rich. In terms of age composition; the community is composed of young and old; retired and upwardly mobile professional individuals. Intra-communal relations are quite cordial, even if not everyone knows, or even cares about, or speaks to each other. It is common to find close-knit friendships with families that live closest to each other. Apart from such situations, friendships are only built by those who go out of their way to do so. Apart from this, there are very little opportunities to build fledging friendships in community. Very little communal or public spaces exist for such kind of interactions. Friendships only seem to be built through the nature of interactions among children, which in turn determine the relationships of their parents. As a consequence, friendships are sometimes built amongst rich and poor families according to the level of interaction between their children. The most common way of building friendships outside family circles have been forged in times of turmoil, such as the ethno-religious conflicts mentioned in the beginning. The ethno-religious conflicts reinforced rather than divided the spirit of togetherness however minimal it may have been in the past. This experience, of



course, was not the same for other communities in the city. This community was an exception rather than the rule. There were certainly communities where neighbours of considerable history turned against each other in the most appalling and barbaric ways. Similar to the ethno-religious conflict, the question of crime at a certain period of life of this community was definitely a source of solidarity and friendship. After consistent attacks on several homes, it became apparent that this was a problem that could only be tackled collectively, even if there was an undeniable individual dimension to it. This was, and is a problem that households experience alone – that is, the pain, sorrow, tears and other psychological dimensions of such attacks, or the fear of impending attacks. Interestingly, these isolated individual experiences did however mobilise a collective effort.

In an attempt to deal with this problem, series of meetings were called by several well-respected members of community. The meetings were arranged, and took place on Saturdays. They were open to everyone, but not everyone attended. Many failed to attend for different reasons, which are only open to speculation. For instance, only a handful of women attended the meetings, and this was perhaps because the dates and times for meetings conflicted with their typical domestic and family related chores. There was a very limited presence of the poor, and extremely poor. Again to speculate, their failure to participate may simply be because of inferior social and economic status, or that their contributions might not be considered rational enough to influence an audience composed of individuals with greater wealth, education and intellect. Besides, the poor were often treated with suspicion by the more privileged in community to the extent that they were often regarded as suspects for the crimes.

At the meetings, victims spoke about their experiences; especially how help failed to come from the police even when it was sought. Representatives of the police were present at initial meetings, explaining their difficulties and soliciting for better understanding and cooperation from the community. Several solutions were proposed and considered, one of which was to seek the services of private security firms. This proposal was rejected by the majority present, given that these services were too expensive and also equally ineffective. The proposal which appealed the most – after been discussed and voted upon – was for the formation of a neighbourhood security association, and security watch group. The association was formed, and its mandate was to work in collaboration with the police over matters of security in the community. Membership of the association was open to all residents of community, but on the condition of a payment of a monthly subscription fee. This was for administrative purposes, and for the running of neighbourhood security watch group, which was one of the main proposals and decisions that emerged from initial meetings. Articles of association were drafted and agreed upon at subsequent meetings. Provisions were made for a chairperson, management structure, officials, decision-making and accounting procedures, and procedures for meetings, including their dates. The organisational structure was no surprise given the background of members of the community in the public service or private business. The structure of the main decision making organ of the association was quite similar to a board of directors. Unlike the deliberative nature in the events leading to the formation of the association; debates or discussions hardly existed after it was created. There was a lot of emphasis placed on voting as opposed to deliberation by eligible members of the association.

The association succeeded in forming a neighbourhood security watch group to patrol parts of the community at the vulnerable periods of the night. This was, and still is, a

well-known practice in many residential communities within and outside the city. There is, of course, a dark side to these neighbourhood watch groups – that is, the inhumane or brutal treatment given to perpetrators of such crimes.<sup>458</sup> Fortunately, such nasty incidents were never reported in this community. The association and neighbourhood security watch group operated for a year at the most after it was formed. Its presence was short lived, after it was rocked by allegations of corruption on the part of its chairperson. Whilst the association and group lasted, however, there was a remarkable difference in the rate of crime, even though it did not totally eliminate crime. But, the negative turn of events leading to the failure of the association stifled any motivation for future community organising in this context. It has now left members of this community with little or no choice but to provide their own security through the market, or to depend on unreliable the State police force.

## **2.1. Community as Locality**

The narrative above raises a number of issues of importance to the general purposes of this thesis. On the positive side, the narrative reveals how a problem that threatened collective security promoted wider discussion on the problem, and of ways to address it. Importantly, it discloses how this community in many ways transcended its ethnic, religious, and class differences through attempts at public discussion and collective decision-making, even though such efforts were short lived. In the context above, security was considered as a collective problem, even though some members of this community (especially the rich) were capable of tackling it individually. On the negative side, the narrative reveals one of the consequences of the collapse of the institutions of the State. It also reveals that the market was not an option for many in community. It also makes known some problems that

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<sup>458</sup> See, Walker A. ‘Vigilante groups in Nigeria’, BCC News Report, accessed online <http://news.bbc.co.uk/1/hi/world/africa/8021468.stm> 5 November 2009.

might exist within community, notably, the problematic question of exclusion of the poor. It reveals the improvised nature of the understanding of democracy in that community, which privileged voting as opposed to dialogue as the basis of democratic expression. The narrative reveals the typical Nigerian problem of corruption, which eventually led to the demise of attempts at community organising. This is only a glimpse of the difficulties that can emerge with community participation, and more so, the dangers of over-romanticising with it. Even so, it also shows that self or collective provisioning of economic and social rights seem to be the only option available to communities across the country. As such, it underscores the point of this thesis that any proposals for reform, which seeks to enable access to these human rights, cannot succeed without a comprehensive strategy that involves community. It also begs the question from the perspective of the thesis of why problems of this nature have not been dealt with at the level of community.

The most important point for the purposes of this chapter is that the community depicted in the narrative above is the most commonly associated meaning of the term. It is connected with a specific locality in a given territory. It is as such a material or tangible thing, one that is located in a particular place. Such type of community may exist in a small rural village, even though it is referred to above in an urban context. Community to recall from chapter one – and as depicted above – refers to a residential neighbourhood, that is, a group of individuals who find themselves living together in a place by accident of proximity. This is obviously not the only way of describing community, but it is referred to in this context because of the implications of this theory on practice. The requirements of participation in this thesis require concrete face to face relationships in either temporal or permanent settings. It rests on devising opportunities of encouraging individuals to mobilise collectively in attempt to resolve problems that affect them where they live. But,

as also mentioned in chapter one, there is a more fundamental reason for understanding community as locality. It is that one's neighbourhood, as a type of locality, plays a significant – but not an exclusive part – of one's self-definition, meaning or cultural and identity formation. As Elizabeth Frazer<sup>459</sup> illustrates, this is something that comes out well in recent work by political communitarians.<sup>460</sup> Its, therefore, not an issue that only sociologists have pondered about. Whilst what may constitute a locality includes places where people live, work, shops, businesses, schools, it also includes strong family ties and strong communal relations to achieve social harmony. She says, communitarian political theorists have also stressed the importance of local power in determining redistributive policies and public investment. They have even influenced debates about corporate social responsibility to embrace local community, internal democracy and environmental responsibility.<sup>461</sup> But the most important point about locality is about the values that exist within it. The point is that the neighbourhood as locality plays an important part in determining one's conduct, roles, duties, relationships and most importantly, one's values. It is because of this, as regarded in this thesis, that it constitutes one of the most important aspects of everyday life. To understand this point further, what follows is a discussion of how community is itself a normative ideal.

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<sup>459</sup> Frazer (1999) above n 435, at 143 – 147.

<sup>460</sup> See the following as examples; Sandel M. 'The Procedural Republic and the Unencumbered Self', 1984, 12, *Political Theory*, at 92-93. See also Sandel M. *Democracy's Discontents: America in Search of a Public Philosophy*, Harvard University Press, 1996. See also, Walzer M. *Spheres of Justice: A defence of Pluralism and Equality*, Blackwell, 1983 at 225.

<sup>461</sup> Tam H. *Communitarianism*, McMillan, 1998, at 192.

## 2.2. Community as a Normative Ideal

What Frazer points out is that there is more to understanding the significance community than locality or common residency. It is also a place where common values, attachments and principles are forged. What this means is that it is also possible to understand community as a normative ideal. This point comes out strong, and can further be expanded upon from Selznick's sociology of community.<sup>462</sup> It comes from his suggestion that even when we consider community as a description of our social experiences; it also has an important normative dimension. His work importantly invites us to understand the correlation between descriptive and normative aspects of community. Part of the reason why he discusses the normative side of community is to dispense with the regular scepticism about the concept. He argues that sceptics never seem to stop highlighting the dark side of community and overlook that it is a "prima facie good thing".<sup>463</sup> It is an end in itself and not just a means. Its values are intrinsic like culture, friendship, socialisation and family life. Community presupposes moral values that can be nourished and protected. This does not mean that these presumptions cannot be rebutted, especially if a particular community is too narrow and exclusive. We must not forget that other concepts like friendship, family, law and culture also have dark sides. But this does not mean that we abandon them when they deviate from their principles. Rather we criticise and try to nurture them from our understanding of the general standards they represent. As such, a normative theory of community must both affirmative and critical. On the one-hand, it is affirmative when "it explores, identifies and embraces the positive contributions of a

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<sup>462</sup> Selznick above n 18 at 360.

<sup>463</sup> Ibid.

particular community to human flourishing”.<sup>464</sup> On the other, it is critical when “it asks of a particular community how far, in what ways and with what effects it deviates from a standard”.<sup>465</sup> Such standards would always differ from community in question but the objective will remain the same – that is, one of illuminating what a good community is, as well as how to construct, and nurture it when it fails.

Following on from Selznick it is not only important to pay attention to living experiences of people, but also how a normative theory can be built – to affirm, criticise and reconstruct it – from those experiences. We must seek to understand ways a community can contribute to human flourishing, and what ways a particular community fails to meet these requirements. As such, Selznick provides a list of variables that might help in this respect. They include historicity, identity, mutuality, plurality, autonomy, participation and integration. A community will hardly have all these variables; some will have more than others. It always depends on the kind of community involved – that is, whether it is religious, ethnic, occupational, institutional or residential. Although Selznick’s variables may provide a useful guide to achieving this, they are not the only way of achieving this. The Southern African concept of *ubuntu*<sup>466</sup> serves as a point of departure from Selznick to illustrate a philosophy that can help measure the moral quality of community. For the sake of clarity, *ubuntu* is used to analogise a particular way this can be achieved and it is not proposed as a general moral theory for all communities. Nevertheless, from the concerns of this thesis, *ubuntu* is one way of drawing our attention

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<sup>464</sup> Ibid.

<sup>465</sup> Ibid.

<sup>466</sup> Le Roux J. ‘The concept of ‘*ubuntu*’: Africa’s most important contribution to multicultural education?’ 18(2), *Multicultural Teaching*, 2000, at 43–46. See also, Blankenberg N. ‘In search of a real freedom: *Ubuntu* and the media’, 13(2), *Critical Arts*, 1999, at 42–65. See also, Venter E. ‘The Notion of Ubuntu and Communalism in African Educational Discourse’, 23, *Studies in Philosophy and Education*, 2004, at 149–160.

to human suffering given – as illustrated below – its predisposition to compassion and human interdependence.

*Ubuntu* has no standard definition. It is perhaps simply understood as group solidarity. Justice Mokgoro describes it in the following way:

*Ubuntu* (a Zulu word) is a lifestyle or unifying world-view (or philosophy) of African societies based on respect and understanding between individuals. *Ubuntu* has been translated as “humaneness”, and is derived from the expression: *umuntu ngumuntu ngabantu* [a person is a person because of other people / a person can only be a person through others]. It envelops values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.<sup>467</sup>

Compassion, solidarity, reciprocity and dignity, or such other values that can be found in community are the ethical planks of *ubuntu*. *Ubuntu* is perhaps more of a cosmopolitan philosophy, given that it is founded on values of shared humanity. It depicts universal human values that transcend boundaries of culture, ethnicity and religion. Similarly, territory or boundaries should not stand in the way of expressing or experiencing *ubuntu*. For the general purposes of this thesis, *ubuntu* may be helpful in illustrating ways in which people are connected through the common values of humanity, which can in turn be used to address common problems. It can encourage reciprocity, tolerance, cooperation and trust in society, and around the globe in general. What is more, *ubuntu* is about human interdependence; it is a powerful illustration of the fact that individuals are incomplete without others. Without communion with family and community, individuals are meaningless. One’s community is the basis on which self-definition begins. Life is determined through communal relationships and acts of togetherness. It presupposes that social cohesion or harmony cannot be understood apart from the overlapping and interwoven relationships that we share with others. Individuals never exist in absolute

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<sup>467</sup> Justice Mokgoro cited in Anderson A. M. ‘Restorative Justice, the African philosophy of *Ubuntu* and the diversion of Criminal Persecution’, paper presented at 17th International Conference of the International Society for the Reform of Criminal Law, the Hague, Netherlands, August 24 - 28, 2003.



isolation, except through co-existence and mutual effect on each other. It is what Kenyan theologian John Mbiti meant by the following words, “I am, because we are, and since we are therefore I am”.<sup>468</sup> These expressions of shared humanity are truly unique. But in recognising its potential, one should not generalise its existence across Africa; it is certainly not something that exists within or between all communities. But the point in raising it is that this is something that can be encouraged through certain practices, customs and institutions. More importantly, it can serve to measure of the moral quality of a community when these ideals are found wanting. After all, it is common to find descriptions of African communities overwhelmed by problems of exclusion, amongst other things, as those that lack *ubuntu*.

### **2.3. Limits of Community**

Whilst there is a lot to celebrate about community, there is also a great deal to detest. Bounds of inclusion can so easily translate into bounds of exclusion. As inclusive as Mbiti’s ideas seem, they can also be used to fuel discord, especially when they are interpreted too exclusively. They can be interpreted in ways that reinforce the debate between liberalism and communitarianism, a debate that is unhelpful for the purposes of this thesis. Part of the problem is really how community is defined, which in turn shapes its practice. It comes from – as discussed in chapter one – the consequences of defining community too exclusively, as the defining factor of all of one’s social relationships. Perhaps in the Nigerian and African context, it comes from the failure to recognise anything apart from ethnicity, tribe or religion as valid community. Without attempting to

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<sup>468</sup> See, Mbiti J. *African Religions and African Philosophy*, Heinemann, 1969, at 108.

be exhaustive, one such example is the work of Nigerian philosopher Ifeanyi Menkiti.<sup>469</sup> He argues that, 'I am, because we are; and since we are, therefore I am' asserts the superiority of the community over the individual in metaphysical terms. In the strongest possible terms, he argues that, "the reality of the communal world takes precedence over the reality of the individual life histories, whatever these may be."<sup>470</sup> In doing so, he seems to generalise almost to a fault about western academic traditions when he suggests that communalism is what makes the African individual distinct from her western counterpart. Perhaps what he meant to say is that communalism makes the African distinct from the abstract individual, thanks to liberalism. There are really not many dividing lines between African communalism and western communitarian thought on this metaphysical standpoint.

Menkiti's views are open to contest, and it is no surprise that they have been questioned by African philosophical accounts. To recall, the work of Ghanaian philosopher Kwame Gyekye<sup>471</sup> has shown that the African is far less constrained by community than Menkiti seems to suggest. What Menkiti achieves is an exaggeration of the normative status and power of community over the individual. The individual is constituted by other influences apart from her community. Furthermore, and again to recall from the analysis of Gyekye in the previous chapter, individual autonomy is not something earned from one's duties to community; it is something that can be established in the theistic and non-theistic sense.

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<sup>469</sup> See, Menkiti I. 'Person and Community in African Traditional Thought,' in Wright R. *African Philosophy: An Introduction*, University Press of America, 1979, at 171. See also, Menkiti I. 'On the Normative Conception of Person', in Wiredu K (ed.) *A Companion to African Philosophy*, Blackwell Publishers, 2004, at 324.

<sup>470</sup> Ibid.

<sup>471</sup> Gyekye above n. 433.

Besides (and for purposes of this thesis), Menkiti does not articulate a view about what the community is, or what it should or should not be, even though his views on the metaphysical composition of the individual seem to give some indication of what he means by the term. He is perhaps speaking about only a tribal or ethnic community in which individuals have no choice over their identity. From his views of the metaphysical composition of the individual, a person's identity is almost exclusively defined by tribe or ethnicity, and furthermore, by the performance of duties. Those arguments sufficiently indicate that what Menkiti might think of community is really quite impoverished. They are not impoverished because they privilege primordial ideas of community. After all, it will be wrong to deny that these are the most important defining features of individuals in any given society. Menkiti's vision is not wrong because of the appeal to tribe or ethnicity as constitutive of community. Rather, it is narrow because it seems to suggest that ethnicity or tribe are the only constitutive sources of an individual's identity, as well as one's social relationships. It fails to recognise that individuals have more than one source of communal identity, which are formed by different interactions and relationships shared with others. Our ethnic, tribal and linguistic identities might be important but they are not the only ways in which community can be understood.

