

# BOLSTERING THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE MALAWIAN CONSTITUTION

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## ABSTRACT

*The Malawian Constitution protects a handful of socio-economic rights in the Bill of Rights and enshrines the rest as part of directive principles of national policy. The only socio-economic rights expressly protected in the Bill of Rights are the right to education; the right to participate in cultural life of one's choice; the right to engage freely in economic activity, to work and pursue a livelihood; and the right to development. Socio-economic rights are thus not given the same level of protection as civil and political rights. Yet the Malawi Law Commission (Commission) in its current review of the Constitution has not identified these rights as a point of focus. The attitude of the Commission reflects the ideological position that regards socio-economic rights as incapable of judicial enforcement and as being inferior to civil and political rights. This article outlines the theoretical basis for including socio-economic rights as justiciable protections within the Malawian Constitution.*

## I INTRODUCTION

In 2006, the Malawi Law Commission (Commission) embarked on the review of the 1994 Constitution of the Republic of Malawi. The decision to review the Constitution was motivated by the fact that, on many occasions, the credibility of the Constitution has been questioned and many conflicts have arisen regarding its interpretation.<sup>1</sup> According to the Commission, one of the areas which have stirred debate includes the provisions in the Bill of Rights.

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<sup>1</sup> Malawi Law Commission 'Constitutional review programme: Issue paper' (March 2006), available at <http://www.lawcom.mw> (accessed 27 June 2007).

However, without elaborating on the nature of this debate, the Commission has identified several issues in the area of human rights, which it regards as being pertinent to the review process. These include the death penalty, marriage rights, children's rights, the right to education, the rights of arrested and detained persons, and political rights relating to political party funding.<sup>2</sup> Thus, apart from the right to education, economic, social and cultural rights (socio-economic rights) have not been included as a point of focus in the constitutional review. The attitude towards these rights follows the model implicit in the current Constitution whereby only a handful are protected in a justiciable Bill of Rights whilst the rest are enshrined as part of the directive principles of state policy.<sup>3</sup>

The only socio-economic rights expressly protected in the Bill of Rights are the right to education;<sup>4</sup> the right to participate in cultural life of one's choice;<sup>5</sup> the right to freely engage in economic activity, to work and pursue a livelihood;<sup>6</sup> and the right to development.<sup>7</sup> Socio-economic rights are thus not given the same attention as civil and political rights. Yet it appears that this unequal protection does not bother the Commission. The attitude of the Commission reflects the ideological position that regards socio-economic rights as incapable of being enforced judicially and as inferior to civil and political rights.

Malawi is not alone in treating these rights in this manner; the same treatment is reflected in a number of constitutions of African countries, which give some protection to these rights in the Bill of Rights and recognise others as directive principles of state policy.<sup>8</sup>

This article outlines the theoretical basis for the inclusion of socio-economic rights as justiciable protections within the Malawian Constitution. It starts with a discussion of the reasons that led to the adoption of the International Covenant on Economic, Social and Cultural Rights (the ICESCR)<sup>9</sup> in 1966 as well as the jurisprudence that has developed since that year. The article also attempts to identify the factors that might

<sup>2</sup> See Malawi Law Commission 'Human rights under the Constitution of the Republic of Malawi,' Discussion Paper No 1, available at <http://www.lawcom.mw> (accessed 27 June 2007).

<sup>3</sup> See Chapter III of the 1994 Constitution of Malawi. The rights that can be deduced from these principles include the right to adequate nutrition, the right to adequate health care, the right to a healthy environment, and the right of children to development.

<sup>4</sup> Section 25.

<sup>5</sup> Section 26.

<sup>6</sup> Section 29.

<sup>7</sup> Section 30, which is broadly couched to mean enjoyment of economic, social, cultural and political development.

<sup>8</sup> These include Ghana, Namibia and Uganda.

