

# Justiciability of Socio-Economic Rights Under the Constitution of Malawi: Unbundling the Right to Development

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## Abstract

Most governments in sub-Saharan Africa have for long steered away from giving legal force to socio-economic rights, even though political and civil rights have had due recognition for some time. The main reason is that socio-economic rights are polycentric, meaning their justiciability has resource implications which most governments cannot fulfil in a short space of time. There has been a shift though, since South Africa enacted its Constitution after 1994, ushering in a new period where socio-economic rights not only became recognised but they were also given legal force, albeit with limitations. Malawi followed suit and enacted a new Constitution in 1994 which was unlike the earlier ones that did not recognise socio-economic rights. The only anomaly is that the Constitution does not put all socio-economic rights under the Bill of Rights, meaning that even though some of these rights now have legal force, others such as the right to health do not. These were drafted as principles of national policy, which are just guidelines referred to when the government is making policy. There is a redeeming factor though, which is the right to development. This article contends that all the socio-economic rights that are recognised as principles of national policy do have legal force under the right to development. Even though the right to development is not qualified, the social rights under it are justiciable and it is up to the courts to give them the correct interpretation.

**Keywords:** justiciable; polycentric; principles; development; socio-economic rights



## Introduction

Socio-economic rights challenge the traditional conception of human rights as negative entitlements. Proponents of negative liberty subscribe to the notion that the realisation of human rights can only be possible if the State does not interfere with the freedom of individuals who form part of a political community. Socio-economic rights are regarded as being polycentric; that is, they are rights, the adjudication of which tends to have unforeseen and broad consequences affecting many people and functionaries of the public administration (see Mbazira 2009, 41–50). It becomes questionable whether Courts have the institutional competence and political legitimacy to make pronouncements relating to the economic and social wellbeing of ordinary citizens and their communities. Whether or not the Court desires to rearrange budgets, socio-economic rights adjudication may have budgetary implications and provide room for the Courts to usurp the functions which are traditionally the responsibility of other arms of the State – the Legislature and the Executive. The problem of polycentrism of socio-economic rights, in fact of all human rights, has been extensively dealt with by others on the subject, therefore it is not the focus of this article.

However, from what has been gathered from contemporary debates on socio-economic rights, it is submitted in this article that all human rights are polycentric; that all human rights create negative and positive obligations, the fulfilment of which has budgetary implications; that all human rights are indivisible, interdependent, interrelated and interconnected (see Langford 2008; Liebenberg 2010; Mclean 2009; Pieterse 2004; Ssenyonjo 2009), and therefore that all rights are justiciable (directly or indirectly) regardless of whether or not they have been codified in positive law (see Yusuf 2012). The importance of having socio-economic rights in national Constitutions is something that can never be over-emphasised or even underestimated. The main concern in this instance, is that a number of socio-economic rights (right to health, shelter, food, etc.) were included in the Constitution of Malawi, not as enforceable entitlements but as mere principles of national policy, save for the right to education, women's and children's rights and a few others (Constitution of the Republic of Malawi 1994). Clearly, principles of national policy are not rights, but just mere guidelines which can be referred to in order to guide policy, but they are not enforceable. The perception therefore seems to suggest that the Malawian Constitution does not fully and directly protect socio-economic rights. There is however, a way out of this quandary which the authors of this Constitution provided and they did this by including development as a justiciable right. This right is broad and the “missing” fundamental rights are found under it. The express intent and aim of this article is to investigate the constitutional protection of socio-economic rights in Malawi and show that the “missing” socio-economic rights are justiciable and enforceable under the broad right to development.

This article is divided into two parts, with the first part exploring the implications of enforceable social and economic rights in the Constitution of Malawi. Given that socio-economic rights engender the positive duty to provide resources to less fortunate members of society, the benefits of codifying all socio-economic rights in a national Constitution are investigated. In the second section, the right to development is analysed to show that as a composite right, it allows the justiciability of socio-economic rights and the adoption of affirmative action steps that have the express objective to benefit and add value to categories of persons previously disadvantaged by colonialism, exploitation and unfair discrimination. This article contends that the future of socio-economic rights under the Malawian Constitution, is intricately tied to the adjudication of the right to development.

## A Critical Survey of Socio-Economic Rights in Malawi

### **Socio-Economic Rights before the Adoption of the 1994 Constitution**

Socio-economic rights in Malawi did not enjoy adequate protection before the adoption of the 1994 Constitution. This goes way back to the colonial era where no straightforward constitutional framework was in place to regulate the lives of the majority of the people. Colonial authorities presided over the expropriation of African land in order to promote colonial interests and productivity was based on the exploitation of Africans through forced labour (Kanyongolo 1998, 353–354). Early Constitutions soon after the fall of colonial rule in Malawi were not drafted in ways that gave recognition to the importance of socio-economic rights, with the 1966 Constitution making things even worse by leaving out civil and political rights (Chirwa 2005, 209). This created a situation where many human rights violations took place without being checked. The important thing to note is that these violations were not just confined to civil and political rights but extended to socio-economic rights as well (Chirwa 2005, 209). These violations pervaded all spheres of the public administration and it is “beyond doubt that such violations of socio-economic rights formed a central part of the discontent against the Banda regime.” (Chirwa 2005, 210) The Constitution that was finally adopted in 1994 was an attempt to bring corrective measures to a longstanding situation of human rights abuses but the result was a hastily put together document which did not offer adequate protection of socio-economic rights.

The lack of adequate attention towards socio-economic rights presents problems pertaining to the nature of the few that are entrenched as justiciable rights such as the right to development and the right to education. These rights do not have any internal limitations such as “progressive realisation” or “available resources” which makes it difficult to ascertain whether the government is under an immediate obligation to fulfil these rights on demand. This is quite problematic for a country as poor as Malawi. The human development index ranks the country as the 12<sup>th</sup> poorest country in the world and there has not been any significant economic growth since 1994 (UNDP 2004).

