

Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities

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Summary

Socio-economic rights are of special significance in a developing country such as Malawi. The framers of the Malawian Constitution included the right to development in the country's Bill of Rights. The right to development is not only included as a self-standing right, but is also a conduit for the guarantee of equal access to a range of other socio-economic rights. Regrettably, the record of judicial enforcement of these rights subsequent to 1994 is disappointing. Only in a few cases, largely focusing on a narrow range of rights such as property, work, economic activity and, to a lesser extent, education, have courts directly and significantly dealt with socio-economic rights. Such consideration has also been deficient as courts have failed to develop the content of the rights and to define the nature of the obligations of both the state as well as non-state actors in relation to socio-economic rights. There has been little or no attempt to apply norms of international human rights law and comparable foreign case law. Worse still, in some related cases, courts have stated that they will not deal with any issues that raise policy considerations as such matters are outside the province of judicial competence. This is a problematic approach that could stultify the development of socio-economic rights jurisprudence. The Masangano case, however, offers some hope as it represents the first real attempt to address key socio-economic rights issues such as access to food, clothing, adequate housing and healthcare, albeit in relation to prisoners. While the final decision ultimately turned on cruel, inhuman and degrading

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treatment or punishment, the High Court of Malawi made some definitive affirmations of the guarantee of a number of these key rights and presented a first real attempt to fashion a time-bound remedy, that also required the state to take positive steps in allocating sufficient resources for the realisation of socio-economic rights for prisoners. The Masangano case represents a good stepping stone upon which courts can stand in developing more systematic and sophisticated jurisprudence on socio-economic rights in Malawi.

1 Introduction

Socio-economic rights are empowerment rights: They allow socially-vulnerable and marginalised individuals and groups to use the legal process in order to obtain the satisfaction of their essential socio-economic needs.¹ Socio-economic rights empower people who are subject to the jurisdiction² of a state to demand that that state acts reasonably and progressively to ensure that all enjoy the basic necessities of life.³ In so doing, these rights enable citizens to hold government accountable for the manner in which it seeks to pursue the achievement of social and economic welfare and development.⁴ In this regard, Davis has urged that socio-economic rights and the obligations they impose go to the heart of the developmental state.⁵ Liebenberg, similarly, states that these rights are central in ensuring that significant sections of the population, especially the socially and economically vulnerable, are able to develop to their full potential, to realise their life plans and to participate as equals in the political, economic, social and cultural spheres in a constitutional democracy.⁶ In other words, socio-economic rights impose both negative and positive state duties⁷ to realise individual rights to material goods, which enable both human survival and the individual pursuit of the

1 See M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlements to healthcare services' (2006) 22 *South African Journal on Human Rights* 473 477.

2 It is necessary to point out here that this discussion does not restrict the enjoyment of socio-economic rights to 'citizens' in a narrow sense of those entitled to hold a passport of the state concerned. As will become apparent in subsequent paragraphs, I take the view that socio-economic rights are applicable to nationals as well as non-nationals.

3 *Mazibuko & Others v City of Johannesburg & Others* 2010 4 SA 1 (CC).

4 *Mazibuko* case (n 3 above) para 59.

5 DM Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 302.

6 See S Liebenberg & B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335 337.

7 There is of course a growing school of thought, to which the author is party, that holds that in appropriate cases, non-state actors also have positive obligations in respect of socio-economic rights.

good life.⁸ Thus, as Mbazira urges, the realisation of socio-economic rights serves to ameliorate the conditions of the poor and heralds the beginning of a generation that is free from socio-economic need.⁹ Such realisation guarantees people entitlements that enable them to attain a series of interrelated capabilities which enable the pursuit of individual value choices and which are often impeded or restricted by material deprivation.¹⁰

Given this background, it is clear that these rights play or should play a central role in Malawi as a developmental state. As I have observed elsewhere, Malawi faces a number of socio-economic problems, such as a fast-growing population that in turn exerts substantial pressure on limited land and natural resources; high unemployment levels; corruption in government and in public administration; a general lack of fiscal discipline in the public service; heavy dependence on outside balance of payments support; low levels of education and training opportunities; a poor state of health services compounded by an HIV/AIDS pandemic that is not yet under control; heavy dependence on agriculture and exports of a few agricultural commodities which are largely in raw (unprocessed) form; low-level productivity in small-scale farming and a vast gap between small-scale and estate agriculture with respect to product range and productivity; and vulnerability to external political and economic shocks.¹¹ These socio-economic problems exemplify the need for an emphasis on socio-economic rights that empower and enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic welfare and development.

The character of Malawi as a developmental state and the centrality of socio-economic rights in its constitutional design, are recognised in the Preamble of the Constitution of the Republic of Malawi of 1994 (Constitution), where it is explicitly provided that one of the purposes for adopting the Constitution was the quest 'to guarantee the welfare and development of all the people of Malawi'.¹² In this regard, a

8 As above. See also DI Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 27 39-60; S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 3 9-18; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 2 8-10 31; JP Ruger 'Toward a theory of a right to health: Capability and incompletely theorised agreements' (2006) 18 *Yale Journal of Law and the Humanities* 273 293-304.

9 C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 3.

10 See M Pieterse 'The interdependence of rights to health and autonomy in South Africa' (2008) 125 *South African Law Journal* 553 554. See also AK Sen *Development as freedom* (1999); M Nussbaum *Women and human development: The capabilities approach* (2000).

11 See RE Kapindu 'Policies, aspirations, or rights? A case for mainstreaming socio-economic rights in the Malawi growth and development strategy (MGDS)' (2011) 14 *Yale Human Rights and Development Law Journal* 34.

12 Preamble, Constitution of the Republic of Malawi, 1994.

range of socio-economic rights are either guaranteed in the Bill of Rights (chapter IV), or recognised in the Directive Principles of National Policy in chapter III. In his seminal article on the constitutional protection of socio-economic rights in Malawi, Chirwa locates the Malawian Constitution in the model that bifurcates the scheme for the protection of socio-economic rights into those rights that are 'entrenched' in the Bill of Rights, including the rights to family life, education, culture and language, property, economic activity, development and fair and safe labour practices, on the one hand, and those that are simply recognised as goals in chapter III.¹³ These include the rights to health, food and nutrition. However, as I shall demonstrate, it would appear that with a more innovative and robust interpretation of these rights, this bifurcation should have a minimal effect in the judicial enforcement of socio-economic rights in Malawi.

In recent years, Malawi has witnessed some budding jurisprudence in the area of socio-economic rights that is explored and analysed in this article. It is evident, however, that socio-economic rights litigation has thus far been generally confined to a narrow range of economic rights, namely, labour rights, the right to work, the right to economic activity and to pursue a livelihood and, to a very limited extent, the right to education. Many other key socio-economic rights, such as access to housing, access to water, access to food, and others, that could conceptually have been litigated almost 20 years after the adoption of the Constitution, have remained judicially unexplored.