<sup>9</sup> Adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entry into force 3 January 1976. Malawi ratified this instrument on 22 December 1993

explain the limited protection of socio-economic rights in the Malawian Constitution. It concludes by recommending that Malawi should adopt the full range of socio-economic rights in its Constitution as have several other African countries.<sup>10</sup>

## II RELEGATION OF SOCIO-ECONOMIC RIGHTS

### A International perspective

The protection of socio-economic rights as justiciable rights proved controversial at the adoption of the ICESCR. A number of countries, mostly from the 'West,' argued that these rights could not be enforced legally because they were imprecise. These rights were also perceived of as engendering positive obligations and not the negative obligations usually associated with civil and political rights. In contrast, countries, mainly from the 'East,' argued for the full legal recognition of socio-economic rights. They considered these rights to be critical to people's socio-economic development and to the protection of the basic needs of the poor such as shelter, food, clothing, access to medical care and work.<sup>11</sup>

As a compromise, the ICESCR was adopted separately from the International Covenant on Civil and Political Rights (ICCPR)<sup>12</sup> contrary to an earlier direction from the United Nations General Assembly (GA) that had called for the adoption of a single covenant incorporating both categories of rights.<sup>13</sup>

The perceived distinction between the two categories of rights is also reflected in the manner in which their respective obligations are defined. The rights in the ICESCR are to be realised progressively to the maximum of the available resources.<sup>14</sup> However, in respect of the civil and political rights, states undertook to respect and ensure these rights without any express limitations pertaining to the availability of resources.<sup>15</sup> The distinction is also reflected in the enforcement measures provided in the two Covenants. The ICCPR was adopted together with an optional protocol establishing an individual

<sup>10</sup> The countries include Benin, Cape Verde, Saõ Tomé and Príncipe, Burkina Faso, Gabon, Madagascar, Mali, Niger, Seychelles and South Africa. DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49(2) *Journal of African Law* 207.

<sup>11</sup> See generally M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford: Clarendon Press, 1998).

<sup>12</sup> Adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entry into force 23 March 1976.

<sup>13</sup> See General Assembly Resolution 421 E (V), 14 December 1950, UN Doc A/1775 (1950).

<sup>14</sup> Article 2(1) of the ICESCR.

<sup>15</sup> Article 2(1) of the ICCPR.

complaints mechanism.<sup>16</sup> No such mechanism was put in place in respect of the ICESCR. This disparity worked to entrench the perception that the rights in the ICESCR were incapable of judicial enforcement. As the drafters of the ICESCR thought that these rights required extensive state action, they envisaged that these rights would be best realised through international cooperation and the work of intergovernmental organisations.<sup>17</sup>

The objection to the full recognition of socio-economic rights has taken two dimensions; the legitimacy dimension and the institutional competence dimension.<sup>18</sup> The legitimacy objection is rooted in the traditional conception of human rights. The question here is whether it is legitimate to give courts the power to enforce socio-economic rights in light of their nature.<sup>19</sup> The traditional conception of human rights views social justice as involving the redistribution of wealth and the intervention of the state in the free market economy. Adherents to this view hold that the constitution and courts should not be involved in the redistribution of wealth as this would adversely affect the functioning of the free market. The market economy functions best without state intervention and endorses those rights that protect individuals against the state (civil and political rights). Socio-economic rights are believed to engender affirmative features that are dangerous to the market economy.<sup>20</sup>

In terms of the institutional competence dimension the judiciary is considered to be ill-equipped to deal with the complex matters of social justice. This argument draws on the concerns of majoritarian democracy. Issues of social justice are viewed as matters falling within the province of elected representatives, not the unelected judges.<sup>21</sup>

This article is not concerned with the institutional competence problem but focuses on the legitimacy objection simply because an adequate response to the later renders the former irrelevant. It will critique the objections against socio-economic rights which, as will be shown below, overstate the differences in the nature of these two sets of rights.<sup>22</sup> In the main, it argues

<sup>16</sup> *Optional Protocol to the International Covenant on Civil and Political Rights* adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entry into force 23 March 1976. This Protocol empowers the Human Rights Committee to receive and consider communications from individuals who claim to be victims of violations by a state party of the rights protected in the Covenant (art 1).

<sup>17</sup> S Liebenberg 'The interpretation of socio-economic rights' in S Woolman & others (eds) *Constitutional law of South Africa* (Pretoria: Juta & Company, 2005) 33 1, 33 12.

<sup>18</sup> C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 20.

<sup>19</sup> As above, 21.

<sup>20</sup> As above, 23.

<sup>21</sup> See generally D Horowitz *The courts and social policy* (Washington DC: The Brookings Institution, 1977) 19.

<sup>22</sup> See *In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).

that civil and political rights and socio-economic rights are largely similar, without ignoring the fact that they exhibit some important differences. However, these differences do not warrant downgrading socio-economic rights.