Pressure from multinational organisations that lend finance (IMF and the World Bank) led Malawi to implement, in the 1980s, several policy reforms aimed at restructuring the economy. The International Monetary Fund (IMF) and World Bank (WB) prescribed macro-economic policies that Malawi adopted, which encouraged less expenditure on social services like basic healthcare and education. Few benefits accrued to the poor as the majority of the population were trapped in abject poverty. This is corroborated by Mulwafu and Msosa (2005, 961–962), who state that “the majority of the population experienced no change in their economic status as poverty incidence rose to 65.3%.” Oxfam observed that “IMF-inspired policies have continued to undermine the access of poor people to education, not just by cutting basic social service budgets but also by intensifying household poverty,” (Watkins 2000, 234). The inclusion of social and economic rights (limited though) in the Constitution, came as a result of the realisation, on the part of the policymakers, that poverty was not going to simply vanish immediately without any form of intervention. The inclusion of these rights was therefore meant to give the government a platform to implement various schemes aimed at alleviating poverty and to give citizens the right to claim the protection of their social and economic wellbeing.

### **The Constitutional Protection of Socio-Economic Rights after 1994**

The Bill of Rights in the Malawian Constitution does not include all the social and economic rights because some of them have been drafted as directive principles of State policy, and the result is that only a few of these rights are justiciable. Under the chapter on Fundamental Human Rights (Chapter IV), the Malawian Constitution entrenches the right of all persons and peoples to development, thereby extending to all peoples the right to social, cultural, economic and political development.<sup>1</sup> Under this section, the State is required “to take all necessary measures for the realisation of this right and the measures taken should ensure, amongst other things, equality of opportunity for all in their access to basic resources, education, healthcare services, food, shelter, employment and infrastructure.”<sup>2</sup> Malawi also has a duty to adopt “measures to introduce reforms aimed at eradicating social injustices and inequalities, to respect the right to development and to justify its policies in accordance with the latter responsibility.”<sup>3</sup> The reach of the right to development is examined later in this contribution and it is argued that the local courts and lawyers should invoke section 30 rather than rely on the directive principles of State policy (DPSP) section 13(b), because they are not enforceable rights.

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1 Section 30(1) of the Constitution.

2 Section 30(2) of the Constitution.

3 Section 30(3) and (4) of the Constitution.

Apart from the right to development, the Malawian Constitution broadly protects the rights of all persons to education,<sup>4</sup> the right to family and marriage,<sup>5</sup> the right to use the language and to participate in the cultural life of one's choice,<sup>6</sup> the right to acquire property (alone or in association with others) and not to be arbitrarily deprived of property;<sup>7</sup> and the right to engage freely in economic activity, to work and to pursue a livelihood anywhere in the Republic of Malawi.<sup>8</sup> Moreover, the Constitution guarantees children's right to "be protected from economic exploitation or any treatment, work or punishment that is, or is likely to (a) be hazardous; (b) interfere with their education; or (c) be harmful to their health or to their physical, mental or spiritual or social development."<sup>9</sup>

For the purposes of this article, specific focus is placed on some, but not all of the few socio-economic rights that were put in the Bill of Rights. These include rights for women, children, family and education as well as other "unenumerated" rights which include health and social security. This choice was made because of two reasons. First, some of the rights (like the rights to economic activity and property), though important, are virtually "non-existent" and "unthinkable" for the category of people addressed. This article seeks to consider the bread and butter rights an uneducated, unemployed, hungry, homeless, sick, and marginalised person would think of the first time he or she hears that they have rights. Second, most of these rights have been discussed in detail by other leading scholars of Malawian Constitutional Law and it is highly unnecessary and akin to an attempt to reinvent the wheel (see Chirwa 2005).

Under Malawian constitutional law, "no restrictions or limitations may be placed on the exercise of any rights and freedoms ... other than those [reasonable limitations] prescribed by law, recognized by international human rights standards and necessary in an open and democratic society."<sup>10</sup> It is noteworthy that the Constitution sets a very high threshold for limitations to pass constitutional muster. Limitations of rights, including socio-economic rights, legally prescribed, have international recognition in accordance with accepted norms and standards and are an indispensable part, in an open and democratic society. These limitations should be reasonable and in line with the progressive realisation principle, a common feature in the Constitution of the Republic of South Africa (1996), which takes cognisance of the fact that resources are scarce. It is however, surprising to note that this principle was not included in the Malawian Constitution as part of the content for socio-economic rights in the Bill of Rights.

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4 Section 25 of the Constitution.

5 Section 22 of the Constitution.

6 Section 26 of the Constitution.

7 Section 28 of the Constitution.

8 Section 29 of the Constitution.

9 Section 23(4) of the Constitution.

10 Section 44(2) of the Constitution.

Further, the Malawian Constitution states that laws “prescribing restrictions or limitations *shall* not negate the essential content of the right or freedom in question [and] shall be of general application” (Constitution of the Republic of Malawi 1994). “Essential content” implies that the State may not ignore the minimum core of the right in question even though its medium and long-term poverty alleviation programme is reasonable and well justified.

### *The right to family and marriage*

The family is recognised as a fundamental social unit under the Constitution of Malawi<sup>11</sup> and this is consistent with the provisions of the Universal Declaration of Human Rights and other international human rights instruments. Section 22 extends to every man and woman the right to marry and raise a family. The right to a family implies the possibility to procreate and live together.<sup>12</sup> This further places the responsibility on the State to take up measures that would safeguard the sanctity of the family. No person should be forced or prevented from getting married unless they are under the age of fifteen. For those between fifteen and eighteen years of age, parental consent must be sought before the consummation of marriage.<sup>13</sup> In order to prevent the prevalent problem of “forced” marriages in traditional communities, the Constitution states that “no person shall be forced to enter into marriage.”<sup>14</sup> This is evident from section 22(5) which declares that “the prohibition of forced marriages applies to all marriages at law, custom as well as marriages by repute or by permanent cohabitation.”

However, the Constitution does not quite abolish underage marriages as it only requires the State to “discourage marriage between persons where either of them is under the age of fifteen years.”<sup>15</sup> This appears to be a moral rather than legal obligation. More importantly, adults (18 years and above) cannot be stopped from getting married if they wish and agree to do so. One gathers from this clause that where customary rules require the payment of bride wealth as a precondition for the consummation of a customary union, these rules may be constitutionally invalid. Central to the sanctity of marriage and the family is the freedom to choose whether or not to marry.<sup>16</sup> No doubt, Article 22 places an obligation on the State to protect the family unit and not to interfere with it or

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11 Article 22 of the Constitution.

