

# RIGHTS-BASED APPROACHES TO SOCIAL PROTECTION

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## Acronyms

DFID	Department for International Development
GDP	Gross Domestic Product
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
MEGS	Maharashtra Employment Generation Scheme
ODI	Overseas Development Institute
RBA	Rights-based approach
SSAJ	Safety, Security and Access to Justice
SP	Social Protection
SRM	Social Risk Management
TSP	Target Strategy Paper
ToRs	Terms of Reference
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund

# 1 Introduction

## 1.1 Purpose

This paper has been commissioned as part of a project of the Overseas Development Institute (ODI) to assist the UK Department for International Development (DFID) in developing an institutional policy and approach to social protection programming. Social protection is here defined as ‘an approach towards designing policies and interventions which respond to the ... risks poor and vulnerable people face and which will make them less insecure’ (Shepherd, 2004: 1).

This paper provides background information and analysis on the relevance of rights-based approaches (RBAs) to development for the provision of social protection (SP) in developing countries, supported through international development assistance. This background paper does not purport to serve as programmatic guidance; it only identifies key arguments and some illustrations of the relevance of RBAs for social protection. It needs to be read in conjunction with the overarching position paper (Shepherd, 2004) as well as the other background papers.<sup>2</sup>

## 1.2 Central argument

This paper argues that there is a strong congruence between the two agendas. Rights-based approaches strengthen the normative case for social policy in general, and social protection in particular (Conway and Norton, 2002: 535; Ferguson, 1999). Such approaches offer normative standards and principles, analytical tools and operational guidance (Moser and Norton, 2001), which are relevant in both justifying social protection measures and informing their design, implementation and evaluation.

The key contributions of a rights-based approach to social protection are that it:

- considers SP to be a right and entitlement, and not just a matter of charity;
- places clear obligations on states to guarantee SP;
- can use a range of international human rights standards to justify SP, starting with those related to social security but broadening out to all human rights;
- highlights the core obligations and minimum standards that can be expected, as well as the specific requirements of vulnerable groups;
- can use a range of human rights principles to justify SP and also influence the design of schemes (e.g. equality and non-discrimination, participation and accountability);
- places citizenship, and the importance of understanding social and political contexts, at the centre of the justification and delivery of SP;
- as a result requires a focus on the ability of citizens to claim their SP entitlements;
- as well as a focus on accountability mechanisms, and institutional capacity, to guarantee the appropriate design and delivery of SP; and thus
- links demand-side with supply-side considerations, when SP can often appear be more technical and supply-side focused.

In addition to a RBA making a contribution to SP, social protection policies and programmes can support the realisation of human rights for the poorest and most vulnerable. This is particularly the case when the range of social protection instruments (e.g. insurance schemes, public works, food aid, targeted cash transfers or social funds)

are seen not as based on humanitarian concerns or charity, but as grounded in social justice and the equal rights and entitlements of those that benefit from SP. From this perspective both approaches can be seen as complementary and mutually reinforcing.

### **1.3 Rights-based approaches**

#### **1.3.1 Human rights principles and standards**

There are several definitions of rights-based approaches (Piron and Watkins, 2004). The one adopted here is derived from DFID's 2000 Human Rights Target Strategy Paper (TSP), 'Realising Human Rights for Poor People', and complemented by more recent developments, in particular the 2003 UN Inter-Agency Common Agreement (Annex 1 summarises the agreement).<sup>3</sup>

In the TSP, DFID states: 'The human rights approach to development means empowering people to take their own decisions rather than being the passive objects of choices made on their behalf. The objective of DFID's Human Rights Strategy is to enable all people to be active citizens with rights, expectations and responsibilities' and to 'claim their rights to the opportunities and services made available through pro-poor development'. The policy has been operationalised through three principles: 'participation', 'inclusion' and 'fulfilling obligation'. Section 3 of this paper applies these and related UN principles to SP.

One of the main characteristics of a RBA, and what distinguishes it from most other development approaches, is that it is normative: it is derived from a framework assigning rights and obligations to individuals, groups and states. These global standards are grounded in 'the idea that states are obliged to provide appropriate regulation of labour and financial markets and an acceptable basic standard of health care and education, all of which will improve the ability of households to manage risk within livelihood strategies that are focused on improving standards of living' (Conway and Norton, 2002: 535).

International human rights standards are covered under the DFID 'obligation' principle; they are also the starting point for the UN's recently agreed common understanding.

The importance of these standards in relation to social protection is that they explicitly recognise a 'right to social security' as well as the 'right to an adequate standard of living' (e.g. clothing, shelter, food, health). The scope and application of international standards is examined in Section 2. (Annex 2 identifies those most relevant for social protection.)

#### **1.3.2 Rights regimes**

However, international standards constitute only one normative 'level' or 'regime' in a rights-based framework. These standards are to be translated in constitutions or statutory laws; customary and other informal systems are also relevant, as is illustrated in Table 1.

One of the challenges of a rights-based approach to social protection is the translation of these standards into practice at the national and community level, so that vulnerable individuals and groups benefit from the prevention and protection they offer.

**Table 1 Various rights regimes**

Rights regime	Type of rights	Institutional framework	Relevance for social protection
<b>International human rights law</b>	Human Rights Universal application	International institutions (e.g. UN, ILO). Member states have to abide by these standards domestically and contribute to the development of new standards and their monitoring. The ILO has developed a body of labour and social security standards relevant for social protection	Human rights law sets international norms, standards and principles which support the rights of the vulnerable to live in dignity and justify social protection. The right to social security is recognised as a human right. These standards can be used to assess and amend other types of law, to ensure that social protection measures are in place and protect the most vulnerable
<b>Regional human rights law</b>	Human Rights Regional application	Regional level (e.g. Europe, Africa, Americas). Some powers of enforcement (e.g. Europe). Can be incorporated into domestic law (e.g. UK Human Rights Act)	Regional bodies may be more politically acceptable to political elites and accessible to NGOs defending vulnerable individuals and groups. European instruments specifically provide social protection based on ILO standards (Council of Europe, European Social Charter)
<b>Constitution</b>	Constitutional rights National application	National level. Enforced domestically through the courts (constitutional courts, judicial review). A constitution sets the fundamental formal 'rules of the game', which can include social security financing (e.g. the French Constitution). Constitutions can give human rights institutions responsibility for monitoring and promoting human rights domestically	Most constitutions establish equal rights for all citizens, and provide particular protection for civil and political rights ('fundamental freedoms') which are relevant to claim social protection and ensure non-discrimination. Some include provisions on economic and social rights, which can cover social security and other dimensions of social protection, but they are usually less enforceable
<b>Statutory law</b>	Statutory rights National application	National level. Covers state laws in federal systems and local bylaws. Enforced through domestic courts, police, etc. Administrative law governs the behaviour of state officials and can be used to bring them to account. Statutes can specify social protection entitlements	Social protection schemes can be defined in statutory law which establishes clear entitlements, such as to pension or health-care. However, laws can be discriminatory in content and in their implementation and thus be a cause of risk for the vulnerable. They can sometimes offer protection against local practices
<b>Religious law</b>	Religious rights Normally applies to followers	Multiple levels. Enforcement varies and depends on relation to the state. Human rights and constitutional norms may take precedence and ban certain practices. Can include social protection practices (e.g. charity, gift-giving)	Religious law may benefit the vulnerable and provide elements of social protection (e.g. practice of gifts to the poor under Islam). It may also discriminate (e.g. against women, the non-believers) or lead to inhuman practices and punishments which undermines its social protection function
<b>Customary law</b>	Customary rights associated with socio-ethnic groups/localities	Local level. Enforced through structures of customary authority (e.g. chiefs) or lowest courts. Can include community-based social protection	Customary law can represent shared values and practices which promote social protection practices. It may also provide more accessible dispute resolution mechanisms. However, customary norms and practices may render certain groups even more vulnerable (e.g. widows rituals)
<b>'Living' law</b>	Informal rights and norms of behaviour associated with localities and cultures	Micro level through social arrangements, including local elites. Can include community-based social protection	Living law may be associated with discriminatory social practices which further poverty and exclusion (e.g. dalits in India). Local norms may however also provide informal social protection

Source: Piron (2003), based on Norton and Moser (2001).

### **1.3.3 Human rights obligations**

Human rights norms and standards do not operate in a vacuum: they lead to a conceptualisation of political and social relations between the state and citizens (as well as between citizens and towards non-citizens) from the perspective of legitimate claims and obligations. Of central importance to a RBA is seeing individuals as ‘rights-holders’ and states as ‘duty-bearers’.

With regards to social protection, such a perspective means that the state is obligated to guarantee SP, and that citizens (but also non-citizens) can claim it. SP is not a matter of charity or generosity, but a basic responsibility of the state. For a number of reasons examined in this paper, this language of rights can be more persuasive and effective than one based on compassion or humanitarianism.

Over the past few years, the way in which states are obligated as a result of the human rights framework has become more precise and can be applied to obligations relating to SP (see Box 1). Such an approach also puts at the centre of the analysis the risks directly caused by the state and its agents (e.g. torture, corruption, discriminatory access to services), and the preventative, mitigating or promotional actions that can be taken to respond to various forms of risks (directly provided or enabled by the state).

#### **Box 1: Understanding states’ obligations regarding social protection**

The obligation to **respect**: states are required to refrain from interfering in a manner that negatively affects the realisation of a right, e.g. the right to housing is violated by arbitrary forced evictions by a state. With regards to social protection, states are obliged not to act in ways that can cause risks or enhance the vulnerability of poor people, for example, they should not use excessive force which may lead to death or bodily harm, or should not prevent poor people from organising to claim their social entitlements.

The obligation to **protect**: states have to prevent violations by third parties, e.g. states have to ensure that private sector employers respect basic labour standards, which is highly relevant for social protection, as a number of schemes are related to formal employment status. Social protection could encompass a broader conception of protection, for example family protection against domestic violence and other abuses or protection of human life or dignity during conflict).

The obligation to **fulfil**: states have to take appropriate legislative, administrative, budgetary, judicial or other measures to ensure the full realisation of the right, e.g. states have to provide essential primary health care or free and universal primary education. Social protection schemes to provide minimum social security to all would come under this obligation – though the obligation does not necessarily mean that the state has to directly provide social protection; it can facilitate or encourage actions of third parties.

Obligation can be of **conduct**: states have to take the necessary steps to realise a particular right, e.g. adopt and implement an action plan to address maternal mortality. This would include an obligation to take steps towards ensuring the realisation of social security and more broadly developing a social protection strategy.