## B Domestic perspective

The failure to include socio-economic rights in a comprehensive manner in the 1994 Malawi Constitution has been attributed to the nature of the process through which the Constitution was adopted. This process 'was not preceded by a careful analysis of the various models of protecting these rights principally because the Constitution was adopted hurriedly.'<sup>23</sup> The drafters of the Constitution ignored the fact that Malawi had ratified international and regional instruments protecting socio-economic rights such as the ICESCR and the African Charter on Human and Peoples' Rights (African Charter).<sup>24</sup>

Another very important, yet least discussed factor, to explain the scant attention given to socio-economic rights in African countries relates to the objectives that propelled human rights discourse on the African continent. The early 1990s witnessed the introduction of multi-party democracy and regular elections in many African countries. This change was in a large measure driven by the donor community which at the time held the view that participatory democracy and the empowerment of civic society were necessary for Africa to overcome underdevelopment. Thus, constitutions that emerged as a result laid emphasis on civil and political rights. Malawi seems to fit in this general trend.

By failing to protect socio-economic rights in a comprehensive manner, the Malawian Bill of Rights not only contradicts the preambular guarantee of welfare and development for all but also fails to respond to the high levels of poverty in the Country.<sup>25</sup> Malawi is one of the least developed countries in the world and is characterised by socio-economic marginalisation pegged to such factors as gender, geographical location and social class.<sup>26</sup> Recent research indicates that 52.4% of the Malawian population (approximately 4.4 million people) lives below the poverty line; 22.4% of these (approximately 2.7 million people) are in dire poverty.<sup>27</sup> In these circumstances, socio-economic

<sup>23</sup> Chirwa, above note 10, 208, 211.

<sup>24</sup> Adopted on 27 June 1981 by the OAU Assembly of Heads of State and Government, in Nairobi, Kenya OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entry into force 21 October 1986. Malawi ratified this instrument on 17 November 1989.

<sup>25</sup> Chirwa, above note 10, 213.

<sup>26</sup> See S Gloppen & E Kanyongolo 'Courts and the poor in Malawi: Economic marginalization, vulnerability and the law' (2007) 5(2) *International Journal of Constitutional Law* 258, 261.

<sup>27</sup> African Forum and Network on Debt and Development *The impact of economic reform programmes on social services: The case of Malawi* (Harare: AFRODAD, 2004) 19.

rights would be a formidable tool for alleviating poverty and marginalisation. These rights impose obligations on the state to prioritise the meeting of people's basic needs and could be used by individuals to fulfil their full potential.<sup>28</sup> It is in this context that the importance of constitutionalising socio-economic rights should be understood. In the next section, arguments against protecting socio-economic rights in the Bill of Rights are analysed and countered.

### III ARGUMENTS FOR AND AGAINST SOCIO-ECONOMIC RIGHTS

#### A Human rights engender negative obligations

Historically, human rights have been conceived of as safeguards aimed at protecting the individual from the state.<sup>29</sup> The aim of human rights is therefore to guarantee freedom.<sup>30</sup> This conception of human rights derives from the natural rights theory.<sup>31</sup> This theory holds that the state may not interfere with the individual's freedom and liberty; the individual must be placed in a bracket beyond the reach of the state.<sup>32</sup> Those who support this philosophy restrict human rights to those norms that engender negative obligations on the state.<sup>33</sup>

However, modern human rights have not been inspired by the natural law theory alone. To be sure, the International Bill of Rights was inspired by a need for solutions to moral and political problems<sup>34</sup> caused by the two world wars and the emergence of dictatorships.

One of the purposes of the UN is to solve problems of an economic, social, cultural or humanitarian nature.<sup>35</sup> Such problems include lack of access to

<sup>28</sup> See generally A Sen *Development as freedom* (Oxford: Oxford University Press, 1999).

<sup>29</sup> See B De Villiers 'Social and economic rights' in D Van Wyk & others (eds) *Rights and constitutionalism: The new South African legal order* (Lansdowne: Juta & Company, 1995) 599, 601.

<sup>30</sup> K Raes 'The Philosophical basis of economic, social and cultural rights' in P Van der Auweret & others (eds) *Social, economic and cultural rights: An appraisal of current European and international developments* (MAKLU, 2002) 43, 48..

<sup>31</sup> See generally C Macpherson *The political theory of possessive individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1967).

<sup>32</sup> See G Peces-Barba 'Reflections on economic, social and cultural rights' (1981) 2 *Human Rights Law Journal* 281 3.

