

Poverty reduction strategies and the rights to health and housing: The Malawian and Ugandan experiences

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Summary

This article examines the poverty reduction strategies of Malawi and Uganda, namely, the Malawi Poverty Reduction Strategy Paper (2002) and the Uganda Poverty Eradication Action Plan (1997). This is done with a view to assessing the extent to which these strategies act as tools towards the progressive realisation of the rights to health and housing in the two countries. The article provides this analysis from a human rights-based approach. The paper argues that the poverty reduction strategies of the two countries under examination are seriously lacking from a rights-based perspective as they fail to address these two rights sufficiently. They even fall short of recognising health and housing as human rights. Against the backdrop of the overarching economic policies of the World Bank and the International Monetary Fund, the paper demonstrates how these strategies address the issue of poverty reduction as mere programmatic rather than a human rights issue, and largely directed by the dictates of the International Monetary Fund and the World Bank. The result is that, notwithstanding some levels of popular participation in their drafting, particularly evident in the case of Uganda, the countries under study cannot assume full ownership of their strategies and this undermines the basic ethos behind the principle of national sovereignty and the right to self-determination.

1 Introduction

Poverty Reduction Strategy Papers (PRSPs) were born out of the policies

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of the World Bank (WB) and the International Monetary Fund (IMF).¹ They were introduced 'in the wake of the failure of Structural Adjustment Programmes (SAPs) to reduce the incidence of poverty'.² PRSPs are linked to the IMF's and WB's Heavily Indebted Poor Countries (HIPC) debt relief initiative.³ In order to have access to debt relief, countries have had to draw up PRSPs and start moving towards their effective implementation.⁴ PRSPs are meant to be the national guide informing almost every facet of the human development framework. They are being used as benchmarks for the prioritisation of the use of public and external resources for poverty reduction.⁵ Further, multilateral as well as bilateral donors and lending institutions are using them as an overarching framework from which the development policies and actions of developing countries are to be gauged and decisions on further assistance or loans are made.⁶

In that light, PRSPs have become pivotal to the social fabric of the countries concerned as they affect the daily undertakings of the people through, among other things, their allocative and redistributive roles.⁷

It has been argued, however, that what is sad about the policies is that they are imposed on African countries, leaving them with the agonising choice of either bowing to the demands or risking the freezing of financial assistance.⁸ As Mathews aptly puts it:⁹

The PRSP, as a key vehicle for donor lending and aid disbursements, wields power and influence and for this reason tends to overwhelm and subsume other strategies at other levels, leaving participants little choice but to tag onto 'the only game in town'. Any look at poverty reduction strategies and human rights needs to focus on PRSPs, as it comes in tow with a number of ramifications and impacts, both in terms of process and content that deserve assessment and response from a human rights perspective.

¹ These institutions are collectively referred to as the Bretton Woods Institutions. It was agreed at the September 1999 Annual Meetings of the World Bank Group and the IMF that nationally-owned participatory poverty reduction strategies should become the basis for concessional lending and debt relief under the enhanced Heavily Indebted Poor Countries (HIPC) Initiative. See World Bank Group Overview of poverty reduction strategies <http://www.worldbank.org/poverty/strategies/index.htm> (accessed 16 August 2004).

² J Oloka-Onyango *Economic and social rights in the aftermath of Uganda's fourth Constitution: A critical reconceptualisation* CBR Working Paper No 88 (2004) 24.

³ n 1 above.

⁴ S Mathews *Poverty reduction strategies and human rights* Position paper presented at the World Social Forum, Mumbai, India, 2004 2.

⁵ Mathews (n 4 above) 1.

⁶ Mathews (n 4 above) 2.

⁷ MEJN *Economic governance — Budget Literacy Project* <http://www.mejn.org/econ-govnc.htm> (accessed 29 March 2004).

⁸ J Oloka-Onyango & D Udagama *The realisation of economic, social and cultural rights: Globalisation and its impact on the full enjoyment of human rights* E/CN 4/Sub 2/2000/13 para 22.

⁹ Mathews (n 4 above) 1.

Thus, the importance of an examination of PRSPs in relation to economic and social rights cannot be overemphasised.

Malawi and Uganda, on which this paper focuses, are bound by their Constitutions as well as various international treaties to which they are party, such as the African Charter on Human and Peoples' Rights (African Charter)¹⁰ and the International Covenant on Economic, Social and Cultural Rights 1966 (CESCR),¹¹ to ensure the realisation of economic and social rights and, in particular, the rights to health and housing.

This study is not just about drawing a theoretical paradigm within which to locate poverty and human rights; it is geared towards influencing policy-makers to adopt a well-balanced integrative and practical approach. Such an approach should highlight the value of human rights entitlements as an important lever in pro-poor change, whilst at the same time ensuring the sustenance of a measure of flexibility that is necessary for policy change and prioritisation within a democratic framework.

2 Conceptualising poverty

2.1 The meaning of poverty

The defining feature of poverty is that it entails the restriction of opportunities for a person to pursue his or her well-being.¹² Sen states that poverty entails 'the failure of basic [human] capabilities to reach certain minimally acceptable levels'.¹³ The Office of the High Commissioner for Human Rights (OHCHR) argues that, since poverty denotes an extreme form of deprivation, only those capability failures that are deemed to be basic in order of priority would count as poverty.¹⁴ As much as it is recognised that there is a degree of relativity in the concept of poverty from community to community, the OHCHR states that there are certain basic capabilities that are common to all. These include adequate nutrition, adequate health, adequate clothing and adequate housing.¹⁵ The OHCHR approach rejects the idea of viewing poverty narrowly as a lack of adequate income.¹⁶ It is thus argued that instead of simply identifying the poor as those who fall below a certain minimum income level, commonly called the poverty line, there is need to come up with

¹⁰ Malawi ratified the African Charter on 23 February 1990, whereas Uganda ratified it on 18 August 1986. See <http://www.africa-union.org/home/welcome.htm> (accessed 11 October 2004).

¹¹ Malawi ratified CESCR on 22 March 1994, whereas Uganda ratified it on 21 April 1987. See <http://www.unhchr.ch/pdf/report.pdf> (accessed 11 October 2004).

¹² OHCHR *Human rights and poverty reduction: A conceptual framework* (2003) 7.

¹³ A Sen *Inequality re-examined* (1992) 109.

¹⁴ n 12 above.

¹⁵ As above.

¹⁶ As above.

innovative mechanisms that use qualitative as well as quantitative methods to define the minimum level of capability attributes below which a person is to be deemed poor.¹⁷

This study agrees with this approach and argues that a system of indicators, akin to those used by the UNDP to measure the level of human development, as stated in the UNDP Human Development Reports, be adopted in that regard. The UNDP characterises as Least Developed Countries (LDCs) those countries that fall below the Human Development Index (HDI) value of 0,5.¹⁸ This study argues that it would be appropriate to define the poor in terms of a similar index rather than with reference to the so-called income poverty line.

2.2 Poverty as a human rights issue

A number of commentators have identified poverty as a serious human rights issue. Former UN High Commissioner for Human Rights, Mary Robinson, has said: 'I am often asked what is the most serious form of human rights violations in the world today, and my reply is consistent: extreme poverty.'¹⁹

Haugh and Ruan state that poverty, particularly in its extreme forms, amounts to a violation of not only virtually all social and economic rights, 'but also — through marginalisation and discrimination — of civil and political rights'.²⁰ According to Mazengera, poverty has the effect of nullifying economic and social rights like health, adequate housing, food and safe water.²¹

The Committee on Economic, Social and Cultural Rights (ESCR Committee) has affirmed these propositions, stating that:

Although the term is not explicitly used in the International Covenant on Economic, Social and Cultural Rights, poverty is one of the recurring themes in the Covenant and has always been one of the central concerns of the Committee.²²

There thus seems to be no doubt that poverty is a serious human rights issue.

¹⁷ OHCHR *Draft guidelines: A human rights-based approach to poverty reduction strategies* (2002) para 48.

¹⁸ UNDP *Human Development Report* (2004) 141.

¹⁹ UNDP *Poverty and human rights: A practice note* (2003) iv.