12 Covenant on Civil and Political Rights (CCPR), General Comment 19 “Protection of the Family, the Right to Marriage and Equality of the Spouse” (1990/07/27) para 5.

13 Section 22(6), (7) and (9).

14 Section 22(4) of the Constitution.

15 Section 22(8) of the Constitution.

16 See art 10(1) of the International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI) 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).

its members. Intrinsic in the right and freedom to marry and found a family is the State's obligation to create conditions necessary for individuals to freely exercise this right.

### *Children's rights*

Children readily qualify for positive protection and this means that socio-economic rights impose positive obligations upon the State. It is interesting to point out that children's rights are more readily accepted even in jurisdictions (such as the United States) where positive rights are grudgingly accepted (Kutigi 2017). Part of the reason is that children are weak and vulnerable. They cannot protect themselves from harm. Since their capacities are evolving, they cannot make sound decisions and have to rely on adults for guidance and protection. The Constitution of Malawi protects children and their rights to full protection and provision of all their requirements. Children "have the right to be protected from economic exploitation or any treatment, work or punishment that is likely to be hazardous; or to interfere with their education; or to be harmful to their health or to their physical, mental, spiritual or social development."<sup>17</sup> Implementation of this provision involves the government taking up special measures in order to protect children. Section 23 further states that a child should be looked after by his/her parents, who bear the primary responsibility to provide care.

The Constitution is silent on what happens if parents are not fit or proper persons to care for children or if parental care is lacking for some reason. Important socio-economic rights such as the right to nutrition and the right to food that should fall under this section are missing, except just a few of them. Unfortunately, section 23 of the Constitution prescribes the age of majority as sixteen years and persons between 16 and 18 years are subjects of the rights contained in that section.<sup>18</sup> This means that the prohibition of economic exploitation and of any treatment, work or punishment that is likely to be hazardous; or to interfere with the education of persons falling within this category is inapplicable where the victim of the exploitative practices voluntarily takes part in such. Similarly, the prohibition of practices that are likely to be harmful to the health or to the physical, mental, spiritual or social development is also not applicable to persons falling in this age category. In other words, the prohibitions of exploitation of children as envisaged in section 23 do not apply to persons between the ages of 16 and 18 because these persons are regarded as adults. One could argue that Malawi should extend its age of majority to 18 so that it would align with and conform to international standards.

### *Women's human rights*

Women's human rights are codified as justiciable equality claims against society, men and the State. Women "have the right to full and equal protection by the law, and have

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17 Section 23(4) of the Constitution.

18 Section 23(5) of the Constitution.

the right not to be discriminated against on the basis of their gender or marital status.”<sup>19</sup> Section 24 is where the right to full and equal protection by the law for women is contained in the Constitution, and there are a few other socio-economic rights in it as well, like the right to property and maintenance after divorce. Malawi’s Constitution is one of the few in the world that contains this provision. Women are also entitled to enjoying the same rights enjoyed by their male counterparts in civil law, including entering into contracts; acquisition and maintenance of property on their own or with others, regardless of their marital status and “to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing.”<sup>20</sup> The right to own property by women has to be read together with the general prohibition against arbitrary deprivation of property.<sup>21</sup> However, the Malawi Constitution goes further in that the equal right to own property is not just claimable under the general equality clause,<sup>22</sup> but is unambiguously identified as a special right of women.

On the dissolution of marriages to which they are part, the Constitution grants women the right to “(i) a fair distribution of property that is jointly owned with a husband; and (ii) fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.”<sup>23</sup> The State has a greater responsibility to abolish all forms of legislation that are discriminatory towards women on all grounds. Laws should protect women against sexual abuse, deprivation of property, and many other practices that are deemed discriminatory.<sup>24</sup> This is very empowering for women, as this right challenges customary and other laws under which women could not own property or be involved in any form of business. That section 24 was mainly designed to transform gender relations in communities that are governed by customary law, is evident from the fact that the State should enact laws that remove or make it illegal for certain discriminatory cultural practices that perpetuate the subjugation of women in various contexts. It will be recalled that under African customary law, particularly in its pre-colonial version, women could not inherit from their husbands as much as girls could not inherit from their biological fathers. Further, women could not own property and could not easily claim guardianship and custody of children.

Section 24 outlaws discrimination of women at work, in business and in public affairs, thereby guaranteeing them protection both in the work environment and in the public

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19 Article 24(1) of the Constitution.

20 Section 24(1)(a)(i), (ii) and (iii) of the Constitution.

21 Section 28(1) and (2) of the Constitution.

22 Section 20(1) of the Constitution prohibits discrimination based on, among others, “sex, birth or other status.”

23 Section 24(1)(b) of the Constitution.

24 Section 24(2) of the Constitution.

sphere.<sup>25</sup> Read together with everyone's right, "freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi"<sup>26</sup> women's right to be treated equally by the law binds the government to unlock the political system and to dismantle structures and patterns of systemic disadvantage that have troubled women for centuries. It requires the State to open up opportunities for women to claim their stake in the country's social, economic and political life. As a State party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>27</sup> Malawi has committed itself to undertaking a series of measures to end discrimination against women in all forms, including the elimination of all acts of discrimination against women by persons, organisations or enterprises.<sup>28</sup> In this regard, for horizontal application of the Constitution, section 15(1) is relevant. It states that, "human rights and freedoms enshrined in this Chapter shall be respected by all organs of State and, where applicable, by natural and legal persons in Malawi." The only anomaly might be that the Constitution covers a few of these rights and was perhaps premised on the assumption that women enjoy other rights on a par with men.

### *The right to education*

Just like the South African Constitution,<sup>29</sup> The Constitution of Malawi protects the right to education for all its citizens.<sup>30</sup> Education is a vital tool for development, especially for a developing country like Malawi. Education enables citizens to have important life skills and, therefore, to transform their own lives. The importance of education as a human right has been reiterated by the International Covenant on Economic, Social and Cultural Rights which states that:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of

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25 Section (2)(a) and (b).