<sup>33</sup> This argument was also advanced in South Africa by the South African Law Reform Commission. The Commission endorsed the position that civil and political rights are negative while socio-economic rights are positive, which makes them hard to enforce. This view was supported by a number of legal scholars; see C Dlamini 'The South African Law Commission's working paper on group and human rights: Towards a Bill of Rights for South Africa' (1990) 5 *SA Public Law* 91.

<sup>34</sup> Craven, above note 11, 11.

<sup>35</sup> UN Charter, art 1(3). In addition to this, the preamble expresses the determination to promote social progress and enhance standards of living.

basic needs such as food, shelter, health care services and employment.

It is also important to note that on closer scrutiny, civil and political rights too engender positive obligations. It is on this basis that Sepúlveda submits that all human rights impose a 'continuum' or 'spectrum' of obligations.<sup>36</sup> On the one side of the spectrum is the obligation of non-interference by the state and on the other side is the obligation requiring positive action. Both civil and political rights and socio-economic rights should, therefore, be viewed through this spectrum. Thus, the South African Constitutional Court in the *First Certification* case held that at 'the very minimum, socio-economic rights can be negatively protected from improper invasion.'<sup>37</sup>

Likewise, the obligations of states under the ICCPR are not restricted to the duty to respect civil and political rights; states also have the obligation to take specific measures to realise these rights.<sup>38</sup>

Nevertheless, it must be conceded that certain socio-economic rights call for more extensive state action than civil and political rights.<sup>39</sup> This is what makes judicial review of socio-economic rights more difficult than civil and political rights. This concession should not be understood to mean that civil and political rights litigation do not challenge inaction. The difference is one of the degrees of positive action required.

## B Universality of human rights

Cranston submits that socio-economic rights are not human rights because they lack the essential characteristics of *universality and absolutism*.<sup>40</sup> Human rights are said to be universal if they accrue to every individual by virtue of their humanity rather than as a result of their position or role in society.<sup>41</sup> Socio-economic rights are said to accrue to classes of people and, therefore, lack universality. Additionally, it has been argued that socio-economic rights do not derive from one's humanity. Cranston describes socio-economic rights as 'mere utopian aspirations.'

<sup>36</sup> M Sepúlveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (Oxford: INTERSENTIA, 2003) 125, quoting H Shue 'The interdependence of duties' in P Alston & K Tomaševski (eds) *The right to food* (Dordrecht: Martinus Nijhoff Publishers, 1984) 83, 84.

<sup>37</sup> Above note 22, para 77.

<sup>38</sup> See para 1 of General Comment No 3 'Implementation at the national level (Art 2),' 29 July 198, HRI/GEN/1/Rev.7, 12 May 2004. See also P Alston & G Quinn 'The nature and scope of States Parties obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 172.

<sup>39</sup> P De Vos 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67, 53.

<sup>40</sup> See M Cranston 'Human rights real and supposed' in D Raphael (ed) *Political theory and rights of man* (London: Macmillan, 1967).

<sup>41</sup> Craven, above note 11, 13.

Cranston's objection is based on the idea of 'substantive universality' as opposed to 'conceptual universality.' The theory of conceptual universality is not intended to prove the existence or even justiciability of rights. It is merely based on the belief that human rights apply to all human beings equally.<sup>42</sup> In contrast, substantive universality is intended to prove or disprove certain rights based on certain characteristics of human rights.<sup>43</sup>

What I understand from Cranston's objection is that human rights are supposed to focus on the individual and cannot be couched as group rights. Cranston is not saying that socio-economic rights are relative, but rather that human rights do not exist to protect collective interests. In his opinion, human rights are norms that protect the individual and not groups as socio-economic rights do.

However, Cranston's objection lacks merit. Both categories of rights have elements that focus on the individual as well as on collective interests. A number of civil and political rights are enjoyed meaningfully only in groups. For instance, the freedoms of association and assembly become useful only when exercised by a group. Members of the media profession may collectively demand respect for their freedom of speech through their professional bodies. Academics, scientist, politicians, minority groups and artists, too, may make similar demands for freedoms of expression and association.

On the other hand, even the so-called collective rights empower the individual. Better health, freedom from hunger and the proceeds of employment all benefit the individual in as much as they promote societal cohesion.<sup>44</sup>

Therefore, all rights, in addition to protecting the individual, promote collective interests.<sup>45</sup> All human rights, whether civil and political or socio-economic, are aimed at creating an environment in which individuals flourish and decide how they want to live.