This article starts by critically examining some of the cases that thus far have been litigated. It explores the possible reasons for the lack of socio-economic rights jurisprudence in the key socio-economic rights, such as access to healthcare, access to housing and access to food. The article investigates the conceptual approaches that Malawian courts have adopted over the years, some of these flowing from decisions that did not directly implicate socio-economic rights, and concludes that such conceptual approaches could possibly be a major reason why socio-economic rights jurisprudence in the country has experienced little growth since 1994. The article concludes with recommendations on some measures that can be taken to further the judicial enforcement of socio-economic rights in Malawi.

2 Status and extent of socio-economic rights guarantees in Malawi

The Malawian Constitution is not regarded widely as containing a comprehensive set of guarantees of socio-economic rights. For

¹³ DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *Journal of African Law* 207 212.

instance, as earlier noted, Chirwa classifies the Malawian Constitution into a model that bifurcates the inclusion of these rights into entrenched rights, on the one hand, and Directive Principles of State Policy, on the other, a model that he suggests ensures only 'half a loaf' of guarantees.¹⁴ It is true that at face value, this bifurcation is evident: the rights to family life, education, culture and language, property, economic activity, development and fair and safe labour practices are clearly and separately guaranteed as entrenched justiciable rights under the Bill of Rights, whereas the rights to health, food and nutrition, and environmental rights are only included as non-binding directive principles of national policy.¹⁵

Mbazira laments 'the failure to include socio-economic rights in a comprehensive manner in the 1994 Malawi Constitution',¹⁶ observing that¹⁷

[t]he 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 freely engage in economic activity, to work and pursue a livelihood; and the right to development.

He points out that '[t]he 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'. He argues that¹⁸

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.

One setback with Mbazira's analysis, though, is that he does not engage with the significance of section 30 of the Constitution that guarantees a wide-ranging right to development. Section 30(1) provides:

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.

Further, section 30(2) states:

The state shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.

14 As above.

15 Sec 13 Constitution.

16 C Mbazira 'Bolstering the protection of economic, social and cultural rights under the Malawian Constitution' (2007) 1 *Malawi Law Journal* 220 224.

17 Mbazira (n 16 above) 221.

18 As above.

In addition, section 30(4) provides that '[t]he state has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility'.

It is evident from these provisions that this right, to a significant extent, protects a number of the rights that Mbazira argues are unprotected. At a minimum, it guarantees equal access to these specific rights. Further, in terms of section 30(4), the Constitution clearly requires that government policies must be justified in accordance with the responsibility of the government to 'respect' the right. This means that any person with sufficient interest may bring a claim to court challenging any government policies that do not meet the test of equal access to the various socio-economic rights identified in section 30.

In addition to the specific negative responsibility to 'respect' the right to development under section 30(4) of the Constitution, an interpretation of the responsibility of government in respect of this right and other socio-economic rights guaranteed in the Bill of Rights ought to be informed by other enforcement provisions under the Constitution. Section 15(1) of the Constitution, for instance, provides for a duty on the part of government and, where applicable, non-state actors as well, to 'respect' and 'uphold' all the rights under the Bill of Rights. In addition, section 46(3) provides that where a court finds that the rights or freedoms conferred by the Constitution 'have been unlawfully denied or violated, it has the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms'. Read together, it is submitted that these provisions provide a proper framework, not only for the negative enforcement of the various socio-economic rights guaranteed under the Bill of Rights, but also to ensure that government upholds its positive obligations that are 'necessary and appropriate to secure the enjoyment of' socio-economic rights.

The significance of the right to development has been recognised by other commentators. Notably, Chirwa has observed that this right is particularly significant in the Malawian context as 'it provides an avenue for protecting many socio-economic rights not expressly recognised in the Malawian Constitution',¹⁹ and that regrettably '[t]he potential of this right is yet to be exploited'. Gloppen and Kanyongolo, agreeing with Chirwa's analysis, further state that the right 'provides a basis for marginalised groups to challenge policies and claim equal access to resources and services'.²⁰

Gloppen and Kanyongolo further argue that although the Constitution of Malawi bifurcates socio-economic rights in the above-mentioned fashion, it is worth noting that section 14 requires that, in

19 Chirwa (n 13 above) 224.

20 S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalisation, vulnerability, and the law' (2007) 5 *International Journal of Constitutional Law* 258 265.

interpreting the Constitution, courts are entitled to have regard to the Directive Principles of National Policy provided for in section 13 of the Constitution. In that respect, they argue that 'a]n activist judiciary could thus give the directive principles significant jurisprudential force'.²¹

Gloppen and Kanyongolo's argument is consistent with the approach adopted by the High Court of Malawi in the case of *Gable Masangano and Others v Attorney-General and Another (Masangano case)*.²² In response to the erroneous argument by the Attorney-General that socio-economic rights were non-justiciable under the Constitution and that they were only non-binding principles of national policy under section 13 of the Constitution, the Court stated:

The reference to section 13 of our Constitution on principles of national policy and section 14 of the same Constitution on the application of the said principles of national policy that they are directory in nature as a basis for saying that the present matters are non-judiciable does not provide a sound basis for the argument. In any event, section 14 of the Constitution further provides that '[c]ourts shall be entitled to have regard to them in interpreting and applying any provisions of this Constitution or any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution'.

Gloppen and Kanyongolo's argument also resonates with the approach adopted by the Supreme Court of India which has recognised the significance of directive principles of national policy in the enforcement of socio-economic rights. Thus, for instance, in *Olga Tellis and Others v Bombay Municipal Council*,²³ the Supreme Court of India stated:²⁴

Social commitment is the quintessence of our Constitution ... Therefore, Directive Principles, which are fundamental in the governance of the country, must serve as a beacon light to the interpretation of the constitutional provisions ... The Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country ... The Principles contained in articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights.

What this means, therefore, is that in our understanding of the content of the socio-economic rights under the Bill of Rights, we ought to consider and, where necessary, apply, the directive principles of national policy. Thus, for instance, in our understanding of section 30 that provides for, among other things, equal access to education (as part of the right to development), and section 25 that generally guarantees the right to education, we can observe that, although none of these provisions mentions anything about free and

21 As above.

22 Constitutional Case 15 of 2007 (HC, PR) (unreported).

23 AIR 1986 SC 180.

24 n 23 above, para 73.

compulsory basic education, section 13(f) in the directive principles provides that²⁵

[t]he state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at [providing] adequate resources to the education sector and [devising] programmes *in order to make primary education compulsory and free to all citizens of Malawi.*

Consequently, in ascribing content to the right to education, a court would be entitled to interpret the right to education under section 25 as including the entitlement of every person in the country to free and compulsory primary education as clarified by directive principle 13(f) under the Constitution. Such an interpretation would also be in line with the minimum core content obligations of Malawi under article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) that provide for free and compulsory primary education.²⁶

In view of these analyses, it is submitted that with a more innovative and robust approach to the interpretation of socio-economic rights under the Malawian Constitution, particularly having regard to section 30 of the Constitution, the bifurcation in the inclusion of socio-economic rights provisions should have a minimal effect in the judicial enforcement of socio-economic rights in Malawi. Hansungule has taken note of the potential comprehensiveness of the socio-economic rights guarantees under the Malawian Constitution when compared to most constitutions in Africa. He states:²⁷

Though sporadic and provided for in 'pick and choose' fashion, Malawi's socio-economic rights provisions stand out strikingly compared to the ... constitutions in fellow African states. In the region, Malawi loosely compares to South Africa ... in as far as constitutionalising socio-economic rights is concerned.