²⁰ R Haug & E Ruan *Integrating poverty reduction and the right to food in Africa* (2002) <http://www.nlh.no/noragric/publications/reports/NoragricRep2B.pdf> (accessed 8 November 2006).

²¹ S Mazengera 'Making rights of poor people practical in Malawi through a rights-based approach to development' unpublished LLM dissertation, University of Pretoria, 2001.

²² See Statement of the Committee on Economic, Social and Cultural Rights to the Third United Nations Conference on the Least Developed Countries, adopted at the 25th session (20th meeting) 4 May 2001.

3 The Washington Consensus

3.1 The advent of Structural Adjustment Programmes

As stated before, PRSPs came about in the wake of the failure of SAPs to reduce the incidence of poverty.²³ According to Oloka-Onyango, SAPs emerged out of a concern that sub-Saharan African countries had failed to come out of abject poverty and marginalisation during the 1970s and early 1980s. They were thus geared to remove 'structural and institutional impediments standing in the way of effective development'.²⁴

Some of the essential characteristics of SAPs are:²⁵

- deep cuts to social programmes, usually in the areas of health, education and housing and massive lay-offs in the civil service;
- currency devaluation measures which increase import costs while reducing the value of domestically produced goods;
- liberalisation of trade and investment and high interest rates to attract foreign investment; and
- privatisation of government-held enterprises.

These measures, commonly referred to as the Washington Consensus, were intended to operate as a 'shock therapy' aimed at jumpstarting these ailing economies.²⁶

After years of experimentation, it became apparent that the SAPs were not achieving the desired results. Deep cuts in social spending, trade liberalisation and privatisation of government-held enterprises, among others, only perpetuated the poverty situation of most African people, thus drawing heavy criticism on the Bretton Woods Institutions (BWIs). The critics argue that decreases in social expenditure as required by the SAPs have had an adverse impact on the fulfilment of human rights obligations, particularly economic and social rights, of developing countries.²⁷

3.1.1 The Poverty Reduction and Growth Facility and Poverty Reduction Strategy Papers

In reaction to the damaging criticism leveled at SAPs, the BWIs came

²³ Oloka-Onyango (n 2 above).

²⁴ Oloka-Onyango (n 2 above) 22.

²⁵ Halifax Initiative 'What are structural adjustment programmes (SAPs)?' <http://www.chebucto.ns.ca/current/P7/bwi/cccsap.html> (accessed 28 August 2004).

²⁶ See C Jakobeit 'The World Bank and human development: Washington's new strategic approach' *Development and Co-operation No 6*.

²⁷ See S Akermark 'International development finance institutions: The World Bank and the International Monetary Fund' in A Eide *et al Economic, social and cultural rights: A textbook* (2001) 516.

with the Poverty Reduction and Growth Facility (PRGF) framework that marked a shift from SAPs to PRSPs.²⁸

According to the IMF, the PRSP approach is intended to be a comprehensive country-based strategy for poverty reduction. It is aimed at providing²⁹

the crucial link between national public actions, donor support, and the development outcomes needed to meet the United Nations' Millennium Development Goals (MDGs),³⁰ which are centred on halving poverty between 2000 and 2015. PRSPs provide the operational basis for Fund and Bank concessional lending and for debt relief under the HIPC Initiative.

The BWIs state that the core principles of PRSPs are that they should be:³¹

- country-driven, promoting national ownership of strategies through broad-based participation of civil society;
- result-oriented and focused on outcomes that will benefit the poor;
- comprehensive in recognising the multidimensional nature of poverty; and
- partnership-oriented, involving co-ordinated participation of development partners (government, domestic stakeholders, and external donors).

However, the PRSP process has still attracted criticism as a new form of SAPs in so far as the BWIs stick to rigid requirements that must be met for a PRSP to pass the debt relief test.³² Oloka-Onyango observes as follows:³³

There is a thread of continuity between the old policy stipulations and the new, in that the 'fundamentals' (including the liberalisation of the economy and rapid privatisation and deregulation) have remained intact.

This study examines the extent to which, if at all, PRSPs operate within the framework of the Washington Consensus.

4 Poverty Reduction Strategy Papers and the human rights-based approach to poverty reduction

At present, there is a growing emphasis on the need for governments

²⁸ n 1 above.

²⁹ IMF *Poverty Reduction Strategy Papers: A fact sheet* <http://www.imf.org/external/np/exr/facts/prsp.htm> (accessed 26 August 2004).

³⁰ See UNGA *UN millennium development goals (MDGs)* <http://www.un.org/millennium-goals/> (accessed 27 August 2004).

³¹ As above.

³² F Cheru *Foot-dragging on foreign debt* <http://www.southcentre.org/info/southbulletin/bulletin10/bulletin10web-03.htm> (accessed 26 August 2004).

³³ Oloka-Onyango (n 2 above) 24.

and development agencies to adopt a human rights-based approach to human development. Thus, the UNDP Human Development Report 2000 was devoted to this issue.³⁴ The World Bank has argued previously that there is no need for an explicit human rights-based approach in PRSPs, as the goals of human rights and poverty reduction in PRSPs are the same.³⁵ Haugh and Ruan, however, argue that there is a need for a more thoroughly developed and explicit link between poverty reduction strategies and rights-relevant policies and measurements. They state that what rights-based thinking can add to development thinking is that rights are legal and can be claimed. In other words, they state, rights-based approaches include an accountability system on duty bearers in order to ensure the effective implementation of economic and social rights. In their analysis, rights can be regarded as the legal basis for the poor to claim their rights and poverty reduction strategies as the operational policy instrument for action.³⁶

According to the OHCHR:

One of the most distinctive features of a human rights based approach to poverty reduction is that it is explicitly based upon the norms and values set out in the international law of human rights.³⁷

The office advises that, when beginning to prepare a PRSP, a state should expressly identify national human rights law and practice in its jurisdiction; the international and regional human rights treaties; other important human rights instruments such as the Universal Declaration of Human Rights (Universal Declaration), and commitments entered into at recent world conferences in so far as they bear upon human rights.³⁸ The OHCHR has further observed that under a rights-based approach, the issue of poverty reduction is³⁹

a matter of right rather than charity. Essential to the very definition of human rights is the existence of claims and corresponding obligations at various levels of government and society.

Osmani furthers the debate by arguing that, although the primary obligation to fulfil the rights lies on states, the broader obligation lies on the whole international community.⁴⁰

³⁴ UNDP *Human Development Report 2000: Human Rights and Human Development* (2000).

³⁵ Mathews (n 4 above) 6.

³⁶ See Haugh & Ruan (n 20 above).

³⁷ n 12 above, 1.

³⁸ n 17 above.

³⁹ See Opening Statement of the High Commissioner for Human Rights, 2nd Inter-Agency Workshop 'Implementing a human rights-based approach in the context of UN reform' 5-7 May 2003, Stamford, USA in Mathews (n 4 above) 8-9.

⁴⁰ See World Vision & World Bank *PRSP Conference Report* (September 2002) http://www.worldbank.org/poverty/events/092502_session1b.pdf (accessed 29 March 2004).

Gibbons states that many PRSPs have adopted the Washington Consensus, which is in many ways diametrically opposed to the idea of a state having redistributive or regulatory roles, and that this is one reason why there is a gap between PRSPs and human rights.⁴¹

In this respect, it is essential that if PRSPs are to be compatible with the human rights-based approach to development; they must be clearly premised on the understanding that poverty reduction is a state obligation. A PRSP must come out clearly that it embodies entitlement-based strategies. It must be made express that the PRSP is not merely a policy instrument that seeks to guide the state in its allocative and redistributive roles of public resources, but that, more importantly, it is an instrument that seeks to further the enjoyment of human rights.

Liebenberg conceptualises a human rights-based approach to development as entailing, among other things, the recognition that all public and private actors in society have a duty to respect and promote human rights. She argues that the rights-based approach embraces the creation of open and transparent institutions and processes for participation by civil society in the political, economic, social and cultural life of the country, and that it prioritises the needs of vulnerable and disadvantaged groups, and the adoption of special measures to assist these groups to gain access to opportunities, resources and social services. She goes further to state that this approach provides for the creation of a range of effective mechanisms of accountability to ensure human rights observance and that these mechanisms include public accountability through the monitoring of human rights commitments by an independent media and organs of civil society as well as legal accountability through the courts, other independent and impartial tribunals, and institutions such as national human rights commissions.