26 Section 29 of the Constitution.

27 GA Res 34/180, 34 UN GAOR Supp (No 46) 193, UN Doc A/34/46 (entered into force 3 September 1981).

28 CEDAW "Overview of the Convention". Accessed October 8, 2011. <http://www.un.org/womenwatch/daw/cedaw/>. For horizontal application of the Constitution, see s 15(1) stating that "human rights and freedoms enshrined in this Chapter shall be respected by all organs of State and, where applicable, by natural and legal persons in Malawi."

29 See s 29 of the South African Constitution, 1996.

30 Section 25 of the Constitution; see also arts 13 and 14 of the ICESCR.

education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.<sup>31</sup>

The fact that education can accelerate the economic advancement and the expansion of industry; serve as a tool for uplifting the poor, the vulnerable and the disenfranchised; be a mechanism through which people acquire knowledge, life skills, competencies and the expertise to perform effectively in various facets of life; and function as a tool with which to challenge poverty and disadvantage, has repeatedly been acknowledged by the Malawian Government (see for instance, Ministry of Education, Science and Technology NESP 2008; Ministry of Education, Science and Technology and the Malawi National Commission for UNESCO 2008). Under the Malawian Constitution, all persons, whether young or old, are entitled to an education.<sup>32</sup> Subject to section 44 of the Constitution, this right can be claimed by all Malawians without any limitation. The Constitution provides that primary education consists of at least five years.<sup>33</sup>

However, the Constitution is silent on whether or not primary education is compulsory for all children, nor does it say whether or not access to primary education is free of charge. Given the importance of education in facilitating access to information and human development, it is argued that the Courts should interpret this provision widely to include compulsory and free basic education for all children. The Constitution has also paved the way and made possible the existence of private schools and other private institutions of higher learning, provided that (a) “such schools or institutions are registered with a State department in accordance with the law”; and that (b) “the standards maintained by such schools or institutions are not inferior to official standards in State schools”<sup>34</sup> Thus, the Constitution empowers the government to regulate education in public and private schools to ensure that similar standards are maintained. The law is silent on whether the State is legally obliged to support poor students until they complete tertiary education.

In terms of the more embracing definition proposed by the Ministry of Education, Science and Technology (NESP 2008, 5), basic education includes “Early Childhood Care and Education, adult literacy, out-of-school youth education, primary education and the lower levels of secondary education to ensure the inclusion of 15 and 16-year-olds.” As for primary education, the Malawian government in 1994 adopted the position that primary education must be available to all persons free of charge. For many children under or above the age of five years, the right to basic education remained a dream even at the height of the Free Primary Education (FPE) movement. At that time, the National

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31 ICESCR General Comment 13 “The Right to Education”. Accessed October 8, 2011. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement>.

32 Section 25(1) of the Constitution.

33 Section 25(2) of the Constitution.

34 Section 25(3) of the Constitution.

Statistical Office (1998) stated that an estimated 2.7 million (or one-third of the total population aged 5 years or older) had never attended any school and 4.9 million (or 59%) had attended primary school. Riddell (2003) summarises the results of the FPE policy thus:

In the first year of FPE, enrolments increased by over 50% from 1.9m in 1993/4 to about 3.2m in 1994/5. Net enrolments prior to FPE had been 58% for girls, increasing to 73% by 1996; and 58% also for boys, but only increasing to 68% by 1996. Gross enrolments increased from 67.9% in 1990/1 to 158.1% in 1999/2000. Male and female gross enrolment rates were comparable in 1999/2000: at 157.9 and 158.3%, respectively. Such rapid enrollment increases challenged an already weak system that even before expansion had a pupil-teacher ratio of 70:1 with 13% of teachers being unqualified and an average of 100 pupils crowding existing classrooms.

The policy notes that a lot of pressure was brought to bear on the entire education system and in response, the government of Malawi saw its recurrent expenditure rising from 11% in 1990/1991 to 24% in 1997, with the bulk of the money invested going towards teacher salaries (Riddell 2003). Thus, while the FPE policy led to the overall expansion of primary education, it compromised the existing standards and quality of education services existent before its adoption. This challenge persists to this day. If everyone's right to education is to be adequately realised, the government should take positive steps to reduce the student-teacher ratio; improve classroom facilities; procure effective learning materials; train, attract and retain qualified teachers; accelerate retention rates for pupils (especially girls) already in school and curb the levels of brain drain. Ligomeka (2002) reflects on the failures of the FPE policy and observes that, “[a]lthough admission rates to primary schools initially soared by more than a staggering 80 per cent after free education was introduced in Malawi in the mid-1990s, they have consistently dropped again because conditions at schools remain deplorable.” It is encouraging to note that the NESP established concrete goals aimed at addressing most of these challenges before or by the year 2020. Three of the priority areas for many educational programmes, particularly those concerning basic education, are: (a) quality and relevance; (b) access and equity; and (c) governance and management. Quality and relevance are mainly about the improvement of teaching inputs to allow for a more productive way of learning to increase learning outcomes; to cut down on the size of classes so that learning can be improved; to increase the number of trained educators as they become available; to enhance the relevance of the primary curriculum; to improve delivery by diversifying the modes and methods of teaching; to strengthen the monitoring of schools and the management systems of primary education; and to adopt an incentive-based system that rewards good performance on the part of educators (see the NESP 2008, 11).

The government is also called upon to take drastic measures in terms of improving access to allow more children into the school system. Enrolment of all vulnerable and disadvantaged groups in the country has to be made a top priority, taking into account serious gender disparities that still exist in many communities of the country. The government also has an obligation to encourage students to complete their first eight years of school and improve the overall school infrastructure by way of integrated development programmes in all areas of the country. According to the NESP (2008, 12), these measures must be complemented by grants to communities to ensure the provision of temporary classes which are temporarily without classrooms. The priority area of governance and management envisages that the State would be able to encourage people in various areas to take part in the building and improvement of schools; ensure a proper system that allows an effective delivery of education services through proper planning, budgeting, financing, monitoring and evaluation processes; and introduce policy measures designed to scale down class sizes, repetition and drop-out rates (see the NESP 2008, 12). Lastly, there is a need to emphasise that the NESP addresses all levels of education, but this article chose to concentrate on basic and primary education because these are areas where learners lay the foundation for whatever they are going to pursue in life. Another reason is that the achievement of basic and primary education outcomes does not usually raise the question of resource scarcity. If the policies laid down in the NESP are implemented, the State would have shown that the right to education is more than paper law.