Obligation can also be of **result**: states have to achieve specific targets to satisfy a specific standard, e.g. achieve the Cairo/MDG maternal mortality reduction target. States are obligated to actually ensure social protection in line with the policy and legislative framework they have adopted.

Source: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (International Commission of Jurists et al, 1997).

## **1.4 Outline**

The rest of this paper is structured as follows. First, it examines whether there can be said to be a human right to social protection by reviewing the relevance of international human rights standards, and in particular the ‘right to social security’, as well as the International Labour Organisation’s approach to social protection. The conclusion is that *all* human

rights (and not just social security) are relevant. Social protection instruments can be seen as a response to meeting human rights obligations, in particular by guaranteeing that basic minimum standards are met (Section 2). The paper then applies the three DFID human rights principles to social protection policies and programming. This highlights the centrality of equal citizenship to justify social protection, and the importance of both demand-side 'claiming' as well as supply-side reforms to ensure social protection (Section 3). This is taken a step further towards operationalisation by donor agencies, by examining how SP instruments can be assessed from a rights-based approach and reviewing the World Bank's Social Risk Management Framework (Section 4). The conclusion draws together key messages and some recommendations for DFID (Section 5). Background on human rights can be found in Annexes 1 and 2, country case studies in Annex 3 and ToRs in Annex 4.

## 2 Human rights standards and social protection

In this section, we examine the relevance of human rights standards for social protection policies and programmes, and ask whether there is a ‘human right to social protection’. By this we mean whether there is a codified right to social protection, rather than seeing it as desirable but not recognised in international, regional or domestic frameworks.

The international human rights framework recognises the right to social security, and the International Labour Organisation (ILO) has developed an approach to social protection centered on it. A short review of the ILO illustrates one way of implementing a RBA to SP.

However, we argue that the strength of a RBA is that it draws on *all* human rights. Particularly relevant for social protection is that a RBA highlights the minimum standards that need to be respected in relation to every human being. Human rights standards also offer specific protections for vulnerable groups. These minimum standards and the focus on vulnerable groups provide a strong normative justification for social protection measures, which go well beyond social security.

### 2.1 Social security and the ILO

#### 2.1.1 Social security

Social protection thinking has evolved over time, starting from a narrow range of instruments to help poor people cope with shocks and risks, such as famine or loss of income as a result of illness, developing to one which looks at how the risks and vulnerabilities that poor people face can be prevented or mitigated, and how poor people can be helped in their recovery (Shepherd, 2004).

Social security is one of the traditional social protection instruments, often based around formal employment. It includes both social insurance (contributory schemes) and social assistance (resource transfers, often tax-financed) measures.

A ‘right to social security’ has been recognised by the international community and has been codified in international instruments (see Box 2). This right is principally related to events beyond the control of an individual or linked to specific stages in life which require particular protection, for example in cases of:

- unemployment
- sickness
- disability
- widowhood
- old age
- motherhood or
- childhood

Constitutions may establish the right to social security (e.g. the French Constitution covers social security financing), although it is principally through social security legislation and policies that entitlements to specific benefits will be granted. In general, they tend to protect individuals rather than communities against various contingencies; these contingencies can be both idiosyncratic (e.g. illness) or co-variant (e.g. economic shock).

## **Box 2: Universal Declaration of Human Rights: the right to social security**

Art 22: Everyone, as a member of society, has the **right to social security** and is entitled to realization through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Art 23.3: Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and **supplemented, if necessary, by other means of social protection**.

Art 25: Everyone has the **right to a standard of living** adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the **right to security** in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

### **2.1.2 The ILO approach**

The ILO defines social protection as (Garcia and Gruat, 2003: 13–14):

- the set of public measures that a society provides for its members to protect them against economic and social distress that would be caused by the absence or a substantial reduction of income from work as a result of various contingencies (sickness, maternity, employment injury, unemployment invalidity, old age, and death of breadwinner);
- the provision of healthcare; and,
- the provision of benefits for families with children.

The ILO develops and monitors international standards in relation to employment rights which are relevant for social protection (see Box 3). The Social Security Minimum Standards Convention lays down nine branches of social security, all covered by specific standards (except family benefits and allowances) (Javillier, 2003).

Income is at the centre of the ILO's approach to SP and the 2000 *World Labour Report* defines social protection in terms of 'income security': the adequacy and regularity of income to maintain a standard of living (ILO, 2000: 22). The 1944 ILO Income Security Recommendation lays down the principle that 'persons employed for remuneration should be insured against the whole range of contingencies covered by social insurance as soon as the collection of contributions in respect of them can be organized and the necessary arrangements can be made for the administration of benefit' (para 20).

By virtue of its mandate, the ILO is principally concerned with social protection associated with employment; this limits its relevance for developing countries, where a number of risks and vulnerabilities are not associated with employment and income. The ILO is aware of the limitation of this approach and estimates that, in low-income countries, only 10% of the working population and their dependents are covered by statutory social insurance (e.g. pensions and healthcare) (ILO, 2000: 198).

### **Box 3: The ILO and social protection**

Instruments in the ILO's approach to SP include:

- **Social protection:** includes both public social security and private and non-statutory schemes (e.g. mutual benefit societies, occupational pension schemes)
- **Social security:** public measures to
  - offset the absence/reduction of income from work as a result of various contingencies
  - provide healthcare and
  - provide benefits for people with children (based on ILO Convention 102)
- **Social insurance:** contributory schemes
- **Social assistance:** tax-financed benefits to those with low incomes
- **Universal benefits:** tax-financed benefits to all (not means-tested)

The following **Social Security Conventions** are officially current and are to be taken into account when states develop new social security standards:

- Social Security (Minimum Standards) Convention, 1952 (No. 102)
- Equality of Treatment (Social Security) Convention, 1962 (No. 118)
- Employment Injury Benefits Convention, 1964 (No.121)
- Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No.128)
- Medical Care and Sickness Benefits Convention, 1969 (No.130)
- Maintenance of Social Security Rights Convention, 1982 (No. 157)
- Employment Promotion and Protection against Unemployment Convention, 1988 (No.168)
- Maternity Protection Convention, 2000 (No.183)

Sources: ILO (2000); Javillier (2003).

Though the ILO's definition of social protection as focused on income security began with an emphasis placed on social insurance covering certain categories of workers (Javillier, 2003), the ILO has now adopted a comprehensive approach, including aiming to extend social insurance coverage (see Box 7). Rather than defending the interests of specific groups, social protection now also forms part of a broader 'decent work for all' agenda (ILO, 1999). 'This universality of coverage, pervasiveness of concern and comprehensive conception of goals is a well-chosen alternative to acting only in the interest of some groups of workers, such as those in the organized sector, or those already in employment, or those already covered by explicit rules and regulations' (Sen, 2000 :120).

In summary, the 'right to social security' is recognised in international law, and the ILO's approach to social protection is based mostly on income security, although it is moving towards a more comprehensive approach. This is, however, only one way of showing that there is a recognised human right to social protection. A broader approach can be adopted, based on *all* human rights, to cover a wider set of risks and vulnerabilities, and a wider set of public policy options, covering for example enhanced access to social services and not just social security schemes such as social insurance.

## 2.2 Human rights and minimum standards

### Box 4: UN principles relating to the nature of human rights

**Universality and inalienability:** Human rights are universal and inalienable. All people everywhere in the world are entitled to them. The human person in whom they inhere cannot voluntarily give them up. Nor can others take them away from him or her. As stated in Article 1 of the Universal Declaration of Human Rights, ‘All human beings are born free and equal in dignity and rights.’

**Indivisibility:** Human rights are indivisible. Whether of a civil, cultural, economic, political or social nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights, and cannot be ranked, a priori, in a hierarchical order.

**Inter-dependence and inter-relatedness:** The realization of one right often depends, wholly or in part, upon the realization of others. For instance, realization of the right to health may depend, in certain circumstances, on realization of the right to education or of the right to information.

#### 2.2.1 Minimum standards

When poverty and vulnerability are defined in relation to more than income, the relevance of all human rights can be brought to bear on social protection. Key are those related to ‘the right to a standard of living adequate for the health and well-being’... ‘including food, clothing, housing and medical care and necessary social services (UDHR, Art 25).

The Committee that monitors the International Covenant on Economic, Social and Cultural Rights has established that states hold ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels’ of each of the rights in the Covenant. These are to be met irrespective of the availability of resources in a country, which implies reliance on international assistance in very poor countries and provides a strong justification for the use of aid for SP. Minimum standards include:

- essential food stuff;
- essential primary health care;
- basic shelter and housing; and
- the most basic form of education.

Social protection policies and programmes help ensure that these minimum standards are met, not just in relation to social security, but to the whole set of rights required to promote livelihoods and wellbeing (Annex 2 provides an indicative list of such rights). Given that human rights are ‘inter-related’ and ‘inter-dependent’, protecting or promoting a basic right will ensure that other rights are also better protected and promoted. For example, respect for the rights to adequate food and health is also a strategy to ensure better access to, and benefits from, education. Social protection policies and programmes can thus contribute to the realisation of all human rights.

#### 2.2.2 Progressive realisation of economic and social rights

However, there are a number of challenges in giving economic and social rights such status. For example, growth and poverty reduction can be achieved without respect for these rights. Economists can point to the high growth rate achieved in China with limited respect for labour and employment rights, accompanied by increased inequalities, but which has also contributed to poverty reduction (Song, 2003). Affordability is another challenge: for example, social insurance and social assistance schemes may be affordable in developed countries (such as European welfare states where transfers correspond to 25% of GDP (ILO 2000: 2)), but they may be beyond the reach of poor nations of the South.

These objections do not take into account the qualification that economic and social rights are to be prioritised and ‘progressively realised’ within the limit of state resources. In addition, evidence on financing suggests that SP schemes are in fact affordable even in developing countries (Barrientos, 2004; HAI, 2003b). What matters, therefore, is that a state takes appropriate steps towards enhancing the realisation of economic and social rights (e.g. progressively improving school enrolment rates): the obligation of conduct described in Box 1. In addition, decisions about prioritisation are not just economic but depend on constitutional and political decisions (e.g. whether to spend less on defence and more on social protection). As is shown in several South African examples, it is possible to make a judgement on the reasonableness associated with the affordability of specific policies or state actions (see Box 5).

#### **Box 5: South Africa: affordability and the right to health**

The South African Constitution is relatively unique in granting enforceable economic and social rights, and the Constitutional Court has been willing to rule on cases relating to the affordability of policies. The existence of these justiciable rights has enabled individuals and groups to mobilise to challenge public policy and service provision.