It is submitted that an effective PRSP that complies with the demands of a human rights-based approach to development must incorporate and meet these essential standards.

5 Participation in the PRSP process

5.1 Participation in the PRSP process and national ownership

As noted above,⁴² one of the essential features of an appropriate PRSP is that it should be country-driven and promote national ownership through the broad-based participation of civil society.⁴³ It is thus critical to analyse the level of civil society and public participation in the Malawi Poverty Reduction Strategy Paper (MPRSP) process. The MPRSP's self-

⁴¹ See E Gibbons *Democratising development: Deepening social accountability through PRSPs* http://www.worldbank.org/poverty/events/092502_session1b.pdf (accessed 29 March 2004).

⁴² n 30 above.

⁴³ n 35 above.

proclaimed attribute is that it was achieved through 'a highly consultative process involving a broad range of stakeholders over the course of 15 months'.⁴⁴ It further states that 'stakeholders in all the 27 districts and 4 cities and municipalities were consulted'.⁴⁵ The BWIs, however, whilst observing that 'the MPRSP process in Malawi was highly participatory', state that the participatory momentum was not sustained throughout the process.⁴⁶

Fozzard and Simwaka are more critical. They state that '[t]he rushed timetable, the secretive negotiations between government and IMF/World Bank and the lack of opportunities for comprehensive consultation were criticised from the start'.⁴⁷ They conclude that the small but vocal Malawi Economic Justice Network (MEJN), a civil society organisation that actively participated in the PRSP process, has lamented government's reluctance to engage in meaningful consultation and participation in the poverty planning process.⁴⁸

McGee *et al* similarly state that government has not been open to civil society involvement and that it has been up to civil society to push itself into the process as well as showing that it can add value to it.⁴⁹ What emerges is that it was largely through the vigour of the MEJN that a segment of civil society was consulted in the process. It further appears that only the MEJN can be said to have meaningfully participated rather than just having been consulted in the process.⁵⁰ Public participation, and even consultation, was very minimal. Thus, although the MPRSP boasts of stakeholders in all 27 districts and four cities and municipalities having been consulted, Fozzard and Simwaka state that 'consultations [were] held at the national level ... through *half-day* meetings' in all the districts.⁵¹ Further, the PRSP was not and has not yet been translated into local languages.⁵² Considering the high levels of illiteracy,⁵³ and the fact that even some of the fairly literate people cannot easily follow the PRSP's technical language, the necessity of such translation cannot be overemphasised. In light of the foregoing, it is

⁴⁴ MPRSP xi.

⁴⁵ MPRSP 2.

⁴⁶ IMF & IDA *Malawi Poverty Reduction Strategy Paper — Progress report: Joint staff assessment* (2003) 4.

⁴⁷ A Fozzard & C Simwaka *How, when and why does poverty get budget priority: Poverty reduction strategy and public expenditure in Malawi* ODI Working Paper 166 (2002) 9.

⁴⁸ n 47 above.

⁴⁹ R McGee *et al* *Assessing participation in Poverty Reduction Strategy Papers: A desk-based synthesis of experience in sub-Saharan Africa* (2002) 50 51.

⁵⁰ McGee *et al* (n 49 above) 49-54.

⁵¹ Fozzard & Simwaka (n 47 above).

⁵² This was confirmed during the author's interview with DK Kubalasa, Programme Manager for PRSP and Budget Monitoring, MEJN, at the MEJN offices in Lilongwe on 22 July 2004.

⁵³ The UNDP 2004 HDR puts the adult literacy rate Malawi at 61,8%. See UNDP *Human Development Report 2004* (2004) 142.

submitted that if there was public participation at the national level at all, then it was at best largely purely cosmetic. Worse still, the PRSP was not even taken for debate and approval to parliament, as the people's elected representatives.⁵⁴ It is submitted that this is a serious weakness and puts a serious dent on the idea of national ownership of the MPRSP.

5.2 Participation in the Poverty Eradication Action Plan process and national ownership

It has been said that Uganda's PRSP (Poverty Eradication Action Plan (PEAP)) 'undoubtedly presents one of the most comprehensive and country-owned participatory process[es] to date'.⁵⁵ Gariyo states that the 1997 PEAP was developed after two years of extensive consultation with, and participation by, civil society.⁵⁶ Leading the civil society groups that participated was the Uganda Debt Network (UDN), which is Uganda's leading civil society organisation in the area of economic justice.⁵⁷ Of course, just like in the experience of Malawi, civil society groups had to lobby their way into the process that was initially viewed as being the domain of government and its donor partners.⁵⁸ Thus, by the time the need arose to revise the PEAP with a view to transforming it into a PRSP under the PRGF, there was already an array of highly empowered civil society groups ready to participate and a pre-existing understanding by government of the need for broad civil society participation.⁵⁹

McGee *et al* state that in Uganda⁶⁰

[t]he participatory process has been higher quality, more sustained, much more country-owned, higher-profile and influential than in any other country, not least because of the favourable conditions which existed and substantial donor support.

However, these impressive observations notwithstanding, it is worth noting that the PEAP, just like the MPRSP, has not been translated into any local language.⁶¹ As in Malawi, the relatively high levels of illiteracy as well as the lack of technical literacy for the PEAP language did not and do not bode well with the concept of popular public participation.⁶² Further, as with the MPRSP, the PEAP was not put to

⁵⁴ Fozzard & Simwaka (n 47 above).

⁵⁵ McGee *et al* (n 49 above) 69.

⁵⁶ See Z Gariyo *Participatory Poverty Reduction Strategy Papers: The PRSP process in Uganda* (2002) 7. See also generally Z Gariyo *Civil society in the PRSP process: The Uganda experience* (2002) [http://www.trocaire.org/policyandadvocacy/Civilsociety %20inthe PRSP processtheUgandaexperience.ht](http://www.trocaire.org/policyandadvocacy/Civilsociety%20inthePRSPprocessintheUgandaexperience.ht) (accessed 6 October 2004).

⁵⁷ See Gariyo (n 56 above); McGee *et al* (n 49 above).

⁵⁸ McGee *et al* (n 49 above) 69.

⁵⁹ Gariyo (n 56 above).

⁶⁰ McGee *et al* (n 49 above).

⁶¹ Confirmed during the author's interview with Zie Gariyo on 12 October 2004.

parliament for debate and approval and this casts some doubt on its legitimacy as a popular, people-owned strategy.

5.3 Comparative analysis of participation in the MPRSP and PEAP processes

The discussion in this part of the article shows that there is a striking conceptual difference in the forces that drove Malawi and Uganda into adopting PRSPs. Whilst the example of Malawi clearly falls into the category of those countries that adopted PRSPs primarily in order to access debt relief under HIPC, Uganda had in the 1997 PEAP a type of PRSP that pre-dated the PRGF. Thus, instead of simply being pushed by the BWIs into adopting the PRSP, Uganda was rather cajoled into revising its PEAP to suit the PRGF framework for PRSPs. This was done so that Uganda could be used as a showpiece for donors to stem the increasing tide of criticism that the HIPC Initiative was becoming another BWIs farce.⁶³

The fact that there was broad participation in the formulation of the PEAP might be part of the explanation as to why it has been better implemented in Uganda as compared to other countries such as Malawi. This is because popular participation and a clear sense of national ownership are critical to garner commitment for implementation. It is still clear from this discussion, though, that the role of the BWIs has been pervasive in both processes. The PRSP process and some of the flaws as identified notwithstanding, it is a given fact that the PRSPs are here and that they wield power and influence that subsume other strategies at other levels.⁶⁴ As Mathews states, any look at poverty reduction strategies and human rights needs to focus on both process and content.⁶⁵ It is therefore very essential to examine the content of the PRSPs with a view to establishing whether they offer an effective conceptual framework that is requisite for enhancing the welfare and development of the people of the two countries through the advancement of economic and social rights. Thus, the discussion that follows in the next section focuses on the content of the PRSPs of Malawi and Uganda, with special focus on health and housing.

