

**THEORY AND PRACTICE OF SOCIAL AND ECONOMIC RIGHTS IN  
KENYA**

**By**

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**DECLARATION.**

I declare that **THEORY AND PRACTICE OF SOCIAL AND ECONOMIC RIGHTS IN KENYA** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

**Signature: .....**

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**DATE.....**

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I am excited to have come to the conclusion of this leg of my academic journey. I thank the Almighty God for helping me to surmount the numerous hurdles that almost made me to give up. My gratitude to my dear wife Brigitte Namachanja and son Keon Tumiso who never gave up on me and encouraged me to believe in the beauty of my dreams. To my supervisor Mrs C.A Mienie, thank you for your insight and guidance; this work would not have been possible without your input. Finally to my parents Julias and Grace Khakula, thank you for teaching me values that have played a pivotal role in this academic odyssey.

*“The future belongs to those who believe in the beauty of their dreams” Eleanor Roosevelt 1884 - 1962.*

## **LIST OF ABBREVIATIONS**

**ACHPR** – African Charter on Human and People’s Rights.

**BORs** – Bill of Rights.

**CCC**- Constitutional Court of Columbia.

**CPRs** – Civil and Political Rights.

**CSECR** – United Nations Committee on Social, Economic and Cultural Rights.

**HRs** – Human Rights.

**ICESCR** – International Covenant on Economic Social and Cultural Rights.

**IDPs** – Internally displaced People.

**SAC** – The 1996 South African Constitution.

**SACC** – South African Constitutional Court.

**SAJHR** – South African Journal of Human Rights.

**SERs** – Socio-economic Rights.

**UDHR** – Universal Declaration of Human Rights.

**UN** – United Nations.

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## Chapter one: Background

### 1.1 Introduction

Defining human rights (HRs) is an arduous task. There is far from universal agreement on definitional issues, let alone theorizing about the definition of a concept like HRs.<sup>1</sup> In fact, it is widely accepted that there is no universal definition of HRs.<sup>2</sup> Henkin argues that, HRs are universal rights accruing on all human beings that are fundamental to human existence and can neither be transferred, forfeited, nor waived.<sup>3</sup>

The United Nations (UN) has described HRs as;

“those rights which are inherent in our nature and without which we cannot live as human beings... human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual needs. They are based on mankind’s increasing demand for a life the inherent dignity and worth in which of such human beings will receive respect and protection”.<sup>4</sup>

Interestingly, the Universal Declaration of Human Rights (UDHR) creates a nexus between respect for HRs and social stability.<sup>5</sup> One can therefore argue that failure to respect HRs leads to social instability like civil upheavals, war and bad governance among others. Mubangizi refers to HRs as those rights that one possesses by virtue of being human; one need not possess any other qualification to enjoy HRs other than the fact that he or she is a human being.<sup>6</sup>

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<sup>1</sup> Mubangizi, J.C “Towards a new approach to the classification of human rights with specific reference to the African concept” (2004) 4 *African Human Rights Journal* 94.

<sup>2</sup> See Brendalyn A *Democratisation and the process of human rights in Africa* (1995) 29, E. Azinge ‘Milestone decisions on rights in Akalu & Osinbajo (eds) *Perspectives on Human Rights* (1992) 196.

<sup>3</sup> Henkin L *The Age of Rights* (1990) 2 New York: Columbia University Press.

<sup>4</sup> United Nations Department of Public Information, Human Rights, *Questions and answers* (1987) 4 United Nations, New York.

<sup>5</sup> See the preamble of the Universal Declaration of Human Rights, G.A res 217A (III) U.N Doc A/810 at 71 (1948) which provides that respect for HRs and dignity is the foundation of freedom, justice and peace in the world.

<sup>6</sup> Mubangizi (Note 1 above) 94 see also Brendalyn (note 2 above).