In the **Soobramoney case**, the applicant suffered from kidney failure and had not been given access to a dialysis machine. The provincial hospital only had a few machines and had decided to use them for cases where they could extend the lives of the patients. Mr Soobramoney’s health was so bad that the hospital decided not to offer him access to a dialysis. The Court decided that, in this particular case, it was not unreasonable to prioritise the use of an expensive and limited resource, even though an individual’s right to life might be violated.

In the **Treatment Action Campaign case**, the government refused to allow public hospital doctors to use a retro-viral to prevent mother to baby transmission of HIV. The Court tested government health policies against constitutional requirements and held that it was unreasonable for the state not to take affordable steps to save lives. An NGO, the Treatment Action Campaign, has been actively involved in this case and in following the implementation of the court decision.

Source: Piron (2003), based on <http://communitylawcentre.org.za>

#### **2.2.3 The relevance of civil and political rights**

Finally, recognising that the realisation of all human rights, and not just of the rights to social security or an adequate standard of living, is what a rights-based approach to social protection entails, also requires broadening the realm of rights one step further to include civil and political rights – thus respecting the principle of the ‘indivisibility’ of rights. Rather than talking of a ‘human right to social protection’, what this recognises is that all human rights standards can be relevant for SP and that SP policies and programmes are instruments to realise human rights.

Civil and political rights may not seem at first obviously related to social protection; however, they are required to ensure that rights-holders are able to take part in processes of defining a country’s approach to social protection and that they can claim their entitlements (see Section 3.2). In addition to this instrumental justification, civil and political rights are directly relevant as they constitute a form of protection against risks and vulnerabilities, in particular those caused by state actions such as illegal detention, lack of transparency or restrictions on media activity.<sup>4</sup> Social protection measures may be required in order that the poorest and most vulnerable can participate fully in decision-making processes and realise the full range of civil and political rights to which they are entitled.

For example, in relation to ILO’s work, Sen (2000: 125–27) notes the importance of democratic arrangements as a protection against vulnerability and contingency (providing

‘protective security’ and ‘transparency guarantee’) and concludes that: ‘It is not adequate to concentrate only on labour legislation since people do not live and work in a compartmentalized environment. The linkages between economic, political and social actions can be critical to the realization of rights and to the pursuit of the broad objectives of decent work and an adequate standard of living for working people.’

In summary, social protection policies and programmes can be seen as contributing to the realisation of the right to an adequate standard of living, and to the minimum standards related to all economic, social and cultural rights. In addition, social protection can contribute to civil and political rights, and the latter also have a contribution to make to ensure the effectiveness and appropriateness of social protection schemes. Rather than discussing the existence of a human right to social protection, the normative justification is that SP is required in order to ensure the realisation of all human rights for all.

### **2.3 Human rights standards and vulnerable groups**

Human rights, and the constitutional and legal rights and entitlements associated with them, are particularly valuable as a mechanism to provide additional protection for specific groups with particular vulnerabilities, such as those associated with life-cycle stages and gender, disability, race and other identity-based factors.

As with all international or regional standards, protection is provided at the national or local level through domestic laws, policies, programmes and institutions which should meet or exceed these standards. We illustrate the relevance of specific standards for vulnerable groups by looking at the Convention on the Rights of the Child. The Convention and domestic child rights legislations in line with it establish a number of standards and principles adapted to the needs and capabilities of children. A guiding principle is that the ‘best interest of the child’ needs to be a ‘primary consideration’ in all public or private action, including those of the courts, social welfare or administrative authorities. The Convention recognises that parents or guardians have primary responsibility for a child’s development, but also establishes a state obligation to provide care and protection for children as necessary in protecting their wellbeing, which includes the need to establish standards for institutions dealing with children.

The Convention also explicitly recognises the right to benefit from social security, including social insurance. However, as argued above, a rights-based approach building on the Convention brings a broader perspective the recognition of: the need to respect, protect and fulfil the various rights needed for a child’s full development; dimensions where children may need special protection (e.g. adoption, domestic violence, institutionalised care); or preconditions for the full exercise of all rights and duties as an adult (e.g. education, civil registration, nationality).

In summary, human rights norms and standards also draw attention to specific groups and can provide them with additional protection. The human rights principles of equality and non-discrimination, to which we now turn, also reinforce such a focus.

### 3 Human rights principles and social protection

A rights-based approach to development, as defined in Section 1, builds on both human rights norms and standards and operational human rights principles. This section illustrates the relevance of the three DFID human rights principles for social protection and starts to discuss some of the implications for designing and implementing SP schemes.

#### 3.1 Inclusion, equality and non-discrimination

##### Box 6: Inclusion, equality and non discrimination

**Inclusion:** building socially inclusive societies, based on the values of equality and non-discrimination. Actions to support the development and implementation of legislation, policies and programmes promoting equality of rights and addressing discrimination on the grounds of gender, race, ethnicity, age, disability, class or other social status (DFID).

**Equality and non-discrimination:** All individuals are equal as human beings and by virtue of the inherent dignity of each human person. All human beings are entitled to their human rights without discrimination of any kind, such as race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status as explained by the human rights treaty bodies (UN).

A rights-based approach starts from the principles of universality and equality: every human being is equally entitled to social protection. This implies a preference for schemes that are universal over those that only benefit a specific category of persons, such as contributory insurance schemes. The ILO's rights-based approach (see Box 7) leads to the recommendation that personal coverage of social insurance should be progressively extended to all, in line with the human rights principle of 'universality' (all should benefit from social security) as well as the requirement of 'progressive realisation' of economic and social rights (adequate steps need to be taken in the direction of full coverage).

##### Box 7: The ILO's rights-based approach to social protection

The ILO's approach can be described as rights-based. In particular it is:

- grounded in international standards;
- using a tripartite monitoring approach (involving states, employers and workers); and
- based on a set of fundamental values: 'the promotion of opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity and human dignity' (ILO, 1999: 3).

Four ways of extending social protection have been proposed by the ILO (Beattie, 2000):

- extending contributory schemes' compulsory coverage;
- promoting voluntary coverage;
- introducing universal benefits or services financed from general state revenues; or
- establishing or extending means-tested benefits or services.

Three rights-based criteria assessing both the feasibility and human rights impacts of the various options to extend coverage include:

- affordability;
- whether those with the greatest needs are reached; and
- gender equality.

Source: ILO (1999); Beattie, (2000).

However, a rights-based approach also calls for a focus on those that are not benefiting equally from goods and services, and an exploration of the reasons for such exclusion, which may be linked to specific vulnerabilities (e.g. disability or illiteracy) or more structural

discrimination (e.g. apartheid in South Africa denying equal rights on the basis of race). In a situation of scarce resources requiring prioritisation, a rights-based approach suggests that it is the entitlements of these individuals and groups that should receive priority. ‘Special measures’ may also be required to ensure that everyone benefits equally from rights related to social protection and guaranteed under the Constitution and the law. This may require policy or budgetary decisions that favour specific groups (e.g. affirmative action policies), until such a time when they are deemed no longer to need such protection (e.g. once gender or race equality is achieved). Or these may be permanent, as with maternity benefits. Such measures are particularly relevant as a strategy for responding to social exclusion and combating discrimination.

Targeting may thus be necessary, from a rights-based perspective, in order to reach those groups that are most vulnerable, suffer discrimination, may otherwise not benefit from social security and other social protection schemes, or do not have adequate access to services. However, even within targeted schemes, the principles of equality and non-discrimination apply. Self-targeted schemes in particular may be stigmatising and approaches are required to ensure that those that need them the most do benefit, but not at great social cost. Schemes may be less stigmatising if they are (see Box 8):

- presented as a right, not as charity
- institutionalised and
- seen to have broader social benefits

#### **Box 8: India: the Maharashtra Employment Generation Scheme (MEGS)**

An example of a rights-based approach to social protection, the MEGS has, since 1977, provided a legally based guarantee of employment to anyone aged over eighteen who applies. The scheme has reduced the depth of poverty by raising and stabilising incomes of households below the poverty line. It has been of particular benefit to marginalised and vulnerable groups, such as women and low-caste groups, although, as it is work-based, it fails to reach other vulnerable groups, such as the elderly or disabled. It appears to be relatively cost efficient; the wage rate is set low so that the scheme is self-targeting and, as a result, there is little leakage (only 10% of beneficiaries are classified as non-poor). By presenting work as a right rather than charity, the scheme avoids the stigmatisation often attached to self-targeting schemes.

This ‘right to work’ scheme has produced secondary benefits, such as strengthening the bargaining position of workers, and providing childcare and local employment opportunities. Other second-order effects include an upward pressure on agricultural wage rates in some localities and the construction of infrastructure, which is of benefit to all in the community and improves poor people’s access to markets and services.

The guarantee element of the scheme is being weakened as a result of the political decision to increase piece rates, which has undermined the ability to provide employment to all that need it. However, the entrenchment of the scheme as a right has increased its sustainability and it has become institutionalised. The political consensus that exists around the scheme, and the continued willingness of urban groups to finance it, is a result of the belief that they benefit from the public assets it creates and its containment of rural-urban migration.

Sources: Norton *et al.*, (2001); Kabeer (2002).

In summary, social protection aims to ensure that vulnerable, marginalised or excluded individuals or groups benefit from support to respond to shocks and risks and to address their vulnerabilities in a preventative manner. This can also be presented from a RBA: well designed SP schemes are needed to assist poor and vulnerable groups realise their human rights equally. Policy choices and schemes will depend on local contexts, but include a range of options, including non-stigmatising affirmative action or targeting. Social protection policies and programmes which explicitly take into account human rights

standards and principles thus reinforce a rights-based approach, and provide it with implementation instruments. Both RBA and SP contribute to deeper and more effective poverty eradication, and the achievement of the Millennium Development Goals by prioritising those groups that are the most difficult to reach.

## 3.2 Citizenship and participation

### Box 9: Participation

**Participation:** Actions to enable people to exercise their rights to participate and access information relating to decision-making processes (**DFID**).

**Participation and inclusion:** Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized (**UN**).

#### 3.2.1 The centrality of citizenship

It is principally at the national level, and in statutory laws, policy priorities and programmes, that social protection is provided, including through agreements on specific entitlements that all citizens can claim, such as free primary education or social assurance for the elderly.<sup>5</sup> This requires providing a justification for social protection schemes acceptable to all members of society, and processes of negotiation in which the value of redistribution and the equal rights of vulnerable members are recognised: ‘Contemporary approaches to integrating human rights into development practice have highlighted the need to convert such aspirations into standards and entitlements which reflect consensus on sustainable approaches and which are communicated widely. In this form, they can assist groups which lack voice and the political and social networks required to claim these benefits successfully. Without such concrete elaboration, however, statements of rights are of questionable policy relevance.’ (Norton, *et al.*, 2002: 554).