6 An overview of the rights to health and housing

6.1 Scope of the right to health

The right to health has been recognised in a number of international and regional human rights instruments, as well as in some national

⁶² UNDP 2004 HDR puts the adult literacy rate in Uganda at 68,9%. See UNDP (n 53 above) 141.

⁶³ Gariyo (n 56 above).

⁶⁴ Mathews (n 4 above).

⁶⁵ As above.

constitutions, such as that of the Republic of South Africa. On the international plane, the right has been provided for under article 25 of the Universal Declaration, article 12 of CDESCR and article 24 of the Convention on the Rights of the Child (CRC), among other instruments. Under article 25(1) of the Universal Declaration, the right is covered within the broader context of the right to an adequate standard of living. That provision states as follows:

Everyone has the right to a standard of living *adequate for health* and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right has, however, received more detail under CDESCR. Article 12 guarantees the right to the highest attainable standard of physical and mental health. Further elaborating on the right is General Comment No 14 of the ESCR Committee, where the Committee unpacks the content of the right.

In the African regional context, the right receives expression in article 16 of the African Charter. That provision states that:

- 1 Every individual shall have the right to enjoy the best attainable state of physical and mental health.
- 2 States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The World Health Organisation (WHO) conceptualises health as a 'state of complete physical, mental and social well-being and not merely the absence of disease and infirmity'.⁶⁶ It thus embraces a wide range of socio-economic factors that constitute the underlying determinants of health such as nutrition, housing, safe and potable water, and a healthy environment.⁶⁷

Mzikenge-Chirwa argues that the WHO definition is problematic as it presupposes that the state can ensure the complete good health of an individual. He states that one's good health is dependent on many variables, including actions of other persons, society as a whole and one's own behaviour and habits, as well as the limitations of nature.⁶⁸

It is submitted, though, that this view misses one point, namely that WHO here defines 'health' rather than 'the right to health'. The main plank of the argument, it is submitted, should be that it is the term 'the

⁶⁶ See ESCR Committee General Comment No 14 (2000): The right to the highest attainable standard of health (art 12 of the Covenant) para 4.

⁶⁷ n 66 above.

⁶⁸ See D Mzikenge-Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19 *South African Journal on Human Rights* 545.

right to health' itself that presents problems if the interpretation of the right is that the state is obliged to guarantee 'a state of complete physical, mental and social well-being' of all people. Perhaps a better definition is that which is given by the ESCR Committee in General Comment No 14, where the Committee states that:⁶⁹

[t]he right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.

This formulation does not necessarily imply that the state is under an obligation to ensure that people subject to its jurisdiction enjoy a state of complete well-being, but it places emphasis on ensuring the enjoyment of a variety of things and conditions necessary to ensure the full realisation of the highest attainable standard of health. This is where this paper agrees with Mzikenge-Chirwa that:⁷⁰

[t]he right to health, despite the differences in formulation, consists of both curative and preventive health care services and the protection of the underlying determinants of health.

In the case of *Free Legal Assistance Group and Others v Zaire*, the African Commission held that:⁷¹

The failure of the government [of Zaire] to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine constituted a violation the right to enjoy the best attainable state of physical and mental health and the obligation of the State to take the necessary measures to protect the health of its people as set out in Article 16 of the Charter.

Just like any other socio-economic right, the right to health admits of progressive realisation within the available resources of the state.⁷² Some scholars have argued that, in light of the absence of the words 'progressive realisation' in the African Charter, the social and economic rights guaranteed thereunder impose unqualified immediate obligations. Odinkalu, for instance, argues that⁷³

unlike the ICESCR, the African Charter avoids the incremental language of progressive realisation in guaranteeing . . . economic, social and cultural rights . . . Instead, the obligations that states parties assume with respect to these rights are clearly stated as being of immediate application.

This debate, however, seems to have been settled finally by the African

⁶⁹ Para 9.

⁷⁰ Mzikenge-Chirwa (n 68 above).

⁷¹ Centre on Housing Rights and Evictions ESC Rights Litigation Programme — Working Paper No 1 (2003); see also *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

⁷² See art 2(1) of ICESCR and General Comment No 3 of CESCR.

⁷³ See C Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 178.

Commission. In *Purohit and Another v The Gambia*,⁷⁴ the Commission considered the argument and held that:⁷⁵

[M]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of states party to the African charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all aspects without discrimination of any kind.

The right to health has four interrelated essential elements, namely, availability, accessibility, acceptability and quality.⁷⁶

The requirement of *availability* entails that public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantities within the state. These include the availability of the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs.

Accessibility means that health facilities, goods and services have to be accessible to everyone. Accessibility includes physical, economic as well as information accessibility. Physical accessibility entails that facilities for health care must be available within a reasonable geographical distance. Information accessibility means the right of every person to seek, receive and impart information and ideas concerning health issues, without prejudice to the essential need for confidentiality in health matters.⁷⁷ On the other hand, is generally understood to mean affordability.⁷⁸ Thus, the ESCR Committee has stated that:⁷⁹

Payment for health care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

Acceptability brings a cultural dimension to the right to health. It connotes, among other things, that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate.⁸⁰

⁷⁴ (2003) AHRLR 96 (ACHPR 2003).

⁷⁵ Para 84.

⁷⁶ General Comment No 14 (n 66 above) para 12.

⁷⁷ General Comment No 14 para 12(b).

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ General Comment No 14 para 12(c).

Quality demands strong adherence to issues of safety and the upholding of high standards, both ethical as well as technical and scientific, in order to ensure that the highest attainable state of health is achieved. Thus, this element demands, among other things, the availability of skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.⁸¹

An effective strategy to reduce poverty through the improvement of the health status of the people must be tailored towards ensuring the effective guarantee of these elements.

Further, like other socio-economic rights, the right to health is amenable to minimum core obligations, notwithstanding the applicability of the notion of progressive realisation in their implementation. These obligations are designed 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.⁸² The ESCR Committee has stated that if the rights were to be interpreted in a way that does not impose these minimum obligations, CESCR would be deprived of its *raison d'être*.⁸³ In this regard, it is imperative to note what have been identified as the core minimum obligations in respect of the right to health. These core obligations include ensuring the following:

- (a) equal access to primary health services, especially for vulnerable and marginalised groups;⁸⁴
- (b) access to minimum essential nutrition for everyone;⁸⁵
- (c) access to basic shelter, sanitation, safe and potable water;⁸⁶ and
- (d) access to essential drugs as defined by WHO from time to time.⁸⁷

Thus, where it is shown that the state is not ensuring the realisation of these minimum core obligations, then the state is in violation of the right.

6.2 Scope of the right to housing

The right to housing means the right to live somewhere in security, peace and dignity and not just the shelter provided by merely having a roof over one's head.⁸⁸ In the leading South African case of *Government of South Africa and Others v Grootboom and Others* (Grootboom case),⁸⁹ the Constitutional Court held that '[h]ousing entails more

⁸¹ General Comment No 14 para 12(d).

⁸² General Comment No 3 (n 72 above) para 10.

⁸³ n 55 above.

⁸⁴ General Comment No 14 para 43(a).

⁸⁵ General Comment No 14 para 43(b).

⁸⁶ General Comment No 14 para 43(c).

⁸⁷ General Comment No 14 para 43(d).

⁸⁸ CESCR General Comment No 4 (1991): The right to adequate housing (art 11(1) of the Covenant) para 7.

⁸⁹ 2000 11 BCLR 1169 (CC).

than bricks and mortar . . . For a person to have access to adequate housing . . . there must be land, there must be services, there must be a dwelling.⁹⁰

The Commission on Human Settlements has stated that '[a]dequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities — all at a reasonable cost'.⁹¹

The right to housing has also been linked to the right to life. In the Indian case of *Shakti Star Builders v Naryan Khimali Tatome and Others*,⁹² the Indian Supreme Court held that:

The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. For a human being [the right to shelter] has to be a suitable accommodation which would allow him to grow in every aspect — physical, mental and intellectual. A reasonable residence is an indispensable necessity for fulfilling the constitutional goal in the matter of development of man and should be taken as included in 'life'.