## **The Right to Development**

The right to development is provided for in section 30 of the Constitution. This right is broad and all-encompassing, one that can be used to challenge poverty and systemic disadvantage in Malawi's impoverished communities. The article makes the argument that even though most socio-economic rights are not expressly mentioned in the current Constitution as justiciable, they can still be recognised as justiciable under the right to development. Before delving into the meaning of the right to development under the Constitution of Malawi, it is imperative to give a brief background of its origins, nature and meaning on a global scale.

### *Origins and nature of the right to development*

The United Nations Declaration on the Right to Development (UNDRTD) was formally adopted by the United Nations General Assembly (UNGA) on 4 December 1986.<sup>35</sup> However, the right to development can be traced way beyond the date of its formal adoption. It can be traced from the period of African nationalism in the 1960s right through the UNGA Declaration and Programme of Action on the Establishment of the

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<sup>35</sup> UN Doc A/RES/41/128 (adopted 4 December 1986). Accessed November 16, 2020. <http://www.un.org/documents/ga/res/41/a41r128.htm>.

New International Economic Order (NIEO) 1974.<sup>36</sup> The declaration was seen as the first real effort to give international expression of both the individual and collective right to development (Arts and Tamo 2016,224). The declaration had been inspired by the wave of liberation efforts that had swept through Africa because it had more support from the developing world (Arts and Tamo 2016, 224). This is well captured by Igbinedion (2019, 405) when he wrote the following:

It emerged from the legitimate preoccupation of newly independent countries with problems of development and the dominance of east-west issues on the agenda of the Commission on Human Rights, marginalizing the concerns of the political South, except for racial discrimination, apartheid, and foreign occupation, which did receive special consideration.

Developing States conceptualised UNDRD as a collective right meant to primarily cover peoples as a group (Cheru 2016). According to Igbinedion (2019), the provisions of the RTD proceed from the platform of recognising development as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. Despite this initial conceptualisation, the right also became recognised as an individual right as well (Arts and Tamo 2016, 224). The right to development has therefore been presented as both an individual and collective right (Arts and Tamo 2016, 224). As a result of the ambiguous nature of this right, many debates have ensued as to the actual content it ought to have, and these debates have raged on for the entire period it has been in existence. Overall, the implementation and operationalisation of the right to development has been affected by political controversy pitting developed countries versus developing countries (Arts and Tamo 2016, 224). The bone of contention has mainly been the interpretation of the right in a manner that imposes a legal requirement on developed countries to provide development assistance to developing nations, which they have refused (Kutor 2014). However, in spite of the ongoing debates about the content and application of the right to development, it has so far been viewed as a right that is meant to correct what is wrong in the world economic order (Kutor 2014). According to Villaroman (2016, 14) the right to development was meant to “address the effects of the asymmetrical relationship between the developed and developing countries.” The right to development has slowly continued to gain recognition from international bodies and instruments despite the controversy around its enforceability. The African Charter on Human and Peoples’ Rights (the African Charter 1981 hereinafter) was the first to legally recognise the right to development and it has generated jurisprudence around this right which is slowly growing (Ngang 2018). The Charter has slowly developed content of this right centred upon the original

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36 GA Res 3281 (XXIX) (12 December 1974).

interpretation that was envisaged by the UNDRD and this has given the impression that regional instruments might lead the way in solving the controversy and debates around its content (Ngang 2018).

### *The right to development under the African Charter*

The right to development was given its most prominent expression by the African Charter which has continued to bestow an individual and collective RTD with binding and enforceable obligations imposed on States.<sup>37</sup> Article 22 of the Charter states that, all peoples “shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind” and all States “shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

All African countries that signed and ratified the African Charter are bound by the statement in its preamble that urges all state parties to pay “particular attention to the right to development” (Rajagopal 2013,893). The African Charter has so far handled about 7 cases on RTD, with most of them either explicitly about RTD or at least related to it. There are scholars who have raised concerns about the content contained in Article 22 (Okafor 2013), even though the way in which the African Charter has interpreted Article 22 seems to have provided relevant content. One of the more prominent cases on RTD handled by the African Charter is known as the *Endorois* case in which the complainants challenged the Kenyan authorities on a number of violations against their rights under the Charter.<sup>38</sup> After considering the case, the African Commission ruled that indeed the Kenyan Government had violated Article 22 and in its ruling it clarified the content of the article by stating that:

[T]he right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants’ arguments that recognizing the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, overarching themes

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37 The African Charter on Human and Peoples’ Rights, (adopted 27 June 1981, entered into force 21 October 1986). Accessed November 20, 2020. <http://www.achpr.org/instruments/achpr>. Article 22 of the Charter states that: all peoples “shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind” and all States “shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

38 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya* 2003 Communication No. 276/2003, 25 November 2009.

in the right to development ... development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live ...<sup>39</sup>

The way in which the African Commission has interpreted Article 22 provides a way out of the raging debates that have been going on about the content of RTD. The interpretation can be looked at, from two perspectives, with the first one being that it provides a more detailed understanding of the RTD (Arts and Tamo 2016, 244). The second perspective is that in terms of enforcing the RTD, the African system does hold clues for everyone advocating for similar accountability or enforcement structures at global level (Arts and Tamo 2016, 244). In the African context, the RTD provides a gateway to a people-driven concept of development as guaranteed by the African Charter (Ozoemena 2017). Malawi as a party to the African Charter decided to enshrine the RTD in line with the provisions of the Charter.