A direct consequence of exclusively defining community which re-enforces the problem above is that it is articulated in profoundly nostalgic terms. It is encouraged by the appeal for the restoration of primordial values, identities or norms believed to have been lost either as a consequence of colonialism or capitalist modernity. Without reviving such values or practices, as it is often argued, social change would seem impossible. It is not that there is a problem with primordial representation of community; the difficulty is rather that

they are often expressed in melancholic terms. A corollary effect is that it gives a false depiction of the community itself – it is depicted as a place without conflict or disharmony. Attempts to assert traditional or cultural authenticity is an exaggeration of the potentials that lie within a community, especially its capacity to resolve the problems expected of it. The attempts to rediscover lost values of family, hard-work or cooperation found in a traditional community not only exaggerate, but generalise that these values existed in all communities of the past. To describe this in the words of a critic of the African authenticity, “the traditionalist perspective paints the African world before colonialism as peaceful, cooperative, and fulfilling. Order, authority, and hierarchy, in this vision, created families and communities without discord, unhappiness, or alienation.”<sup>472</sup> As such, there is a lack of appreciation of the hierarchies and divisions within or between nostalgic communities and families.

We cannot, of course, deny the values of history or tradition – these are, after all, values that make us who or what we are today. At the same time, we must not over romanticise with such aspects of history, especially in ways that overlook how they might contribute to a number of problems today. The grip of tribe and ethnicity, and the violence it often provokes in many parts of the world, not necessarily in Africa, arises from this problem. The question then becomes how can community be re-imagined in new ways that build on the strengths of the past, but at the same time, discards its weakness? How can community to be re-imagined without necessarily denouncing aspects of its authenticity, but including other values which have now become part of the reality in African societies? More so, how can community be defined in ways that unlocks the grip of tribe, ethnicity or religion as the only source of one identity or social relationships? These are all similar and difficult questions, but some answers can be found if we think of community – as Selznick

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<sup>472</sup> See, Howard above n 427, at 86.

suggested – as a variable aspect of a group’s social relationships. This helps recognise other – at least more contemporary social relationships – as valid communities. It does not discard tribe, ethnicity or religion as valid communities; neither does it valorise one over the other. Instead, it finds space to accommodate all of them. This is something – as will be considered next – that can be explored through the writings of both Amartya Sen and Giorgio Agamben.

## 2.4. Re-imagining Community

One important way of overcoming such narrow depictions of community, particularly recognising other experiences which are constitutive of our communal identities can be found in Amartya Sen’s book entitled *Identity and Violence: The Illusion of Destiny*.<sup>473</sup> Sen’s contribution is not about community, but rather about the universality of humanity, a point, however, that thinking about community can also profit from. Sen is animated by identity related violence, which, he suggests, emerges from the tendency to depict identity in singular terms. This has, and continues to be the source of many conflicts across the world today, including the September and post-September 9/11 conflicts.<sup>474</sup> The pursuit of single-based identities, Sen concludes, can be used to fuel violence and to kill without regret.

Sen’s point of entry into these discussions is taken through an explanation of the contradictory nature of identity.<sup>475</sup> On the one-hand, it can be a great source of strength, pride, comfort and encouragement for many. He acknowledges that it has served as an

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<sup>473</sup> See, Sen A. *Identity and Violence: The Illusion of Destiny*, Norton and Company, 2006.

<sup>474</sup> The informal definition of citizenship in Nigeria is based on a similar question of single identity. It has created what has become known as the *indigene and settler* dichotomy. This has in turn fuelled numerous conflicts – including in the city of Jos. It is indeed a different dimension to the problem Sen is speaking about. See, Adesoji A. ‘Indigeneship and Citizenship in Nigeria: Myth and Reality’, 2(9), *The Journal of Pan African Studies*, 2009, at 151-164. See also, Mandami M. Political Identity, Citizenship and Ethnicity in Post-Colonial Africa, paper presented at *Arusha Conference, New Frontiers of Social Policy*, 2005.

<sup>475</sup> Sen above n 474.

important foundation for the pursuit of inclusion and social justice. Sen argues that one cannot overlook some of the successes of identity politics today, as it has served as an important way of bringing the plight of certain minority groups to attention. At the same time, identity has encouraged conflict, as group or communal solidarity has tended to be matched by group hatred and discord. The inclusion shared within certain groups tends to exclude others. According to him, the gift of inclusion has corresponded with the adversary of exclusion. This can be traced back to the pursuit of single identity as its main cause – the imposition of a single identity either by, or without choice, is often the source of violence and exclusion.

Sen's central thesis is quite rational. Individuals are not defined by single but shared relationships, which are indeed constitutive of the different ways our identities are formed. Consider this example: "a Hutu laborer from Kigali may be pressured to see himself only as a Hutu and incited to kill Tutsis . . . he is not only a Hutu, but also a Kigalian, a Rwandan, an African, a laborer and a human being."<sup>476</sup> The point is that, individuals have more than one identity, which extends beyond culture, religion or nationality. To put this argument into the perspective of community, we are all certainly members of more than one community. Our (communal) identity sometimes overlaps across nationality, class, gender, race, ancestry, language, amongst others things. The remedy then following Sen's logic is to maximise – and not diminish – the plurality of our identities. The power of competing identities is that it reinforces what we share in common – that is, our common humanity. But, the difficult question is how can or should our multiple identities be maximised? Sen seems to think that this can be made by choice, even though he acknowledges that such choices are difficult to make. Besides – a point that Sen agrees with but does not resolve is that – it might be easier to choose or reject certain

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<sup>476</sup> Ibid., at 4.

identities, but what is more difficult to reject are identities ascribed on us by others. He doesn't adequately address this question and also why certain identities take priority over others, or even how conflicts between identities can be resolved. These are generally very difficult questions, however, some of Sen's suggestions above about encouraging people to understand different ways in which they are connected to each other is a helpful way out of such problems. In doing so, Sen believes in the power of critical reasoning in exploring this possibility and reducing some of these problems. In contrast, Sen rejects communitarian theories that suggest that identity is something predetermined by a fact of nature, as such, not open to critical reasoning.<sup>477</sup> Agreeing with Sen, received identities, customs, traditions and practices should always be open to critical scrutiny. They are not in any way unquestionable. Reasoned questioning is the only way we can explain changes in abhorrent conservative practices today. The point is that we should never leave such things unquestioned otherwise we would succumb to unacceptable conservatism.

It is not difficult to see the value of such ideas. They undoubtedly help address the tendency of community to exclusively be understood in ethnic, tribal or religious terms. More importantly, by understanding that we belong to multiple communities, we may understand how we connect with others in other ways, and in ways that bring out the shared nature of our humanity. This is one of the more interesting points that comes out from Sen's work above. It is really about human interdependence – about how individuals are all connected to each other in multiple dimensions. A view of community – as in my narrative in the beginning of this chapter– does also analogise this point. It shows the interlocking nature of relationships that cannot readily be reduced to a single affiliation. This is the point of referring to a community in the *metropolis*. It is used to suggest that the

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<sup>477</sup> Ibid., 32-36.

richness and diversity within metropolitan communities can encourage thinking out of the narrow perceptions of community. It is not – as suggested in the previous chapter – meant to imply that metropolitan communities should take priority over rural communities. Whilst the bounds in residential areas may not be as strong as those of family, tribe or ethnicity, shared space – the neighbourhood – can be a different source of solidarity amongst strangers. What is important is that it doesn't negate opportunities of belonging to other communities. It is also not a suggestion that the relationships within metropolitan communities are unproblematic or without conflict. Not all neighbours get along or are expected to get along. The fact that such problems exist does not mean that they cannot be overcome or at least reduced for purposes of participation. This can be achieved by emphasising on the more positive relationships or the problems that affect everyone collectively, rather than the things that divide.

Giorgio Agamben's work on *The Coming Community*<sup>478</sup> achieves the emphasis on humanity in exactly the opposite way from Sen by negating any condition of belonging to community altogether. I am not concerned about the differences between their approaches, but rather how they arrive at the same conclusion. It is also important to begin by noting that Agamben looks at the difficulties with community from the perspective of metaphysics. His attempt is to offer a vision of community in ways that it can transcend either identity or universality as a criterion of belonging. Agamben takes as his starting point the limitations of community, and attempts to re-imagine it in a way that it can exist without exclusion. In a rather dense and complex formulation, he suggests that this can be achieved if conventional standards of belonging or singularity are re-conceptualised by an understanding of what he calls "the whatever being":

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<sup>478</sup> See, Agamben G. *The Coming Community*, Hardt M (Trans.), University of Minnesota Press, 1993.



...The whatever in question relates to singularity not in its indifference to a common property (to a concept, of example: being red, being French, being Muslim), but only in its being such as it is. Singularity is thus freed from the false dilemma that obliges knowledge to choose between the ineffability of the individual and the intelligibility of the universal.<sup>479</sup>

The coming community is not constituted by individualism or universalism such that it excludes others from it. Rather, the coming community understands and represents the multiple or horizontal relationships that exist in society. It opens up the community to more inclusive and fluid interpretations. For Agamben, this rests on understanding the concept of singularity in ways that are not attached to any condition of belonging, whether it is biological, or social like class, or tribe, or race, or ethnicity. Rather, it should be defined on its own terms, or for want of a better description, this singularity is not representable. The point is that there really are no words that can describe this community; the condition of belonging can only be represented by itself.<sup>480</sup> This is something, Agamben says, that can further be established from a rather mundane example of love. Love is a good example of the condition of belonging in the coming community. It is “never directed toward this or that property of the loved one (being blond, being small, being tender, being lame), but neither does it neglect the properties in favour of an insipid generality (universal love).”<sup>481</sup> Thinking of community can certainly benefit from the above. It illustrates how new communities might be constituted without prior conditions of belonging – that is, without rules, duties or identities.

In doing so, it also calls dominant way of thinking about solidarity into question once new ways of mobilising community are appreciated. Solidarity is built through undifferentiated singularities, which are reconciled by belonging rather than the

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<sup>479</sup> Ibid.

<sup>480</sup> Ibid., at 24-25.

<sup>481</sup> Ibid.

“conditions of belonging itself”.<sup>482</sup> It is built across different categories by creating diverse relationships of being with others. Unfortunately, Agamben’s views above may seem too abstract to be useful, apart from being extremely difficult to propose in practical terms. Even Agamben (as noted above) recognises that no language can adequately depict the coming community. But at least one can argue that it may be regarded as an example that can attract practice to it. After all, the right practical solutions cannot be made available without a background philosophy. Besides, such questions are equally about a change of *mindset* as they are about the legal and institutional frameworks that can attract practice to them. Whilst it is true that framing the right kind of law or designing the right institution might be an important way of achieving such goals, but it is all contingent upon getting the philosophy right from the outset.

One problem that still needs to be overcome is that, not only does it depend on how to understand community in different ways, but also how it is defined without the problems of nostalgia. This is difficult, but also important since single based depictions of community are also a product of this sort of thinking. One way of overcoming this is made possible through the work late Ghanaian President, and philosopher, Kwame Nkrumah. Although his idea of *philosophical consciencism*<sup>483</sup> was proposed for a different objective in mind, it provides a useful analogy for encouraging new thinking of community, particularly in the African continent.

*Philosophical consciencism* is helpful in this context because it attempts to grapple with the notion of African identity and society in light of colonial and postcolonial

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<sup>482</sup> Ibid., at 85.

<sup>483</sup> See, Nkrumah K. ‘Consciencism: Philosophy and Ideology for De-colonisation’, in Eze, E. *African Philosophy: An Anthology*, Blackwell Publishers, 1998, at 81.

experiences. Nkrumah's starting-point is how best to grasp the African society, which as suggested above, cannot be defined today solely by its authenticity. He acknowledged that there were three distinct influences that have come to shape what Africa or the African means today. Quite apart from African tradition, western (and Christian) modernity and Islam now call to question what is authentically African. Though his idea of a social revolution was an attempt to recover African authenticity, it was more inclusive and pragmatic than often acknowledged. It was a vision of African authenticity that recognised and accommodated the influence of western modernity and Islam:

What is called for as a first step is a body of connected thought which will determine the general nature of our action in unifying the society which we have inherited, this unification to take account, of all times, of the elevated ideals underlying the traditional African society.<sup>484</sup>

*Philosophical consciencism* is the key to the objective above, but really as a philosophy for practice. Nkrumah argued that no valuable practice could exist without *thought* just like *thought* cannot exist without practice. What Nkrumah meant is that the social revolution – he was proposing – had to be preceded by the intellectual revolution, one that had as its objective the task of reinventing African societies. This revolution, he urged, should be founded on a philosophy, which “must find its weapons in the environment and living conditions of the African people”.<sup>485</sup> Pivotal to this social and intellectual revolution is mediating between the historical fact of colonisation, the reality of decolonisation and the contemporary political, economic or social forms life. This is in essence what *philosophical consciencism* means:

[...] it is born out of the crisis of the African conscience confronted with the three strands of present African society. Such a philosophical statement I propose to name *philosophical consciencism*, for it will give the theoretical basis for an ideology whose aim shall be to contain the African experience of Islamic and Euro-Christian presence as well as the experience of the traditional African society, and, by gestation, employ them for the harmonious growth and development of that society.<sup>486</sup>

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<sup>484</sup> Ibid.

<sup>485</sup> Ibid.

<sup>486</sup> Ibid.

This was a very pragmatic attempt not only to interpret the nature of postcolonial Africa, but also the contradictory nature of African identity, in particular.<sup>487</sup> There was a realistic distinction between pre-colonial and postcolonial Africa, which has now become a melting pot of different people and influences. What this called for were processes of discursive engagement with the influences that now shape identity as well as the very nature of the body politic. Even though he articulated most of his ideas in nationalistic terms, Nkrumah was more forward looking and cosmopolitan in his outlook. Consciencism was cast in philosophical terms to provide the ideological underpinnings to re-invent Africa in light of these new experiences. To use his words again:

[C]onsciencism is the map in the intellectual terms of the disposition of forces which will enable African society to digest the Western and Islamic and the Euro-Christian elements in Africa and develop them in such a way that they fit into the African personality. The African personality is itself defined by the cluster of humanist principles which underlie the traditional African society.<sup>488</sup>

Nkrumah was not the only postcolonial leader with this vision, others such as Leopold Senghor's idea of *Negritude*, Kenneth Kaunda's '*Humanism*' and Julius Nyerere's '*ujamaa*', were all – with considerable differences – different attempts to assert African communal authenticity in the postcolonial context.<sup>489</sup> Take *ujamaa* as another example. Like Nkrumah, Nyerere shared the vision of building a postcolonial African polity on the basis of African communal principles. Again like Nkrumah's vision, *ujamaa* was at best a mixture of Fabian socialism, Catholic socialism and the application of principles of African communalism.<sup>490</sup> Nyerere gave primacy to extended family relations reminiscent of

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<sup>487</sup> Ibid.

<sup>488</sup> Ibid.

<sup>489</sup> See, Young J. *Postcolonialism: A historical Introduction* Blackwell Publishers, 2001, at 252 - 569. See, Nyeyere J. *Ujamaa: Essays on Socialism*, Oxford University Press, 1968, at 1-13.

<sup>490</sup> See, Ibhawoh B and Dibua. 'Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Quest for Social and Economic Development in Africa', 8(1), *African Journal of Political Science*, 2003, at 62-70.

traditional African society in his vision of a new African political community. Nyerere considered the family not antagonistic class relations as the basis for the socialisation of individuals. Nonetheless, it can be argued that Nyerere was overly romantic about pre-colonial Africa, especially in ways that have been criticised above. The social and cultural revolution he proposed, however, was to be achieved through an emphasis on education. And this was for the all important objective of reviving values of community. Like the others, there was a high sense of morality in community that needed to be revived, particularly African notions of reciprocity and care in community. These were themes rehearsed in Nyerere's Arusha declaration – the policy document that formally inaugurated *ujamaa*.<sup>491</sup> Like Nkrumah's consciencism, it was an attempt to integrate the strengths of traditional African communalism, and those elements ushered in by the colonial encounter. It was on this account far from a nostalgic or retrospective articulation of communalism.