3 Malawian courts and socio-economic rights: An overview

Since the adoption of the Constitution in 1994, Malawian courts have on various occasions been presented with the opportunity to pronounce on the question of the justiciability of this cluster of rights under the new Constitution. Most of these cases revolved around the

25 My emphasis.

26 Committee on Economic, Social and Cultural Rights The right to education (art 13) 12 August 1999 E/C.12/1999/10 (General Comments) para 57.

27 M Hansungule 'Conceptual and international legal framework for the protection of economic, social and cultural rights' paper presented at the Symposium on the Role of the Judiciary in the Enforcement of Economic, Social and Cultural Rights in Mangochi, Malawi, 28-29 September 2011 (on file with author).

rights to economic activity, to work and to pursue a livelihood under section 29 of the Constitution.²⁸

In the case of *Nseula v Attorney-General*,²⁹ the issue before the Court related to the declaration as vacant of the seat of the applicant, a Member of Parliament, by the Speaker of Parliament on account of his alleged floor-crossing in Parliament in terms of section 65(1) of the Constitution. The main point of the state's argument was that the decision of the Speaker of Parliament was immune from judicial scrutiny based on parliamentary privilege. The Court held:

There is an acceptance of the existence of immunities, privileges and powers of the House. Others are not in the purview of the courts, others are. What a court cannot do under the Constitution is to allow the National Assembly to masquerade behind powers and privileges of Parliament where there is a violation of human rights. Where there is a violation of rights of a citizen, be it to a member of the House or not, courts will on the generality of provisions in our Constitution be seized of the case if only to vindicate the rights of the citizen protected under the Constitution which the citizen alleges have been violated either by legislation or legislative action, resolution or decision. Mr Nseula was elected by his constituency to fulfil certain constitutional functions. He has a constitutional right to perform the duties. This is work. Under article 29 of the Constitution he is entitled to engage in economic activity, to work and to pursue a livelihood. Under article 28(1) his position in Parliament entitles him to a salary and pension – property – for which he cannot be arbitrarily deprived. In my opinion there is a threat or violation of fundamental rights. The only institution under our Constitution that can protect his rights if he claims his rights have been violated is this court, not Parliament. When there is such a threat to a citizen's rights, human or otherwise, it is idle to plead privilege or immunity of Parliament.

The Court held that the powers of the Speaker were reviewable where there was a violation or a threat of violation of a constitutional right. The Court found that there was at least a threat of such violation in respect of the right to work and the right to property and, based on such violation, it was idle to plead parliamentary privilege in this case.

The *Nseula* case is also significant in another sense. It demonstrates that, in some cases, socio-economic rights can have an instrumental function in the construction and nurturing of constitutionalism in a democratic society. By piercing the veil of parliamentary privilege, it was demonstrated that these rights can be invoked as a basis for tempering with the constitutional principle of separation of powers in Malawi.

28 As Gloppen & Kanyongolo observe: 'Since the entry into force of the 1994 Constitution, despite the various forms of social rights protection enshrined in that text, civil and political rights cases still dominate and, to the extent that litigation involves social rights, it deals with employment and education rights of non-poor litigants, rather than health, housing, water, or other social rights critical to transforming the lives of marginalised groups' (Gloppen & Kanyongolo (n 20 above) 269).

29 Civil Cause 63 of 1996 (HC, PR) (unreported).

Another interesting decision, premised on the right to economic activity and to pursue a livelihood under section 29, was *Stanton v City Council of Blantyre (Stanton case)*.³⁰ In this case, the plaintiff had received a restriction order from the City of Blantyre preventing him from supplying meat to his customers because all livestock had to be slaughtered at an approved slaughter house. The defendant justified its action on the grounds that the situation was created and governed by the city's by-laws. The by-law in issue, it was argued, was intended to protect the health of residents of the city and not to stifle economic activity. The issue before the court was whether by-law 6(3) of the City of Blantyre (Food) By-Laws 1975 was *ultra vires* the Local Government (Urban Areas) Act and, importantly for the purposes of this article, whether the provisions violated the plaintiff's right to economic activity under the new Constitution, and consequently were null and void. Chimasula-Phiri J found that the provisions of by-law 6(3) were not compatible with the spirit of the new constitutional order. It violated the plaintiff's constitutional right to freely engage in economic activity. Chimasula-Phiri J stated:³¹

Why should business organisations be forced to use Cold Storage [State] abattoir or slaughter-house if they have their own comparable facilities elsewhere? I consider this to be an unreasonable restraint on trade. What is even more shocking is that preference is given to imported meat and meat products. The only condition is compliance with health certificates. Why can similar provisions not be applied to meat and meat products of animals or birds slaughtered outside the city council's jurisdiction? The provisions of by-law 6(3) are not compatible with the spirit of the current constitutional order. I hold the view that by-law 6(3) indirectly violates the plaintiff's constitutional right to freely engage in economic activity.

This case is significant for a number of reasons: First, it is illustrative of the point that courts have been alive to the fact that, in appropriate cases, national legislation, by-laws and policies have to be refashioned to comply with the socio-economic rights obligations of the government under the new Constitution. Secondly, the case demonstrates that the socio-economic rights obligations of the government under the Constitution require that certain common law rules, in this regard the rules relating to trade competition, should be revisited and appropriately developed to comply with the spirit and letter of the Constitution. This approach is consistent with the obligation of the courts to develop the common law in a manner that is consistent with the principles and provisions of the Constitution in terms of section 10(2) thereof. Thirdly, the case also demonstrates, consistent with the language of section 15(1) of the Constitution, that the Bill of Rights applies to private law matters as well. Fourthly, the case stands out as the first decision in which law was declared unconstitutional and therefore invalid based on its conflict with the

30 [1996] MLR 216 (HC).

31 *Stanton* (n 30 above) 220-221.

Malawian government's socio-economic rights obligations under the Constitution.

Another case where the right to economic activity was implicated was *State v The Minister of Finance and Another, Ex parte Golden Forex Bureau Ltd and Others (Golden Forex Bureau case)*.³² The Court held that the Exchange Control (Forex Exchange Bureaux) Regulations, 2007, promulgated by the Minister of Finance in terms of the Exchange Control Act,³³ substantially affected fundamental rights under the Constitution, including the right to economic activity under section 29 of the Constitution. The Court, adopting with approval its earlier decision in the *Stanton* case, found that the Exchange Control (Forex Exchange Bureaux) Regulations 2007 violated this right and consequently that such regulations were unconstitutional. The Court held that the respondents had failed to demonstrate that the regulations constituted a limitation that was reasonable, justifiable and necessary in an open and democratic society and acceptable by international human rights standards in terms of section 44(2) of the Constitution. In addition, the Court found that a further ground for the unconstitutionality of the regulations was founded on the provisions of section 58(2) of the Constitution. That section prohibits Parliament from delegating 'any legislative powers to any persons whose effect would be to substantially and significantly affect fundamental rights and freedoms recognised in [the] Constitution'. The very fact that these regulations affected various fundamental rights meant that it was unlawful for them to be adopted.