Social protection schemes are more secure when they are based on a notion of political community and solidarity which the hypothetical ‘social contract’ between the state and its citizens embodies.<sup>6</sup> The redistribution required to finance social protection instruments is politically more sustainable when supported by an understanding of equal rights and duties shared by all citizens (Devereux, 2002), including:

- that all pay taxes and respect the rights of others;
- that all can benefit equally in times of need (e.g. state-provided unemployment or old age benefits); or
- that there may be broader social benefits.

An example of the broader social benefits associated with SP is that it can play an ‘integrative’ role and assist in bringing back into the mainstream individuals or groups that have been excluded, by providing support in getting back into employment and becoming an active (and possibly tax-paying) member of society once again. SP can be justified on the basis of social inclusion related to equal citizenship. It is also a strategy for responding to social exclusion and a way of promoting greater social cohesion.<sup>7</sup>

#### 3.2.2 Participation

For these SP entitlements to become real, two mutually reinforcing strategies need to take place:

- on the one hand, citizens need to be informed of their rights and entitlements, and to develop the capabilities to claim them through appropriate channels (examined here);
- on the other, the state, with its agents, needs to ensure that it is delivering on its obligations and implementing its strategy to achieve social protection (reviewed in the next sub-section).

Participation in its various forms is key to the first strategy; it includes not only formal political rights to take part in elections, but also involvement in various form of decision-making, including in the design and implementation of social protection schemes.<sup>8</sup> The various channels providing opportunities for citizens or civil society action are illustrated in Table 2.

**Table 2 Channels of contestation**

Institutional channel	Types of claims	Methods of citizen and NGO action
<b>Political system</b>	Identification of new claims (e.g. women's rights) Negotiation on how rights should be interpreted and recognised (e.g. content of a law) Negotiations on how entitlements should be implemented	Voting Lobbying Demonstrations Media reports Public hearings Advocacy
<b>Legal system</b>	International human rights system Claiming specific rights through courts Interpretation of a right Implementation and monitoring of a right	Rights education and legal literacy Bringing a legal claim, either individually or through public interest litigation Quasi-judicial options, such as ombudsman or Human Rights Commission NGOs monitor state reports to international treaty monitoring bodies
<b>Policy channels</b>	Negotiation over interpretation of public provision of entitlements	Participatory policy and planning processes Participatory budgeting and access to information NGOs engage in international conferences
<b>Administrative channels</b>	Negotiation over implementation of entitlements	Interactions with health workers, teachers, etc Monitoring of local services e.g. patients charters, report cards, codes of conduct
<b>Social channels</b>	Negotiation over access to natural resources or labour	Informal negotiations within the family or communities
<b>Private sector channels</b>	Negotiation over private sector-related entitlements and private sector activities	Labour standards, union rights, credit provision, consumer action

Source: Based on Piron (2003) and adapted from Moser and Norton (2001).

A rights-based approach to social protection not only needs to take into account the special and, potentially 'additional', protection that certain categories of people may require (e.g. standards and principles set by the Convention on the Rights of the Child as discussed in Section 2.3), but should also pay attention to the ability of these rights-holders to actually claim their social protection entitlements. This is more of a challenge for vulnerable groups, who may be less well able to organise. Appropriate strategies are needed, especially to overcome institutional constraints. An example of the difficulties faced by older people in accessing free healthcare entitlements is illustrated in Box 10.

**Box 10: Bolivia: aged-based exclusion from access to healthcare**

In Bolivia, the Human Rights Ombudsman has estimated that only 37% of those entitled to free healthcare (over 65 years) are receiving their benefits. One of the main causes is the lack of documentation needed to prove eligibility. An NGO, the Social-Legal Centre, was established and, as a result of its advocacy work, the rules have been changed so that a witness can be used to verify the age of the applicant rather than paperwork. However, administration problems also exist; a third of Bolivia's municipalities have no systems or registers to check eligibility and also lack means of disbursement.

Sources: Buetas and Beales (2003); HAI (2002).

The exercise of participation in relation to social protection can amount to social struggles challenging power relations, the existing allocation of entitlements, and the distribution of national resources. Human rights claims are often seen as potentially competing with one another. For example, trades unions may wish to protect the benefits they have acquired for their members, rather than extend social protection benefits to larger categories, for fear of lowering standards. The middle-classes may not wish to see national resources used for 'unproductive' support to the 'undeserving' poor.

However, a rights-based approach can overcome such apparent difficulties: 'even when trade-offs have to be faced, they can be more reasonably – and more justly – addressed by taking an inclusive approach, which balances competing concerns, than by simply giving full priority to just one group over another' (Sen, 2000: 212). Participation thus implies processes of political and social renegotiations around the use of national resources based on the recognition of equal rights and responsibilities. Special efforts are required to ensure that the perspectives of the poorest are included in such debates, either through facilitating the creation of 'pro-poor' political parties, or building alliances across social classes. Social movements can be a powerful source of change (see Box 11).

**Box 11: India: social movements and the right to food**

The 'Directive Principles of State Policy' in India's constitution contain a number of articles relating to economic and social rights which entail the obligation that Indian states apply the principles to legislation and policies. This includes 'raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties'. This has enabled civil society groups to utilise legal processes to hold government to account and challenge the corruption and institutional failure that has led to a massively distorted food distribution system and among the highest levels of malnutrition in the world.

In May 2001, the People's Union for Civil Liberties (registered in Rajasthan by a small group of social activists) submitted a petition in the Supreme Court demanding that the country's gigantic food stocks be used without delay to prevent hunger and starvation. This Supreme Court hearing has led to a wider 'right to food' campaign, associating the right to food with a wider set of rights required to achieve an adequate standard of living, including the right to social security. The interim court orders issued so far have emphasised the need for Indian states to ensure that marginalised and vulnerable groups have sufficient food and that states implement the various food-related schemes (e.g. Public Distribution System, Mid-day Meal Scheme, Food for Work Programme). Many of these court orders are just exhortations to the executive, but others are policy directives requiring state action. Commissioners have been appointed to monitor respect for these orders. The power of public action and the media in holding government to account is demonstrated by events in Orissa, where the state government had failed to respond to the Commissioner's report until it was published in the local newspapers.

Source: Piron (2003)

### **3.2.3 Social protection beyond citizenship rights**

Social protection is, however, not always the result of the exercise of citizenship rights. Informal forms of social protection, such as family or community-based schemes, may reach the poorest not covered by the state or the private sector. Although social protection is a state obligation, this does not mean that the state has directly to provide it, and these mechanisms may be preferable for a number of reasons (Shepherd, 2004).

However, informal mechanisms can sometimes offer protection at certain costs, limiting the ability of beneficiaries to claim a greater set of rights in order to secure the benefits provided by existing arrangements, even if they are less optimal. As noted by Wood (2003: 468), risk management for the poorest and most vulnerable ‘involves loyalty to institutions and organizations that presently work and deliver livelihoods, whatever the longer term cost. Thus multi-period games are established on the basis of patron-client dependencies, comprising a multiple web of transactions which limit the client’s room for manoeuvre since all ties could be threatened if one of them is allowed to collapse.’

SP needs to be analysed in the political and social contexts in which it operates, including the informal norms and rules that govern social relations and influence how formal institutions operate. A risk is that certain instruments may become extensions of patron-client networks, instead of promoting equal rights. Particularly when discretion is given to local officials or traditional authorities in the administration of schemes, they may grant greater benefits to their relatives and ‘clients’ rather than equally to all members of the community, or to men and women alike (Devereux, 2002: 10–11).

A rights-based approach to social protection grounded in citizenship may provide greater protection than one solely relying on informal systems. However, an approach limited to citizenship is not adequate unless it is also ‘human rights-based’. Human rights are universal and apply to all, including non-citizens, such as: refugees, migrants, minority or indigenous groups that may be denied full and equal citizenship, or even women who may have lesser rights in both statutory and customary law, for example in relation to land ownership or inheritance. This analysis leads to several challenges and steps to be taken:

- Ensuring that equal citizenship is formally (*de jure*) extended to all that should benefit from it under the constitution, and that they equally benefit from its protection (e.g. granting citizenship to all minorities; efforts towards gender equality through law reform).
- Ensuring that all citizens actually (*de facto*) benefit from the privileges associated with citizenship (e.g. actions such as ensuring that all have the formal documents required for accessing benefits, or anti-discrimination measures are taken).
- Ensuring a minimum level of protection for all persons on a territory, regardless of citizenship, in line with international obligations (e.g. respecting the basic rights of refugees, asylum seekers and migrant workers, who constitute vulnerable groups often less protected under domestic laws and policies).<sup>9</sup>

In summary, the notion of active citizenship is central to a RBA to social protection. Such an approach draws attention to the ‘demand-side’ of social protection, which a focus on the technical aspects of various supply-side SP schemes may ignore. Such schemes need both to respect the principle of participation, and also to pay attention to broader political and social contexts, and various forms of political empowerment and social mobilisation that can lead to demands and legitimisation of SP.

### 3.3 Obligation and accountability

#### Box 12: Obligation, accountability and the rule of law

**Fulfilling obligation:** strengthening institutions and policies which ensure that obligations to protect and promote the realisation of rights for all are fulfilled by states and other duty-bearers. Actions to increase directly the public accountability of governments and other duty-bearers (**DFID**).

**Accountability and rule of law:** states and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law (**UN**).

#### 3.3.1 *Linking the demand and supply sides of SP*

Social protection thus needs to be seen as much more than a transfer of resources or greater access to basic services. The realisation of human rights, including the design of, and access to, appropriate social protection schemes, requires developing the capacities of rights-holders to know and claim their rights. Various empowerment strategies are required to achieve this, including those that permit ‘active, free and meaningful participation’ in decision-making processes.

An effective rights-based approach also requires linking this ‘demand-side’ of rights-claiming with the ‘supply-side’: the ability and willingness of ‘duty-holders’ to deliver on their human rights obligations, including those relating to social protection. This often requires greater transparency and accountability, which can be partly achieved through governance reforms (see Box 13).