In terms of rhetoric, the political, economic and social policies that emerged from it showed a preference for small-scale agricultural and industrial projects. In practice, there was little evidence of this, as nationalisation was pursued to the fullest, leaving the only alternative to a limited role for the private sector, which was allowed to preside over areas in which the State could not occupy. This was, no doubt a clear contradiction of the philosophy of *ujamaa* and the values of authentic African communalism it sought to espouse. Instead of this, developmentalism thrived as the postcolonial State colonised all aspects of social, economic and political life. Instead of reinventing the African, it re-enforced tribal, ethnic and national identities. Grassroots or community activity was, to say the least, either circumscribed or totally absent.<sup>492</sup>

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<sup>491</sup> Young above n 490, at 246. See also, Nyeyere above n 490.

<sup>492</sup> Adelman S. 'Constitutionalism, Pluralism and Democracy in Africa', 42, *Journal of Legal Pluralism*, 1998, at 73-88.

In spite of these limitations, or the fact that those ideas were deviated from in practice, they still can contribute to how we ought to think about community, amongst other things, today. It calls us to reflect on the strengths, commitments and failures of strategies and struggles of the past, in ways that reveal achievements, limitations or our unfulfilled aspirations. This is indeed one way of thinking of community as something new something new, and yet preserving the strengths of tradition and history. The idea of consciencism is also an important way of understanding the world we live in is different from the past, and now a product of a clash of cultures or values of conflicting worlds, those inhabited by complex individuals. After all, much of post-colonial Africa is different, rich and diverse from what it was in history. There are interlocking influences from across Africa, as well as influences from the western world. This, in my opinion, was what Nkrumah was talking about when he suggested that such influences have to be gestated along with the remnants of what is truly African. If this is the case, then, this helps us re-imagine community in different sorts of ways, not only on the basis of the past.

One further way of contributing to this objective is to conceive community in a temporal dimension – that is, as something that is always emerging.<sup>493</sup> What I mean is simply to think of community in asymptotic<sup>494</sup> terms, the end of which will always remain in a state of constant definition. That way, the identities or imaginary boundaries that often constitute communities will remain more open, given that they can never fully be determined. What this mean is to think of community as a state of ongoing definition and

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<sup>493</sup> One helpful analogy here is the way Emilios Christodoulidis speaks about ‘reconciliation’ in his important essay on the ‘truth and reconciliation’ process in South Africa. Reconciliation is a paradoxical way of rebuilding community, through some sort of solidarity generated by the conflicts which provoked the need for reconciliation in the first place. As such, reconciliation generates a risk that may or may not be overcome. The process of rebuilding community, therefore, is one “always attuned to the aspiration of being-in-common and aware of its vulnerability”. It always draws its meaning from a vision of a better future. Christodoulidis E. ‘Truth and Reconciliation as Risks’, 9(2), *Social and Legal Studies*, 2000, at 198.

<sup>494</sup> I wish to acknowledge and thank Professor Neil Walker for making me aware of this term.

re-definition, especially in ways that includes those that are not currently part of community. This is what I believe is the powerful analogy that one gets from the metropolitan residential community. Its membership always changes in time. Some members move out, whilst others move in. Some die, whilst others are born. Membership of this sort of community is never fully determined. It draws on its sense of history, however minimal it might be, but it also looks to the future to define what it is. It is a process that can never be concluded.

Unfortunately, these sorts of views have not often been emphasised enough in Nigerian thoughts or practices of community. Dominant views about community have often failed to acknowledge community in the temporal nature above, or that individuals are not only shaped by ethnic communal identities, but rather by a range of other communities. This is the reason why the arguments in this section are even more important for the Nigerian context. Irrespective of how hard this might be, it is what we ought to strive to achieve. Given that the following conditions might not exist in all communities, the question from the point of view of this thesis is how it can be encouraged, and furthermore, how communities can strive for collective solutions in the face of differences that may often contradict each other? After all, it is possible to understand that fundamental differences in a community can raise practical difficulties for collective organisation or participation. Any proposal for collective decision-making in diverse or multi-ethnic societies like Nigeria can only be achieved through dialogue. There must be an attempt for shared understanding of not only what divides, but also what unites members in community. It is only then that communities can understand what is shared in common. What is shared in common does not necessarily have to be common values, but could also common problems. Ordinarily, it should not really matter whether individuals

have irreconcilable differences; all that should matter is that they share a given territory, and that there are common problems within it that affect everyone. Indeed, it is possible to argue that the very processes of dealing with common problems may themselves motivate better understanding of the degree of interdependence that exists within community. This is arguably the most important moral from narrative about the Nigerian community. Even if it was short-lived, their common problems inspired discussions to search for collective solutions to substantially improve their security in ways that benefited all. In this sense, the proposals that follow must be seen as part of encouraging new thinking of community.

### **3. Community Participation**

The second component of the theory of community entails offering specific vision of how individuals can take part in community. It is based on the understanding that participation is dependent on certain local practices and institutions. This component is mindful of the fact that community participation is something that might emerge spontaneously, but it is also acknowledged that it is something that has to be engineered by conscious design. Not all communities are as unique as the Nigerian community in the beginning, which seemed to create the environment for participation. Even so, the narrative about the Nigerian community does raise important questions about how to sustain such engagements whenever they emerge, given that participation there was short lived.

Whatever the case may be, a lot depends on the ability to create the right social and institutional environment where individuals can become more accustomed to dealing with matters concerning their continued existence – including collective needs, norms and institutions – or other things that structure their lives. A component is required to



encourage suitable social arrangements that allow values and solidarities in community to prosper. And this entails institutionalising processes where values of kinship, solidarity, cooperation, reciprocity, sympathy and trust can be strengthened. Institutionalisation – used here in its loose sense – is a way of building stronger civic friendship, since this can create the environment for relationships outside the family structure, and more importantly, types of relationships than those encouraged by the State or market. Much of the literature on institutional design is quite helpful here. It elaborates on the importance of institutions in shaping the capacity of agents to acquire different behavioural habits and dispositions.<sup>495</sup> Without pursuing the language of institutional design too far, the point is that there is really no reason why the community cannot be understood as an institution that orients the behavioural activity of individuals within it. There is a much wider significance of institutionalisation. It may also have a further effect of increasing the normative content of democracy by localising it and promoting ideals of participation, equality, and empowerment or, in this case, human rights. More importantly – a point that will be pursued later – community participation is one way of contesting the narrow domain of politics, which is often restricted to political parties or formal public institutions.

The issues outlined above call the standard relationship between community and State into question. The discussions presented so far can so easily be misconstrued as an argument for community as an exclusive alternative. This is partly correct, in that the community doesn't necessarily have to be articulated in opposition to the State. Proposing the role for community is however a means of challenging the exclusivity of the State over

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<sup>495</sup> See, for instance, Hubert Dreyfus on institutions and the development of 'ethical expertise'. Dreyfus H. 'What is Moral Maturity? Towards a Phenomenology of Ethical Expertise', in Ogilvy J. (ed.) *Revisioning Philosophy*, State University of New York, 1992, at 111-123.

the production of human rights.<sup>496</sup> The strength of the argument is perhaps its weakness; the community must rely on the State (regional or local government's) to devolve its powers onto it. This will entail several things, one of which is the need to devise policies and programmes that would enable communities to participate in public affairs. These would, of course, vary as between budgetary allocations, training and recruitment of community workers, and most importantly, it would entail the creation of what might be called 'Community Forums' within neighbourhoods through which decisions over the provisioning of certain public goods (or human rights) can be subjected to democratic scrutiny. Given that this is an important component of this thesis, what follows is a more elaborate explanation.

### **3.1. Community Forums**

It is important to note from the outset that the use of the term Community Forums is slightly different from how it is used in an article co-authored with Maksymillian Del Mar.<sup>497</sup> There 'Community Forum schemes' were proposed to create a critical space for reflection on the limitations of our normative languages or institutions in seeing and responding to different forms of suffering and vulnerability. It was conceived as a space through which "the particularities of suffering and vulnerability within a specific community can be recognised and communicated in a multiplicity of ways."<sup>498</sup> In doing so, the schemes were proposed to serve as a main resource for policy making in relation to different problems, including those regarding public goods in different communities. The Community Forum schemes were to be composed of representatives of local communities,

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<sup>496</sup> I am also aware that the suggestions here have profound constitutional implications, which are, however, beyond the scope of this thesis.

<sup>497</sup> Del Mar and Onazi above n 41, at 361-362.

<sup>498</sup> Ibid.

government and international economic institutions, as well as local and external persons with scholarly and artistic specialisation. The inclusion of that element was an attempt to give a more comprehensive depiction of various forms of suffering and vulnerability, especially through media and other forms of representation. It was an attempt to move away from the over-dependence on dominant modes of representations, such as statistics, or economic analysis, or even political forms of expression or representation. This is consistent with the central thesis on *incompleteness* promoted in that article. In general terms, the article sought to provide a general theory to assess and improve the moral quality of work of international economic institutions, by rejecting the compartmentalisation of behavioural values – that is, activities that either appeal to rules, or forms of institutional design. The article called for a more integrated approach where normative resources that appeal to such different behavioural capacities can be reconciled – that is, a more balanced understanding of rules and institutional design. There was also a third element, one that focused on the application of the theory. It aimed at encouraging the ability of international economic agents to come into terms with the limitations of their ways of seeing and acting. There, Community Forum schemes were proposed to fulfil this aspect of this theory. It was conceived – with work of international economic institutions in mind – to create a space to encourage a variety of ways for actors within those institutions to see and react to problems.

Without in any way deviating too much from the original intention, the Community Forum, here, is framed quite differently even though there are certain aspects of the initial proposal that are retained. The first is the normative function of the Community Forum. It is indeed necessary to retain its function as a site for rehabilitation. It is a personal but yet collective space, where individuals face up to their limitations of their ways of seeing and

acting. In this case, it can be used to encourage critical reflection over common problems, especially in ways that appeal to the understanding of common values and differences. Participation of the kind proposed cannot succeed outside an environment of love, friendship, cooperation, mutual understanding, and most importantly, a space where the limitations of seeing and acting can be understood collectively. And it is not difficult to see how some of the insights from Simone Weil discussed in previous chapters is one way of achieving this. The Community Forum can serve other purposes, for instance, encouraging social activities, so as to assist strengthen relationships, quite apart from its primary reflective or deliberative function. It can serve as a way of building civic and other forms of friendships. As mentioned in chapter's one and three, Community Forums can provide a forum for discussions around competing values, particularly how tensions between the need to main individual and collective autonomy, amongst other values, can be reduced. In terms of its composition, this should be determined by the community in question, which might choose to include representatives of State, local government councils, and whosoever the community might deem necessary to participate. Most importantly, it must be open to all residents of that community.

The second aspect of Community Forum that is retained from its original form is the policy-making component – that is, Community Forums should be understood as a source for decision-making concerning problems of access to water, electricity, education or healthcare. The Community Forum in this context takes the view from below as its point of departure. It is interested in maximising the quality of interactions and the agency of community to instigate social change. It is in this respect ultimately interested in creating opportunities for self-determination and self-governance. The capacity for self-governance would, of course, vary from community; some communities would obviously

have more decision-making capabilities than others. This does not mean that this proposal should lose any appeal; it just means that poorly organised communities need to be encouraged in ways that they can fulfil their potential. This could also be achieved by retaining aspects of the previous proposals for the role of the State, scholarly (and indeed artistic) experts — in this case, the role of the latter will primarily be focused on facilitating dialogues, and nurturing the environment for collective decision-making. Community Forums as such, will ultimately form the main institutional framework for organising participation within neighbourhoods, as well as building solidarity around common problems, and democratic decision-making.

One should be clear that as appealing as this proposal may seem, it is a bit over-romantic. It is true that it is plausible to understand community as a catalyst for change through processes of critical reflection, solidarity and collective action. It is no doubt plausible to understand the importance of neutral spaces where individuals can make connections through aggregate personal experiences in trying to deal with the problems that affect the life of their community. They clearly need an atmosphere of patience, communication and shared understanding of collective problems. There will always be differences in how these problems are understood given the diversity of culture, history and social status that may make up a particular community. It is quite possible to speculate that communities may be united around a particular problem, but it is also possible that they would be disunited by attempts to find solutions. It is very possible that the richer or more privileged classes would not be opposed to solutions like privatisation. At the risk of speculation, this is a proposal that the poor might reject. The emphasis on what is shared — whether values or problems — can also serve as a precondition for conflict. We must not forget that, even in the most egalitarian of communities' exclusion, discrimination,

unreasoned decision-making, conflict, and disagreement always persists. The recent controversies surrounding the town hall debates over healthcare reform in the United States are clear indications of the kind of difficulties that can be predicted. It begs the following question for current purposes: how can possible differences be defended in the processes of participation without necessarily destroying the harmony in community? This is, of course, a very difficult question but some possible answers may be found in certain strands of deliberative democratic theory, which have sought to address similar problems. What this suggests is that decision-making in community needs a further component; it needs a theory of democratic deliberation.

#### **4. A Deliberative Theory of Incompleteness**

The aim in this section is to offer a deliberative theory suitable for participation within Community Forums. It is argued that participation within Community Forums can only be sustained through what is called a deliberative theory of incompleteness. It is a theory that embraces a range of deliberative traditions rather than a single one. In particular, it takes the standard deliberative democratic model as a starting point, but also accommodates criticisms of it, including alternatives proposed by radical democratic theories. As a consequence, no single theory of deliberation is privileged in the context of Community Forums. It begins by recognising the importance of dialogue but it does so without placing too much emphasis on consensus building. At the same time, it does not fall into the trap of over-emphasising disagreement, as these may have an effect on provoking the worst of outcomes in the most divided communities. As a result, this component defends views that suggest that agreements, including the rules about how to constituting them, ought to be understood as temporal settlements, which can be revisited and reworked in light of future circumstances. The potential of the approach adopted in this chapter can only be

appreciated in the context of a discussion about the strengths and limitations of deliberative democracy, and indeed, the radical deliberative alternative.

#### **4.1. The Primacy of dialogue**

The importance of deliberation automatically calls the prevailing conception of democracy into question. Deliberative theories of democracy have arisen out of the impoverished nature of the dominant aggregate model of democracy.<sup>499</sup> They are framed to respond to the limitations of the aggregate model, which is primarily concerned with the collation of voter preferences and the election of leaders. This is indeed the dominant model of democracy across the world, which is simply a process of competition by political parties and candidates to offer their platforms and attempt to satisfy the greatest amount of preferences. The aggregate model of democracy restricts political participation only to elections, representation and political parties. Democracy as such is understood instrumentally, as system of procedures with very little normative content.

There are, of course, many other problems with the aggregate model, which cannot possibly be discussed in this chapter, except to say that some of these problems are clearly visible in the context of Nigeria today.<sup>500</sup> For instance, being a plural society, competition for the control of the State has only reinforced the weakness of elections and representation, as a means of aggregating preferences and differences.<sup>501</sup> This is indeed

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<sup>499</sup> The aggregate model of democracy owes much of its influence to the work of Joseph Schumpeter. See, Schumpeter J above n 183.

<sup>500</sup> For interesting critiques of the aggregate model of democracy, see; Young I. *Inclusion and Democracy*, Oxford University Press, 2000. See, Benhabib S (ed.) *Democracy and Difference*, Princeton University Press, 1996. Mouffe C. 'For an agonistic model of democracy', in O'sullivan N. (ed.) *Political Theory in Transition*, Routledge, 2000, at 113. Gutmann A and Thompson D. *Democracy and Disagreement*, Harvard University Press, 1996.

<sup>501</sup> There are also questions about whether representation adequately deals with questions of difference. Representation is problematic for another reason, that is, it always sits at a distance from the needs and feel of the represented. According to Hardt and Negri, representation operates as a "disjunctive synthesis": "it

one explanation for the electoral related violence in the country, which has often taken religious and ethnic dimensions. Quite surprisingly, commentaries on the democratic deficit in the Nigeria<sup>502</sup> have failed to make these connections – and neither have they seen the need to engender more inclusive democratic models apart from questions of electoral reform.<sup>503</sup> Electoral democracy – as prioritised by the aggregate model – is an insufficient way of responding to these problems; instead, what it seems to encourage is deep discord. Democracy becomes the competition for the control of the State at different levels, most often by the competing identities, vulnerable to capture by dominant elites. This is, of course, very often achieved by the manipulation of the electoral system. Seen this way, there are perhaps wider implications of deliberative democratic theories than their relevance to Community Forums; they no doubt can enrich the practice of democracy in the country. It is not possible to pursue in detail how this might be achieved, except to say that deliberative theories of democracy provide a useful way of responding to the superficial nature of aggregate models of democracy, given the primacy of elections as the most important form of democratic expression. The starting point for most deliberative theories is that all political decisions within a body politic must be reached through processes of dialogue amongst free and equal citizens.<sup>504</sup> Theories of deliberative democracy are interested in creating various forums for dialogue, in which decisions of a

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simultaneously connects and cuts, attaches and separates” the represented from government. Hardt and Negri above n 67, at 241.