Malawian courts have also had occasion to adjudicate on issues relating to property rights. Arguably, the most important among these is *Attorney-General v The Malawi Congress Party and Others (Press Trust case)*.³⁴ In that case, government passed legislation reconstructing the Press Trust (Corporation), a giant economic entity in Malawi. In the process of this reconstruction, the original trustees of the Press Trust were replaced with new ones. The High Court held that the Press Trust (Reconstruction) Act had the effect of expropriating and arbitrarily depriving the original trustee, former President of Malawi, Dr H Kamuzu Banda, and the Malawi Congress Party of private property. It reasoned that that by taking away the property from the original trustees and vesting it in the new trustees appointed under the Act, the original trustees were deprived of ownership rights over the trust property, as well as their right to manage the affairs of the trust. The Supreme Court of Appeal overturned this decision, holding that no such violation of the right under section 28(1) of the Constitution had occurred, that the Press Trust was a public trust created for the benefit of the people of Malawi, and that even if there had been an infringement, it would be

32 Civil Cause 163 of 2007.

33 Cap 45:01 of the Laws of Malawi.

34 MSCA Civil Appeal 22 of 1996 (unreported).

justifiable as a limitation under section 44(2) of the Constitution. The Supreme Court held the view that a trustee administering trust property had no property rights of his own in the trust property.

The *Press Trust* case is a major decision that dealt with complex issues relating to the right to property under section 28 of the Constitution. Had the High Court decision been upheld, essentially the Press Trust, whose assets comprise a very significant proportion of the country's gross national product, would have remained private property and in private control. The Supreme Court of Appeal shifted such control into the public sphere by upholding the constitutionality of the Press Trust Reconstruction Act. Whilst the decision itself does not openly purport to do so, it had, in essence, the effect of the nationalisation of property. In a rather thinly-veiled comment, the Supreme Court of Appeal noted that '[t]he government of Malawi has clearly taken the view that the regulation and control of such an important economic giant is necessary in an open and democratic society, especially since the other constitutional conditions were satisfied'. The Court proceeded to hold that appropriate principles for the limitation of the right to property had been satisfied, without specifically commenting on the plausibility of the argument that the large size of the Press Trust Corporation was in and by itself sufficient reason for regulation which, in this case, effectively entailed a government take-over. Thus, the decision presented a watershed moment in Malawi's socio-economic landscape.

In the case of *State v The Registrar, Malawi College of Health Sciences, Ex Parte Emmanuel Gondwe (Gondwe case)*,³⁵ the Court had to deal with the right to education. The applicant had failed to acquire his diploma in the health sciences after failing in a key subject. He argued that, in breach of his right to education and the right to administrative justice under the Constitution, the respondent had standardised his grades downwards, leading to his failure in the subject. Commenting on the applicant's contention that his right to education had been violated, the Court stated:³⁶

It is apposite that the right to education does not entitle anybody to a certification of successful completion without fulfilling the predetermined criteria. At the minimum, the Constitution guarantees the right to access such education. In that vein, the mere administration of examinations designed to assess the academic acumen and other relevant competencies of the students does not of itself infringe such a right. Rather, where there are allegations of unreasonableness or *mala fides* in the implementation of such an assessment exercise, then issues of fairness in the exercise of such access to education come into play. In such a scenario, the exercise of such a public duty becomes amenable to judicial review as a matter of right. It was considered necessary to explain these matters in the light of the prayers which the applicant seeks, which continually refer to a breach of his right to education.

35 Miscellaneous Civil Cause 16 of 2008 (Lilongwe District Registry) (unreported) *per* Kachale J.

36 As above.

The Court also noted that, in connection with the education policy in public institutions, 'where public resources are in play, the learning institution has to balance the need for academic proficiency with the equally important consideration of ensuring maximum utilisation of scarce resources'.

A major deficiency that one notices in these cases is that courts did not seize the opportunity to clearly articulate the nature and content of these rights, as well as the obligations that these rights engender. The analysis by the courts from a socio-economic rights perspective was not particularly engaging. For instance, in the *Stanton* case where the Court nullified city by-laws on account of their inconsistency with section 29 of the Constitution, the Court simply stated, in a few words, that by-law 6(3) had the effect of creating an unfair monopoly in Cold Storage Company (then a state-owned company) as an abattoir in the city of Blantyre, and that therefore this constituted an unreasonable restraint on trade, thereby constituting an indirect violation of the right to economic activity and to pursue a livelihood under section 29 of the Constitution. However, one would have thought that considering the seriousness of a decision that nullifies law, the learned judge ought to have provided a deeper and more elaborate analysis of the nature of the obligations that are imposed by section 29 of the Constitution. The Court ought to have expansively defined the content of the rights in issue, and explained why the limitations and/or restrictions were not justifiable in terms of section 44(2) of the Constitution. Indeed, in terms of section 11(2)(c) of the Constitution, the Court should have considered international law and comparable foreign case law. For instance, the question of the right to a livelihood was dealt with in the case of *Olga Tellis and Others v Bombay Municipal Council*, where the Court expansively interpreted the right to life to include the right to a livelihood. The Court observed:³⁷

The sweep of the right to life conferred by article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live ... what makes life livable, must be deemed to be an integral component of the right to life.

37 Para 55.

Thus, the Court ought to have emphasised the significance of the right to a livelihood by stressing that it is vital in order to make 'life livable' and that a denial thereof would seriously implicate human dignity.

In addition, the Court could have examined a range of General Comments of the Committee on Economic, Social and Cultural Rights (ESCR Committee) that have stressed the importance of the minimum core content obligations to ensure the satisfaction of minimum essential levels of each of the socio-economic rights.³⁸ A consistent minimum core obligation that spans across the entire range of the socio-economic rights guaranteed under ICESCR is the obligation of non-discrimination. The principle of non-discrimination was evidently violated in the *Stanton* case. The same arguments can be said of the *Golden Forex Bureau* case above.

Similarly, in *Gondwe*, whilst the Court observed that the applicant had argued that his right to education had been violated, instead of defining the content of the right, the Court dwelt on clarifying what that right did not entail, based on the peculiar facts of the case. Further, the Court could have drawn inspiration from General Comment 13 of the ESCR Committee on the right to education. The Court could have observed that whenever decisions are taken that limit or restrict access to education, such decisions must be viewed in a serious light considering that 'education is both a human right in itself and an indispensable means of realising other human rights',³⁹ and that '[a]s an empowerment right, education is the primary vehicle by which economically and socially-marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities'.⁴⁰ The ESCR Committee has further observed that not only is the right to education of great importance to the individual, but it is equally significant to the state as an educated person is also highly productive economically. Thus, the ESCR Committee states that '[i]ncreasingly, education is recognised as one of the best financial investments states can make'.⁴¹ Such an analysis would provide good ground for the Court's proposition that '[w]here public resources are in play, the learning institution has to balance the need for academic proficiency with the equally important consideration of ensuring maximum utilisation of scarce resources'.⁴²

Further, the observations made by the Court that upheld the 'right of educational institutions to adopt policies and implement assessment mechanisms intended to ensure the academic competence and professional proficiency of persons certified as

38 ESCR Committee General Comment 3: The nature of states parties' obligations (art 2, para 1 of the Covenant) UN Doc E/1991/23.