The right to housing is also closely intertwined and implied in the right to human dignity. Thus, in the case of *Social and Economic Rights Action Centre and Another v Nigeria (SERAC case)*,⁹³ it was held that forced evictions without proper compensation were not only a violation of the right to human dignity, but also the right to housing that is implied in human dignity.

The ESCR Committee has spelt out the following interrelated factors that characterise the right to housing:

6.2.1 Legal security of tenure

This implies that the state should take immediate measures aimed at conferring legal security of tenure upon persons and households currently lacking such protection. This is to be done in consultation with affected persons.⁹⁴ It includes rental accommodation, whether private or public, and informal settlements, and is closely related to the issue of forced evictions.⁹⁵ In the celebrated Indian case of *Olga Tellis v Bombay Municipal Corporation*, the Indian Supreme Court held that evictions from shelter places without following appropriate procedures and ensuring alternative accommodation would result in the deprivation of the right to a livelihood.⁹⁶

⁹⁰ n 89 above, para 35.

⁹¹ General Comment No 4 para 7.

⁹² (1) SC 106, Civil Appeal No 2598 of 1989 (JT 1990).

⁹³ (2001) AHRLR 60 (ACHPR 2001) para 46.

⁹⁴ General Comment No 4 para 8(a).

⁹⁵ General Comment No 7 (1997): art 11 para 1 of the Covenant: Forced evictions.

⁹⁶ (3) SCC 545 (1985).

The issue of forced evictions is so pertinent that the ESCR Committee has devoted its General Comment No 7 to the subject.

6.2.2 Availability of services, materials, facilities and infrastructure

This entails sustainable access to such resources as safe drinking water, energy for cooking, lighting, sanitation and washing facilities, and refuse disposal, among others.⁹⁷

6.2.3 Affordability

This enjoins the state to take steps to ensure that the percentage of housing-related costs, such as for some of the services mentioned in 6.2.2 above, is, in general, commensurate with income levels. It requires states to establish housing subsidies for those unable to obtain affordable housing.⁹⁸ States are further enjoined to protect tenants against excessive rent levels or increases.⁹⁹

6.2.4 Habitability

This means that housing must be habitable. Inhabitants must be protected from such hazards as excessive cold or heat, rain and disease vectors, among others.¹⁰⁰

6.2.5 Accessibility

This enjoins the state to fully take into account the special needs of such vulnerable groups as the elderly and the physically disabled in formulating its housing policy and law. It further requires states to ensure, as a central policy goal, the increased access to land by the landless or impoverished segments of society.¹⁰¹

6.2.6 Location

This entails that housing should be made accessible in locations that are within reasonable reach of employment options, health care services, schools and other social facilities.¹⁰²

In terms of core minimum obligations, the ESCR Committee's General Comment Nos 4 and 7 respectively, that address this right, do not offer any concrete guide. In the *Grootboom* case, the Court considered the issue of core minimum content in respect of the right and decided not to apply it to South Africa. The Court argued that 'the [ESCR]

⁹⁷ General Comment No 4 para 8(b).

⁹⁸ General Comment No 4 para 8(c).

⁹⁹ n 95 above.

¹⁰⁰ General Comment No 4 para 8(d).

¹⁰¹ General Comment No 4 para 8(e).

¹⁰² General Comment No 4 para 8(f).

Committee developed the concept of minimum core over many years of examining reports by reporting states' and that it did not have comparable information.¹⁰³ The Court then held that it simply had to direct itself to the principle of reasonableness, although there might be cases where the content of minimum core obligations would help in determining reasonableness.¹⁰⁴

The Court emphasised that the state is obliged to take measures, including legislation and programmes, and that the 'policies and programmes must be reasonable both in their conception and their implementation'.¹⁰⁵ On the particular facts of the case, the Court held that, although the government of South Africa had adopted legislation and devised programmes intended at the progressive realisation of the right to housing, these measures failed the reasonableness test in so far as they did not make provision for measures to be taken in respect of people in desperate need. These included those with no access to land, the homeless, and those in crisis because of natural disasters or because their houses were under threat of demolition. The Court held that these groups needed immediate attention and that their immediate needs could be met by relief, short of housing, which fulfils the requisite standards of durability, habitability and stability.¹⁰⁶

On critically examining *Grootboom*, it is submitted that the Court did impliedly accede to the concept of a minimum core content. This is so in light of its holding that for persons in desperate need, as identified under paragraph 52 of the judgment, the state is bound to take *immediate interim measures of relief*, even if they do not constitute housing, provided they fulfil the requisite standards of durability, habitability and stability. This paper argues that these measures constitute the minimum core content of the right to housing.

7 The PRSP and the rights to health and housing in Malawi and Uganda: A critical appraisal

7.1 The Malawi Poverty Reduction Paper and right to health in Malawi

7.1.1 Constitutional measures

In Malawi, health finds expression in sections 13(c) and 30(2) of the Constitution. Section 13(c) states that the state shall actively adopt and implement policies and legislation aimed at providing 'adequate health commensurate with the health needs of Malawian society and international standards of health care'. This provision is supported by a binding

¹⁰³ n 89 above, para 32.

¹⁰⁴ n 89 above, para 33.

¹⁰⁵ n 89 above, para 42.

¹⁰⁶ n 89 above, para 52.

obligation on the state in section 30(2) of the Constitution that states that:

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.

Section 30(4) of the Constitution goes further and enjoins the state 'to justify its policies in accordance with this responsibility'.

Malawi therefore is not only bound by international law to justify its policies in accordance with its responsibilities on this right; it is equally bound by its own Constitution. Thus, the content of the MPRSP must accordingly be justified in respect of this right.

7.1.2 Health under the MPRSP

The MPRSP identifies poor health as one of the key causes of poverty.¹⁰⁷ Health is covered under pillar 2 of the MPRSP on human and capital development. It recognises that the health of an individual is directly related to economic and social well-being.¹⁰⁸ It gives a very gloomy picture of the state of poverty in Malawi in relation to health, noting, among other things, that life expectancy dropped in the country from 43 years in 1996 to 39 years in 2000, and that the deaths of infants under five as well as maternal mortality rates had been on the increase during the same period.¹⁰⁹ This was so notwithstanding a progressive increase in budgetary allocations to the health sector.¹¹⁰

To address the various health problems that the country faces, the MPRSP has framed what is termed an Essential Healthcare Package (EHP). The EHP is described as a 'bundle of health services provided at community, primary and secondary levels, supported by the necessary administrative, logistics and management systems'.¹¹¹ The MPRSP places the EHP under three main objectives. These objectives are the improvement of the quality and availability of essential health care inputs; the improvement of access to, and equity of essential health care; and the strengthening of administration and finance of essential health care services.¹¹² These objectives are examined in turn.

¹⁰⁷ Malawi Poverty Reduction Strategy Paper 2002 (MPRSP) (2000) x.

¹⁰⁸ MPRSP 58.

¹⁰⁹ These are said to be the most important indicators to measure the health status of a nation. See South African Human Rights Commission, *4th Economic and Social Rights Report: The Right to Health* <http://www.sahrc.org.za> (accessed 10 July 2004).

¹¹⁰ MPRSP (n 107 above).

¹¹¹ n 107 above, 59.

¹¹² n 107 above, 60.

Improving quality and availability of health care

The MPRSP observes that a major problem leading to the country's poor health indicators is the shortage of adequately compensated medical staff.¹¹³ It attributes this to a number of factors, including the brain drain due to poor remuneration and career prospects, as well as the death of staff exacerbated by the HIV/AIDS pandemic.¹¹⁴ It also identifies the problem of a shortage of drugs, particularly in rural areas as a result of, among other factors, low and inefficient drug allocations, and pilferage.¹¹⁵ It stresses that drugs and medical supplies required in an EHP must be constantly present in health facilities both in adequate quantities and of appropriate quality.¹¹⁶

To reduce the shortage of health personnel, the EHP seeks to increase the number of locally-trained health personnel, and to review remuneration and career structures for health personnel.¹¹⁷

To reduce the shortage of drugs, the EHP seeks to ensure the review of the procurement, logistics, management, distribution and prescription of drugs so that all drugs procured reach the intended patients and are prescribed properly.¹¹⁸ It also seeks to ensure a gradual increase in budget allocations to drugs and medical supplies. Annex 2 to the MPRSP under Goal 2.3 shows the strategised phased costing of the budget for financial years 2002-2003 through to 2004-2005. The costing thereunder is demonstrably incremental.