<sup>502</sup> Except for Ilan Kapoor’s interesting article which compares Habermas’s and Mouffe’s approach to deliberative democracy, not much has been done to situate deliberative theories of democracy within the wider context of Third World politics. Mouffe’s work constitutes a slight exception as it is mentioned in the work of Arturo Escobar in relation to social movements. But, it must be noted that, like Habermas, Mouffe does not really have Third World politics in mind when she proposes her theories of agonistic pluralism. See, Kapoor I. ‘Deliberative democracy or agonistic pluralism? The relevance of the Habermas-Mouffe debate for Third World Politics’, 27 (4), *Alternatives: Global, Local, Political*, 2002, at 459-487.

<sup>503</sup> Nigeria has a long history of violence, not the least electoral violence since its inception as an independent country in 1960. However, there seems to have been an escalation of (electoral related) violence in more recent times with the end of military rule, and the emergence of democratic politics from 1998. The appeal to violence around elections is a testimony of the weakness of the dominant aggregate model, especially the inadequacy of elections in dealing with deep difference. Surprisingly, the only attempts at democratic reform, quite visible from elite grievances, only address questions of electoral reform.

<sup>504</sup> Mouffe above n 501.



public nature can be influenced. Deliberative democracy is not particularly concerned with the conduct of elections or even plebiscites.

Deliberative models of democracy are mainly framed to respond to the deficit in participation, the absence of which is believed to account for the formal nature of democracy today. Deliberative democracy attempts to assert a normative dimension to democracy by creating sufficient procedures for dialogue, with the aim of guaranteeing agreement between parties. The key for a successful democracy for deliberative theorists is the removal of structures that impede authentic dialogue, so as to foster agreement between parties. There is an underlying emphasis on finding agreement, the probability of which lies in creating incentives and ensuring the commitment of groups to sustained dialogue. The main presupposition is that in deliberation parties in conflict propose their respective positions and solutions to collective problems by offering reasons for them. Such reasons put forward by individuals are then criticised, as they also criticise proposals and reasons of others. Deliberative democracy encourages participants to be concerned with the interests of others, just as they are concerned about their own interests. This is, of course, on the condition that such interests are ultimately compatible with the interests of justice. Deliberative theories of democracy aim to reduce the influence of power in political decision making. They posit that the outcomes of deliberations should be reached by reasoned argument, without threats or the use of force. Deliberative democracy is considered as a superior way of dealing with the most difficult political questions, as those that concern groups and identities with deep differences. It is a more plausible way of reducing, if not, eliminating the aggressive instrumental nature of partisan politics. Theories of deliberative democracy presuppose that dialogue can only function with the

right type of institutions. And this would reduce the possibility of domination of individuals by other individuals or groups.

Dialogue is, for instance, the primary objective of Jurgen Habermas's<sup>505</sup> procedural theory of democracy which, amongst other things, attempts to provide a framework for unhindered channels of communication in what he calls the public sphere. Habermas's theory builds on his early ideas about the bourgeois public sphere in the European eighteenth century, which he described as an avenue for a whole range of debates over diverse public issues. The public sphere comprised of a whole range of spaces of a public nature, including salons, literary societies, cafes or it included the formulation of public opinion through the media.<sup>506</sup> To put it simply, the public sphere is an open space for informed public discussion over issues that benefit everyone in society. Individuals achieve this by engaging in rational-argument over such public issues. The only condition for achieving success is that they leave out their vested interests or preferences. The public sphere is conceived as a non-coercive, secular, and rational arena. The public sphere is described as a space that accommodates everyone who participates without limiting their input on themes, questions, time, resources, or the actual content of the discussions. It recognises the value of individual rights to ensure the protection of citizens from others, and the State.

All these permutations about the public sphere can be found in Habermas's more recent focus on deliberative democracy, a theory of which is depicted as the rules or

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<sup>505</sup> See generally, Habermas above n 448. See, Calhoun C (ed.) *Habermas and the Public Sphere*, MIT Press, 1994 at 2. For an interesting critique of Habermas's concept of deliberative democracy, see; Scheuerman W. 'Between Radicalism and Resignation: Democratic theory in Habermas's *Between Facts and Norms*', in Dews P (ed.) *Habermas: A critical Reader*, Blackwell Publishers, 1999.

<sup>506</sup> Habermas J. *Structural Transformation of the Public Sphere: An inquiry into a Category of Bourgeois Society*, Burger T and Fredrick L. (Trans.) MIT Press, 1989.

procedures to assist reduce the possibilities of disagreement in the process of public decision-making. Democratic will-formation, as he calls it, is dependent on public conversation according to certain procedures and reason. Public deliberation is only guaranteed through fair procedures, which in turn facilitate “ideal speech situations”<sup>507</sup> – that is, inclusive, non-coercive, and open deliberative procedures. For him, the agenda and participants should not be restricted by any rules that impede the deliberation. All that matters is that individuals initiate an agenda or show that they are affected by the subject-matter of deliberation. Habermas does concede that procedures may not always sufficiently accommodate all interests or always encourage agreement. Nevertheless, the ultimate goal is for procedures that are acceptable to all, and this in many ways depends on their moral impartiality. Agreement, on this view, emerges only when the procedure is neutral to competing moral views. The processes of deliberation as such, ensure conditions for ideal discourse. Dialogues must be open amongst equal participants to be effective. This depends on consensus building as a means of ensuring that all interests are taken into consideration. According to him, these procedures must be constitutionalised in order to give them legitimacy, apart from providing criteria for rich democratic politics. The ultimate goal is to increase the area of influence of the public sphere and to ensure the accountability of administrative or bureaucratic entities. Rationality is important in deliberations, which must in itself be communicative through arguments and counter arguments. Decision-making must be based on consensus, which can only be transformed by the strength of better arguments. Whatever the case may be, all decisions (as already mentioned) must be reached through reasoned argument.

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<sup>507</sup> See, Habermas J. ‘Three Normative Models of Democracy’, in Benhabib above n 501, at 21-30.

### 4.1.1. Application of Theory

It is not difficult to see the ideas above about deliberation might be a potentially useful resource for decision-making within various communities and their respective Community Forums. What it entails is repeating some of the practices of deliberation within such Community Forums. The proposals for deliberation here are quite modest; they are not – like most deliberative theories – concerned with participating in wider political decision-making processes of the State. Neither are they concerned with deliberating in decision-making processes of market institutions. The concerns here depart from the standard deliberative democratic theories, which are framed with institutions of the State – such as legislatures, courts, public enquiries, committees, and administrative tribunals – in mind. The concern for deliberative theories has rarely been about participation beyond those spheres, except in the case of formal consultation exercises. Even in such situations, the goal of deliberation is really to influence rather than directly take control of governance.<sup>508</sup> This is quite different from what Community Forums seek to achieve; the aim here is to take part in governance.

Deliberative theories of democracy are relied upon here to understand how individuals in community can actually participate. And this makes them very relevant for the work of Community Forums. Habermas's work in particular achieves this by importantly recognising the communicative power of civil society, even though it does not seek to give real control or ownership over processes of actual governance. His more recent theories are succinct in this respect, given that they are reformulated in light of criticisms of the public sphere for its narrow base for participation. After all, the public sphere in its original form is conceived as a single arena comprised of educated middle-

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<sup>508</sup> Iris Young makes a similar argument by what she calls the decentred model of deliberative democracy, see; Young above n 501, at 46.

class gentlemen with the gift of eloquence or rational argument. Nancy Frazer's formulation of *subaltern counterpublics*<sup>509</sup> or multiple arenas has been particularly helpful in increasing the scope of participation, especially for subordinated groups whose status naturally excludes them from the public sphere.

But even if the public sphere has benefited from such reformulations, which now allow it to include excluded groups, it does not seem to adequately respond to further problems and limitations with the deliberative model of democracy. This is mainly the inability to deal with deep disagreement and difference within such spaces, not the least in fragmented societies. After all, formulating alternative sites for marginalised groups to inscribe their own imaginations into politics – like Frazer's subaltern counter-publics – does not go far enough to question the exclusion unique in those contexts. Problems of exclusion can be anticipated even with subaltern counter-publics, quite apart from questions of disagreement and conflict. The point is that, there is a further need to understand how conflicts and disagreements can be addressed within those contexts.

The point that I am trying to make is that Habermas's deliberative theory cannot simply be dispensed with in light of the observations above. Even in saying so, there are difficulties with it which need to be understood, and then transcended to make it more relevant to Community Forums. One potentially useful way of understanding the limitations, and at the same time, a potential way of re-thinking deliberative theory is

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<sup>509</sup> Nancy Frazer challenges the unitary bourgeois public sphere and deliberative processes therein. For her, the unitary public sphere is not capable of meaningful impacting on societies with deep social and economic inequalities. These deliberative processes would only replicate the inequalities in society in favour of the socially and economically dominant, who in turn can be expected to dominate proceedings or forums. Instead of speaking of one public sphere, she speaks of a range of public spheres. Quite apart from multiple public spheres, she argues, that disadvantaged groups formulate alternative publics to break the hegemonic relationship that exists between different publics in relation to the poor. This is what she calls *subaltern counterpublics*. Fraser N. 'Rethinking the Public Sphere: A contribution to the critique of actually existing Democracy', in Calhoun above n 506, at 109-142.

provided by the work of Iris Marion Young.<sup>510</sup> She mounts several criticisms of deliberative theory, which cannot be explored here in detail. For the moment, only certain aspects of her criticisms which seem relevant to Community Forums are considered in this context. The most interesting point she makes in this regard can be seen from her criticisms of the dominant form of political communication in deliberative democratic theory, which – as seen above – places emphasis on reasoned argument. It gives priority to a chain of reasoned argument, beginning with a premise and leading to a logical conclusion.<sup>511</sup> Whilst the importance of good arguments cannot be overlooked, Young argues that, they are not the only method of political communication. Most theories usually depict deliberation as something that proceeds on the basis of generally accepted premises, concepts and frameworks, including the types of speech permitted. One consequence is that, it may disguise certain expressions that do not readily fit into those accepted categories or modes of expression. Formulating general rules or practices for deliberation cannot prevent certain problems that do not find expression in the language already agreed upon. The norms of articulation she speaks about are typical of the forms of expression common of “highly educated people.”<sup>512</sup> It is often the case that written, formal, general or circuitous speeches take precedence over other modes of expression.<sup>513</sup> This is perhaps because the norms of articulateness, as she puts it, are culturally specific. Socially privileged individuals usually have better qualities of expression than others. Because of this, deliberative processes are not open to everyone in equal terms. Though public speaking may be difficult, everyone should nonetheless be encouraged rather than

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<sup>510</sup> Young above n 501, at 37.

<sup>511</sup> Ibid.

<sup>512</sup> Ibid.

<sup>513</sup> Young also argues norms of good argument often exclude modes of political communication which are disorderly or disruptive. Ibid at 47.

discouraged from participating, even if they fail to express themselves according to “culturally specific norms of tone, grammar and diction”.<sup>514</sup>

The second limitation with deliberative theories that needs to be transcended is that it usually presupposes discussions around the common good. The idea of the common good here is simply understood as common problems that need to be addressed collectively without any pretensions of the existence of common values or interests. It is usually proposed that such values and vested interests should be kept away from such public debates, and confined to the private sphere. There are usually two ways of interpreting the common good in deliberative theories. First, they refer to some shared values prior to discussions, which would provide a basis for deliberation. Alternatively, they refer to common values, which deliberation should strive to achieve. Both positions, Young argues, are wrong.

First, it is doubtful that this would be a plausible theory for plural societies, where values and interests would always be in conflict. A common good based theory of deliberation only succeeds in circumscribing the public sphere, limiting it only to those values that can be found compatible. In doing this, it tends to exclude incompatible values or interests. There are similar problems with the alternative way of understanding the common good view of deliberative democracy – that is, those views that propose a certain common objective that deliberation should strive to attain. This approach is predicated on the ability of individuals who, in spite of their differences (i.e., background or identity), shelve them for purposes of the common good. In such a case, differences must either be

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<sup>514</sup> Ibid. This is perhaps something that can be assisted by the inclusion of artistic experts in initial proposals for Community Forums. See Del Mar and Onazi above note at 41.

domesticated or transcended by public discourse. Asserting such differences and vested interests must be kept out of the arena of deliberation.

Chantal Mouffe<sup>515</sup> seems to agree with this criticism in her critique of the work of John Rawls and Jurgen Habermas. She, like Young, rejects prior agreement as a starting point for deliberation. For Mouffe, deliberative democrats seem too fixated on the question of consensus and rational agreement, thereby ignoring the conflicting nature of democratic politics itself. Mouffe, as will be demonstrated later, offers an agonistic model of democracy in response to the limitations of deliberative democracy. Her starting point is the rejection of consensus, and she proposes a theory of politics that acknowledges the inevitability of disagreement. For her, democratic politics should be about maximising all opportunities for disagreements to be expressed. Mouffe's main grievance is that the emphasis on agreement only succeeds in disavowing the value pluralism that exists within society. The argument for deliberative democracy is, after all, that consensus can be reached if, and only if, certain vested interests are kept beneath the surface of dialogue.

Before looking more closely at Mouffe's perspective, it will be helpful to explore a few more reasons why the common good approach is problematic, and in this respect, how their limitations can be transcended. On the general level, the common good approach is not capable of dealing with conditions of deep social inequality. Differences in social status or economic position will prove advantageous to some, but they will always also be disadvantageous to others. This was one of the implications of the story of the Nigerian community in the beginning, where the poor rarely attended meetings because of their inferior economic and social backgrounds. But, it must be recognised that this is a problem

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<sup>515</sup> Mouffe above n 501.



that may not be easily overcome even if the poor are able to participate. It may only lead to the formal inclusion of the poor in certain deliberative institutions.

There is a further difficulty with the over-emphasis on the common good. Young says that it is likely to narrow the agenda for discussions, thereby effectively silencing certain view points. A good way of addressing this problem, as she suggests, is that rather than think of deliberation in such terms, individuals should come to the table without pre-conceived notions about how collective problems should be addressed. Parties to deliberation should not be in a hurry to accept a common good in ways that the consensus model presupposes. Real agreement only emerges when parties are willing or open to change their original positions. A more productive approach would be to think of this as an open ended, and context specific process of cooperation. As such, decisions on particular problems can always be revisited and open to change. In this way, methods of resolving specific problems might be agreed upon without repressing various differences.

Whilst the following insights are valuable, it must be recognised that, the concerns by Young and others should not ordinarily affect Community Forums. The anxieties above may be exceptional, and they are not always the norm. The point is that problems relating to access to water or electricity are not so difficult to identify, and it is possible to have dialogues around such commonly held problems, or the common good. The potential difficulty, however, is with the nature of decision-making process. It is here that Young's insights will be most useful. On her approach, decisions should not be preconceived before processes of deliberation. At the risk of being too speculative, what this may entail is that solutions could range from the direct involvement of community say, through co-

operatives to other market alternatives, i.e., through an independent private provider, or even by resorting to the role of the State. What matters the most is that such decisions over choices are not be preconceived prior to deliberations. This, as has already been highlighted, is one of weaknesses of the Bretton Woods Institution's participatory approaches as discussed in chapter two. Participation does little to change the preconceived content of such policies.<sup>516</sup> Policy decisions are often reached before they are offered out for participation.

One inescapable aspect of this question of openness in dialogue is the recognition of the inevitability of conflict and disagreement. The emphasis on consensus (in a bid to preserve the common good) can sometimes be articulated in such a way that it seeks to remove divisive issues from the subject of discussions. In doing so, it may have an effect of silencing issues that are the source of discontent or harm to parties in deliberation. Dialogues or even solutions that are produced by such dialogues are not likely to be sustained if they are reached under the pretensions of consensus. Alternatively, agreement is better reached and sustained through mutual acknowledgment and cooperation amongst individuals, in ways that bridge their differences. In such a situation, agreement will always be temporal and always be open to constant negotiation and renegotiation. In conditions of deep structural conflicts, Young argues that such processes of “political communication are more about struggle than agreement”.<sup>517</sup>

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<sup>516</sup> In the next chapter (chapter seven), I revisit the question of access to electricity, and the extent to which an ‘electricity co-operative’ may be a potential alternative to deal with this problem.

<sup>517</sup> Young above n 501.