39 ESCR Committee The right to education (art 13) UN Doc E/C.12/1999/10 para 1.

40 As above.

41 As above.

42 *Gondwe* case (n 41 above).

having undergone a given course of study' could have been founded on appropriate content of the right by reference to some of the essential features of the right as stated in General Comment 13. For instance, in relation to the facts of this matter, it is important to observe that the content of the right required that 'the form and substance of education, including curricula and teaching methods, have to be acceptable (eg relevant, culturally appropriate and of good quality)' and that the quality of education must meet 'such minimum educational standards as may be approved by the state (see articles 13(3) and (4))'.⁴³

Secondly, it is apparent that the socio-economic rights decisions that were litigated during this period involved individual claims rather than claims relating to systemic or widespread violations of socio-economic rights. One reason for this seems to be that counsel have failed to bring the requisite claims before the courts. A classic example of the failure by counsel is evident from the case of *Gable Masangano and Others v Attorney-General and Another (Masangano case)*.⁴⁴ In that case, the issues raised were a lack of sufficient nutrition, a lack of sufficient clothing, a lack of adequate housing (as cells were too congested), and a denial of access to medical treatment. Strikingly, although the issues raised related to socio-economic rights, the main gist of the argument rested on a violation of the rights to freedom from torture, cruel and inhuman or degrading treatment or punishment – which are in the domain of civil and political rights. Such claims could have been based directly on the violation of socio-economic rights. Section 30 of the Constitution, for instance, could have been invoked to argue that prisoners lacked equal access to basic resources as required under that section.

The *Masangano* case therefore exemplifies the problem of a lack of capacity on the part of counsel to conceptualise and articulate socio-economic rights claims, and to contribute to the development of jurisprudence in this area. However, as demonstrated below, these issues were raised by state counsel, and the Court made definitive affirmations of the socio-economic rights implicated.

Another reason for the lack of jurisprudence on systemic socio-economic rights issues seems to lie in the conceptual approach that courts have adopted in relation to socio-economic matters that generally involve competing policy considerations. The article turns to this conceptual aspect in more detail in the next section.

43 n 39 above, para 6(c).

44 *Masangano* case (n 24 above).

4 Malawian courts: Approach to polycentric policy issues

A careful analysis of the various matters in which socio-economic issues were implicated shows that, in the cases that were decided in the years immediately following the adoption of the 1994 Constitution, courts did not engage with the conceptual issues relating to the competence of courts in determining matters that involve complex and polycentric policy considerations. The reasoning was generally simplistic and unsophisticated. However, in related matters which have been decided over the past ten years there seems to have been a significant paradigm shift. Courts have sought to articulate more extensively on the competence of courts to deal with such issues. Regrettably, such analysis has not emerged from cases directly dealing with socio-economic rights. Only in one instance have courts directly grappled with the question of the justiciability of socio-economic rights. This article argues that the approach adopted by courts in dealing with such issues might be a major factor that has contributed to their lukewarm embrace of socio-economic rights norms, principles and jurisprudence.

The first in this latter category of cases was *State v Ministry of Finance, Ex Parte SGS (Malawi) Ltd (SGS case)*.⁴⁵ The case was a judicial review application challenging the government of Malawi on the manner in which it had handled the tendering process relating to a pre-shipment inspection services contract. The detailed facts are not necessary for present purposes. What is significant, however, is that Mwaungulu J in this case extensively considered the question of justiciability in matters in which the socio-economic policies of the government are in issue. He observed:

Many epithets delineate [as] non-justiciable ... 'matters involving social and economic policy', 'matters involving competing policy considerations', 'questions of social and ethical controversy'. Generally these are matters where, if involved, courts would be in, in the words of Lord Diplock in *Butees Gas v Hammer*, a 'judicial no-man's land'.

Mwaungulu J proceeded to say that in *Butees Gas v Hammer*,⁴⁶ Neill LJ introduced the concept of polycentricity. He quoted with approval the following remarks of Neill LJ:

In this case ... [the] decisions involve a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with. In the language of the late Professor Fuller in his work 'The forms and limits of adjudication' (1978) 92(2) *Harvard LR* 353 at 395, decisions of this kind involve a polycentric task. The concept of a polycentric situation is perhaps most easily explained by thinking of a spider's web: 'A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original

45 [2003] MWHC 41.

46 [1982] AC 888.

pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap.'

Mwaungulu J concluded that the Court was most unsuited to get involved in weighing which options were more economical than others in the domain of public policy, emphasising that courts should exercise the 'utmost restraint' in cases involving 'questions of social and ethical controversy'. Whilst the matters in issue were arguably not directly on the question of the implementation of socio-economic rights, as they dealt with (i) whether government had followed the proper procedure in awarding a tender, and (ii) that it had opted for a more expensive rather than a cheaper supplier of services, it is submitted that the principles enunciated were of direct relevance and would, if accepted by future courts, lay some normative groundwork, albeit conservative and unprogressive, for the future consideration and determination of socio-economic rights cases.

Mwaungulu J's decision in the *SGS* case was also considered in the case of *State v Minister of Finance and Another, Ex Parte Bazuka Mhango and Others*.⁴⁷ In this case, the issue concerned the refusal by the executive arm of government to pay duly-approved allowances of Members of Parliament on the grounds that the approval thereof impacted on the allocation of resources and that Parliament could not approve its own allowances in that fashion without the executive giving prior consent. The Court rejected the argument that the matter involved the evaluation of socio-economic policies or the allocation of resources, agreeing instead with the applicants that the matter was about the implementation of duly-passed legislation. However, importantly, the Court agreed with the decision in the *SGS* case, stating:

This very Court [has] reiterated the fact that courts have little capacity to deal with matters of, *inter alia*, policy. Such matters, we thought, should be left to those best suited to deal with them namely the people's elected representatives and their permanent advisors, ie the civil servants. We would therefore be the first to wash our hands off this case if it raised issues only of policy or required this Court to evaluate socio-economic policy or allocate scarce economic resources.

At the same time, however, there is no doubt that the decision handed down had significant budgetary implications as government was ordered to pay huge sums of money to Members of Parliament by way of allowances.