### C Absolutism and resources

Absolutism refers to the notion that rights belong to all human beings simply on account of their humanity without any pre-requisite conditions. Socio-economic rights are said not to be absolute. Instead, their realisation is

<sup>42</sup> J Donnelly 'The relative universality of human rights' (2007) 29(2) *Human Rights Quarterly* 283.

<sup>43</sup> As above.

<sup>44</sup> Raes, above note 30, 44.

<sup>45</sup> Macpherson, above note 31, 3, submits that the individual is neither a moral whole nor an owner of himself. Rather, he forms part of a larger social whole. The establishment of smooth interactions and the protection of all members of this social setting call for a degree of collectivism.

subject to state resources.<sup>46</sup> Bossuyt goes as far as submitting that civil and political rights can be realised immediately because their realisation does not require resources; all the state has to do is to abstain from infringing them.<sup>47</sup> Robertson asserts that positive rights require rationing and a compulsory transfer of resources and that negative rights, on the other hand, require only the provision of services equally to all at all times. On this basis, he criticises redistributive expenditure as counter-productive because, rather than enhance the standard of living, it reduces it.<sup>48</sup>

However, these arguments are misconceived. The implementation of civil and political rights, as is the case with socio-economic rights, requires resources.<sup>49</sup> For the right to life to be protected, a police force and an army must be trained, equipped, and regularly and adequately funded. For the right to a fair trial to be exercised, courts have to be built and staffed; judges and members of the legal profession have to be trained; and legal aid must be provided to the indigent. All these are done at state expense.<sup>50</sup>

It is also not true that socio-economic rights always require resources to be realised. These rights, like civil and political rights, impose an obligation on the state to respect them to refrain from interfering with the enjoyment of rights.<sup>51</sup>

Furthermore, all government expenditure has a redistributive effect irrespective of the nature of the right upon which it is spent. Expenditures on civil and political rights too have redistributive implications. As Robertson concedes, the state does not create wealth through taxation. This applies to expenditure on socio-economic rights as well as civil and political rights.

It should also be noted that the objection to socio-economic rights on the

<sup>46</sup> See M Bossuyt 'La distinction juridique entre les droits civil et politiques et les droit économiques, sociaux et culturels' [The legal distinction between civil and political rights and economic, social and cultural rights] (1975) 8 *Revue des Droits de l'Homme* [*Human Rights Journal*] 783.

<sup>47</sup> M Bossuyt 'International human rights systems: Strengths and weakness' in K Mahoney & P Mahoney (eds) *Human Rights in the twentieth century* (Dordrecht: Martinus Nijhoff, 1993) 47, 52.

<sup>48</sup> B Robertson 'Economic, social and cultural rights: Time for a reappraisal' (Wellington: New Zealand Business Roundtable, 1997), available at <http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm> (accessed 23 January 2005).

<sup>49</sup> Alston & Quinn, above note 38, 172. Eide has submitted that the argument that socio-economic rights require more resources than civil and political is only tenable in situations where the focus on socio-economic rights is on the tertiary level (duty to fulfil) and not the primary level (duty to respect). In Eide's opinion, socio-economic rights can also be safeguarded by non-interference. See A Eide 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 (1 2) *Human Rights Law Journal* 41.

<sup>50</sup> K Yigen 'Enforcing social justice: Economic, and social rights in South Africa' (2002) 4(2) *International Journal of Human Rights* 18.

<sup>51</sup> See A Eide 'Universalisation of human rights versus globalisation of economic power' in F Coomans & others (eds) *Rendering justice to the vulnerable: Liber amicorum in honour of Theo van Boven* (The Hague: Kluwer Law International, 2000) 99.

basis of resources confuses two things: justiciability and implementation or enforcement. While enforcement may require resources, recognition of the justiciability of socio-economic rights does not. It is also true, as indicated above, that socio-economic rights do not always require resources for them to be realised or respected. As can be deduced from article 2 of the ICESCR,<sup>52</sup> states are only expected to realise socio-economic rights progressively to the maximum of their available resources.

#### D Vagueness

The other objection to the enforcement of socio-economic rights points to their vagueness. These rights are considered by some to be too 'indeterminate'<sup>53</sup> or vague for a judge to determine their precise scope.<sup>54</sup> Neier has argued recently that socio-economic rights are broad assertions not suitable for judicial enforcement.<sup>55</sup>

An immediate response to this objection is that civil and political rights are also vague.<sup>56</sup> For example, the question as to what amounts to inhuman or degrading treatment cannot be answered with precision. The same can be said of free speech. The vagueness of civil and political rights has partly been cleared up through many years of adjudication. By contrast, socio-economic rights have not had a similar advantage.<sup>57</sup> This is one of the reasons why the adoption of a complaints procedure to the ICESCR has been proposed.<sup>58</sup> To deny the justiciability of socio-economic rights is to limit the opportunities

<sup>52</sup> For more on the obligations implicit in socio-economic rights, see section E below.