Quite a similar approach is that offered by James Tully, who proposes a brand of constitutional democracy based on the irreducibility of differences.<sup>518</sup> Again, it must be noted that, the point I am concerned about is quite different from Tully. He is concerned with the legitimacy of constitutional practices in light of the principles of constitutional democracy. For him, a constitutional democracy is legitimate if it upholds certain principles, one of which is the practice of agonistic deliberation. This is because the exercise of democratic freedom carries the requirement that citizens ought to participate according to rules, principles and procedures in democratic-constitutional institutions or various policy related activities. In highlighting the importance of participation, Tully fleshes out a unique brand of agnostic politics, which ought to serve as a precondition for democratic legitimacy. And it is here that his approach can be linked up with the Community Forums, especially his emphasis on the temporal nature of agreements, and furthermore, the importance of mutual recognition. Here agreements are seen as temporal settlements, which are always open to negotiation, given that no final agreement can ever be reached. Agonistic dialogues according to Tully's should be modelled on a framework that recognises the irreducibility of disagreement. Disagreements are irreducible because there is no final consensus on the subject matter of deliberation, including the principles or procedures, which regulate such processes:

Agreement, when it occurs, is always non-consensual to some extent. At its best, free individuals and groups establish a certain provisional overlapping consensus as the result of a critical dialogue within and on the spatial-temporal field of power and norms in which they find themselves. But, for any number of reasons, the best of agreements remain potentially open to reasonable disagreement and dissent.<sup>519</sup>

It is not difficult to see how the proposals above can be repeated within the Community Forums. The deliberative theory of incompleteness would place emphasis on processes of

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<sup>518</sup> Tully J. 'The Unfreedoms of the Moderns in comparison to their ideals of Constitutional Democracy', 65, *Modern Law Review*, 2002, at 210. See also, Tully J. 'The Agonic Freedom of Citizens', 28, *Economy and Society*, 1999, at 116.

<sup>519</sup> *Ibid* (1999), at 170.

negotiation, bargaining and compromise, processes in which positions can be altered with the benefit of hindsight. Participants to dialogues can always “...start over again, reach a provisional agreement or agree or disagree or agree to disagree...”<sup>520</sup> It is important to understand that there is a premium placed on deliberation only in so far as it recognises the irreducibility of disagreement. But, there is a much wider significance of such processes of agonistic deliberation; it seems to offer more scope for inclusion. Everyone is allowed to participate, so are the rules of participation open to question. This is not surprising, given that agonism generally works within a framework of pluralism, one that recognises the diversities with the same degree of equivalence.

To underscore the importance of maximising pluralism, it will be helpful to consider a similar approach to Tully’s, even though its conclusions are quite different, and only partially helpful for the theory of incompleteness. Along similar lines with Tully and Young, Chantal Mouffe’s theory of ‘agonistic pluralism’ cannot be overlooked in light of Community Forums.<sup>521</sup> Agonistic pluralism and theories of deliberative democracy are united on the limitations of the aggregate model of democracy, but depart on alternatives proposed to it. The main difficulty (and point of departure for Mouffe) is that the consensus-based model does not accommodate ethical, cultural or other backgrounds in the pursuit of agreement. Again, it is important to emphasise the relevance of Mouffe’s work, for present purposes, is different from which she herself intends – that is, she intends to propose an alternative to the deliberative theory of democracy. The relevance of Mouffe’s work here is how it might assist in encouraging pluralism within Community Forums in decision-making processes. This cannot only be appreciated through a background explanation of Mouffe’s central ideas.

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<sup>520</sup> Ibid at 171.

<sup>521</sup> Mouffe above n 501.

The failure of Habermas to recognise the relationship between legitimacy and power is Mouffe's starting point. This is what Habermas does when he posits that power can be eliminated by rational argumentation or pure rationality. For her, once the reality of power is recognised, then it is possible to imagine an alternative democratic model to both the aggregate and deliberative models. This alternative is what she calls 'agonistic pluralism'. Teasing out what she means by this term lies in the distinction between politics and 'the political'.<sup>522</sup> The political refers to the inherent antagonistic nature of human and social relations, whilst politics refers to the aggregate of practices, discourses and institutions, which seek to establish a certain order and social relations. For Mouffe, the difficulty with politics is the attempt to conceal hostility, which is always a feature of human relations. Once politics is recognised as *political*, then the next question becomes how unity can be established in the face of conflict and diversity. It is a question about the dichotomy between 'us and them', a dichotomy that cannot be easily transcended. But, it is wrong to try and silence it; rather it can be articulated differently, especially in ways that reflect the plural character of society. Given this, the aim of agonistic pluralism is not to conceive the 'them' as the enemy, but as an 'adversary'. A party to a dialogue is conceived as:

...a legitimate enemy, one with whom we have some common ground because we have a shared adhesion to the ethico-political principles of liberal democracy: liberty and equality. We disagree, however, about the meaning of liberal principles, and such disagreement cannot be resolved through deliberation and rational discussion. Indeed, given the ineradicable pluralism of values, there is no rational resolution of conflict – hence its antagonistic dimension.<sup>523</sup>

What she means is that deliberation should not entail either tacit approval or the rejection of opposing views. Rather, it entails recognising alternative views as legitimate, and those who hold them as adversaries. Accepting the position of an adversary is itself seen as a process of the transformation of political identity. Whilst compromises in positions are

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<sup>522</sup> Laclau E and Mouffe C. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, Verso, 1985. See also, Mouffe C. *The Return of the Political*, Verso, 1993.

<sup>523</sup> Mouffe above n 501, at 126.

part and parcel of politics, decisions can only be considered as temporary settlements. But Mouffe does not in any way suggest that parties would never reach agreement. Her views are not too different from Tully and Young here, who emphasise the temporary nature of agreements. Disagreements or conflicts do not impede democracy, but the only problem is when such disagreements manifest in antagonistic terms. The aim of democratic politics according to Mouffe should be to transform antagonism into agonism, or enemies into adversaries. Agonistic politics seeks to create an environment for agonistic confrontation between adversaries, and not antagonistic confrontations. This is what she thinks democratic politics should be concerned about; it should provide a framework where differences are expressed. This is, for her, a plausible way of deliberating, even if this is not entirely her goal. Mouffe is saying, agonistic confrontations are symptomatic of a good democracy, and to say this, is not a contradiction in terms:

A well functioning democracy, in short, calls for a vibrant clash of democratic political positions. If this is absent, there is the danger that democratic confrontation will be replaced by confrontation among other forms of collective identification, as is the case with so-called 'identity politics'. Too much emphasis on consensus, and the refusal of confrontation, leads to political apathy. Worse still, the outcome of may be a crystallization of collective passions which cannot be contained by the democratic process, with the consequent collapse of agonism into an explosion of antagonism that may appear to tear up the roots of civility.<sup>524</sup>

Mouffe's approach seeks to maximise such differences in such a way different values and principles are expressed. And it is not difficult to see the potentials of agonistic politics for the Community Forums, especially as a helpful way allowing different opinions to come to light. Rational debate or pure rationality is not sufficient enough to eliminate disparities in power, or confer legitimacy in community. The challenge for community politics is the recognition of the pluralism visible in our societies. To use Mouffe's terms, we should embrace rather than renounce value pluralism. This should be the starting point for

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<sup>524</sup> Ibid., at 127.

entrenching rich processes of deliberation within community; it is not a problem that we should seek to overcome.

One should not be too quick to accept Mouffe's position, without at least subjecting it to critical scrutiny. The major limitation is that much of Mouffe's criticisms do not lead to a plausible alternative to follow. At least, the consensus model – unlike Mouffe's – implies that decisions can be made. But, agonism on the other hand, only seems to point to the need for decisions to be subjected to further contestation. It seems certain that even if differences are recognised, a further approach is needed which allows decision-making in the face of such diverse identities. These definitely cannot be resolved simply by acknowledging the primacy of differences; it needs something more than that. Recognition of differences on its own is not sufficient to ethically orient the kind of decision-making proposed. Besides, the temporal nature of agreements may lead to a framework of instability, given that positions can easily be altered by deliberating parties. Outside any rules that prevent this from happening, agonistic politics will always be vulnerable to unpredictability. Moreover, agonism seems to place a lot of expectations on the part of participants that it can actually guarantee. This is because it seems to rely heavily on the good faith of participants. It is true that any kind of democracy cannot function without parties willingly conceding their incompatible positions. But it is not clear how all groups will recognise such differences or act honestly. It is certainly not clear how participants to a discussion will recognise opposing positions as legitimate ones. Mouffe's position seems to invite a pluralism that can so easily slide to the antagonism, which she is trying to prevent. It expects that participants will act democratically, without actually showing how they might do so. For instance, why would a historically dominant ethnic or religious group concede its positions to a less dominant group?

A more fundamental difficulty here stems from arguments made in the first component of the theory of community – that is, the point about recognising the multiplicity of identities. Even though Mouffe defends a type of politics that would not lead to the clash of identities, it is not clear how the clash of political positions would not end up being a clash of identities. Democratic politics, after all, is sometimes about the identity positions of participants. This is often the case in the kind of pluralistic societies that she imagines in her theory. The point is once the importance of identity is emphasised; the clash she conceives can also become hostile, violent or eventually unproductive. What is needed is (as seen from Sen) for the multiplicity of identities to be emphasised, especially showing different ways in which individuals are connected. This possibility doesn't seem available with the agonistic model. Even Tully's brand of agonism, which emphasises cultural recognition,<sup>525</sup> cannot prevent this difficulty mentioned above.

The point in moving forward is to recognise that agonistics' does have some value despite limitations just mentioned. It demonstrates the chaotic nature of democratic politics, even though it does not show how such differences can be resolved, or decisions reached. What is required, for purposes of Community Forums, is a theory that not only allows the expression of differences, but also one that recognises that – in spite of such differences, (including modes of expressing them) – the ultimate objective is for all individuals to contribute to the decisions in the Community Forums. Dialogue as such, is not just an inescapable necessity, but a prerequisite for Community Forums. A plausible way of thinking of this proposal is to consider how agonism, deliberation and such other models can contribute to the equilibrium of the framework. As such, the theory of deliberation for Community Forums embraces agonistic pluralism – which might provide a

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<sup>525</sup> Tully J. *Strange Multiplicity: Constitutionalism in an age of diversity*, Cambridge University Press, 1995.



sufficient theory of plural politics – but it still maintains the primacy of deliberation in the process of decision-making. It must be appreciated that both approaches are responding to the same problem, they only differ on how to resolve it. Looking at it this way, agonism and deliberation are not really conflicting theories.

Furthermore, the theory of deliberation proposed here must be open to the existence of any local deliberative democratic models. Local models of politics, deliberation and dispute resolution ought to be encouraged in their specific country contexts. Again, these are issues that can only be sorted out on a country specific basis. There has been a lot of work on traditional or informal judicial systems but there is very little literature on alternative democratic systems. This is perhaps something that might be unravelled through a research agenda in the Nigerian and other contexts. In spite of this potential, it is something that cannot be addressed here in any detail.

## **5. Conclusion**

It is quite unlikely that Nigerian communities will be challenged by most of the apprehensions raised above, especially about the plausibility of deliberation in general. It may not be so difficult to identify common problems that may form the basis of coming together.<sup>526</sup> After all, access to water, electricity, education and healthcare are problems that would affect everyone in common. Even if common problems are recognisable, one must not be under any illusions that the proposals for participation here would be easy to achieve. They will certainly take time to achieve, just like real change will take time to be nurtured. These proposals nonetheless provide an alternative to what is currently available

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<sup>526</sup> A similar approach is offered by John Dryzek, who suggests that emphasis on specific needs, and not value systems in deliberations is a potentially useful alternative in face of mutually divisive identities. Dryzek J. 'Deliberative Democracy in Divided Societies: Alternative to Agonism and Analgesia', 33 (2), *Political Theory*, 2005, at 218. See also, Dryzek J. *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2002.

in the Nigerian and other contexts. Nevertheless, the arguments in this chapter have by no means been exhaustive, and sceptics may find them too idealistic. For instance, who is it for? How are these proposals going to get implemented? How will it be funded? Forms of taxation or subsidies could be devised. Funding from the State can be mobilised, since – as discussed – its role cannot be dispensed with entirely. As much as Community Forums require initiatives from particular communities involved, they also require the State to devolve some of its powers. Sometimes these sorts of initiatives might have to be created by the State, since as also mentioned such forms of collaboration and participation are not always spontaneous. What is important here is that concrete proposals must be drawn up with the contributions and participation of those most affected by such problems. The importance of dialogues towards this possibility cannot be over-emphasised.

## Chapter Seven

### **ELECTRICITY FOR THE COMMUNITY BY THE COMMUNITY: THE CO-OPERATIVE MODEL**

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#### **1. Introduction**

The main purpose of this chapter is to sketch out models of community electricity co-operatives, as a further step towards encouraging participation amongst individuals in various communities. It aims to build on discussions in the previous chapter by considering, in rather hypothetical terms, a particular option, amongst a possible range of others, that might be open to various communities through their Community Forums. In doing so, it also revisits previous discussions in chapters one and four about electricity to propose an approach that firstly acknowledges it as both a human right and public good in the more ethical sense of the term. Secondly, it is an approach that recognises the importance of cooperation and participation in the quest for electricity, which is ultimately built on a social market philosophy that allows this possibility. The main objective is to demonstrate the possibility of creating a social model of electricity that can avoid the shortcomings of dominant profit market model, one that can also create the atmosphere for solutions to be worked out with the participation of those mostly affected by the problems. Co-operatives provide a practical example of how a community can participate in the supply of electricity.

The chapter begins with a discussion on the significance of co-operatives in general conceptual terms. What follows is a discussion of co-operatives in Nigeria, the origins of which are traced to its colonial history. The chapter then proceeds to discuss the potential of co-operatives in electricity, as a way of enabling access, cooperation and participation within and between communities. It sketches out in theoretical terms how to reframe the legal and institutional framework and then proceeds to sketch out the internal design for three similar types of co-operatives – that is, community supply co-operatives, community generation and supply co-operatives, and off-grid generation and supply co-operatives. It concludes afterwards.

## **2. Co-operatives**

Broadly speaking, the co-operative model has a long history, one that can be traced to early periods of industrial capitalism. In more recent times, economic globalisation has given rise to what might be called a second co-operative moment, and co-operatives now constitute a common phenomenon across the world today. Co-operative activities have permeated different geographical boundaries in attempt to deal with different sorts of problems. Whilst co-operatives have varied in type, their activities have also been diverse. Co-operatives have been in the forefront of attempts to address many pressing problems like the lack of access to public goods.

Conceptually, co-operatives can best be described as democratic, self-help economic organisations, which are formed to assist in alleviating poor socio-economic conditions of its members, and sometimes, problems of a community in which it operates. Co-operatives usually function by aggregating individual market power into a collective whole, so as to tackle problems vital to its members, communities or societies. The origins

of this sort of activity can be traced to England during the period of industrial capitalism. The rise of co-operatives was provoked by the poverty of the times, given that many peasants could only find poorly paid work in the existing capitalist factories. The industrial revolution aggravated the conditions of many leading to situations where shop-keepers and private traders became exploitative, quite apart from individuals having no alternatives but to purchase inferior goods from such exploitative traders.