#### *Why the Malawian Constitution should have explicitly protected all socio-economic rights*

The right of access to optimum health, social security and adequate housing was not given proper recognition and attention as it was directly left out of the Bill of Rights section. By contrast, sections 26 and 27 of the South African Constitution (1996) explicitly protect these rights. Further, the level of legal protection and judicial enforcement the Malawian Constitution gives to socio-economic rights is to some extent unclear. This, to some, might create confusion seeing that these same rights have only been mentioned in section 13 as principles of national policy, and this means that they are not justiciable. However, the same rights are also prescribed under the right to development. For example, the rights to shelter, food and healthcare services (components of the right to development under section 30); the rights to establish a family and to education; children's right to be spared from exploitation; and the rights of the elderly form an important part of the chapter entrenching justiciable human rights but are also stated under section 13 of the Malawian Constitution as the Principles of National Policy.<sup>40</sup>

Since the principles of national policy are not enforceable rights themselves, Courts should not be scared away from their constitutional duty to have regard to such principles when interpreting and applying any of the provisions of the Constitution or of any law or when determining the validity of the decisions of the executive.<sup>41</sup> Accordingly, the principles of national policy remain an important point of reference in

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39 ibid paras 277–278.

40 See s 13(b), (c), (f), (g), (h), (i) and (j) of the Malawian Constitution.

41 See s14 of the Malawian Constitution.

determining the constitutionality or otherwise of any law or the conduct of the executive. This concept of separation of powers, which ensures that the judiciary patrols the borders of the constitutional State (checks the legality of executive action) and reduces the arbitrary exercise of public power, is reinforced in this way. With the repeated mention of socio-economic rights in various parts of the Constitution – we have seen that socio-economic rights are protected as enforceable rights under the right to development (section 30) and as principles of national policy under section 13(b) – Courts have the legal basis to insist that all government policies be designed to curb citizens' vulnerability to poverty, inequality, homelessness, ignorance and disease. However, it must be conceded that the Malawian Constitution should have been drafted in an unambiguous fashion by including socioeconomic rights only in the chapter entrenching justiciable rights. Overall, the Constitution confirms the now undisputed fact that human rights are interconnected and indivisible. It also confirms the justiciability of socio-economic rights.

It is also confusing that the Malawian Constitution does not recognise all socio-economic rights as enforceable rights because some of the rights (the right to education and children's rights) are recognised both as direct principles and as justiciable rights. According to Chirwa (2005, 213), the approach taken “does not dovetail well with the preambular promise to guarantee the welfare and development of all the people of Malawi.” Socio-economic rights reflect the basic needs of the generality of the population in a country and for developing nations like Malawi, judicial protection of these rights is a matter of crucial importance. Considering this, Dixon (2007, 391) observed that:

In enforcing rights courts have a much greater capacity, even a responsibility, to play an active role in countering blind spots and burdens of inertia in the political process. ... In the enforcement of socio-economic rights, courts should ... weigh the benefits of weakened rights versus remedies according to the circumstances of a particular country and case.

When socio-economic rights are directive principles, this makes it difficult to enforce them, as enforcement would depend on political will more than anything else. At the same time, there is no one who can hold the government to account and ensure that it fulfils its obligations. This is not good for an emerging democracy like Malawi. Socio-economic rights serve as a means by which the poor can access opportunities and services that make an adequate standard of life possible. The constitutional protection of socio-economic rights legitimises the Constitution by responding directly to the needs of the poor majorities that are governed by it. The Constitution would guarantee substantive equality and make it clear that all citizens are equal social and economic participants if it protects all socio-economic rights. Substantive equality of opportunity and the right to human dignity can only be fulfilled if the Constitution empowers

marginalised, rural, uneducated and unemployed rural and urban citizens to participate and claim their stake in the social, economic and political systems (see Fredman 2005). When the protection of socio-economic rights and substantive equality guarantees are absent from it, a Constitution becomes a “device to allow structural inequality to manifest itself in the unequal enjoyment of the benefits of [first class] citizenship” (Haysom 1992, 451). When the Constitution does not entrench a positive duty to provide resources to those who are hungry and homeless, it imputes second-class citizenship to this category of persons and sends a signal that they are of less importance than those who have better access to opportunities and basic amenities of life. One renowned scholar once argued that if socio-economic rights are excluded from a Constitution, it becomes an illegitimate “Charter of Luxuries” in the eyes of impoverished communities (Mureinik 1994, 466).

It has long been the norm that the protection of civil and political rights is the standard used to measure the level of democracy in a society. However, a lot of progress has been made in terms of recognising socio-economic rights as an important part in measuring how committed a country is to principles of democracy. Social and economic rights are especially important in championing the cause for the most underprivileged groups of people because they help to create an environment that is conducive to fight conditions of poverty and socio-economic inequality (Chirwa 2005, 214). This necessitates adequate constitutional protection for socio-economic rights as a poverty alleviation tool. Due to poverty, disease, unemployment and homelessness, the adequate protection of socio-economic rights is important to the majority of the population. The entrenchment of the two ‘generations’ of rights would open up economic opportunities for Malawians and thereby enhance their political freedoms and civil liberties. The fact that Malawi is a predominantly rural country, with inadequate arable land, with high population growth, rain-dependent, resource-poor and landlocked, means the economic climate is dire for the majority of the population. According to the report for Malawi prepared by the United Nations Country Programme:

More than 44% of children under five are chronically malnourished and almost every family is affected by disease, notably malaria and HIV and AIDS. Over 52% (2005) of the population lives below the poverty line (US\$0.50 per person per day) and more than 22% live in ultra-poverty (less than US\$0.31 per person per day) unable to meet their minimum food requirements and the majority of these are women.<sup>42</sup>

Scott and Macklem (1992, 141) argue that “[a] constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognise the realities of life for certain members of society who cannot see themselves through the constitutional

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42 United Nations, “Country Programme Document for Malawi (2008-2011)” DP/CPD/ (2007) 2.

mirror.” Against this background, the partial entrenchment of socio-economic rights denies many Malawians the opportunity to see themselves through this “constitutional mirror.” Express constitutional recognition of the rights to adequate housing, social security, water, food and healthcare services, would have given the Malawian Courts the authority to question the country’s commitment to the socio-economic rights project. Whilst the constitutionalisation of socio-economic rights as directive principles will not deter an activist bench from making decisions on whether the State’s poverty alleviation programmes are adequate, reasonable and constitutional, the express entrenchment of these rights in an enforceable Bill of Rights would have meant that judges have the obligation to enforce them. It will take away from politicians and judges the discretion to choose between rights. This is so because the main purpose behind protecting rights in the constitution is to identify them as fundamental, to put them beyond the reach of an electoral majority and to authorise constitutional review of government policy and action.