#### Box 13: India, Uttar Pradesh: the need for greater accountability in pension administration

HelpAge India has undertaken research into pension administration in the Indian state of Uttar Pradesh, including consultation with 1,105 older people and government officials responsible for service delivery. Their findings reveal that there was a need for more transparency and accountability:

- Whilst awareness of the old age pension scheme was high, understanding of eligibility criteria and application procedures was poor, including among implementing officials.
- People in positions of power within the local community could act as a gateway to access to pensions.
- The requirement for written applications forms and supporting documents were an obstacle owing to low levels of literacy among older people.
- There was evidence of corruption at various stages of the application process.
- There was a need for more transparency regarding eligibility, including information about failed applications, particularly as the financial ceiling limits the number of available pensions.
- Despite problems associated with the scheme, support among poor people was high and they felt that it should be expanded.

Source: Soneja and Heslop (2003).

Institutional arrangements that promote a rights-based approach to social protection include, for example (see also Marcus *et al.*, 2004):

- ensuring greater physical and financial accessibility and cultural appropriateness of services (whilst keeping quality and affordability in mind);
- providing access to information;
- open and transparent policy-making processes so that the interests of vulnerable groups can be included; or
- public service reform that addresses institutionalised discrimination.

### **3.3.2 Accountability and the rule of law**

A rights-based approach draws attention to the various accountability mechanisms that are available to ensure that states meet their obligations. The various ‘channels of contestation’ (see Table 2) can also be seen as identifying channels of accountability (e.g. political accountability through elections; quasi-judicial processes such as ombudsman). Some do not require direct citizen action but need to be institutionalised within the public service (e.g. effective internal administrative oversight mechanisms).

Safety, security and access to justice (SSAJ) interventions provide another strategy to claim and enforce rights related to social protection for vulnerable groups. Marcus *et al.* (2004) argue that legal assistance should be considered a social protection instrument, and that greater accessibility of SSAJ services also helps meet SP objectives. SSAJ straddles both the demand and supply sides of a RBA to social protection and can include several aspects, such as:

- law reform to guarantee equal statutory rights for men and women so as to protect women’s livelihoods (e.g. inheritance, divorce, property) and attempt to change customary practices;
- legal literacy so that beneficiaries of specific social protection schemes are aware of their entitlements, as well as more broadly of the wider range of rights (e.g. information campaigns);
- legal aid for individuals (e.g. court representation to defend their interests against more powerful members of society or against violations committed by the state);
- public interest litigation so as to defend the interest of vulnerable groups, including test cases to promote the enforcement of economic and social rights (e.g. Box 14);
- other ‘pro-poor’ access to justice reform so that institutions better accommodate vulnerabilities and specific requirements (e.g. vernacular language used in court).

#### **Box 14: Claiming and enforcing the constitutional rights to health and housing in South Africa**

The South African Constitutional Court has taken an active role in the interpretation and enforcement of social and economic rights, in particular for the poorest and most vulnerable, and the need to balance individual rights with finite resources. The Grootboom case illustrates successful social mobilisation to demand the translation of constitutional commitments into practice.

A group of residents had applied for a court order for the government to provide them with housing following the demolition of their squatter settlement. The court stated that a housing programme that excludes a significant segment of society cannot be said to be ‘reasonable’. This resulted in a declaratory court order that the state was obliged to devise and implement a comprehensive programme to realise the right to access to adequate housing within its available resources and an order based on the agreement that the community in question should be provided with temporary accommodation, sanitation, basic services and running water. Implementation of the orders has not been as beneficial as anticipated, however.

Source: Piron (2003), based on <http://communitylawcentre.org.za>

In summary, in addition to demand-side interventions, a RBA to social protection requires that attention be given to the capabilities of the state and its agents to deliver SP in a manner respectful of human rights standards and principles. Mechanisms of accountability are central to ensuring more effective SP; SSAJ in particular can contribute to SP.

## 4 Operationalising rights-based approaches to social protection

We have reviewed the relevance of human rights standards (Section 2) and human rights principles (Section 3) for social protection. These standards and principles constitute the basis of what can be described as a rights-based approach to social protection.

This section takes the analysis one step further towards operational recommendations, and applies a rights-based approach to three aspects of implementing social protection which are relevant for the development by DFID of an institutional policy and approach:

- how to assess various SP instruments when SP policies are developed and programmes designed and implemented;
- how to improve the World Bank's Social Risk Management approach to social protection, which is becoming one of the leading policy frameworks; and
- human rights arguments in favour of the use of international aid to finance SP.

### 4.1 Social protection instruments

A RBA to social protection entails more than recognising the right to social security or core minimum social and economic rights obligations. Operationalisation can include applying both standards and principles to the existing social protection instruments, and assessing their strengths and weaknesses from a RBA perspective (see Table 3).

**Table 3 Applying a RBA to selected social protection instruments**

Social protection instruments	RBA perspective
Cash or in-kind transfers	Cash transfers may better respect the notion of 'freedom of choice' and the autonomy of individuals, associated with human dignity. When asked, most people prefer these. Income transfers rather than food aid can help restore broader 'access' to food. In general, programmes that impart skills and enhance human development are more consistent with a view of SP as contributing to human dignity and the full development of a person capabilities, rather than humanitarian charity
Self-targeting approaches	Self-targeting may be associated with stigmatisation for being poor, which would not be compatible with equality and non-discrimination. Work requirements discriminate against female-headed households, the elderly and disabled. Lower wage rates may violate minimum wage laws. Community self-targeting may not cover those that are socially excluded and not members of well defined communities (e.g. HIV-AIDS orphans)
Universality versus targeting	There is a presumption in favour of universal provision; at the same time, the focus on minimum standards and non-discrimination suggests that targeting the poorest and marginalised may be required in order progressively to attain universal minimum standards. However, there is a technical problem as to whether targeted programmes actually reach the most vulnerable; universal programmes may in fact provide better coverage than targeted ones
Social funds	These require community-based participation so as to be demand-driven and responsive; however, such participation can be coercive (e.g. requiring labour or cash) and not involve genuine involvement in project selection and decision-making
State provision	State provision of benefits may be better able to respect principles of universality and equality, as the state has a wider reach; however, state bureaucrats may have discretion and adopt discriminatory or stigmatising principles, and may not be able to reach remote rural areas
Informal provision	Community-based provision may be more comprehensive; however, social norms and values may lead to discrimination, such as gender bias (e.g. removing the girl child from school rather than the boy child) or denying protection to those that are not indigenous to the community

Source. Based on Devereux (2002).

A RBA can also be applied at various stages of SP policy and programming, such as in justification, design, implementation, and evaluation (see Table 4).

**Table 4 Applying a RBA at various stages of the programming cycle**

Stages in SP policies, strategies and programming	RBA perspective
Justification	SP is primarily welfarist, focusing on reducing income insecurity, consumption variability, and meeting basic rights. Economic objectives (such as asset-building and investment) need to be secondary. Welfarism should, however, be based on rights and empowerment, and not charity. The normative justification is that all human beings should receive the social protection required to live a life of dignity
Design	SP instruments need to be designed so as to respect constitutional and statutory standards, for example they should not discriminate (directly or indirectly) along gender or ethnic lines. Some schemes may not respect protection provided for in legislation, such as minimum wage. Design also needs to take human rights principles into account: for example a scheme may start as targeted because of limited resources and then expand with the aim of universal coverage
Implementation	Human rights principles can assist in a more effective and fairer implementation. Accountability and transparency encourage beneficiary participation to ensure that schemes benefit all those that they target and that there is no corruption or abuse of power (e.g. giving preference to kin or 'clients'). This draws attention to the drawbacks of supply-side-only approaches: there is also a need for demand-side involvement
Monitoring and evaluation	SP schemes can be assessed on the basis of whether they contribute to meeting minimum standards for the most vulnerable (e.g. minimum level of education, access to basic healthcare and foodstuff; affordability, accessibility and quality of basic services). Whether human rights principles are respected can provide another angle, such as showing how many vulnerable people have not benefited from the scheme and why (universality and non-discrimination principles)
Political sustainability	Politically viable SP schemes are based on bonds of social solidarity (across class or other social distinctions), or show how the interests of the middle classes are protected. SP needs to be based on broad-based political support. Social movements (e.g. right to food campaign) can help generate awareness and consensus on extended guaranteed rights that will provide SP

Source: Based on Devereux (2002).

These two tables provide some illustrative examples of how to apply a RBA to various SP instruments and at various stages of programming. Practical guidance for DFID staff and partners would require further research and field testing.

## 4.2 Social Risk Management

Shepherd (2004) suggests that DFID should consider building on the World Bank's new approach to social protection, that of Social Risk Management (SRM), which offers a dynamic model (World Bank, 2000; Holzmann et al., 2003). The ways in which this approach is compatible with, and mutually reinforces, a rights-based approach include the following:

- an *ex ante* view of poverty as vulnerability includes looking at the structural causes of poverty, which a RBA also highlights;
- the SRM framework identifies a number of risks and responses which can be mapped against the various basic human rights of individuals and obligations of the state, including not only preventing human rights violations (either caused by the state itself or by natural events or third parties), but also fulfilling basic rights;

- the SRM explicitly recognises that social protection is required for welfare (and not just economic) reasons; and
- though not couched in human rights language, some of the Bank's proposed work is directly related to what a RBA would recommend, for example:
  - working with the ILO on building skills and making labour markets more equitable and inclusive;
  - eliminating harmful child labour (following the lead of UNICEF and the ILO);
  - developing strategies for vulnerable groups, such as persons with disabilities; and
  - supporting legal reform efforts, for example in relation to inheritance and family law to better protect women.

**Table 5 RBA aspects in the SRM approach**

SRM strategies	Description	Existing elements that are consistent with a RBA
<b>Prevention</b>	Before a risk occurs Reduce the probability of the risk occurring Overlaps with non-SP policies	Guarantee minimum social and economic rights to livelihoods, education, health, etc. Labour rights standards – including addressing child labour. Strategies to prevent disabilities
<b>Mitigation</b>	Before a risk occurs Reduce impact of future risks Pooling of resources	Social security schemes. Unemployment benefits. Old-age income security. Make women's legal rights more secure so that widowhood, divorce or other family-related events does not lead to poverty
<b>Coping</b>	After a risk Deal with the impact	Social assistance and other transfers. Promote non-discrimination in coping strategies (e.g. ensure that girl child not worse affected than boy child; avoid child labour that undermines education investments)

Source: World Bank (2000 and 2003).