Given these reasons, and other difficulties, the foundations for what is now regarded as a global co-operative movement began at Toad Lane, Rochdale, Lancaster in 1844.<sup>527</sup> The Rochdale consumers' co-operatives emerged in response to the inadequate wages, poor working conditions and the pervasiveness of poverty caused by poor factory wage. More specifically, the co-operative began by buying high-quality consumer goods at low cost and traded them at affordable prices to workers or other customers. The work of social reformer Robert Owen and nonconformist Churches supported these initiatives, and furthermore, encouraged the creation of other co-operative communities across the country. Co-operative activities not only underscored the strength of collective action, but also the value of integrity in business, given the importance attached to values of autonomy, participation, equity and solidarity. These values have now been formalised into the seven guiding principles for worldwide co-operative activities today:

- 1) Membership is voluntary and open (co-operatives are always open to new members).
- 2) Democratic control by the membership (members vote on all important decisions according to the principles of "one member, one vote", regardless of the capital contribution made by each member, or of his or her role in the cooperative).
- 3) Economic participation by members, both as solidarity owners of the co-operative and as participants in decision-making concerning profit distribution.
- 4) Autonomy and independence in relation to the state and other organizations.
- 5) A commitment to educating cooperative members to help them participate more effectively.
- 6) Co-operation amongst cooperative members to help them participate more effectively

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<sup>527</sup>. Santos above n 258, at xxvii. See also, Birchall J. *The International Cooperative Movement*, Manchester University Press, 1997

7) Contribution to the development of the community in which the co-operative is located.<sup>528</sup>

These principles have no doubt been integral to ensure ownership and control over the business of its members. The democratic element seems to constitute the most important attribute that make co-operatives unique. One may speculate but, it is fair to argue that co-operatives may have a wider effect on deepening the practice of democracy by extending values of participation into the economic sphere. This is, after all, one of the limitations of the practice of democracy today – it is restricted to the political sphere. The lack of political accountability in the economic sphere is, of course, an old problem, one that can be understood from developments in Eighteenth century Europe.<sup>529</sup> This became an issue after the emergence of the market economy as a substitute for centralised economic systems. The ability of markets to maintain individual autonomy was obviously one its main sources of attraction, quite apart from its ability to determine the distribution of society's resources. This was, to recall justified by the work of Fredrick Hayek, who emphasised the epistemic superiority of markets. In comparison, his views were different from Adam Smith, who in spite of supporting markets, emphasised the importance of “sympathy and benevolence”.<sup>530</sup> He believed this ought to be “the basis of social relations, and economic action”,<sup>531</sup> as such, “its political settings were not separable from, but rather part of, an overall framework of human relations, which were to be understood as a greater unity.”<sup>532</sup>

The emergence of modern capitalism, however, caused a distortion of Smith's ideas about the proper foundations of the economy. The civic dimensions of Smith's thought

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<sup>528</sup> Ibid.

<sup>529</sup> See; Veitch S. *Law and Irresponsibility: On the Legitimation of Human Suffering*, Routledge, 2007, at 64.

<sup>530</sup> Ibid.

<sup>531</sup> Ibid.

<sup>532</sup> Ibid.

were replaced by ideas about personal gain and self-interest. This can be recalled from Yunus's insights in chapter three, which illustrated that the emphasis on profits was a consequence of an incomplete reading of Smith's idea – that is, *The Wealth of Nations* without *The Theory of Moral Sentiments*. In other words, profit oriented markets were considered apart from the importance of social markets. One consequence of this has been the prevalence of the economic sphere as a separate entity, even though the political realm still presides over economic policies.

Scott Veitch's work explains a further extenuating factor from the emergence of rights to equality, especially voting rights of citizens in European political societies. The difficulty arose from extending voting rights to citizens on the basis of universal suffrage. This attracted a different consequence from granting voting rights according to property qualification. The effect – as we learn from Karl Marx – was the creation of two different constituencies, that is, the political as separate from economic constituency. As such, the “forum of political principle, with its ideals of equality, freedom and citizenship, was not co-extensive with the economic realm and its practices of domination, exploitation and insecurity.”<sup>533</sup> Instead, the “political and economic identity are held apart, and the idea of participation or representation in the two realms are treated as disconnected achievements, despite the enormous impact of the latter on people's daily life experiences.”<sup>534</sup> The effects of these circumstances are very evident in many contexts, not the least in the Third World. Although economic actions continue to take more political dimensions, many societies including in the Third World seem to lack the same kind of accountability mechanisms in the political realm. These are of the kind capable enough to deal with these problems. Whilst the activities of many economic actors are “undoubtedly political”... they “do not

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<sup>533</sup> Ibid, at 66.

<sup>534</sup> Ibid.

register as political activities, nor—crucially—as subject to the same demands of political justification.”<sup>535</sup> Instead, the separation between the political and economic sphere is normalised by agitations political democracy with the effect of distilling claims for economic democracy.<sup>536</sup>

The separation of the political from the economic realm described above is one of the things co-operatives can assist remedy. They importantly illustrate how businesses can be more democratic, and furthermore, how this might have a spill-over effect on the polity. But, it is fair to say that the internal democracy within co-operatives is by far its greatest novelty. A lot can be said about members of co-operatives being allowed to vote on decisions regardless of the level of their investments. These democratic principles importantly address concerns of equity, since they take into consideration possible disproportionate effects of linking participation to level of individual investments. Furthermore, education is recognised as a crucial element for more meaningful and effective democratic participation in activities of co-operative. Accountability to the host community is also a key principle that must be mentioned in this respect. One other important factor about co-operatives is their obligations to assist alleviate problems of the host community in which they operate. What this means is that, even though co-operatives may evolve for purely instrumental reasons, there is an obligation to extend such concerns beyond the realms of the organisation.

It is understandable in light of the above why several enthusiasts have proposed substituting the current economic model with an economic system organised around co-

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<sup>535</sup> Ibid.

<sup>536</sup> Ibid., at 68-72.



operatives. But, these aspirations are yet to come to light for several reasons.<sup>537</sup> One explanation is that the method of control in co-operative businesses actually prevents the kind of expansion typical of profit-making enterprises. The democratic content of co-operatives actually prevents them from the kind of capitalisation characteristic of profit oriented firms. Moreover, co-operatives are unlikely to appeal to investors, since their level of influence does not extend beyond a single vote despite their investments.

Regardless of what some might consider a shortcoming, proposals for the expansion of co-operative activity has featured in proposals and policies of the major international development institutions. The UN – and its inter-governmental organisations – has by far been the strongest advocate of the expansion of co-operatives. Co-operatives have been acknowledged at different forums, including at the General Assembly (GA) through a resolution recognising how they can contribute to social development, employment generation and poverty reduction, amongst other things.<sup>538</sup> GA Resolution No. 56/114<sup>539</sup> encourages governments and the relevant international institutions to collaborate both internationally or locally to provide suitable legal and institutional frameworks for co-operatives to function. Furthermore, the UN encourages governments in partnership with co-operatives to promote programmes that will strengthen their activities. Most recently, an Expert Group Meeting (EGM) of the UN's Department of Economic and Social Affairs have made quite stringent appeals for more meaningful recognition of co-operatives within the UN development framework.<sup>540</sup> This call was made in the context of the current global financial crisis. The EGM recognised that co-operatives

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<sup>537</sup> Santos above n 258, at xxvii – xxix.

<sup>538</sup> On the impact co-operatives can have on the reduction of poverty, see; Birchill J. 'Rediscovering the cooperative advantage: poverty reduction through self-help', *International Labour Organization*, 2003.

<sup>539</sup> Co-operatives in Social Development, Resolution No 56/224 adopted by the United Nations General Assembly at 57<sup>th</sup> Session, 2001.

<sup>540</sup> Division for Social Policy and Development (DSPD) *Cooperatives in a World in Crisis*, report of the Expert Group Meeting, United Nations Department of Economic and Social Affairs, 20-30 April 2009.

might be more suitable to address some of the current economic problems. The EGM underlined this point by drawing comparisons with the performance of investor-owned and consumer co-operative banks during the crisis. The point is that unlike the most investor-owned banks, cooperative banks seemed to have fared better during the crisis. Why this was the case is because of their different philosophical orientation, which prevented them from the kind of excessive risk-taking synonymous with investor-owned banks. The UN joins other advocates in encouraging a new co-operative driven economic model, so as to make business more ethical and place humanity, including the environment at the core of its activities. Comparatively speaking, co-operatives have not received the same degree of recognition in the work of the Bank. They are not, for instance, specifically mentioned in the Bank's CDF or the PRSPs, despite emphasis on participation of the poor in aspects of the design and implementation of these policies. Nonetheless, the role of co-operatives may be implied in the emphasis on civil society in the CDF. But, it is also fair to say that some other aspects of the Bank's work recognise the value of co-operatives. The Bank recognises the role for co-operatives in agriculture where it supports micro-credit and other co-operative initiatives.<sup>541</sup>

## **2.1. Co-operatives in Nigeria**

Like in other parts of the world, co-operatives are also an important social business institution in Nigeria, as they are in other Third World countries. Most co-operatives have emerged by institutional design, even though others have emerged spontaneously. In the Third World in general, the relationship between cooperatives and the State is not clearly distinguishable. The State in many contexts has used co-operatives to serve as an instrument of social control. Regardless of this, co-operatives have also evolved

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<sup>541</sup> See, World Bank, *Agriculture and Development*, World Development Report, 2008.

independent of State backing, some of which mitigate the hardships of economic globalisation. Such co-operatives operate informally through activities ranging from thrift to associations of garbage pickers.<sup>542</sup> The rise of Third World co-operatives has also been encouraged by the international co-operative movement. It has done this by encouraging the formation of co-operatives independent of State control. But the expansion of co-operatives has not been successful without an element of State support. It is fair to say that the State plays a similar role that it does for markets. The role of the State is (or ought to be) restricted to creating the suitable environment for co-operatives to function.

Looking specifically at Nigeria, co-operative activity emerged before it became independent.<sup>543</sup> Co-operatives in Nigeria have their origins in colonial rule, which was a period in which several marketing, production, thrift and consumer co-operatives emerged.<sup>544</sup> Agricultural related co-operatives were, and still are, by far the most successful organisations. Notable amongst them was the 'Cocoa Marketing Co-operatives' of Southern Nigeria. This comprised of several co-operatives with 20,000 members, who belonged to 300 primary co-operatives, which were part of a federated network of 12 unions. Whilst they existed, their activities led to the production 10, 000 to 15, 000 tons of cocoa annually. Interestingly, the cocoa co-operatives competed with middlemen for the supply of cocoa to British firms like Cadbury's and Fry's and Rowntree. Indeed, it was the sharp practices of the middlemen that led the colonial authorities to set up co-operatives to guarantee fair deals for firms and farmers.

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<sup>542</sup> See, Garavito C. R. 'Solidarity Economy and the Struggle for Social Citizenship in Times of Globalization: A Study of the Cooperatives of Informal Garbage Pickers in Colombia', in Santos above n 245, at 43 – 69.

<sup>543</sup> See, Haig E.F.G. 'Co-operatives in Nigeria', 49 (194), *African Affairs*, 1950, at 41-56.

<sup>544</sup> Chikwendu, E. 'Women, Cooperatives and Economic Recovery in Nigeria', 22, *Dialectical Anthropology*, 1997, at 353-371.

Apart from producing and marketing cocoa, such co-operatives performed other functions, some of which extended beyond trading. For instance, they provided short-term loans to its members, even though these were loans connected to the production of cocoa. The point is that co-operatives enjoyed nearly a 90% return rate despite not being created to perform this function. But, there were also distinct cocoa co-operatives formed to encourage the practice of thrift. The Yoruba farmer's co-operative society, for instance, was unique in this sense. Its members succeeded in saving £15,870 between the periods of 1947-48.<sup>545</sup> The co-operatives functioned as banks as well as financial educational institutions for its members. Similarly, co-operatives provided sites for agricultural education, especially for transferring knowledge of new farming techniques. Quite apart from that, such co-operatives provided sites through which members could voice their grievances against the authorities. It must be noted that on a wider scale, not all agricultural co-operatives were as successful as the cocoa producing, or marketing co-operatives. To be specific, groundnuts, cotton and palm sectors were not as successful. The most rational explanation as to why this was the case is that they were not given the same level of institutional and organisational support as the cocoa co-operatives.

Consumer co-operatives on the other-hand were partially experimented with in certain villages and rural communities with very little success. The problem was that it was quite difficult to diffuse practices typical of Western societies to a predominantly rural country, one not accustomed to the workings of capitalist systems. Nonetheless, consumer cooperatives were able to supply the needs of host communities in which they operated. Such needs were quite material and ranged from the provision of soap, salt, kerosene, to bush lamps and tobacco. More positively, consumer co-operatives extended their activities

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<sup>545</sup> Haig above n 544, at 43.

beyond trading in cheap consumer goods. They contributed to various community or village institutions, such as maternity centres from the surpluses of their profits.<sup>546</sup> Apart from consumer co-operatives, thrift associations of various kinds emerged during this period. They seemed to have laid foundations for what has now become a thriving thrift or craft practice in contemporary Nigeria. *Esusu*, *Isusu* or *Adashi* are Nigerian terms for indigenous thrift systems. But, it is fair to say that they are really local interpretations of Western thrift practices introduced during colonial rule. As such, thrift co-operatives might best be described a hybrid of local and dominant practices.<sup>547</sup> Regardless of their origins, thrift practices are now widespread across Nigeria performing different functions ranging from assisting the poor build up capital for particular business activities to assisting the sick search for medical care to assisting families bury their dead.<sup>548</sup> Such activities are usually driven instrumentality, quite apart from sometimes being exploitative by charging exorbitant interest rates on loans.

Most co-operative associations exist informally, even though a limited number of them are registered under formal law. They are regulated by the Nigerian Co-operative Societies Act of 1993, which makes it mandatory for them to be registered as limited liability co-operatives irrespective of whether they exist as industrial co-operatives or primary and secondary co-operatives.<sup>549</sup> Whilst it is really not possible to give an accurate figure of the number of co-operatives in Nigeria today, the most organised type can be found in the agricultural sector. Such co-operatives have even benefited from policy and institutional support from a quango called the Nigerian Investment Co-operative Agency

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<sup>546</sup> *Ibid.*

<sup>547</sup> See, Escobar above 110, at 60.

<sup>548</sup> See, Ayoola et al above n at 5, at 32.

<sup>549</sup> Nigeria Co-operative Societies Act, 1993.

(NICA).<sup>550</sup> Details of its activities can be found on its website, which states that the agency was created to provide institutional support for co-operatives as part of Nigeria's government's current economic reforms, which partly attempts to build what it calls a 'caring' market economy. This, it suggests, cannot exist without 'popular participation' in the economy. It acknowledges that most Nigerians do not have the economic means to participate given the relative level of poverty in the country. As a consequence, the body seeks to provide loans through which they can achieve inclusion. As it suggests, cooperatives are "one of the vehicles for economic empowerment"<sup>551</sup>... [and] "the national objectives of economic growth and sustainable social development"<sup>552</sup>.

The developments above are indeed commendable, but the basic justification for the introduction of co-operatives – as indicated from these statements – does raise some questions. It would seem the purpose for co-operatives here is conceived in narrow economic terms, which is in turn considered as the only way of promoting social empowerment. But these assumptions can be questioned, thanks to the work of Amartya Sen, whose critique of such perceptions of development has already been discussed in chapter three. The main point being that they helpfully illustrate that economic development alone is no guarantee for human or social development. The point in raising it is that co-operatives have much wider significance to the Nigerian society than what seems to be acknowledged by the policy. As it is framed, the social and humanistic side of co-operatives is hidden from view. Moreover, apart from the agricultural sector, there seems to no clear agenda for co-operatives in other sectors of the economy. A case in point is the absence of a role for co-operatives in the provisioning of electricity, water, healthcare and

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<sup>550</sup> Nigerian Cooperative Investment Agency, accessed online at <http://www.nicanig.org/poda/institutes.php> 24<sup>th</sup> July 2009.

<sup>551</sup> Ibid.

<sup>552</sup> Ibid.

education. Even Nigeria's PRSP, NEEDS fails to acknowledge the role for co-operatives as part of the goal of reducing poverty. This is not surprising given that it originates from the Bank's CDF, which also fails to formally establish a role for co-operatives. There needs to be a more affirmative statement of recognition and support for co-operative businesses on the institutional level. Setting up cooperatives is indeed not a simple task. It does not rest only on a question of providing loans to the poor; it also requires legal, technical, educational and other forms of support.

### **3. Community Electric Co-operatives**

Having looked at co-operatives in general terms, the focus in this section is to address questions of internal design of electricity co-operatives. Community electricity co-operatives<sup>553</sup> are proposed as a new element of the existing market framework, which to recall is composed of six generation companies, one transmission company and eleven distribution companies. As a new component of this framework, three types of community electricity co-operatives are proposed for purposes of this thesis. These are namely community supply co-operatives, community generation and supply co-operatives and finally, off-grid generation and supply co-operatives. In addition to the following, the creation of a National Co-operative Electricity Agency (NCEA) and various State Co-operative Electric Agencies (SCEA) is proposed to provide financial, technical and institutional assistance for the operation of electricity co-operatives.

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<sup>553</sup> On the potential benefits and limitations of electricity co-operatives, see; Iiskog E et al. 'Electrification co-operatives bring new light to rural Tanzania', 33 (10), *The Electricity Journal*, 2005, at 1299-1307. Co-operatives have a long history of success in the US electricity sector. For recent discussion on co-operatives in the US, see; Collier S. 'This is not your father's oldsmobile: electric cooperatives venture into the future', 10(9), *The Electricity Journal*, 1997, at 58-67; Greer M. 'Can rural co-operative survive in a restricted electricity market? An empirical analysis', 25(5), *Energy Economics*, 2003, at 487-508.