The express codification of all socio-economic rights in a State’s Constitution would entitle the Courts to ask the State to explain how it envisaged fulfilling the obligations imposed by these rights. It would open up government and introduce a culture of government by explanation. To many decision-makers who are alive to that danger of having to defend a decision that bears the potential to violate socio-economic rights, the constitutional protection of socio-economic rights would be reason enough to consider a decision more closely, than if these rights were not justiciable. According to Mureinik (1994, 471), “[a] decision maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated.” If any government programme fails to meet the constitutional standard of justification, then the courts would have to strike the programme down. In this respect, the non-inclusion of many socio-economic rights under the enforceable chapter on Fundamental Human Rights (Chapter IV of the Constitution of Malawi) is regrettable.

### **The Right to Development and its Meaning Under the Constitution of Malawi**

According to the Constitution, the State and its related agencies are obliged to place all resources at their disposal towards the inalienable right to development which the Constitution confers on individuals and society at large. The responsibility for putting in place adequate implementation measures to ensure the right to development rests with the State and individuals become the beneficiaries. This makes the right to development a basic human right. There is no special preference accorded to a basic right, but if the question is that the right to development enables people to enjoy or exercise other rights, then the provision of basic needs should be secured as an intrinsic part of the right (Sengupta 2010, 9, 28). Sengupta further observes:

The right to development is a composite right to a process of development; it is not just an “umbrella” right, or the sum of a set of rights. The integrity of these rights implies that if any one of them is violated, the whole composite right to development is also violated. The independent expert describes this in terms of a “vector” of human rights composed of various elements that represent the various economic, social and cultural rights as well as the civil and political rights. The realisation of the right to development requires an improvement of this vector, such that there is improvement of some, or at least one, of those rights without violating any other (Sengupta 2002, 5, 6).

This approach promotes the interdependence of human rights and portrays the violation of one or more social, economic, cultural, civil and political rights as a failure to respect and uphold the right to development. Given that development is recognised as an enforceable right in Malawian Courts, it can be safely concluded that all socio-economic rights are justiciable under the Constitution of Malawi since they also fall under this right as part of its content. To clarify this line of argument, it is necessary to explore in detail the link between the right to development and socio-economic rights. According to the United Nations Development Programme (UNDP n.d.), “development is about creating an environment in which people can develop their full potential and lead productive lives in accordance with their needs and interests.” The UNDP (n.d.) further states that, “human development and human rights are mutually reinforcing, helping to secure the wellbeing and dignity of all people, building self-respect and the respect of others.” An acceptable form of livelihood is defined by an individual or a group of people’s ability to acquire and enjoy the most basic resources needed in life (UNDP n.d.). It is quite clear from this view of development that it involves resources and how they are distributed. The same purpose is the basis of socio-economic rights.

According to Sengupta (2010, 15), development as a right is referred to as “an inalienable right to a particular process of development in which all human rights and fundamental freedoms can be fully realised.” It is a composite right, where all the rights are realised together, recognising their interdependence and not just their aggregation (Sengupta 2010,15). It seems that under the right to development all rights carry equal value and are therefore justiciable. Therefore, the main purpose of human development is to enhance the social, political, economic and cultural wellbeing of people in any given society. This also means that if a State entrenches the right to development in its Constitution, socio-economic rights are given legal impetus. For most developing countries and development agencies, contends Marks (2004, 142), the realisation of economic, social and cultural rights is critical to the implementation of the right to development.

Since the right to development is an all-encompassing right, it follows that socio-economic rights can be said to be very much justiciable under it. The Constitution of Malawi states that:

- (1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
- (2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.<sup>43</sup>

This is clearly an all-encompassing right as it does not classify the category of persons who are supposed to enjoy the right to development. According to section 30, “all persons and peoples have a right to development.” This means that everyone, including people under incarceration, should enjoy all the elements that form part of this right. Sub-section (3) clearly reinforces this fact by stating further that, “the State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.”<sup>44</sup> This ensures that the State does not unjustifiably discriminate against any particular group for whatever reason. The Court also supported this position when it stated that, “prisoners’ rights must be understood to mean the rights that prisoners have as human beings as they remain incarcerated in a prison.”<sup>45</sup>

Section 30 extends political, cultural, social and economic development rights to individuals. The right to development can be interpreted widely to include the basic needs of every citizen in any country or State. This is evident from the fact that the “State shall take all necessary measures for the realization of the right to development [and that] such measures shall include equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.”<sup>46</sup> Further, the State is bound to take steps and reforms that seek to alleviate instances of social inequalities and injustices.<sup>47</sup> These are positive obligations to provide all persons, especially underprivileged and disadvantaged groups such as women and children, with access to basic education, health services, adequate housing, food and employment. The fact that the measures adopted must ensure equality for all in people’s access to basic amenities of life, marks the Constitution out as a transformative document. This is consistent with Sen’s understanding of income poverty as capability deprivation and development as capability enhancement (see in particular, Sen 1999, 87–110; UNDP 2000). Of significance in this regard, is the

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43 Section 30 (1) of the Malawian Constitution.

44 Section 30 (3) of the Malawian Constitution.

45 *Masangano v Attorney General and Others* (15 of 2007) (2009) MWHC 31 (8 November 2009) 37.

46 Section 30(2) of the Constitution.

47 Section 30(3) of the Constitution.

Malawian government's definition of poverty, as "a state of continuous deprivation or a lack of the basics of life" (Republic of Malawi 2002).