Improving access to and equity of essential health care

The MPRSP identifies the lack of access to essential health care as another serious poverty problem.¹¹⁹ It notes, among other things, that health centres, particularly in rural areas, are not adequate.¹²⁰ It further notes that even existing health structures need to be rehabilitated and modernised.¹²¹ The MPSRP therefore makes provision for increased access to health care facilities through the rehabilitation of existing infrastructure and increase in mobile health services. It emphasises the need for health centres to have functioning support systems such as potable water, electric energy, including back-up supplies, and communication systems.

¹¹³ n 107 above, 58.

¹¹⁴ n 107 above.

¹¹⁵ n 107 above, 59.

¹¹⁶ n 107 above, 61.

¹¹⁷ n 107 above.

¹¹⁸ n 107 above, 58.

¹¹⁹ n 107 above, 60.

¹²⁰ n 107 above, 59.

¹²¹ n 107 above, 61.

Strengthening the administration and financing of essential health care services

The MPRSP notes that weak financial and managerial capacity in health centres also contributes to inefficiency and poor service delivery.¹²² It therefore makes provision for the training and retraining of financial and management health staff.

In terms of a lack of sufficient finances to run health institutions, the MPRSP states that the financing strategy 'will take full account of the fact that many Malawians can afford to contribute to better health care', and justifies this statement by arguing that in 1999 to 2000, the richest 40% of the population spent MK822 million (about US \$14,95 million at the time) on health care.¹²³ It therefore states that

operational research will guide the decision as to whether the EHP will be free at the point of entry, or subject to user fees charges with an exemption mechanism for poor or targeted groups.¹²⁴

The MPRSP further calls for the strengthening of essential health care services through the development of a Sector Wide Approach (SWA) in the health sector.¹²⁵ The role of the SWA is to ensure the co-ordination, strengthening and effecting of donor and government financing on the EHP.¹²⁶ It states that this will largely leave private sources of finance to develop the rest on the non-EHP health sector.¹²⁷

7.1.3 Critique of measures instituted

Positive developments

It is significant that the MPRSP has identified health as one of the key causes of poverty in Malawi. It rightly concludes that health is directly related to the general economic and social well-being of an individual. This is in accord with the conceptualisation of health as 'a state of complete physical, mental and social well-being and not merely the absence of physical infirmity'.¹²⁸ It is also significant to note that the MPRSP recognises some of the interrelated essential elements of the right to health as identified by the ESCR Committee under General Comment No 14. The EHP expressly mentions availability, accessibility and quality, although it is conspicuously silent on acceptability.

Further, the MPRSP strategises a phased increase in budgetary allocations. This is in line with the demands of, among others, article 2(1) of CESCR as read with General Comment No 14 of the ESCR Committee,

¹²² As above.

¹²³ As above.

¹²⁴ As above.

¹²⁵ n 107 above, 62.

¹²⁶ n 107 above, 61-62.

¹²⁷ n 107 above, 62.

¹²⁸ General Comment No 14 (n 66 above) para 4.

in terms of progressive realisation of the right. It is also clear that health is one of the key priority areas under the MPRSP. An examination of Annex 2 to the MPRSP shows that, apart from education, health is apportioned the biggest funding. These, it is submitted, are positive measures that are in line with the duty of the state to 'take steps' with a view to ensuring the progressive realisation of the right.

Weaknesses

The positive measures above notwithstanding, the MPRSP has a number of weaknesses in relation to the right to health.

Firstly, it is conspicuous that the MPRSP is not expressly based on the norms and values set out in the international law of human rights.¹²⁹ Its conceptualisation of health is not premised on health as a right that imposes duties on the state. As observed in the literature, in order to comply with the human rights-based approach to poverty reduction strategies, a PRSP should expressly identify national human rights law and practice in its jurisdiction; the international and regional human rights treaties; other important human rights instruments such as the Universal Declaration; and commitments entered into at recent world conferences in so far as they have a bearing upon human rights.¹³⁰ The MPRSP makes literally no mention of any of these instruments and the obligations thereunder. Thus, without any explicit reference to underlying legal norms, there is a disconnect between law and policy that creates room for the state to view the MPRSP strategies as mere programmatic aspirations and not policies targeted at giving effect to legal rights.¹³¹ Further, the MPRSP does not even mention the principles of national policy enshrined in section 13 of the Constitution that are supposed to be the overarching framework guiding government's policy formulation. It is therefore submitted that the MPRSP has a major weakness in that respect.

Secondly, the MPRSP makes no reference to the concept of core minimum content of the right to health so as to ensure, at the very least, satisfaction of the minimum essential levels of the right.¹³² Indeed, an examination of the discussion on health under Pillar 2 of the MPRSP shows that not only is this concept not mentioned, it is also not given any implied effect. Thus, for instance, the MPRSP does not state that every person is entitled to primary health care 'as of right'. As demonstrated above, the right to primary health care is a minimum core content obligation.¹³³ Thus, the MPRSP, in its analysis of issues,

¹²⁹ See the recommendation of the OHCHR (n 37 above) that PRSPs must be explicitly based on the norms and values set out in international human rights law.

¹³⁰ n 38 above.

¹³¹ See the remarks of the OHCHR (n 37 above).

¹³² General Comment No 3 (n 72 above).

¹³³ n 84 above.

ought to have clearly borne this fact out and stated the mechanisms of accountability against which the state is to be held in this respect. This is another major weakness of the MPRSP, bearing in mind, as Mzikenge-Chirwa succinctly puts it, that¹³⁴

for a continent characterised by widespread corruption, misallocation of resources and mismanagement, a principle requiring the state to consider provision of minimum essential levels of economic, social and cultural rights as a matter of priority is most commendable.

It is therefore submitted that the MPRSP lacks conceptual reasonableness under the *Grootboom* test in this regard.

Another weakness of the MPRSP relates to the strategies that it puts in place with a view to addressing the challenge of insufficiency of finances. As shown above, the MPRSP states that many Malawians can afford to contribute to better health care and uses this as a justification to introduce user fees in hospitals under the EHP as part of a cost-sharing mechanism.¹³⁵ It must be stressed here that hitherto, essential health care services in Malawi have remained free for everyone at entry point, with the exception that those who have needed more expensive forms of health care have had the option to access the 'private wards' of hospitals.¹³⁶ It is submitted that statements in the MPRSP like¹³⁷

operational research will guide the decision as to whether the EHP will be free at the point of entry, or subject to user fees charges with an exemption mechanism for poor or targeted groups

and that development of the rest of the non-EHP health sector should be left to private sources of finance,¹³⁸ can only be construed as a resurrection through the back door of the failed SAPs. It must be recalled that the cost-sharing scheme in social services is an essential component of SAPs.¹³⁹

This study argues that the statement that many Malawians can afford to contribute finances towards better health care goes against the weight of evidence. The MPRSP itself concedes that poverty in the country is widespread, deep and severe, and that as at 1998, 65,3% of the population was poor.¹⁴⁰ The poor were categorised as those whose consumption for basic needs was below MK10,47 (US \$0,34)

¹³⁴ D Mzikenge-Chirwa 'Minister of Health and Others v Treatment Action Campaign and Others: Its implications for the combat against HIV/AIDS and the protection of economic, social and cultural rights in Africa' (2003) 9 *East African Journal of Peace and Human Rights* 174.

¹³⁵ n 124 above.

¹³⁶ Partnerships for Health Reform *Health reform policy issues in Malawi: A rapid assessment* (1998) 16.

¹³⁷ n 107 above.

¹³⁸ See n 127 above.

¹³⁹ n 25 (first bullet) above.