Similarly, in the case of *State v Chief Secretary to the President and Cabinet, Ex Parte Bakili Muluzi (Muluzi case)*,⁴⁸ the applicant was the former President of the Republic of Malawi. He has not been in very good health in recent times. He has been receiving specialist medical

47 Miscellaneous Civil Cause 163 of 2008 (HC, MR, unreported).

48 Miscellaneous Civil Application 3 of 2011 (HC, MR, unreported).

treatment in the Republic of South Africa. The applicant had a prescription from his doctor in South Africa indicating that he was due for a medical check-up for his condition. As former head of state, he was entitled to free medical treatment (that is, at the expense of the state), whether within or outside the country. Government, however, refused to pay for his treatment, stating that he first had to get certification from a local government medical practitioner that his condition merited referral to a foreign hospital. Aggrieved by this decision, he applied for judicial review. He alleged a breach of government's obligations under the Presidents' (Salaries and Benefits) Act, as well as its general obligations towards the health of its citizens under the Constitution. The Court, whilst finding that government was under an obligation to fund the former President's treatment as requested, in terms of the Presidents' (Salaries and Benefits) Act, reiterated the need for courts to keep away from getting entangled in issues that involve policy considerations. The Court said:

We should also emphasise that we are not here to decide on health policy or how best the powers that be should use scarce resources in relation to the provision of health care services. That is for the people's elected representatives and those that advise them.

What therefore emerges from the foregoing is that in a number of cases, courts have made it clear that in matters where polycentric socio-economic policy considerations are implicated, they do not have the competence to adjudicate. Although the decisions have not directly turned on the determination of socio-economic rights cases, it is axiomatic that socio-economic rights claims, particularly where the issues implicated are of a systemic nature, such as a problematic housing or health policy, courts must necessarily deal with polycentric policy issues. Almost invariably, whenever a court is invited to consider core socio-economic rights under the Constitution, such as access to education, access to health, access to food, and so forth, it will have to engage with policy considerations. As Eide and Rosas astutely observe:⁴⁹

Taking economic, social and cultural rights seriously implies a simultaneous commitment to social integration, solidarity and equality, including the issue of income distribution. Economic, social and cultural rights include a major concern with the protection of vulnerable groups, such as the poor. Fundamental needs should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements.

Eide and Rosas' statement suggests that where socio-economic issues are enshrined as rights, government programmes should be designed in such a way as to give effect to such rights, and that such rights should not, on the contrary, be defined by constantly-changing government policies.

⁴⁹ A Eide & A Rosas 'Economic, social and cultural rights: A universal challenge' in A Eide *et al* (eds) *Economic, social and cultural rights* (1995) 17-18.

Thus, whilst it is perhaps correct that the courts are ill-equipped to make budgetary allocations, it is a fundamental flaw in jurisprudence for courts to make sweeping assertions that they cannot deal with policy issues.

The 'policy hands-off' approach generally espoused by courts in this stream of jurisprudence is also clearly inconsistent with section 30(4) of the Constitution. It will be recalled that that section states that '[t]he state has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility'. Considering that this duty is entrenched in the Bill of Rights, and it specifically addresses the issue of the justification of policy in accordance with guaranteed rights, it is anomalous for courts to make blanket statements that they will refuse to determine matters where they are called upon to evaluate policy.

Such a 'policy hands-off' approach stultifies the transformative potential of the new constitutional order in Malawi,⁵⁰ which could equally be said to represent, in Mureinik's words, 'a bridge away from a culture of authority ... to a culture of justification'.⁵¹ As Liebenberg observes, the transformative character of a constitution is furthered by the entrenchment and guarantee of socio-economic rights in a constitution as this 'creates the possibility for ordinary people to challenge exercises of public or private power that undermine the rights underpinning' the vision of the Constitution.⁵²

However, a more progressive approach was adopted in the *Masangano* case. In that case, the applicant was a prisoner who brought a class action on behalf of all prisoners in Malawi. Although the main gist of the argument rested on a violation of the rights to freedom from torture, cruel and inhuman or degrading treatment or punishment, which are in the domain of civil and political rights, this was the first case in which core social rights such as health, housing, food and basic sanitation were directly implicated. In her defence, the Attorney-General invoked Mwaungulu J's position in the *SGS* case. The Court noted in this regard:⁵³

The case of *Ministry of Finance ex parte SGS Malawi Limited* Misc Civil Application No 40 of 2003 was ... cited where Mwaungulu J pointed out

50 According to Klare, transformative constitutionalism can be described as a 'long-term project of constitutional enactment, interpretation and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent processes grounded in law.' See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150.

51 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 32, cited in *S v Makwanyane & Another* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) para 156 n 1.

52 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 34.

53 *Masangano* case (n 24 above).

that matters involving social and economic policy, matters of policy and principle, matters involving competing policy considerations are clearly non-justiciable in judicial review proceedings.

However, the Court rejected the respondents' arguments in this case. It held that the *SGS* case had to be understood on its unique facts. The fact that the reasoning of the Court in the *SGS* case was raised in this matter further demonstrates the dangers that the 'policy hands-off' approach adopted by courts poses to the adjudication of socio-economic rights.

To its credit, however, in response to the specific objection raised against the justiciability of socio-economic rights, the Court rejected the respondent's argument, holding that socio-economic rights in Malawi were justiciable. The Court observed thus:

On the argument that social-economic rights are non-justiciable we would like to suggest that modern legal and judicial thinking has significantly diminished the importance of such an assertion.

The Court made a comparative analysis with the South African position, affirming Christiansen's observation that at the core of socio-economic rights under the South African Constitution are rights to adequate housing, health care, food, water, social security and education; that '[e]ach of these rights is enumerated in the 1996 South African Constitution'; and that '[m]oreover, most of them have been the subject of full proceedings before the South African Constitutional Court'.

The Court concluded in this respect:

Clearly therefore matters of prisoners' [socio-economic] rights are matters that this Court can deal with just like the South African Constitutional Court has dealt with the various matters of socio-economic rights.

The Court then, quite significantly, definitively affirmed the guarantee of various socio-economic rights for prisoners. The Court began by stating:⁵⁴

We would like to reaffirm that prisoners' rights include right to food, clothing, accessories and cell equipment to the minimum standards as set out in the Prisons Act and Prison Regulations. Going below the minimum standards runs the risk of duty bearers not providing anything at all and coming up with seemingly plausible and seemingly convincing excuses.

The Court also identified the right to housing in respect of prisoners, stating that '[w]e also affirm that prisoners have a right to appropriate prison accommodation which is not congested and which has appropriate ventilation'.⁵⁵

Further, the Court affirmed the guarantee of the right of access to healthcare. The Court stated in this respect that prisoners 'have the right to access to medical attention and treatment like any other

54 As above.

55 As above.

human being', and that 'such prisoner should not be asked what offence he/she committed as a precondition for getting the medical attention or treatment'.⁵⁶

In the final analysis, the Court held the view that⁵⁷

[p]lacing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and is therefore unconstitutional.

This final proposition formed the *ratio decidendi* in this case, but from the above exposition of the various affirmations of the unquestionable guarantees of various socio-economic rights for prisoners 'like any other human being', the *Masangano* case clearly marks a very progressive step in the development of socio-economic rights jurisprudence in Malawi and could be a stepping stone from which more sophisticated jurisprudence on systemic socio-economic rights issues can be built.