The constitutional obligation to "take measures to introduce reforms aimed at eradicating social injustices and inequalities" (Constitution of Malawi 1994) requires the State to transform socio-economic relations to ensure that people who were historically marginalised gradually embark on a journey towards the centre of the economy and the political system. The State must realise that poverty, vulnerability, illiteracy and marginalisation have a territorial dimension and a gendered face. A significant share (90%) of poor people live in the rural areas; urban households have an income almost three times that of their rural counterparts and approximately 25% of urban dwellers live in poverty. Women, rural communities, peasant farmers, and unskilled workers have been relegated by law to the periphery of the political and economic systems. Female households, with an average annual income of US\$250 (compared to \$415 for male-headed households) bear the brunt of poverty and marginalisation. The work of Gloppen and Kanyongolo (2007) on Malawi's socio-economic situation, is instructive in this regard. Similar trends and disparities exist in the fields of literacy and formal education. Poverty and lack of political power feed on each other, especially in the case of women and rural communities. These are the conditions the drafters had in mind when they created a transformative Constitution. The duties to "create equal opportunity for all and take measures to introduce reforms aimed at eradicating social injustices and inequalities" (Constitution of Malawi 1994), both codified as part of the right to development, underline the transformative potential of the Constitution.

Section 30 requires the State to address historical injustices, to adopt affirmative action or other corrective measures targeted at benefitting persons historically disadvantaged by colonialism, racial discrimination and lack of equal opportunities. This constitutional provision is cognisant of the fact that the most devastating form of poverty that still affects most communities, is structural poverty (which results from prolonged exclusion of individuals who occupy the lower levels of society) as opposed to poverty that comes as a direct result of natural disasters, such as volcanoes or floods. At the core of the problem of social inequality is the vulnerability of particular groups of people, which exposes them as easy targets of structural poverty. Aggravating the problem of poverty are recurrent famines, lack of skills, unemployment and deteriorating health. These problems most severely affect the poor, women and children. The right to development under section 30 requires the State to address these challenges. Given that section 30 forms part of the enforceable human rights Chapter IV, litigants and the Courts should not invoke the unenforceable principles of State policy over the binding right to development (see Moyo 2011).

Under the United Nations (UN) system, the right to development and the corresponding obligations are defined in terms of the realisation of all human rights. The Preamble of the Declaration on the Right to Development states:

[A]ll human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.<sup>48</sup>

From the above perspective, it is evident that the inviolable and inalienable core of all human rights should be ‘acknowledged’ rather than ‘granted’ by governments through positive law (see for instance, Petersmann 2005, 625). According to Sen, human rights are a combination of civil rights for all, religious freedoms, political liberties, nutrition and healthcare and basic education (Sen 2006, 1, 5). Section 30 of the Malawian Constitution not only places a positive obligation on the State to enable its citizens to realise the right to development but it also places a “negative obligation to respect the right to development.”<sup>49</sup> This approach casts the Constitution not only as a “limiting document” designed to limit the abuse of power so as to protect human rights, but also as an “enabling document” crafted to facilitate the provision of goods and services by public bodies and private persons. This means that if there is evidence that the State has violated this right, the Courts have the power and jurisdictional bite to hold the government accountable.

Intricately linked to the right to development is the State’s obligation to justify its policies. The Constitution imposes on the State the “responsibility to respect the right to development and to justify its policies in accordance with this responsibility”<sup>50</sup> According to Chirwa (2011, 267), section 30(4) “effectively judiciales policy-making since the judiciary is given express constitutional authority to ask the government to justify its policies by reference to the right to development.” He laments the failure to apply the right to development in the Malawian context and argues that section 30 is pivotal for the protection and promotion of all unenumerated socio-economic rights. Although section 30(4) does not immerse the Courts in the business of policy-making and priority-setting, it enables them to promote a culture of justification and a sense of responsibility. The requirements of the right to development adequately counter the argument, wrongly accepted by the Court in *Masangano*, that socio-economic rights claims are not expressly covered or guaranteed under Chapter IV of the Constitution of

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48 Preamble of the Declaration on the Right to Development; see also art 6(2) of the same Declaration.

49 Section 30(4) of the Malawian Constitution.

50 Section 30(4) of the Constitution.

Malawi.<sup>51</sup> The respondents were under the impression that socio-economic rights were not included in Chapter IV of the Malawian Constitution, an unfortunate assertion which led the Court to rely on an inappropriate constitutional provision.

## Conclusion

This article set out to explore and evaluate the treatment of socio-economic rights under the Constitution of Malawi. The main question was whether these rights are justiciable since some of them were not prescribed under the Bill of Rights as clear and enforceable rights but were put in as principles of national policy. Principles of national policy are not rights but guidelines which the government can refer to when they want to come up with new policies. By treating socio-economic rights as principles of national policy, it seems as though the government wanted to avoid the resource obligations that came with recognising them as direct rights. However, this is not the case as the policymakers also included the right to development, which is quite broad and all-encompassing as most of the “missing” social and economic rights were inserted under this right. Since the right to development places both positive and negative obligations on the government, it means that all the social and economic rights that fall under it are justiciable. It is quite unfortunate that in one of the most prominent cases on social and economic rights, the Court did not use the right to development in its decision, preferring to use the guiding principles which carry no legally binding force. This article contends that in the absence of an explicit constitutional protection of socio-economic rights that were prescribed as principles of national policy, the Courts should interpret the right to development in a manner that gives them legal force. These rights include the right to nutrition, healthcare, food, social security and others. The fact that socio-economic rights impose resource implications on the State is well acknowledged, which means that the way in which the right to development is prescribed might be a bit problematic, due to the fact that the right is unqualified. In general, socio-economic rights have to be progressively realised, depending on the availability of resources but if they are unqualified it gives the impression that their obligations are immediately enforceable. It remains the duty of the Courts to redefine and interpret the right to development and put it in the right context to avoid conflict between the State and its citizens with regards to fulfilling the obligations of socio-economic rights. Despite this however, the Constitution of Malawi is quite progressive in the sense that the protection of socio-economic rights is guaranteed, which is a positive reality for most of its citizens who live in abject poverty, as it offers them hope. The right to development signifies the right to a form of economic development, which serves to expand the human rights of all citizens in the country, and through doing so, enhances their own ability to contribute

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<sup>51</sup> *Masangano v Attorney General and Others* (15 of 2007) (2009) MWHC 31 (8 November 2009) 20.

further to the development of their communities. For the individual citizen, it signifies the right to share in society's economic development.

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