¹⁴⁰ n 107 above, 5.

per day.¹⁴¹ It goes without saying that this is a shocking indicator. Worse still, successive indicators of the UNDP HDR indicate that the level of poverty in the country has since deepened.¹⁴² It is therefore submitted that this statement in the MPRSP is just one of the subtle ways of rolling back the role of the state in the health sector and re-introducing the SAPs with a view to impressing the BWIs. Studies in other LDCs have shown that, whilst the idea of cost sharing through user fees is possible in the developed or middle-income world, this is not practicable in LDCs.¹⁴³ The studies demonstrate that the impact of user fees is actually minimal on the health budget expenditure and that the fees, however minimal, substantially discourage people from seeking health services in the formal sector.¹⁴⁴

This study argues that such a policy is inconsistent with the duty of the state to ensure economic accessibility and availability of health services as expounded by the ESCR Committee, as it will have a negative impact on the affordability of health services. It is further submitted that this measure is likely to lead to a breach of the obligation on the state to respect the right to health by taking away entitlements that were already being enjoyed under the pre-existing free essential health-care services policy.¹⁴⁵ It is also inconsistent with the duty to fulfil in that, instead of moving its machinery towards the actual realisation of the right through the direct provision of basic health needs or resources,¹⁴⁶ the state is proposing to shirk this obligation.

Another weakness of the MPRSP is that it does not place emphasis on preventive health care strategies, including the critical role of public health education. Such a strategy is very essential and constitutes one of the measures of discharging the duty of the state to promote the right to health through raising awareness of healthcare issues.¹⁴⁷ Emphasis on public health education ensures information accessibility of health information by the poor that is an essential element of the right to health.

Further, the MPRSP falls short of proposing the enactment of legislation with a view to stressing that health is a right and clearly identifying who the duty bearers and the claim holders are in that regard, as well as clearly stating their respective roles.

¹⁴¹ n 125 above.

¹⁴² UNDP (n 53 above) 142 146.

¹⁴³ RK Quaye *Paying for health services in East Africa: A research note* (2004).

¹⁴⁴ Quaye (n 143 above) 97 99.

¹⁴⁵ *SERAC* case (n 93 above) para 46.

¹⁴⁶ n 93 above, para 48.

¹⁴⁷ n 93 above, para 47.

7.2 The Poverty Eradication Action Plan and the right to health in Uganda

7.2.1 Constitutional measures

In Uganda, the right to health finds expression as a non-binding aspiration in the national objectives and directive principles of national policy. Principle XIV(b) provides, in part, that the state shall ensure that

all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

Further, principle XX states that ‘the state shall take all practical measures to ensure the provision of medical services to the population’. The right to health is not mentioned at all in the Bill of Rights.

It is submitted, though, that article 45 of the Uganda Constitution that states that the rights and freedoms specifically mentioned in the bill of rights are not to be regarded as excluding others not specifically mentioned, should be read to imply into the Constitution the full scope of all economic and social rights, including the right to health.

It follows therefore that, just like Malawi, Uganda is bound by its own Constitution as well as international law, to justify its policies in accordance with its responsibilities on this right. Thus, similarly, the content of the PEAP must accordingly be justified in respect of this right.

7.2.2 Health under the PEAP

The PEAP recognises health as a central concern of the poor and emphasises the need to address it effectively.¹⁴⁸ Health is specifically addressed under Pillar 4 which deals with actions which directly improve the quality of life of the poor.¹⁴⁹ It is also addressed in part 2 of the PEAP that addresses the national vision and overall goals.¹⁵⁰ Quite unlike the MPRSP, the PEAP paints a rather positive picture of the trend of health indicators in the country. Indications from the PEAP, as corroborated by the UNDP *HDR 2004*, are that life expectancy has been on the increase throughout the past decade, and that the death rates of infants under five as well as maternal mortality rates have been on the decrease.¹⁵¹

The PEAP still recognises, though, that the indicators are very poor and hence the need for a special focus on the health sector in the PEAP.¹⁵² It also recognises the specific challenges posed by the HIV/AIDS pandemic and, quite unlike the Malawi situation, indicators are

¹⁴⁸ Uganda Poverty Eradication Action Plan 2000 (PEAP) 8.

¹⁴⁹ n 148 above, 13.

¹⁵⁰ n 148 above, 10.

¹⁵¹ n 148 above, 10; also UNDP (n 53 above) 141.

¹⁵² n 148 above.

that the pandemic has at least been contained and that infection rates are decreasing.¹⁵³ It stresses the link between education, access to information and health, especially in the primary health care sector.¹⁵⁴ It thus emphasises the enormous importance of sending out simple health messages to the public as a way of addressing the wider issue of health.¹⁵⁵

Just like in the MPRSP, the PEAP frames the Minimum Health Package (MHP) to address the poverty-related health challenges that the country faces.¹⁵⁶ However, quite unlike the MPRSP that clearly identifies the specific challenges being faced and the respective strategies under the EHP to address them, the PEAP outlines the challenges very briefly. It states that the MHP seeks to improve service delivery through better remuneration and training, better infrastructure, and better accountability to consumers.¹⁵⁷ It also identifies the pro-poor implementation of cost recovery measures through the successful identification of targeting mechanisms.¹⁵⁸

7.2.3 Critique of measures adopted

Positive measures

The PEAP, just like the MPRSP, clearly identifies health as a central concern in the poverty reduction drive.¹⁵⁹ This is in line with the position of the ESCR Committee that has stated that poverty reduction is one of the central concerns in the discourse on economic, social and cultural rights.¹⁶⁰ By giving health specific attention in the PEAP, the government of Uganda is, at least in part, complying with its obligation to take steps through, at a minimum, the adoption of policies aimed at progressively achieving the full realisation of the right.¹⁶¹

Further, just like the MPRSP, the PEAP strategises a phased increase in budget allocations to the health sector that is a positive measure in line with the duty of the state to fulfil the right to health.

Furthermore, and quite unlike the MPRSP, the PEAP identifies public education with a view to enhance public awareness of necessary health issues as a key strategy in ensuring the enhancement of good health in

¹⁵³ n 148 above.

¹⁵⁴ n 148 above, 10 11.

¹⁵⁵ n 148 above, 12.

¹⁵⁶ The MHP is described as a co-ordinating framework of the new health strategic plan; n 148 above, 17).

¹⁵⁷ n 148 above, 17.

¹⁵⁸ n 148 above.

¹⁵⁹ n 148 above.

¹⁶⁰ n 22 above.

¹⁶¹ Art 2(1) of CESCR and General Comment No 3 of the ESCR Committee.

the country.¹⁶² This is very critical and in compliance with the duty to promote the right to health.¹⁶³

Weaknesses

The PEAP has a number of weaknesses as well in relation to the right to health.

Firstly, just like the MPRSP, the PEAP is not expressly premised on the norms and values of international human rights law.¹⁶⁴ The measures adopted under the PEAP are not conceived as legal obligations, but rather as programmatic aspirations.¹⁶⁵ The lack of an expressed sense of legal obligation leaves the state to view health, and indeed all other areas covered under the PRSP, as pure matters of policy that may be disregarded without legal sanction. It is interesting that the PEAP does not even mention the constitutional national objectives and directive principles of national policy. One would have thought that these should have provided the overarching framework within which the PEAP would be formulated. Thus, just like the MPRSP, the PEAP has a major weakness in this regard.

Secondly, the PEAP similarly makes neither express reference of Uganda's core minimum obligations as identified by the ESCR Committee, nor is there any implied provision for the same. The conceptual weakness of the PEAP in this respect is thus as discussed in relation to the MPRSP.¹⁶⁶

Further, again as mirrored in the Malawi experience, the PEAP makes an implied suggestion of the introduction of user fees for essential primary healthcare. By stating that 'the pro-poor implementation of cost-recovery will require successful identification of targeting mechanisms',¹⁶⁷ it is apparent that the PEAP is impliedly proposing the introduction of user fees. This rings in consonance with the language of introduction of user fees 'with an exemption mechanism for the poor or targeted groups' as used in the MPRSP.¹⁶⁸ Thus, the argument raised under the MPRSP discussion in this respect similarly applies to the PEAP. In the case of Uganda, the situation is probably even worse because the country once introduced and later abolished targeted user fees in public hospitals after observing the disadvantages of such fees.¹⁶⁹ This PEAP proposal thus comes notwithstanding the studies discussed above that show that user fees in public hospitals in LDCs have negative conse-

¹⁶² n 148 above.