There are, however, some areas where the Bank's SRM approach could be refined or strengthened by an explicit adoption of RBA. Examples include:

- Explicitly recognising that the international human rights framework establishes state obligations to respect, protect and fulfil human rights, which the World Bank needs to take into account in its lending activities. These include SP, which is a strategy that can contribute to the realisation of these rights for the poor and vulnerable.
- Explicitly recognising that concerns about the social impact of structural adjustment programmes, which triggered an interest in developing safety nets and social funds, are fundamentally human rights arguments about the excessive costs of reforms in terms of human dignity and basic human rights. They are not a simple 'afterthought to economic or human development', or the result of the East Asian economic crisis (World Bank, 2003: 18), but central to the way in which the state, and international development assistance, can play a role in respecting, protecting and fulfilling basic rights and fundamental freedoms as part of the process of development.
- Recognising that the state has an active role to play in supporting SRM, rather than assuming it is only a second best to market arrangements,<sup>10</sup> such as in the cost recovery approach to health and education or the residualist safety net approach (Norton *et al.*, 2002: 556). This is not to say that a RBA is necessarily statist (preferring state provision over other options), but it is grounded in the recognition that states have obligations towards their populations, and that values such as solidarity or equality require intervention (such as affirmative action policies where justified or redistribution of resources) as well as regulation of markets.

- Reviewing aspects of the SRM matrix by carefully applying human rights standards and principles. For example, the matrix identifies discrimination as an ‘idiosyncratic risk’. However, it may be more properly described as ‘co-variant’, especially when it is institutionalised and systematic. More work would be required to identify the various forms of discrimination (formal/informal and direct/indirect) and how they impact on risks and vulnerabilities and influence the application of a SRM approach.
- Ensuring that SP assistance is not limited in its application to the few vulnerable groups mentioned in the various SRM documents (e.g. child labour, disability, old age, unemployed youth) and that the Bank also works with a range of vulnerable groups to meet standards recognised in international agreements (e.g. minorities, migrants, etc.), based on an analysis of the structural causes of poverty. Simply put, SRM should not pick and choose certain social groups.

#### **4.3 Social protection and international assistance**

Some argue that human rights obligations apply not only to states in their relations with their own citizens, but also at the international level, and require certain forms of cooperation between states (ICHRP, 2003). Donor governments tend to be reluctant to accept that they may have a legal obligation of international cooperation towards developing countries, and are concerned that this might entail a ‘right to international assistance’ (Piron, 2002). Some, such as the United States, who do not recognise economic and social rights domestically, are unwilling to recognise them as part of their aid policies and strategies.

**Box 15: International Covenant on Economic, Social and Cultural Rights: international cooperation**

Art 2: Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means including particularly the adoption of legislative measures.

However, the ICESCR (see Box 15) and other instruments, as well as international aid statements and agreements, such as the Monterrey Consensus, recognise responsibilities relating to international assistance. Whether or not there is a right to international assistance, such arguments can be used in response to those that argue that social protection is justified in wealthy Northern countries which can afford social security systems, but not in poorer developing nations. An international obligation can be identified to support transfers not just to contribute to processes of economic, social and political development, but also to guarantee that minimum standards are met, including through social protection, even in poorer countries, so that every human being can live a life of dignity. Such an argument can already be made on moral, economic or political grounds.<sup>11</sup> A human rights perspective further strengthens the case, providing additional redress and monitoring mechanisms and sources of normative justification.<sup>12</sup>

## 5 Conclusion

This background paper has argued that there is a strong congruence between a rights-based approach and social protection. If designed in a rights-based manner, SP policies and instruments can contribute to the better realisation of the rights of the vulnerable.

There are a number of ways in which a RBA can contribute to the justification, design, implementation and monitoring of SP. The key contributions are summarised below. A RBA:

- **considers SP to be a right** and entitlement, and not just a matter of charity. Beneficiaries of SP schemes are seen as ‘rights-holders’, making legitimate claims on the allocation of resources and availability of services;
- **identifies a set of minimum state obligations** in particular in relation to economic, social and cultural rights, including to an adequate standard of living, which implies a focus on the provision of at least minimum levels of social services, and a focus on equal accessibility to these goods and services. Poorer nations’ limited resources imply that international assistance may be required to meet these obligations, in addition to improved domestic prioritisation and resource management;
- **recognises that there is a human right to social security**, which requires states to develop appropriate policies and programmes, aiming to meet the minimum standards set in particular by the ILO;
- but more importantly can use the **full range of international human rights standards** to justify SP and inform policy development and programming – this includes civil and political rights which can play more than an instrumental role in realising other rights associated with SP;
- **guarantees special protection** to vulnerable groups based on identity or life-cycle stages, for example child protection against domestic or institutional violence, or exclusion from services based on race or gender;
- **provides a set of principles**, which both justifies SP and can be used to assess and select SP instruments. The principles of inclusion, equality and non-discrimination are central both to a RBA and to SP and focus attention on the most vulnerable. Participation and accountability are also required to realise rights and inform the design of SP instruments and the broader social and political contexts within which they operate;
- **recognises the importance of citizenship** as a justification for SP and a mechanism to ensure that rights are specified into claimable, concrete entitlements. This also draws attention to the various political incentives associated with various SP schemes, which can solidify citizenship bonds or further patron-client relations as a result of the degree of discretion or their informality. Non-citizens are, however, also entitled to some forms of SP, and equal citizenship may need to be extended in practice (e.g. to minorities, women);
- **can be applied through various channels of contestation and accountability**. This includes both demand-side actions to claim rights (e.g. empowerment, social movements) and supply-side reforms to guarantee the delivery of rights (e.g. public service and expenditure management reforms). Access to justice is one channel through which rights can be claimed and enforced and the state held to account;
- **focuses on building the capabilities of actors and institutions**. It is not a model based on a passive provision of benefits or transfer of resources, but one requiring

the progressive building of sustainable structures and capabilities of individuals and groups to be aware of rights and entitlements, claim them or deliver them.

In the development of its policy position and programming approach, DFID should build on its experience of developing and implementing rights-based approaches (reviewed in Piron and Watkins, 2004). This should happen not only in the programmes and projects DFID funds in partner countries, but also in the support it provides to international organisations working in the field of social protection. With regards to general international collaboration, two priorities can be noted:

- continuing to work with ILO on labour and related standards as part of an institutional SP policy and strategy; and
- continuing to work with the World Bank, so helping to apply a RBA to the SRM framework (whether explicitly or implicitly), for example focusing on the social and political contexts and impacts of SRM.

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## 7 Annex 1: Rights-based approaches

A rights-based approach to development is one that aims at the realisation of human rights. There are several ways in which these rights can be realised through development processes; thus there can be a plurality of rights-based approaches in practice, which share a common normative framework, offer analytical tools and can provide different entry points for governments and donors.

At a 2003 meeting, UN agencies agreed on the following common definition of a human rights-based approach:

1. All programmes of development cooperation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.
4. The human rights principles identified in this agreement are:
  - universality and inalienability;
  - indivisibility;
  - inter-dependence and inter-relatedness;
  - equality and non-discrimination;
  - participation and inclusion; and
  - accountability and rule of law.

International human rights are only one normative source on which to ground social protection. As noted in *To claim our rights* (Moser and Norton, 2001), there are a number of other ‘rights regimes’ from the international down to the local level, which assign rights and duties to different actors (see Table1). The rights related to social protection that can be found at the national level, either entrenched in constitutions or protected in legislation, are of most relevance to the analysis of this paper. There are, however, only few countries that have constitutionally protected social rights setting requirements on policies and programmes – South Africa and France are amongst the few examples, with India having an active Supreme Court.

In most countries, economic and social rights are recognised as important, but are not ‘justiciable’ (they cannot be claimed through the courts) and are therefore seen as less well protected than civil and political rights. Table 6, also based on Moser and Norton (2001), identifies a number of ‘channels of contestation, in addition to the courts, through which rights, and in particular those relevant for social protection, can be defined, claimed and realised.

**Table 6 Channels of contestation**

Institutional channel	Types of claim	Methods of citizen and NGO action	Questions for social protection programming
<b>Political system</b>	Identification of new claims (e.g. women's rights) Negotiation on how rights should be interpreted and recognised (e.g. content of a law) Negotiations on how entitlements should be implemented (e.g. choice between state or private provision)	Voting Lobbying Demonstrations Media reports Public hearings Advocacy	Do vulnerable individuals participate in the political system (nationally or locally)? What are the constraints to participation (e.g. clientelism)? Are vulnerable groups organised so as to identify what rights they are entitled to, what new rights they should benefit from, and how they can be realised? What are the pre-conditions for such organising (e.g. education)? Are other civil society groups organised on their behalf?
<b>Legal system</b>	International HR system Claiming specific rights through courts (e.g. against another person or the state) Interpretation of a right (e.g. right to housing, South Africa) Implementation and monitoring of a right (e.g. court order on right to food, India)	Rights education and legal literacy Bringing a legal claim, either individually or through public interest litigation (e.g. India, Bangladesh) Quasi-judicial options, such as ombudsman or Human Rights Commission NGOs monitor state reports to international treaty monitoring bodies	Do the constitution and laws take into account the interests of vulnerable individuals and groups? Are there test cases? What impacts do these cases have? What constitutional and legal reforms would be appropriate? Are vulnerable individuals and groups able to use the courts or quasi-judicial alternatives to defend their rights? Is legal assistance available and effective? What reforms could be recommended to make justice fair and accessible? Are CSOs using legal channels?
<b>Policy channels</b>	Negotiation over interpretation of public provision of entitlements (e.g. social services)	Participation policy and planning processes (PRSPs, SWAs, local government) Participatory budgeting and access to information NGOs engage in international conferences (e.g. Beijing)	Do vulnerable individuals and groups have a voice in international, domestic and local policy-making? Are vulnerable individuals and groups able to participate in local processes of priority-setting? What kind of constraints do they face? How can they be overcome?
<b>Administrative channels</b>	Negotiation over implementation of entitlements	Interactions with health workers, teachers, etc Monitoring of local services e.g., report cards, codes of conduct	How does local corruption affect the delivery of benefits aimed at vulnerable individuals and groups (e.g. pension, subsidies)? How can the poor and vulnerable take part in citizens' monitoring? Do they actually benefit from such activities?
<b>Social channels</b>	Negotiation over access to natural resources or labour	Informal negotiations within the family or communities (e.g. access land, gender roles)	How do customary practices affect the implementation of rights guaranteed by the state? Which informal practices are 'better' for vulnerable individuals and groups?
<b>Private sector channels</b>	Negotiation over private sector related entitlements and private sector activities	Labour standards Union rights Credit provision Consumer action	Do labour rights benefit vulnerable individuals and groups? How can the state provide better regulation?

Source: Piron (2003) adapted from Moser and Norton (2001).

## 8 Annex 2: Selected human rights relevant for social protection

Table 7 starts to identify some of the key human rights standards relevant for social protection. This table would need to be completed to be accurate.