<sup>53</sup> Scott & Macklem, above note 18, 45. See also B Andreassen & others 'Assessing human rights performance in developing countries: The case for a minimum threshold approach to economic and social rights' in B Andreassen & A Eide (eds) *Human rights in developing countries 1987/88: A Yearbook on human rights in countries receiving Nordic aid* (Copenhagen: Chr Michelsen Institute, 1988) 333, 335.

<sup>54</sup> See para 53 of the Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2004/44, 15 March 2004.

<sup>55</sup> See A Neier 'Social and economic rights: A critique' (2006) 13(2) *Human Rights Brief* 3.

<sup>56</sup> Some of the delegates at a recent session of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights argued that the ICESCR differs from the ICCPR in this respect; that it was for the interpreters of the treaty to apply a particular provision of the Covenant to concrete cases, see Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, above note 54, para 53.

<sup>57</sup> See Sepúlveda, above note 36, 132; Scott & Macklem, above note 18, 72-73.

<sup>58</sup> See P Alston 'No right to complain about being poor: The need for an optional protocol to the economic rights Covenant' in A Eide & J Helgesen (eds) *The future of human rights protection in a changing world: Fifty years since the four freedoms address; Essays in honour of Torkel Opsahl* (Oslo: Norwegian University Press, 1991) 88. See also L Chenwi & C Mbazira 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 7(1) *ESR Review* 9.

for elaborating their obligations.<sup>59</sup>

## E Human rights obligations

As pointed out earlier, all rights entail the duty to respect, the duty to protect, the duty to promote, and the duty to fulfil. General Comments produced by the CESCR have helped to clarify the meaning of these obligations with respect to socio-economic rights. The obligation to respect requires states to refrain from interfering with the enjoyment of socio-economic rights.<sup>60</sup> The state must respect the free use of resources by individuals or groups for the purpose of satisfying human needs.<sup>61</sup>

The duty to protect requires the state to prevent third parties from violating the rights of individuals or groups.<sup>62</sup> It requires the state to take measures, such as legislation and regulations, to prohibit third parties from interfering with the enjoyment of socio-economic rights. In addition, the state should put in place an effective framework for seeking redress for violations of rights committed by third parties.

The duty to promote is the least discussed of the duties; the CESCR itself did not include the duty to promote in its initial General Comments.<sup>63</sup> Recently, however, the Committee has defined this duty as a component of the duty to fulfil. In its General Comment on the right to water, the Committee has said that the 'obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide.'<sup>64</sup> It then defined these duties thus:

The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to

<sup>59</sup> L Scott 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20(1) *Human Rights Quarterly* 88.

<sup>60</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997 (Maastricht Guidelines) para 6.

<sup>61</sup> *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* Communication No 155/96 of the African Commission on Human and Peoples' Rights, (2001) AHRLR 60 para 45.

<sup>62</sup> See Maastricht Guidelines, above note 60, para 6.

<sup>63</sup> See CESCR General Comment No 12 'The right to adequate food (art 11) (20<sup>th</sup> session, 1999), UN Doc E/C.12/1998/5 (1999), reprinted in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 54 (2003) para 15.

<sup>64</sup> CESCR General Comment No 15 'The right to water' (29<sup>th</sup> session, 2003), UN Doc E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 105 (2003) para 25.

minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.<sup>65</sup>

#### IV CONCLUSION

This paper has provided a theoretical basis for the inclusion of the full range of socio-economic rights in the Malawian Constitution as fully justiciable rights. Malawi has already committed itself to these rights by ratifying a number of international instruments. These include the ICESCR and the African Charter. Malawi has also already included the right to education, the right to family protection, the right to economic activity, labour rights and the right to development in its Bill of Rights. The rights which are currently not protected include the right to the highest attainable standard of health, the right to water, the right to education, the right to food, the right to social security, and the right to housing. For the Malawian Bill of Rights to fully enshrine the principle of the indivisibility of all rights, it ought to protect these rights.

<sup>65</sup> As above.