It is important to note from the outset that the proposals offered here are quite hypothetical. The aim is really not to provide a comprehensive blue-print on how to create electricity co-operatives; rather it is to provide a vision that can attract practice to it. It must also be noted that several issues with respect to these proposals cannot be sufficiently dealt with in detail here. Part of the reason is really a question of expertise, since the proposal here overlaps into various disciplines, including economics, engineering, science and technology, architecture, amongst others areas. It must be appreciated that these are issues that are better worked out by relevant experts in the relevant local contexts. One important preliminary question that is dealt with at this point is the extent to which co-operatives can be accommodated under the current legal and regulatory framework. This is a question of significant magnitude more so because the proposals here are mainly legal in nature.

### **3.1. Reframing the Legal and Regulatory Framework**

Proposing a role for co-operatives in the Nigerian electricity sector generally depends on whether they can be accommodated within the existing legal, regulatory and institutional framework. The conclusion here is that without any significant changes to legal and regulatory framework, the inclusion of co-operatives cannot be possible. For electricity co-operatives to operate, they need a framework that accommodates different entities without any discrimination of who can participate. This entails re-thinking the current framework, but not necessarily creating a new one from scratch. It must be appreciated that electricity co-operatives cannot operate effectively through a legal regime that relies solely on market incentives. The point is that, apart from limitations of markets, the current framework is not accommodating to other entities like community. As such, a new regulatory approach is the first step towards establishing a role for community – through co-operatives – in electricity. What is proposed in this light is an approach that accommodates a range of



actors, including their values and interests. It is an approach that has as its keywords, diversity, pluralism, collaboration and participation. The legal and regulatory framework must be inclusive enough to encourage the adoption of a wide variety of approaches. More importantly, it must give legitimacy to the interest of community in such a way that they are equivalent with market interests. Seen this way, it is possible to understand how electricity provisioning can benefit from other entities, apart from traditional institutions of State and market.

One of the best ways of understanding how such proposals can be achieved is through Gunther Teubner's concept of reflexive law.<sup>554</sup> Reflexive law is a theoretical approach that creates the type of legal structure required for the proposals. It accommodates a wide range of parties, including their values and interests. It achieves this by translating regulatory designs into practical regulatory frameworks. Law is reflexive when it does not take over the regulatory responsibility of social processes itself, but rather enables it by installing, correcting and redefining democratic self-regulatory mechanisms. Teubner argues that the complexity of modern life is such that it requires a different system of regulation, one that law functions at the background by restricting itself to facilitating the coordination of other social systems. In doing so, reflexive law increases the self-referential capacities of other social institutions. Not surprisingly, Teubner builds such insights from Niklas Luhmann's work on system theory which enables the legal system to perform this function by enabling communication amongst radically closed social systems. He develops a new perspective on the legal process of legal and social change that points to a new evolutionary stage of law – reflexive law. Law becomes a system for the coordination of action within and between semi-autonomous subsystems. It is developed

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<sup>554</sup> Teubner above n 86.

from both Philip Selznick and Philip Nonet, and also, Habermas's work on Luhmann's evolutionary theory of law.<sup>555</sup> They both identify different types of law, and show the progression from one type of law to another. Their theories are formulated with the crisis of formal rationality in mind.

The work of Selznick and Nonet is used as a point of entry into how Selznick develops the idea of reflexive law. According to them, the evolution of law can be understood by looking at how it evolves from being repressive to autonomous, and finally to a responsive stage. As the most important stage of the development of law, responsive law emerges to increase the level of participation and responsiveness in the creation of law as well as other societal processes. But responsive law is really no more than a product of internal developments of the autonomous characteristics of law. These are developments that also contradict the formal characteristics of law. Nonet and Selznick pick up most of their arguments from Max Weber's accounts of legal rationality in attempt to explain how law progresses in the direction of substantive and reflexive rationality. As such, responsive law includes substantive and reflexive elements which are combinations of two different forms of legal rationality.

Regardless of this, Teubner questions the extent to which responsive law sufficiently provides a stable framework to respond to the crisis of legal rationality. On this point, he suggests that responsive law is better understood as a further stage in the development of law. Apart from that, Teubner questions the priority given to the internal as opposed to external elements of legal change in most accounts of responsive law. Teubner finds this insufficient because it leaves out external accounts of how legal

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<sup>555</sup> *Ibid.*, at 497.

transformation takes place. Reflexive law responds to this shortcoming by uniting internal and external accounts of legal change,<sup>556</sup> and furthermore, illustrating how law itself creates the complex environment for functionally differentiated, semi-autonomous subsystems to operate. Teubner calls this a post-responsive legal order, which encourages self-reflective processes within different social subsystems. Reflexive law as such, responds to the limitations of responsive law, particularly the inability of the latter to deal with social complexity, as well as the purposive and substantive aspects of responsive law. What Teubner means is simply that reflexive rationality facilitates rather than imposes itself on social structures. It guarantees the autonomy of social institutions and creates the opportunities which allow problems to be resolved:

Reflexive law tends to rely on procedural norms that regulate processes, organization, and the distribution of rights and competences. The new procedural orientation characteristics of reflexive law can be observed in different legal fields as an emerging alternative to formal as well as substantive rationality. Under a regime of reflexive law, the legal control of social action is indirect and abstract, for the legal system only determines the organizational and procedural premises of future action.<sup>557</sup>

The point is that law provides the background structural framework for the reflexive processes of other social systems. One of the best ways of understanding this, as Teubner himself notes, is through obligations in contract law. He illustrates this by comparing how disputes are settled under formal, substantive and reflexive law. Firstly, Teubner shows that the formalistic approach is always concerned with the fulfilment of formal, general and objective conditions of such contractual obligations. Formal law does not pay attention to the social effects of such obligations. It does not even take account of the relationships that parties are enabled to create. Substantive law as second approach – and as the term implies – is concerned with the actual outcomes, especially how interventions might produce substantive effects for individuals. Reflexive law as the third and more superior approach departs from the others by encouraging negotiations between different actors. In doing so,

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<sup>556</sup> *Ibid.*, at 249.

<sup>557</sup> *Ibid.*, at 251.

it provides a level playing field in which bargaining relations can take place between contractual parties. Reflexive law paradoxically influences results without really getting involved in the processes of bargaining.

One can indeed argue that neutrality assumed by reflexive law ignores asymmetries of power, which distorts the quality of outcomes. It is fair to argue that such a framework he proposes is only sufficient in conditions of equality, and not those dealing with deep asymmetry. It would make more sense to have a reverse-discriminatory type of law that can overturn such huge inequalities. This perhaps rests on the balancing of the reflexive and substantive aspects of law, as certain situations will need a more biased than neutral type of law. Teubner accepts this when he talks of the importance of developing reflexive structures which can compensate inequality of power and information. Here he particularly speaks about having standards of substantive judicial intervention. Even here, law is still reflexive in so far as it is the legal system that stimulates social self-regulation. The legal system adapts to such situations in order to provide a framework through which disempowered parties can challenge or assert their positions.<sup>558</sup> Reflexive law not only enables grievances of silent voices to be heard, but also enables them to be written into the logic of the system. Even so, there is something to be said here about the importance of autonomy, which reflexive law is also about. Looked at this way, then it is not difficult to understand the importance of a reflexive approach in light of proposals for the inclusion of electricity community co-operatives. Reflexive law can be a way of creating an environment in which distinct communal values and modes of operation can be recognised. More importantly, it can indeed open up opportunities for counter-hegemonic responses to the dominance of State and market discourse. Through this approach, communities can

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<sup>558</sup> See, Bankowski above n 213, at 192.

participate in equal terms – that is, with the same powers, rights and freedoms – with the State and market institutions. What it achieves is that it creates incentives for different parties – including community – to achieve their desired objectives.

### **3.2. Institutional Architecture**

The discussions so far have described the potential inclusion of community electricity co-operatives legal theoretical terms, what follows here is an attempt to also understand it in institutional and organisational terms. For the sake of emphasis, this is proposed hypothetically, given that the substantive aspects of such proposals can only be worked out in relevant local contexts. Given this, I begin here with a hypothetical scenario – that is, by assuming that a community through its Community Forum wants to provide its own electricity, and furthermore, want to know the implications of setting up a co-operative. A logical starting point entails considering the relevant laws that apply in this context, particularly the extent to which they permit the formation of co-operatives. In light of discussions above, electricity co-operatives can only be created if the legal and regulatory frameworks permit it as such. Whilst the impetus lies on the ability of the community to organise themselves, electricity co-operatives can only come into effect if they are permissible in law. What this means is that there is also a burden of the responsibility on the State to create a suitable legal and institutional environment for the operation of co-operatives. In light of previous analysis, the Electric Power Reform Act 2005 and the Nigerian Co-operative Societies Act of 1993 do not consider a role of co-operatives in the electricity sector. The first recommendation as such is for amendments to the legal and regulatory framework to pave way for the creation of electricity co-operatives. Following on from that, there needs to be an institutional mechanism to provide support to communities seeking to establish co-operatives. Because of this, a further recommendation

is made for the creation of a specialised agency called the National Co-operative Electricity Agency (NCEA). It should be established on the national level with the objective of initiating, administrating and supervising a policy programme of co-operative electricity in Nigeria. Such an agency should be funded by the State and ought to be responsible for providing interest-free loans to various communities seeking to set up co-operatives. Similarly, regional State governments should work in collaboration with the NCEA to set up State Co-operative Electricity Agencies (SCEA), which will in turn provide local support for community co-operatives in electricity.

### **3.3. Internal Design of Co-operatives**

A further aspect of the hypothetical scenario relates to the internal composition of the proposed co-operates. For the sake of emphasis, the proposals here will only be possible if amendments have been made to relevant laws. If this is able to take effect then, it is proposed that communities should have an option of choosing from three types of co-operatives. Such choices would depend on the size of the community given that economies of scale might impede the creation of co-operatives in small communities. However, this does not mean that the co-operative model cannot work under such circumstances. What it means is that small communities may have to unite with others to establish co-operatives. At the very basic level, the first proposal here is for the creation of supply co-operatives by a single Community Forum or a combination of Forums. As expected, supply co-operatives will operate on a non-profit basis, quite apart from being democratically owned by members of such communities. Supply co-operatives ought to be considered as an additional element of the emerging Nigerian electricity market, and they shall be responsible for purchasing electricity from market-owned generating companies at minimal

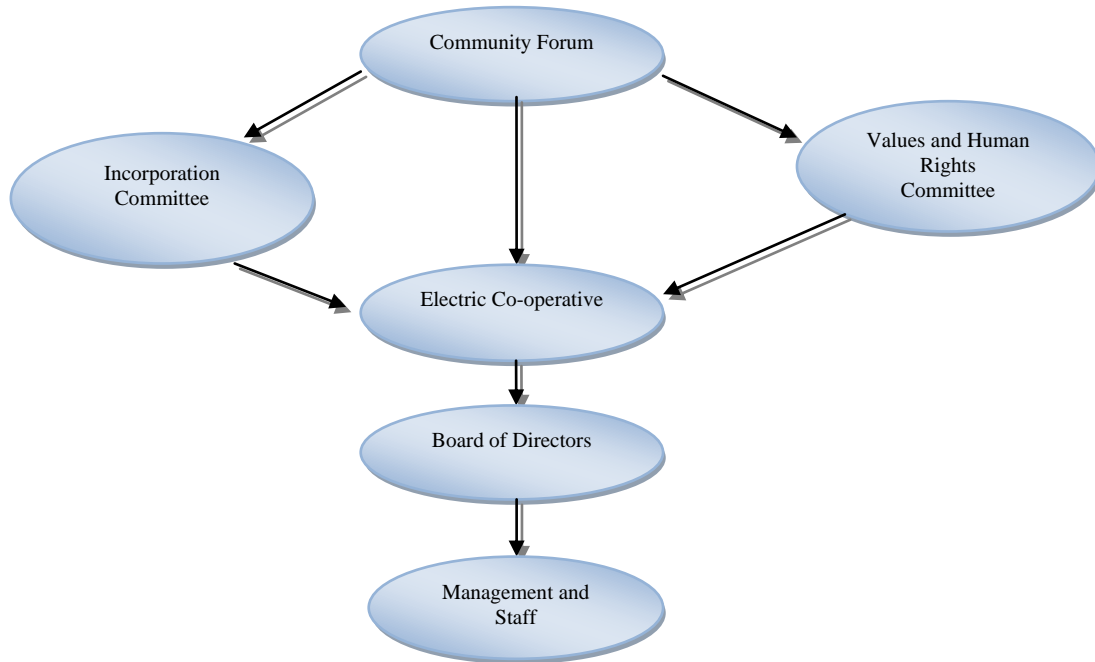
costs. The purchased electricity will in turn be re-sold to members of the community at affordable prices.

As expected, community supply co-operatives ought to operate under the seven co-operative principles discussed above. An eighth principle is however proposed to strengthen the operation of co-operatives. These are principles of human rights, which will provide the normative framework for co-operative operations. Specifically, the distinct human rights approach – that is, with human suffering at its core – is proposed to assist in drawing obligations amongst members of community (chapter one and four). The approach is one way that might increase the moral consciousness amongst individuals in community – and an important step towards tackling exclusion. It might be speculative to suggest what actions might be taken in those circumstances. One thing is certain that the primary response in community shall not be to disconnect the poor if they are unable to pay for electricity. Rather, other modes of payment might be considered, as well as other methods of providing assistance to poor. The distinct human rights approach here is proposed to enable individuals in community to see the value of fixing prices at the barest minimum. Cases of electricity poverty must be distinguished from the classical free-rider problem. But this is not in any way a suggestion that the question of free-riders would not constitute a problem. It certainly would, but the point is that those whose circumstances prevent them paying for electricity ought not to be categorised as free-riders. It is believed that one way of understanding such problems in their proper contexts, and furthermore, to ensure deeper understanding of specific needs individuals in community, a special Committee on Human Rights and Values is proposed for the work of co-operatives.

In terms of internal structure of the proposed framework, Community Forums are proposed as the main decision-making body. The success of electricity co-operatives lies with Community Forums. Much will depend on its ability to provide a space for dialogue, shared understanding and collective decision-making over questions of access to electricity. Community Forums shall be responsible for the creation of co-operatives and such other matters like budgeting, tariff system and pricing, which will always vary from time to time. Some possible alternatives that might be explored is that members of Community Forums shall have the option of electing a governing board of directors, which will in turn, appoint a manager and management staff for the day to day running of the co-operative. The proposed internal structure is illustrated in sketchy form in the diagram below. It is important to emphasise that co-operatives are not restricted to the proposals in the diagram; Community Forums should be open to other ideas about how co-operatives should be formed. For the sake of emphasis, the aim here is really to illustrate that this is both a possibility and necessity in the Nigerian and other Third World country contexts.



**Diagram I:** Community electric co-operative structure



### 3.3.1. Community Generation and Supply Co-operatives

The proposals above are not unquestionable; there are several problems that can be teased out from those suggestions. One question is that those proposals are framed in such a way that they seem to be too dependent on markets, as with the monopolistic forms of producing electricity. This would seem like one of the most noticeable objections to what has just been proposed. It is true that co-operatives need markets to function, but (as will be seen) sole dependence on markets for purposes of electricity can have disastrous consequences. As it is framed, co-operatives can only provide (cheap) electricity through privatised generation companies. Quite apart from questions of costs (which can be avoided by enforcing strict concession agreements), the most pressing problem is simply

that the Nigerian electricity market system is simply not working. The promises of market reform have simply failed to live up to expectations. It would seem a contradiction in terms if the only option open to co-operatives is the current malfunctioning system of electricity. The point is that Nigerians should not have to wait for the market or State system to function before they have an opportunity to enjoy or provide their own electricity. Supply co-operatives in this context can only work if the market system is efficiently functioning. As a consequence the supply co-operatives might be a logical starting position but they should not be seen as the end in itself. The ultimate goal for communities should be to achieve own autonomy, and this can only be achieved when communities are able to generate and supply their own electricity. A different kind of co-operative might provide a different alternative, one that combines both elements of generation and supply. The suggestion here is that a number of generation and supply co-operatives can be formed by several Community Forums to achieve this objective.