Notwithstanding that courts are under an obligation in terms of section 11(2)(c) of the Constitution to consider applicable norms of public international law, no court thus far has sought to engage government's socio-economic rights obligations under international law. Malawi, for instance, is a party to ICESCR.⁵⁸ The United Nations (UN) body entrusted with the mandate of interpreting ICESCR and monitoring state compliance with their treaty obligations under the Covenant, the ESCR Committee, has issued General Comments that stress the concept of minimum core content obligations. These minimum core obligations define the minimum essential levels of enjoyment of the rights guaranteed under ICESCR below which citizens should not fall, and failure of which constitutes a violation of the Covenant.⁵⁹ Courts in Malawi have generally not addressed the issue of minimum core obligations, even in the various decisions on the right to economic activity that they have dealt with directly.

The closest the Court came to invoking international law standards was in the *Masangano* case, where the Court made reference to the UN Standard Minimum Rules for the Treatment of Prisoners, but then the Court merely noted that the Prisons Act of Malawi was in tandem with those rules and based its analysis on the said Act. Be that as it may, it is important to observe that the Court stressed the duty of government to adhere to minimum standards of treatment whenever these are laid down by the law. The Court emphasised:

No one should be allowed to disobey the law merely on the ground that he or she does not have sufficient resources to enable them obey the law

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ Malawi ratified ICESCR on 22 December 1993. See UN Status of Ratifications, International Covenant on Economic, Social and Cultural Rights <http://www2.ohchr.org/english/law/cescr-ratify.htm> (accessed 9 December 2011).

⁵⁹ ESCR Committee General Comment 3 para 10.

and fulfil their obligations under the law. The minimum standards place an obligation on the duty bearer to meet those standards and not to bring excuses for not complying with those standards. We therefore hold that the respondents have a responsibility to comply with the minimum standards set in the Prison Regulations.

To concretise this statement, the Court held:

Accordingly we direct the respondents to comply with this judgment within a period of 18 months by taking concrete steps in reducing prison overcrowding by half, thereafter periodically reducing the remainder to eliminate overcrowding and by improving the ventilation in our prisons and, further, by improving prison conditions generally ... Parliament should therefore make available to the respondents adequate financial resources to enable them meet their obligations under the law to comply with this judgment and the minimum standards set in the Prisons Act and Prison Regulations.

Thus, it is evident that the *Masangano* case provides a ground-breaking precedent in the area of remedies in this cluster of rights. Firstly, it clarifies that where the law sets minimum standards and, by implication, we can read into this statement the minimum core content obligations binding on Malawi, it is no defence that the state does not possess sufficient resources to secure the realisation of such rights. Secondly, not only did the Court specifically require government to take concrete steps and commit sufficient resources to address the socio-economic rights problems in prisons that were made evident in the case, the Court also defined specific time frames within which the order of the Court was to be complied with. Again, whilst the *Masangano* case shows only the beginning of attempts by Malawian courts to give meaningful content to socio-economic rights claims, it remains highly significant as a stepping stone for further jurisprudential development in the area.

5 Missed opportunities

Apart from the foregoing cases where socio-economic rights were either addressed in a very fleeting fashion, or other cases where principles that are likely to be a drag on the judicial enforcement of socio-economic rights in Malawi were adopted, there have also been occasions where courts have been presented with clear opportunities to address some of the key socio-economic rights mentioned above, and missed such opportunities.

A classic instance is the case of *Chatepa and Another v Malawi Housing Corporation (Chatepa case)*.⁶⁰ In that case, the first plaintiffs were tenants of the defendant, a statutory corporation established under the Malawi Housing Corporation Act.⁶¹ The Malawi Housing Corporation, among other things, builds and sells houses to the

60 [1997] 1 MLR 237 (HC).

61 Cap 32:02 of the Laws of Malawi.

public at relatively low cost, and also lets out some of its premises at significantly lower cost affordable to low-income earners. In 1995 and 1996, the defendant increased the amount of rent payable by its tenants by a high percentage. According to the plaintiffs, this made it very difficult for most tenants to fulfil their obligations to pay the new rentals. According to section 7(2) of the Malawi Housing Corporation Act, it is provided that the making of profits is not an object of the activities of the Corporation. The plaintiffs argued, therefore, that the defendants were precluded by law from raising rent with a view to making profits and that the raising of rent in the instant case, having evidently been made with a view to achieving profit, was *ultra vires*.

However, in argument counsel did not raise the issue of the right to housing, which was clearly at issue here. In its judgment the Court did not raise the issue either. The Court only narrowly addressed its mind to the confines of the words of the statute, and concluded that it was 'clear from the wording of the Act that in carrying out its operations, the Malawi Housing Corporation's purpose was simply to break even, not to make a profit'.⁶² In that regard, the Court held that the 'raised rentals were clearly motivated by commercial interests to make a profit and were therefore *ultra vires* the scope of the powers conferred by the Act'.⁶³

This was an instance where the Court could explicitly have raised the issue of violation of the right to housing on the basis of, among others, section 30 of the Constitution. The Court could have adverted to the ESCR Committee's General Comment 4 on the right to adequate housing which, among other things, explicitly deals with the issue of affordability as one of the essential elements of the right. The ESCR Committee states:⁶⁴

Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised ... In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases.

Section 7 of the Malawi Housing Corporation Act had to be read in the context of the Bill of Rights as a whole, which in turn requires the consideration of applicable norms of public international law such as those stated in the ESCR Committee's General Comment 4. Thus, *Chatepa* is clearly a decision which ought to have been anchored in the socio-economic rights discourse.

Another interesting case, relating to the rights to property and housing, is *Jessica Somanje v Euwate Somanje and Others (Somanje case)*.⁶⁵ The facts were that the plaintiff's husband, Mr Harvey Robert

62 *Chatepa* case (n 60 above) 238.

63 As above.

64 ESCR Committee General Comment 4: The right to adequate housing (art 11(1) of the Covenant), UN Doc E/1992/23.

65 Civil Cause 2055 of 1999 (PR) (unreported).

Somanje, had died at a private hospital in Blantyre, Malawi. The defendants soon after his death locked up the matrimonial home together with the property of the family. The plaintiff and her seven children were not allowed to enter the house. They had to squat at the plaintiff's brother's house. In its decision, the Court stressed a number of constitutional rights, including the rights of widows to a fair distribution of property upon the dissolution of the marriage in terms of section 24(1) of the Constitution. The Court also cited, regrettably without any analysis, section 23 of the Constitution that deals with child rights. The Court proceeded to observe that property grabbing of deceased estate property was a crime under section 84A of the Wills and Inheritance Act. The Court then stated:⁶⁶

The scenario in the present case is that the widow and her seven children have been abruptly made homeless and destitute and have been forced to seek refuge in the applicant's brother's house causing great inconvenience and hardship to everybody concerned ... In the circumstances, I grant an order to the applicant and direct that the defendants unlock the house and allow the widow and her seven children to occupy the house and have quiet enjoyment of the matrimonial home pending the determination of the main action.