**Table 7 Key human rights for SP**

	Universal Declaration of Human Rights	International Covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR)	Other international	Other regional <sup>13</sup>
<b>Social security</b>	(Art 22) everyone, as a member of society, has the right to <b>social security</b> and is entitled to realization through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality	Article 9 'the right to everyone to <b>social security</b> , including <b>social insurance</b>	Key ILO social security standards: <ul style="list-style-type: none"> <li>• Social Security (Minimum Standards) Convention, 1952 (No 102)</li> <li>• Equality of Treatment (Social Security) Convention, 1962 (no 118)</li> <li>• Employment Injury Benefits Convention, 1964 (No 121)</li> <li>• Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (no 128)</li> <li>• Medical Care and Sickness Benefits Convention, 1969 (No 130)</li> <li>• Maintenance of Social Security Rights Convention, 1982 (No 157)</li> <li>• Employment Promotion and Protection against Unemployment Convention, 1988 (No 168)</li> <li>• Maternity Protection Convention, 2000 (No 183)</li> </ul> CEDAW (Art 11.1.e social security; 11.2.b maternity benefits, 13 family benefits, 14 benefits for rural women) CRC 26 (social security including social insurance)	EU European Social Charter (undertaking that parties maintain a social security system at an adequate level, sufficient to ratify ILO Convention 102) Council of Europe European Code of Social Security (reproduces most of the basic provisions of ILO Convention 102) San Salvador Protocol of the American Convention on Human Rights Art 9
<b>Standard of living:</b> <b>Health</b>	(Art 25) Everyone has the right to a <b>standard of living adequate</b> for the <b>health</b> and well-	Article 11 1. The States Parties to the present Covenant recognize the right of everyone to an <b>adequate</b>	ILO health dimensions of social security CERD 5 CRC 6 (survival and development of child), 24 (health) and 27 (standard of	

<b>Food Clothing Housing</b>	being of himself and of his family, including <b>food, clothing, housing</b> and <b>medical care</b> and necessary <b>social services</b> , and the <b>right to security</b> in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.(....)	<p><b>standard of living</b> for himself and his family, including adequate <b>food, clothing</b> and <b>housing</b>, and to the continuous improvement of living conditions (...).</p> <p>2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from <b>hunger</b>, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed</p> <p>ICESCR 12 (heath) ICESCR 11 (food)</p>	<p>living, material and support programmes in relation to nutrition, clothing and housing)</p> <p>CEDAW 11 (employment and social security), 12 (health), 13 (other economic and social rights) 14 (rural women)</p> <p>World Conferences e.g. Durban 2000, Rome 1996 (Food security)</p> <p>MDG 1 (hunger)</p> <p>MDG 4, 5, 6 (heath)</p> <p>MDG 7 (slum dwellers)</p> <p>World Conference (Habitat II)</p>	
<b>Mothers and children</b>	(Art 25 continued) <b>Motherhood</b> and <b>childhood</b> are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection	Article 10' The States Parties to the present Covenant recognize that: +	CEDAW 5b (maternity as a social function), 6 (trafficking), 11 (various maternity related benefits)	
<b>Child birth</b>		1. The widest possible protection and assistance should be accorded to the <b>family</b> , which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.	CRC 3 (best interests of the child), 11 (illicit transfers), 19 (physical or mental protection), 21 (adoption), 23 (mental and physical disability) 32 (labour), 34 (sexual exploitation and abuse), 35 (trafficking), 36 (other exploitation), 39 (recovery of victims)	
<b>Maternal leave benefits</b>		2. Special protection should be accorded to <b>mothers</b> during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.	ILO social security family benefit standards	
<b>Children and young persons</b>		3. Special measures of protection and assistance should be taken on behalf of all <b>children and young persons</b> without any	ILO child labour protection (no 138 and 182)	
<b>Child</b>				

<b>protection from economic and social exploitation</b>		discrimination for reasons of parentage or other conditions. Children and young persons should be <b>protected from economic and social exploitation</b> . Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of <b>child labour</b> should be prohibited and punishable by law.		
<b>Decent work</b>	Art 4 (prohibition slavery) Art 23 (right to work, equal pay, just remuneration supplemented by other means of social protection, trade unions) Art 24 (rest and leisure)	ICESCR Art 6, 7, 8 ICCPR Art 8	Various ILO standards: Forced labour: (29 and 105), Freedom of association (87), collective bargaining (98) 1998 Core Labour Standards 1995 World Summit on Social Development CEDAW 11 (employment) CERD 5 CRC (protection economic exploitation and hazardous work)	
<b>Education</b>	Art 26	ICESCR 13, 14	CRC 28, 29 CERD 5 CEDAW 10 World Conferences e.g. Dakar 2000 MDG 2 (universal primary education)	
<b>Water</b>		In process of being codified – see recent ICESCR General Comment 15	CEDAW 14h (sanitation and water supply for rural women)	
<b>Equality and non-discrimination</b>	Art 2	ICESCR and ICCPR Art 2 ICCPR 14 (equality before the law), 26 (equal protection of the law and protection against discrimination), 27 (rights of persons belonging to minorities)	All, Conventions protecting particular groups include <ul style="list-style-type: none"> <li>• UN Convention on the Rights of the Child (CRC)</li> <li>• UN Convention on the Elimination of All Forms of Discrimination Against</li> </ul>	

			<p>Women (CEDAW)</p> <ul style="list-style-type: none"> <li>• UN Convention on the Elimination of All Forms of Racial Discrimination (CERD)</li> <li>• ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries</li> <li>• UN Minority Rights Declaration</li> <li>• UN Disability standards</li> <li>• UN Migration Convention</li> </ul>	
<b>Gender equality</b>	Art 2 (general), 16 (marriage)	ICESCR and ICCPR Art 2 (general) and 3 (equal rights of men and women), ICCPR 23 (equal rights in relation to marriage)	<p>All of CEDAW, including</p> <ul style="list-style-type: none"> <li>• Art 2 (condemns all discrimination and requires measures)</li> <li>• Art 4 (special measures protecting maternity are not discriminatory)</li> <li>• 15 (equality before the law / equal legal capacity of men and women)</li> <li>• 16 (equality in marriage)</li> </ul>	
<b>Participation</b>	Art 21 (take part in government)	ICCPR Art 25 (political participation)	<p>Declaration on the Right to Development CEDAW Art 7 CRC 12 (expressing views) 17 (information) CERD 5</p>	
<b>Personal security and justice</b>	Art 3 (life, liberty, security), 5 (prohibition of torture), 6,7,8,9,10,11 (various aspects of access to justice)	ICCPR 9 (liberty and security) ICCPR 14 (equal access to justice)	<p>CERD, 5 CEDAW 15 CRC 37 (liberty and freedom from torture), 40 (penal law) Convention against Torture</p>	
<b>Fundamental freedoms</b>	Art. 18 (thought, conscience, religion); 19 (opinion and expression), 20 (assembly/association)	ICCPR 19 (opinions), 21 (assembly), 22 (association)	<p>CERD Art 5 CRC Art 13 (expression), 14 (thought, conscience, religion), 15 (assembly)</p>	

## **9 Annex 3: Case studies<sup>14</sup>**

### **1. Brazil and Bolivia: Discrimination and Accessing Entitlements**

Both Brazil and Bolivia have put in place measures to provide social protection to vulnerable sections of their societies. Bolivia has a universal non-contributory pension and free healthcare scheme. Brazil recognised the right to social protection for workers in the rural sector, particularly those in informal employment, in its 1988 Constitution and, as a result, established non-contributory means-tested rural old age and urban social assistance pensions (HAI, 2003a). Whilst studies have shown that these schemes have had a positive impact on poverty reduction (e.g. cash transfers are distributed within the family and serve to reduce vulnerability and inter-generationally transmitted poverty), it is important to stress the additional actions that are likely to be necessary to ensure that vulnerable and marginalised groups enjoy equal access to them.

The inability to access entitlements can be the result of several factors. Foremost is the need to make citizens aware of their entitlements. However, procedures for claiming entitlements must also be designed with the intended beneficiaries in mind. For instance, in Bolivia the Human Rights Ombudsman has estimated that only 37% of those eligible for free healthcare are accessing it and that similar problems exist in relation to the pension scheme. This low uptake has been ascribed partly to the requirement that applicants produce a birth certificate, because most elderly people in rural areas do not have these and find it difficult to acquire them owing to, for example, the cost and the complexity of the processes involved. The Social-Legal Centre was established to provide a solution for the healthcare problem and, as a result of its advocacy, the rules have been changed so that a witness can be used to verify the age of the applicant rather than documentation (HAI, 2003b).

Another set of issues revolve around discriminatory practices in service provision. The cumulative affects of historical discrimination has meant that Afro-descendants in Brazil are socio-economically and politically disadvantaged. If the 1998 Brazilian indicators for the Human Development Index are disaggregated by race, the index is 0.796 for white Brazilians but 0.680 for Afro-descendants (a ranking of 48 and 108 respectively) (Santos Roland, 2001). Groups that experience discrimination are more likely to require social protection but are, perversely, less likely to be able to access it or can experience discrimination when they do. The public healthcare scheme in Brazil is based on the principle of equity and universal access. However, studies based on census data have shown that race is an important factor governing differences in access to public health care. A draft National Healthcare Policy for the Black Population stresses that ensuring universal access requires government acknowledgement of the impact of differences such as race or gender (Bairros *et al.*, 2003). This suggests that, even when guaranteed social protection measures are in place, it is important for the state to undertake additional measures to ensure that these entitlements can be accessed by all eligible citizens. This includes advocacy and educational activities to ensure that citizens are aware of their entitlements, tailoring services according to the needs of specific groups, and also measures to prevent discriminatory practice in the provision of services, such as undertaking human rights education, providing public official with non-discrimination training, or taking action when discrimination occurs.

## **2. India: The Right to Food<sup>15</sup>**

Both the UDHR and ICESCR contain articles obliging signatories to recognise the right to an adequate standard of living, which encompasses the right to adequate food. In India's case, the means to fulfil this right is available – at one point in 2002, more than 65 million tonnes of rice and wheat were lying idle in public warehouses across the country – but, owing to a distorted food security system, India has among the highest levels of malnutrition in the world. Such disjuncture reflects a failure in government accountability and, in recent years, civil society groups have mobilised around the right to food.

In India, the economic and social rights pertaining to this obligation are contained in the constitutional chapter on the 'Directive Principles of State Policy' and, according to Article 47 of the Indian Constitution, a state must 'regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties'. The Directive Principles are not justiciable, unlike the chapter relating to civil and political rights, but they do entail an obligation for them to be applied to legislation. This has enabled civil society groups to utilise legal processes to claim their economic and social rights, to challenge government corruption and institutional failures, and to make demands for government to be accountable.