¹⁶³ n 68 above.

¹⁶⁴ n 148 above.

¹⁶⁵ n 148 above.

¹⁶⁶ n 132 above.

¹⁶⁷ n 148 above, 17.

¹⁶⁸ n 124 above.

¹⁶⁹ Quaye (n 143 above) 98-100.

quences on access to healthcare.¹⁷⁰ It is submitted that the subtle proposed re-introduction of this SAPs measure is inconsistent with Uganda's obligations to respect and fulfil the right as discussed above.

Lastly, the PEAP similarly falls short of making legislative proposals with a view to stressing that health is a right and clearly identifying who the duty bearers and the claim-holders are in that regard, as well as clearly stating their respective roles.

7.3 PRSPs and the right to housing in Malawi and Uganda

7.3.1 Constitutional measures

There is a sharp contrast in the manner in which the right to housing is provided for under the Malawian and Ugandan Constitutions. Whereas in Malawi housing is not even mentioned in the principles of national policy, it finds expression as a binding right in section 30(2) of the Bill of Rights. In Uganda, on the other hand, the right finds no mention in the Bill of Rights, whereas it is provided for in principle XIV(b) of the national objectives and directive principles of national policy.

It is submitted, however, that the clarity with which this right is covered under these two Constitutions is substantially the same as that in relation to the right to health as discussed above, particularly in view of the fact that article 45 of the Uganda Constitution indirectly guarantees the right.

7.3.2 Housing under the MPRSP and PEAP

The MPRSP does not address housing as a poverty issue. The closest that it comes to it is to address issues of access to land.¹⁷¹ An examination of these land issues, though, reveals that they are discussed in the context of agriculture and not housing.¹⁷² Similarly, the PEAP does not address the issue of housing in any serious way. It merely mentions it in passing, stating that 'housing is a private sector responsibility, but the state can encourage the availability of low cost housing'.¹⁷³

7.3.3 A critique of the MPRSP and PEAP approach to housing

Shelter is indisputably one of the basic needs of humanity.¹⁷⁴ It has been argued that as a basic need, housing should be placed along

¹⁷⁰ As above.

¹⁷¹ n 107 above, 65 67.

¹⁷² n 107 above, Pillar III, 65 67.

¹⁷³ n 148 above, 17.

¹⁷⁴ See A Nuwagaba *The impact of macro-adjustment programmes on housing investment in Kampala City, Uganda: Shelter implications for the urban poor* <http://www.ajol.info> (accessed 22 September 2004).

the same priority lines as education and health.¹⁷⁵ Indeed, the ESCR Committee has emphatically stated that the right to housing is of central importance to the enjoyment of all economic, social and cultural rights.¹⁷⁶

Thus, the fact that the PRSPs of Malawi and Uganda have not addressed the issue of housing in any meaningful way is as surprising as it is disturbing. It goes without saying that poor housing in the two countries is widespread and the lack of adequate housing has severe implications for the enjoyment of other rights, including the right to health.¹⁷⁷ In both countries, problems of lack of access to safe drinking water, energy for cooking, lighting, washing facilities and refuse disposal facilities, among others, are very commonplace.¹⁷⁸ Affordability of housing, particularly in urban areas such as Blantyre and Lilongwe in Malawi and Kampala in Uganda, is another big problem that affects the poor quite severely.¹⁷⁹

Problems relating to affordability extend from arbitrary rent increases to related costs such as those for basic services like water, and energy for lighting and cooking.¹⁸⁰ Related to this is the problem of the lack of security of tenure from unreasonable evictions that is common among the poor.¹⁸¹ Accessibility to housing for vulnerable groups, such as orphaned street children and those who are in extreme poverty and have no habitable shelters, is yet another problem. There is a growing problem of homeless street children in both countries.¹⁸²

The foregoing problems are certainly key poverty issues. Malawi and Uganda are therefore under an obligation to provide clear plans in their PRSPs on how these issues are to be addressed. For instance, the ESCR Committee states that steps should be taken to ensure that housing-related costs are, in general, commensurate with income levels. It states that subsidies should be provided to those unable to find affordable housing and that forms and levels of housing finance should reflect housing needs. Further, in accordance with the principle of affordabil-

¹⁷⁵ See M Kasekende in Summit Communications 'Cheaper and better housing is a priority' <http://www.summitreports.com/uganda/housing.htm> (accessed 22 September 2004).

¹⁷⁶ General Comment No 4 para 1.

¹⁷⁷ n 67 above; also see T Benson *et al* *Malawi: An atlas for social statistics* (2002) 67-74; Malawi National Statistical Office 1998 Population and Housing Census http://www.nso.malawi.net/data_on-line/demography/census_98/census_results.html (accessed 4 September 2004).

¹⁷⁸ n 177 above.

¹⁷⁹ Nuwagaba (n 174 above).

¹⁸⁰ See 'Why Ugandans don't take housing loans' *The Monitor* <http://allafrica.com/stories/200409200349.html> (accessed 22 September 2004).

¹⁸¹ n 180 above.

¹⁸² See UNICEF *Bellamy urges attention on Uganda's displaced people crisis; calls on LRA to release children* http://www.unicef.org/media/media_21136.html (accessed 8 October 2006).

ity, the right to housing entails that tenants should be protected from unreasonable rent levels or increases as well as illegal evictions. In respect of people with physical disabilities, the state is under an obligation to ensure that planning laws and regulations that ensure that housing structures comply with their special needs are in place.

Further, minimum core content obligations in respect to the right to housing require the state to take immediate interim measures of relief for persons in desperate need, such as the homeless. By not making provision for immediate strategies to address the problems facing those in desperate need, such as homeless street children, the PRSPs of Malawi and Uganda are unreasonable in conception and fall below the minimum requisites of the right to housing.

8 Conclusion

Poverty reduction is a critical process aimed at achieving the full enjoyment of economic and social rights. Therefore, policy documents such as PRSPs have to be firmly premised on human rights norms. They need to define all people subject to the jurisdiction of the state, particularly the poor, as the claim-holders and the state as the duty-bearer.

This study has demonstrated that the PRSPs of Malawi and Uganda, whilst they may in some measure be viewed as tools indirectly targeted at the realisation of economic and social rights, such as the right to health, they are lacking in many respects. They are not explicitly premised on human rights norms and fall short of addressing all the necessary essential elements of the rights. In some instances, they propose retrogressive measures from an economic and social rights perspective within the framework of LDCs, such as their proposals to introduce cost sharing user-fees in primary health care.

Further, in some areas, such as housing, they are either completely silent or, worse still, propose the complete rolling-back of the state through relegation of the housing responsibility to the private sector and privatising institutions that provide public housing. This is a characteristic of the SAPs that, notwithstanding the introduction of the PRSPs through the PRGF, continues to hold sway. The involvement of the BWIs in the PRSP process, both directly and indirectly, has had very negative implications, not only impairing the sovereignty and autonomy of the LDCs concerned, but also, through the timelines attached to accessing debt relief under the HIPC initiative, negatively affected the time available for genuine public participation. Public participation is important for a number of reasons. Among other things, it is a variant of the exercise by peoples of their right to self-determination through their involvement in the determination of their economic and political destiny. Further, public participation instills a sense of ownership that is critical to elicit the will to faithfully implement the strategies.

This discussion shows that, whilst in the case of Uganda, the adoption of the PEAP as a PRSP was the culmination of both an internal drive as well as pressure from the BWIs, the situation in Malawi, although reflecting a pre-existing will through the adoption of such policies as the Poverty Alleviation Paper, was largely dictated by the demands of the BWIs. These attributes do not augur well for the need of PRSPs to act as effective tools for the full realisation of human rights. The fact that they are not readily accessible to many people, for instance because they are not available in vernacular languages, is an impediment to people's empowerment as they cannot make informed claims on the state that are premised on the PRSPs. Further, the fact that PRSPs are not put to the legislature for debate and adoption reduces their legitimacy and authoritative status.