Again, this is a matter where the Court was presented with an opportunity to develop constitutional norms relating to key socio-economic rights and it missed the opportunity. From the facts, this is a matter where the immediate family of the deceased person was rendered homeless by the deceased's relatives through arbitrary and extra-judicial eviction. It is clear that the right to housing was violated. The deceased person's relatives failed to respect the plaintiff and her children's right to housing by arbitrarily evicting them from the family house. The Court here had an opportunity to define the contours of this right and, also significantly, to articulate the obligations of non-state actors, and thus the horizontal application of the Bill of Rights in socio-economic rights cases. The Court instead chose the path of constitutional avoidance and resolved the matter merely by the application of legislative provisions.

6 Lessons from elsewhere: Remedies

Malawian courts might draw a number of lessons from other jurisdictions, most especially South Africa, whose constitutional design mirrors closely that of Malawi as far as the Bill of Rights is concerned. As South African courts have done much in defining the obligations of the state in this area generally, and also in respect of various specific rights, an exercise that Malawian courts have generally shunned thus far, the latter might generally benefit from the former in developing jurisprudence that both meets international standards and is responsive to the specific circumstances of Malawi.

66 As above.

One critical area where courts in Malawi might draw lessons from South Africa in respect of these rights is on remedies. In particular, two innovative remedies are significant. First is the remedy of 'meaningful engagement' that was first artfully adopted and elaborated in the *Olivia Road* case.⁶⁷ Under such an order, instead of the court making its own decision on the substantive issues raised, it instead requires the parties to go back and meaningfully engage with each other with a view to reaching a mutually-agreeable solution. An order of meaningful engagement does not leave the parties unguided. The court is at liberty to provide pointers in respect of some of the critical issues that the parties have to address. Further, as the name of the order suggests, the engagement between the parties has to be 'meaningful'. Parties should not approach the engagement process with a pre-conceived idea of ensuring that the engagement process would fail. Indeed, to the court's credit, the parties in the *Olivia Road* case reached a mutually-agreeable solution after meaningful engagement. The standard used to gauge the meaningfulness of such engagement is that of reasonableness.

The second remedy where Malawian courts might equally draw inspiration from is that of supervisory (structural) interdicts.⁶⁸ Here, upon making an order, a court proceeds to require the state to report back to the court on the measures adopted in order to give effect to the court's order. This order can indeed be made together with an order for meaningful engagement in appropriate cases.⁶⁹ As noted above, whilst it is commendable that the Court in the *Masangano* case issued an order with specific timelines on the implementation thereof by the state, the order fell short of requiring the government to report back to the Court on the measures adopted to give effect to the order. It is hoped that this is something that future courts will do in order to make the judicial enforcement of these rights more effective.

7 Conclusion

The Constitution of Malawi envisages a developmental state committed 'to guarantee the welfare and development of all the people' of the country.⁷⁰ Socio-economic rights which empower people, particularly the most vulnerable, to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life,⁷¹ thus play a critical role in the creation of such a welfare and developmental state. Through their adjudication of socio-

67 *Occupiers of 51 Olivia Road, Berea Township & 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 3 SA 208 (CC).

68 In Malawi, an interdict is called an 'injunction'.

69 *Residents of the Joe Slovo Community v Thubelisha & Others* 2010 3 SA 454 (CC).

70 Preamble (n 12 above).

71 *Mazibuko* case (n 3 above).

economic rights, courts play a pivotal role in social transformation aimed at achieving this goal.⁷²

Liebenberg identifies four functions or roles that courts can play in this process. Firstly, 'they provide a forum where the impact of legislation and policies on the lives of the poor receives serious and reasoned consideration in the light of the values and commitments of the Constitution'.⁷³ Therefore, in the Malawian context, as demonstrated in this article, the argument that courts should adopt a 'policy hands-off approach' on the basis the traditional and now rather anachronistic arguments that they lack the requisite competency or legitimacy, is problematic as it is contrary to the spirit and letter of the Malawian Constitution.

Secondly, such adjudication, according to Liebenberg,⁷⁴

can facilitate meaningful participation by civil society and communities in the formulation and implementation of social programmes requiring such participation as a component of the relevant rights, and by requiring transparency in the formulation of social policies and programmes.

As this article has demonstrated, one of the lessons that Malawian courts can draw from South African socio-economic rights jurisprudence lies in the area of remedies, one of which is that of 'meaningful engagement'. Such a remedy enhances participatory democracy in the process of development. From the socio-economic rights jurisprudence in Malawi, it seems there is not much to show for the role that courts have thus far played in promoting social transformation through participatory and transparent decision making in the implementation of these rights.

Thirdly, the judicial enforcement of these rights helps to 'develop the normative basis of those parts of our legal system that regulate traditionally private relations in ways that protect and facilitate poor people's access to socio-economic resources'.⁷⁵ It has been demonstrated in this article that, generally, Malawian courts are yet to substantially develop the normative content of socio-economic rights, and indeed to develop jurisprudence that clarify, in a transformative fashion, how traditionally private relations are to be regulated with a view to advancing the protection of socio-economic rights. Thus, for instance, in *Jessica Somanje v Euwate Somanje and Others*, an opportunity was missed for the court to clarify the horizontal application of the Bill of Rights in respect of the right to housing.

Fourthly, such enforcement can prod the polity as a whole 'to be more responsive to systemic socio-economic inequalities and deprivations'.⁷⁶ This article has shown that, whilst a number of

72 Liebenberg (n 52 above) 37.

73 As above.

74 Liebenberg (n 52 above) 38.

75 As above.

76 As above.

decisions have been handed down in this area of human rights, most of these cases have revolved around few economic rights and that, apart from the *Masangano* case, there has been no meaningful attempt to address systemic violations of socio-economic rights. The *Masangano* case is significant as it, for the first time, addressed comprehensively the issue of the treatment of prisoners with a focus on issues of a social rights nature. Such treatment of prisoners has been prevalent in Malawian prisons for decades, with the result that most people took it as part of the normal and expected consequences of being incarcerated. What decisions like the *Masangano* case would achieve in doing, as Liebenberg correctly observes, is to enjoin authorities and society as a whole 'to be more responsive to systemic socio-economic inequalities and deprivations'.

Clearly, much remains to be done in the judicial enforcement of socio-economic rights in Malawi. This article has, firstly, painted a picture of what has thus far been done in adjudicating these rights since the adoption of the Constitution in 1994. The major decisions on these or connected to these rights have been explored. Most of these decisions were very pedantic, narrow and simplistic in their approach to the determination of the socio-economic issues at hand. There were missed opportunities, and the courts need to be more vigilant, resourceful and robust in their articulation of the normative content of these rights and the nature of the obligations that they engender on the state as well as non-state actors where applicable.

Lastly, the article has highlighted some of the conceptual deficiencies that exist, mostly articulated in matters that did not directly implicate key socio-economic rights but which, nevertheless, are directly conceptually connected to the justiciability of socio-economic rights. These cases, it has been shown, have tended to adopt what in this article is referred to as a 'policy hands-off' approach, which might stultify further development of jurisprudence in this area. In this regard, the article has pointed to some of the lessons that can be drawn from elsewhere. It is hoped that the article will contribute to the developing intellectual conversation on the judicial enforcement of socio-economic rights in Malawi.