In May 2001, the People's Union for Civil Liberties (registered in Rajasthan by a small group of social activists) submitted a petition in the Supreme Court demanding that the country's gigantic food stocks be used without delay to prevent hunger and starvation. This Supreme Court hearing, which is likely to last several years, has led to a wider 'right to food' campaign. The foundational statement of the campaign says: 'The Right to Food campaign is an informal network of organisations and individuals committed to the realisation of the right to food in India ... Realising the right to food requires not only equitable and sustainable food systems, but also entitlements relating to livelihood security such as the right to work, land reform and social security. We consider that the primary responsibility for guaranteeing these entitlements rests with the state.'<sup>16</sup>

The right to food is therefore being associated with a wider set of rights that are required to achieve an adequate standard of living, including the right to social security. These linkages have also been made in Supreme Court judgments and have highlighted the role of the state in safeguarding the right to life, including the conditions necessary to live with dignity. The interim orders issued in relation to this case have also emphasised the need for states to ensure that marginalised and vulnerable groups have sufficient food and that states implement the various food-related schemes (e.g. Public Distribution System, Mid-day Meal Scheme, Food for Work programme). Many of these court orders are just exhortations to the executive but other are policy directives requiring state action, although problems exist with monitoring compliance owing to the limited resources available to the commissioners who have been appointed for this purpose. However, the power of public action in holding government to account is demonstrated by events in Orissa, where the state government failed to respond to the commissioner's report until it was published in the local newspapers. (Dr N. C. Saxena was appointed by the Indian Supreme Court as commissioner for the purpose of monitoring the implementation of recent orders relating to the right to food (PUCL vs Union of India and others, Writ Petition 196 of 2001). The commissioner is empowered to enquire about any violations of these orders and to demand redress. He is also expected to report periodically to the court.

### **3. South Africa: The Right to Health and to Housing<sup>17</sup>**

The right to an adequate standard of living, including the right to adequate housing and wellbeing, is recognised in both the UDHR and the ICESCR. The South African state is committed to reducing social and economic inequality and is one of the countries to have constitutionally guaranteed social and economic rights, including the right to housing and health. The existence of justiciable rights has enabled individuals and groups to mobilise to challenge public policy and the provision of services. It has also led the Constitutional Court to take an active role in the interpretation of these rights and the need to balance individual rights with finite resources, and demonstrates how the courts can defend the interests of vulnerable and marginalised groups. Two cases, in particular, illustrate successful social mobilisation to demand the translation of constitutional commitments into specific entitlements.

First, in the Treatment Action Campaign case, the Court tested government health policies against constitutional requirements. The government had refused to allow public hospital doctors to use a retro-viral drug (Nevirapine) to prevent the transmission of HIV from mothers to their babies. The drug was registered with the Medicines Control Council and was available cheaply, but the state claimed that it was still carrying out research on the drug. The court held that it was unreasonable for the state not to take affordable steps that would save lives. The Treatment Action Campaign is an NGO campaigning for greater access to treatment for all South Africans, by raising public awareness and understanding about issues surrounding the availability, affordability and use of HIV treatments. It has actively followed the implementation of this court decision and has mobilised activists throughout the country, in the churches and trade union movements, to demand not only action in the case, but also the development of a general treatment plan.

Second, in the *Grootboom* case, a group of residents applied for a court order for the government to provide them with housing following the demolition of their squatter settlement. The Court took an administrative law approach to defending the right in question and grounded its judgement on ‘reasonableness’. It stated that a housing programme that excludes a significant segment of society cannot be said to be reasonable. The judgement’s conclusion was that the government not only should have medium to long-term housing programmes but also was under an obligation to provide immediate relief to those in a desperate situation. Implementation should also be reasonable. This resulted in two court orders: a declaratory order that the state was obliged to devise and implement a comprehensive programme to realise the right to access to adequate housing within its available resources; and an agreement that the community in question should be provided with temporary accommodation, sanitation, basic services and running water. However, there were setbacks with the implementation of this order because inadequate resources were assigned to the programme and it did not impose a time limit. It has also not been interpreted as requiring system changes to state housing programmes. Nevertheless, some commentators do perceive a shift in the government’s housing policy, including in eviction cases.

A third case illustrates how it is possible to assess whether a decision over the allocation of scarce resources is reasonable, even if it means that some rights will not be respected. In the *Soobramoney* case, the applicant suffered from kidney failure and had not been given access to a dialysis machine. The provincial hospital only had a few machines and had decided to use them for cases where they could extend the lives of the patients. Mr Soobramoney’s health was so bad that the hospital decided not to offer him access to a dialysis. The Court decided that, in this particular case, it was not unreasonable to prioritise the use of an expensive and limited resource, even though an individual’s right to life might be violated.

## **10 Annex 4: ToRs**

### **Rights Based Approaches to Social Protection**

#### *Objective*

To inform the position paper on the extent to which a rights-based approach is useful in developing social protection policies, strategies and programmes.

Additionally:

- To generate material from a review of experience, published and grey literature for incorporation in the position paper

#### *Output*

A draft paper as specified in the overall ToR by 21<sup>st</sup> May

#### *Key questions*

- How can social protection be seen as a rights-based policy choice e.g. as part of a participation, inclusion and obligation framework? In particular:
  - What roles do the principles of equality and non-discrimination play in promoting social protection?
  - How do they promote the principles of equality of access and minimum standards?
  - What is the relevance of citizenship in this framework?
- Is it meaningful and helpful to talk about a ‘right to social protection’? In what way is this a right which is codified? Has it been recognised by states?
- What are existing rights and corresponding obligations already recognised and codified that are relevant for social protection (recognised as either human rights or citizenship rights at international, national, regional or local levels)?
  - In particular, how useful is to talk of a ‘core of basic minimum rights’?
  - What are the implications for social protection of such an approach?
- How might the realisation of these rights and respect of rights-based principles make a difference in terms of poverty reduction and economic growth?
- What is financially and politically affordable in terms of respect, protection and fulfilment of these rights?
- What complementary actions are necessary to make a reality of the rights relevant for social protection?
  - In particular, what is the role of advocacy, social mobilisation, empowerment and other actions to build the capacity of claim-holders?
- What institutional arrangements show promise for the implementation of a rights-based approach to social protection? In particular:
  - How does the approach assist in linking rights-based claims to social protection with institutional responses?
  - What is the role of safety, security and access to justice to realising and enforcing rights relevant for social protection?

#### *Approach*

As far as possible, the other background papers will need to take into account the implications of a rights-based approach (as well as a gender perspective).

## 11 Endnotes

<sup>1</sup> Research Fellow, Overseas Development Institute. Research assistance was provided by Tammie O'Neil. This revised version attempts to respond to comments from Jane Alexander, Catherine Audard, Florence Martin and Andrew Shepherd.

<sup>2</sup> This paper was prepared in five days. A quick literature review did not identify any study examining in detail the application of rights-based approaches to social protection for donor policy or programming purposes. This confirms the finding by Norton *et al.* (2001: 8) that 'In the literature on social protection in general the dimensions of governance and rights seem underdeveloped.'

<sup>3</sup> A distinction can be drawn between 'human rights-based approaches' and 'rights-based approaches' depending on the emphasis placed on international standards (Piron and Watkins, 2004). In this paper, the latter is used, except when the relevance of international standards is highlighted as in relation to the human rights of non-citizens.

<sup>4</sup> See Marcus *et al.* (2004), for a discussion of state abuses and the relevance of civil rights and safety, security and access to justice interventions. Social protection is not just a matter of livelihoods opportunity in a narrow sense but risks factors include those linked to crime or inability to participate in social and political life. The author is grateful for discussions with Florence Martin on this point.

<sup>5</sup> Examples of constitutionally protected or policy-based SP includes: Brazil, which has formalised it as a citizenship right in its 1998 Constitution guaranteeing basic benefits to all citizens whose income falls below a certain level; Kerala state, India, which provides social insurance to about half the workers in the unorganised sector and also has non-contributory pension schemes; and the well defined entitlements to a social pension for the elderly poor in South Africa and Namibia (Devereux, 2002: 18). The MEGS is politically sustainable and entrenched in state law guaranteeing the right to employment (see Box 8).

<sup>6</sup> A 'liberal' social contract is based on a model of a just society as a fair scheme of cooperation between free and equal citizens. Social protection is crucial for participating equally in that scheme (Rawls, 1971). A 'communitarian' approach would justify social protection by emphasising the stronger bonds that exist within a family or a well defined community, such as one based on locality, ethnicity or nationality (Sandel, 1982; Walzer, 1983). It may have more difficulties justifying social protection for those that sit outside those communities.

<sup>7</sup> Exploring how social protection instruments can respond to the various forms of social exclusion (and possibly avoid the drawbacks of some social inclusion approaches) is not done here but would support the paper's central argument.

<sup>8</sup> A review of the degree of participation in SP schemes and the impact on fairness and effectiveness could be undertaken to examine the extent to which this is already happening in practice.

<sup>9</sup> Whether there would need to be an 'international social protection system' to meet the requirements of non-citizens in addition to current humanitarian assistance, in particular through international organisations, is an issue that could be further explored. The relevance of the UN migrants' rights convention could also be examined.

<sup>10</sup> See for example the statement that 'In an ideal world with perfectly symmetrical information and complete markets, all risk management arrangements can and should be market-based (except for the instruments protecting the incapacitated).' (World Bank, 2003: 9).

<sup>11</sup> For a philosophical and moral argument, see Thomas Pogge (2002).

<sup>12</sup> Specifying the exact nature of an internationally recognised human rights obligation on donors to fund social protection in developing countries would need further examination.

<sup>13</sup> For reasons of time, this section was not completed, but is included to show that regional and not just international standards are relevant.

<sup>14</sup> These case studies are based on research undertaken in 2003 on human rights and chronic poverty for the Chronic Poverty Report and on human rights and discrimination for an ODI project on inequality in middle-income countries. Further research could identify additional case studies to illustrate the points made in this background paper.

<sup>15</sup> This section is based on text by John Farrington and Dr. N.C. Saxena, Indian Right to Food commissioner.

<sup>16</sup> [www.righttofood.org](http://www.righttofood.org).

<sup>17</sup> Background information for this section has been drawn from various reports of the Socio-Economic Rights Project, Community Law Centre, at the University of Western Cape, <http://communitylawcentre.org.za>.