There is a much wider implication of the creation of community-owned generation and supply co-operatives. They invite a potential of moving away from the national grid system, its cost implications, and the burdensome forms of generation it presupposes. Technological developments – especially renewable technology – now make it possible to generate and supply electricity at much cheaper costs, and in ways that do not depend on huge power stations. There is very little recognition of this in Nigeria's electric reform proposals – at least not in the urban areas. Off grid renewable technology only seems to be proposed for rural areas. This type of co-operative offers a strategy and potential for the introduction of environmentally friendly technologies. To recall, renewable electrical sources like solar, wind, biomass, water organic matter and hydro can definitely play an important role towards alleviating poverty and guaranteeing the sustainability of the

environment.<sup>559</sup> Electricity will not only be generated at cheaper costs, but also through much smaller electric plants, which are arguably more compatible to the needs of communities and their environment. Cost effectiveness is also guaranteed when such off-grid generation co-operatives re-sell surplus electricity requirements to the national grid or privately owned generation companies. Renewable electrical products are not subject to price fluctuations that occur with non-renewable sources. Whilst these alternatives may be expensive from the outset, they are, nonetheless, much cheaper in the long term. It must be acknowledged that renewable sources also suffer from a number of technical challenges, since they are generally dependent on good weather – that is, either sunlight, wind or other conditions. Regardless of this, the dynamics of the relationship between new technology, poverty and the environment have been scientifically researched and documented.<sup>560</sup> There is consensus amongst governments and international development institutions today that renewable electric technology has positive effects on both poverty and the environment. Under such dire circumstances in Nigeria today, the potentials it offers seem to outweigh its disadvantages. It is, therefore, not too idealistic to strongly conclude by suggesting that off-grid renewable electricity co-operatives offer a lot more promise for cheap, sustainable and efficient access to electricity than any other alternative in Nigeria today. It is only hoped that they arguments in this chapter have drawn attention to its vast potential.

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<sup>559</sup> See, World Bank, *Development and Climate Change*, World Development Report, 2010.

<sup>560</sup> See, Karekezi S and Waeni K. 'Renewable Energy in Africa: Prospects and Limits', paper prepared for Workshop for *African energy experts on operationalising the NEPAD Energy Initiative*, 2003.

## **4. Conclusion**

The chapter has been a modest attempt to sketch out the possibility of community participation as a way of enabling more access to electricity through co-operatives. The potential of co-operatives have been discussed, so have three co-operative models been proposed. Discussions have been set in the context of Nigeria, and this has entailed understanding how the existing legal and institutional framework can be reformed to accommodate co-operatives. The chapter is an extension of the arguments of the previous chapter and goes beyond the actual processes of deliberation to pre-empt the kind of decisions that can emerge from participation. The proposals here are by no means an imposition on communities; their deliberations can lead to different outcomes. The proposals, however, should be seen as widening the range of options that communities can choose from, if this possibility exists. As with Community Forums, the proposals are also not exhaustive, quite apart from being hypothetical. Apart from questions of funding, other important dynamics are implicated, including questions of expertise. Regardless of this, the proposals should best be understood as a vision of what can be achieved in any given context in so far as the will to do so exists. Once it exists, then the practical modalities can be worked out in consideration of context specific needs. The intention here, as the thesis in general, has not been to provide a blue-print for how it would work in practice, but rather it has been to inspire and provide a theoretical picture that can ground this possibility.

## Chapter Eight

### CONCLUSION: TOWARDS A POST-STATE HUMAN RIGHTS DISCOURSE

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This thesis has offered a theory, through which the values and solidarities created in community can potentially be maximised towards the promotion of electricity, not only as a human right, but also a public good in the more ethical sense of the term. The theory of community comprised of three related parts. The first has dealt with what community means, its normative weight, and why it ought to be relevant in contemporary social, economic and political contexts. Following closely, the next component has dealt with actual spaces for participation, where Community Forums have been proposed to fulfil this requirement. The final component offered a theory of deliberation for Community Forums, partly as an attempt to anticipate and mitigate challenges of deliberation and participation. There was, however, a prior task before explaining the substantive elements of this theory. This entailed justifying and teasing out the prospect of a mutual relationship between human rights and community. It was an attempt to discursively establish a relationship between both concepts, appreciating that there may be circumstances in which the principles of community may gain priority over human rights, whilst in other situations; the requirements of human rights would assume priority over community. The relevance of the arguments in future practice will depend on how the theory can be adapted or applied to different Third World country contexts, as well as to different problems related to other economic and social rights like water, education and healthcare. The family resemblance

between electricity and these other rights – and the similarity of the problems – is some indication that the theory can be applied in different contexts, as well as to different problems in so far as this is carried out in a context specific way.

The thesis has been an attempt to respond to limitations of Bretton Wood inspired neoliberal reform approaches, which have recently attempted to structure the way human rights are provided in the Third World. This discourse, as was seen, is facilitated by the concept of good governance which, amongst other things, can be understood as an attempt to create a new social, economic, legal and political order in the Third World. Whilst good governance is a term unique to the Third World, it emerges in the context of shifts in perceptions of governance in recent transnational academic debates. This is, of course, reference to discussions of the rise of new forms of governance, which have emerged as substitutes to traditional State centred forms of governance. Not only was a critique of good governance offered, it was linked up with its assumptions about human rights vis-à-vis markets. This has encouraged the privatisation of numerous traditional responsibilities of the State, including the human rights of particular concern. Methodologically, a case study of the reform proposals for the Nigerian electricity sector has been used to instantiate the problems that arise from such narrow assumptions, and furthermore, how the theory of community – through a creative dialectic with human rights – offers an alternative. A further aspect of this theory has been to hypothetically sketch out the potential of co-operatives in the context of electricity. These proposals have been made under no illusions that they will be easy to achieve. There are, of course, many hurdles that need to be transcended, including the potential difficulty of securing the autonomy of communities within the existing market framework. In practical terms, this may entail – as was argued –

creating generation and supply co-operatives to allow communities to achieve this objective.

One important point that must be stressed here is that the proposals in the thesis have not only entailed appreciating how community can strengthen human rights, but also how the latter can strengthen the former. This has meant reformulating human rights in ways that they may serve the goals of community. This is simply because the thesis has also been about appreciating the moral value of human rights, even with their numerous imperfections. There are many reasons why human rights remain (and should remain) relevant in different social and political contexts today, especially in community. To repeat, without human rights, individuals would be too weak to withstand being overwhelmed by certain demands of community. One does not have to be a feminist to appreciate the significance of the famous slogan – the ‘personal is political’. This, amongst other things, draws our attention to the harms that takes place within the household or in community. Aside from this, one must not forget also that human suffering is essentially (but not exclusively) an individual affair. As such, human rights may be one way of protecting and alleviating these sorts of harms. This is on the condition that one of their more fundamental inadequacies is transcended. The thesis has been an attempt to equip human rights with the proper tools to overcome this shortcoming. The thesis has tried to rescue human rights from their limitations of *seeing* and *ameliorating* human suffering. Simone Weil’s famous critique of rights has been most helpful in this context. It was used to draw attention to the epistemic inadequacy of human rights, and furthermore, to understand the inevitability of alleviating human suffering through love. The importance of love has not been proposed in an antagonistic way, but rather based on a mutually dependent relationship with human rights. These arguments as such, have importantly

brought to light aspirations for an ethical framework of human rights, in which obligations to assist the poor are based on love and compassion. This is the sort of philosophy that should underpin human rights. It is one way of encouraging reciprocal practices amongst individuals in community.

Generally speaking, the defence of human rights in this thesis has in part been on account of their continuing dominance in various contemporary economic, political and social contexts, such that they unfortunately sit well with numerous incompatible interests. This was the point of the critique of market-friendly human rights discourse carried out in chapter three. It can be argued, nonetheless, that for all attempts to capture, co-opt, misuse or abuse them, human rights always seem to leave a residue that paradoxically makes them adaptable to progressive struggles. Whilst they may be captured by the dominant neoliberal market ideology, for instance, they can be re-appropriated by the poor through social markets. The point is that human rights can never be closed or definitely reduced to a single meaning. They are always open to different interpretations and serve different purposes. In many senses, they are like love; it, too, cannot be definitely understood given its metaphysical nature. It is difficult to explain what love really is, even though one often accepts that it is a good thing. Human rights are quite similar, and this might explain why there is little agreement on what they are or their proper function. It is this remainder that they leave that make them so unique, and very importantly, why they have a moral appeal.

One implication from the above is that this thesis has itself instantiated this dimension of human rights, that is, their potential for emancipation within hegemonic discourses. Looking back, the intentions here have been quite modest; they have not been an attempt to oust dominant neoliberal human rights discourse, but rather to understand the



paradox that lies within it, one that always leaves a space to be occupied. There are obviously dangers of working within dominant discourses, given that it can simply be interpreted as a form of acquiescence. The strength of the approach here, however, is that it does not operate under some false sense of idealism that the only way of achieving transformation is only by defeating hegemonic discourses. Rather, it accepts the reality of such discourses and seeks to disturb them from within. It is an approach that is certainly consistent with some of the arguments in this thesis, especially the approach to co-operatives or social markets. There are other ways of illustrating this approach, one of which is, to recall, Hardt and Negri's work on the *multitude*. There have certainly been others who have argued along similar lines,<sup>561</sup> but Hardt and Negri is used here to illustrate this point. As described by them, "the multitude is the living alternative that grows within Empire,"<sup>562</sup> the latter of which is seen as a new form of global sovereignty comprising of certain dominant nation states, supranational institutions and major capitalist corporations. What this simply means is that they accept that Empire has spread its network of control across the globe through its vision of globalisation. It has, at the same time, *unintentionally* created new opportunities for a different kind of globalisation, one based on cooperation and collaboration:

Globalisation, however, is also the creation of new circuits of cooperation and collaboration that stretch across nations and continents and allow an unlimited number of encounters. This second face of globalisation is not a matter of everyone in the world becoming the same; rather it provides the possibility that enables us to communicate and act together. The multitude too might thus be conceived as a network; an open and expansive network which all differences can be expressed

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<sup>561</sup> For instance, this was the point of Andre Gorz on 'non-reformist reforms'. Another good example is Boaventura de Sousa Santos's idea of '*subaltern cosmopolitanism*'; it is an attempt to theorise ways in which groups marginalised from dominant narratives of economic globalisation have networked alternatives to it. One good example of the arguments above is the struggles of indigenous peoples, who resort to courts and the language of human rights to press their claims. In doing so, they seem to create a counter-hegemonic discourse. Of course, one cannot speak in such terms without reference to Antonio Gramsci's work on hegemony and counter-hegemony, see; Gramsci A. *Selections from the Prison Notebooks*, Hoare, Q and Smith, N. G (ed. and trans.), Lawrence and Wishart Ltd, 1971.

<sup>562</sup> Hardt and Negri above n 67, at xiii. See also, Hardt M and Negri A. *Empire*, Harvard University Press, 2001.

freely and equally, a network that provides the means of encounter so that we can work and live in common.<sup>563</sup>

The argument above is an important analogy of what has been attempted in this thesis. Whilst opposed to dominant neoliberal human rights discourse, the thesis has not been opposed to working inside it, especially exploring opportunities for transformation and collaboration within it. There are always potential dangers of co-option with such an approach or that communities might inadvertently contribute to neoliberal human rights discourse. There are countless examples of strategies that have emerged from the grassroots, which have been embraced by international institutions and transformed into something else. What this perhaps means is that communities need a mechanism that secures their autonomy,<sup>564</sup> but, at the same time, opens them up for collaboration with other communities or institutions. This is another way of understanding the value of Teubner's work on reflexive law and system theory, discussed in the previous chapter. It helpfully demonstrates how communities can remain radically closed, but simultaneously communicates with other systems, through the idea of structural coupling. It is the mechanism that works at the background to enable communication amongst autonomous systems. A downside of Teubner's work generally is that it is often too abstract to be useful, or translated into concrete terms. For present purposes, however, systems theory does metaphorically analogise how communities can secure their autonomy from neoliberal human rights discourse, and simultaneously assert their claims of authorship of human rights.

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<sup>563</sup> Ibid.

<sup>564</sup> Robert Cover's seminal thesis on 'interpretive or paidieic communities' – communities that ascribe their meanings onto law – is relevant here. The important point is that such communities use the rights guaranteed by law, such as freedom of association, to secure their associational autonomy. See, Cover R. 'Nomos and Narrative', 97(4), *Harvard Law Review*. 1983, at 22-33.

One final – but important – point that needs to be understood in this context is what is the commitment to observe human rights principles in such non-State settings? In other words, what is, or should be, the source of human rights obligations between individuals in community? Another way of putting this question, but from a legalistic standpoint, is what is to become of a country’s international obligations under international human rights law in non-State settings? To what extent do actions of those below the level of the State – who now exert power – embrace the responsibility from the State’s human rights obligations?

Legally speaking, there seems to be no reason to suggest that members of community are absolved from such human rights commitments; they would still operate irrespective of the change of circumstances. Even so, there are also other ways to achieve this, for instance, by aligning human rights horizontally through some sort of device, such as in constitutional law.<sup>565</sup> Whilst it is true that the horizontal application of fundamental rights offers a unique opportunity, the argument here, as with most of this thesis, is that such legal devices, or law cannot make sense outside an operating moral framework that establishes what binds individuals together. It is something that must be done before proposing such obligations in legal terms. One must appreciate how individuals can be committed to respect rights of others prior to how they are legally bound, or the duties they owe community are proposed.<sup>566</sup> It is in this context that the analysis of Alan Gewirth’s thesis in chapter five on the community of rights becomes most relevant. This is his point

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<sup>565</sup> Here I am referring to the horizontal effect of fundamental rights. See, Van de Wault J. ‘Blixen’s Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism’, 1, *Law, Social Justice and Global Development*, 2003. Some other attempts to align human rights horizontally include, the draft declaration on Human Responsibilities, which is similar to the African Charter on Human and Peoples Rights, 1981 or the American Declaration on the Rights and Duties of Man 1948. See, Knox J. ‘Horizontal Human Rights Law’, draft paper presented at Colloquium at *Vanderbilt Law School*, 2007.

<sup>566</sup> I am aware that natural rights theories are justified on the basis that rights exist prior to the emergence of sovereign authority. In spite of being one way of understanding individual obligations, I find them too individualistic for present purposes. See, Waldron above n 40.

about how individuals cannot enjoy human rights without considering the rights of others. Human rights create relationships between right-holders and duty-bearers, which entails a kind of social practice that also involves rules and institutions. What he means is that there is a principle of solidarity entailed in human rights and this has a further effect of linking human rights with the idea of community. It achieves this by transforming members of society into *communities of concern*. There is hardly any difficulty in appreciating that right-holders and duty-bearers share a certain degree of solidarity, what is more difficult to understand is one's obligations to non-duty holders. After all, the right – duty relationship leaves out a range of individuals from the solidarity implied. To repeat, it excludes the vulnerable, disabled, children, nature, future generations or such others not capable of bearing duties. As such, the rights – duty relationship is only partially helpful in this context. One can propose a different way of understanding solidarities and relationships in community. This can be understood if one appreciates that the essence of community is equally about love and compassion. More importantly, it is about assisting vulnerable and less fortunate individuals in community.

Discussions about the significance of human suffering further illustrate how horizontal obligations in community can be created. This point, of course, takes us back to how this thesis began. It refers to the arguments about the significance of human suffering as the core reason behind human rights. This is an important way of generating obligations in community, quite apart from strengthening human rights itself. Without such kinds of relationships, human rights seem too weak or inadequate to draw the kind of obligations required in community or society as a whole.

In this case, it would seem difficult to rebuild human rights in ways that have been suggested without reference to Simone Weil's work, especially her concepts of *attention*

and *love*. Love not only draws our *attention* to human suffering, but also the obligations necessary to ameliorate it. Love – the kind that embraces strangers – not only makes the invisible visible, but can potentially help recreate human rights, including the obligations to observe them. This is quite evident from Weil’s discussions on human obligations.<sup>567</sup> It is symptomatic of the kind of obligations that individuals in community should strive to achieve. Her discussions on obligations are important for another reason; they reveal that she was not as opposed to human rights as it is generally believed. Apart from their inability to come to grips with suffering, her difficulty was the primacy given to human rights over everything else. For her, human obligations should always come first, but this is not to say that human rights have no value. Obligations are important because they express a profound longing in the human heart for good, one which can never be placated.<sup>568</sup> Obligations are based on mutual respect and it is what binds individuals together. For Weil, even though obligations have their divine origins, everyone possesses the power to turn their attention and love to the divine, who would in turn, channel our obligations towards each other. The point is that without such obligations, human rights would themselves be ineffective. There are always conditions attached to human rights, but human obligations are unconditional. Such obligations analogise the kind of horizontal theory of rights that has been anticipated in this thesis. It is the type of obligations that ought to be shared, without condition, by all individuals, whether in community or outside it. It certainly creates new opportunities to promote non-instrumental relationships currently found lacking in human rights discourse.

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<sup>567</sup> See; Miles S (ed.), *Simone Weil: An Anthology*, Virago Press, 1986, at 105-112; 221-237.

<sup>568</sup> *Ibid.*, at 222.

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