HRs have been referred to by various names, phrases and categorizations; these include fundamental rights or ‘common rights’.<sup>7</sup> Fundamental or basic rights are those rights that cannot be taken away by any legislation or act of the State and which are set out in the Constitution of a country while natural or common rights refer to those rights one is entitled to by virtue of their human nature.<sup>8</sup>

There exists three classes or categories of HRs namely; first generation rights, second generation rights and third generation rights.<sup>9</sup> First generation rights consist of the traditional civil and political rights (CPRs) which are basically the rights of the individual against the State and they reflect the *laissez-faire* doctrine of non-interference.<sup>10</sup> These rights aim at protecting the citizen from the arbitrary actions of the State and they include the right to life, the right to liberty, security, privacy, fair trial, dignity, political rights, freedom from torture, freedom of expression, association, movement, religion among others.<sup>11</sup>

Second generation rights consist of economic, social and cultural rights which envisage inter alia, the right to work; the right to just conditions of work; the right to fair remuneration; the right to an adequate standard of living; the right to organize, form and join trade unions; the right to collective bargaining; the right to property; the right to education; the right to participate in the cultural life and to enjoy the benefits of scientific progress.<sup>12</sup>

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<sup>7</sup> See generally P.S Jaswal & N. Jaswal, *Human Rights and the Law* 3 APH Publishing Corporation, (1996).

<sup>8</sup> Mubangizi (note 1 above) 94.

<sup>9</sup> Alston P. “Putting Economic, Social and Cultural Rights Back on the Agenda of the United States (CHRG Working Paper No. 27, 2009) pg. 2 available at <http://www.chrgj.org/publications/docs/wp/Alston%20Spring%202009.pdf> accessed on 12/04/14, see also Jaswal & Jaswal (note 7 above) who categorically state that the modern notion of HRs describes them as ‘three human rights generations’ see also S. Davidson, *Human Rights* (1993) 39-45, Dlamini C. *Human Rights in Africa: which way South Africa?* (1995) 5 and Aka C. ‘military, globalization and Human Rights in Africa (2002) *New York law School Journal of Human Rights* 371.

<sup>10</sup> Basu D.D *Human Rights in Constitutional Law*, Prentice Hall of India (Pvt) Ltd (1994) 82.

<sup>11</sup> First generation rights lay a basis for the narrow conception of a bill of rights as a charter of negative liberties. This means that it is intended to protect individuals against state power by listing rights that cannot be violated by the state either by means law or through the conduct of state actors. See Erasmus G. ‘Bill of Rights’ *Hand Book* (2005, 5<sup>th</sup> ed) 32.

<sup>12</sup> Mbondenyi M.K *International Human Rights and their Enforcement in Africa*, Law Africa Publishing (K) Ltd (2011) 20.

Socio-economic rights (SERs) therefore refer to the category of rights that are connected to socio-economic issues of life for example the right to a clean environment, the right to have access to housing and land, health care, water, and social security among others.<sup>13</sup>

Mubangizi<sup>14</sup> argues that second generation rights contain rights founded upon the status of an individual as a member of the society.<sup>15</sup> It has been argued that unlike first generation rights, SERs require more positive action on the part of the State to provide or at least create conditions for access to those facilities, which are considered essential for the realisation of these rights.<sup>16</sup> Positive rights are defined as rights to government action. When a citizen enforces a positive right, he or she can compel the government to take action to provide certain services.<sup>17</sup> By contrast, negative rights entail freedom from government action. To enforce a negative right, a citizen merely insists that the government should not act so as to impinge on their freedom.<sup>18</sup>

Hertel and Minkler define economic rights as a right to a decent standard of living, the right to work and the right to basic income support for people who cannot work.<sup>19</sup> Third generation rights on the other hand belong to a category that is quite recent.<sup>20</sup> According to Davidson, the emergence of this category of rights is closely associated with the rise of the third world nationalism and the realisation by developing States that the existing international order is loaded against them.<sup>21</sup> These rights are collective in nature and they depend upon cooperation both at the international and national level between the government (s) and its people hence the name

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<sup>13</sup> Second generation rights consist mainly of the human rights specified in the International Covenant on Economic, Social and Cultural Rights G.A res. 2200A (XXI), 2. U.N GAOP Supp(No.16) at 49 U.N. Doc. A/6316 (1996), 993 U.N.T.S 3, entered into force Jan 3, 1976. Also see generally C. Wellman, Solidarity, the individual and Human Rights 22 *Human Rights Quarterly* (2000) 639.

<sup>14</sup> Mubangizi (note 1 above) 95.

<sup>15</sup> Basu (note 10 above) 82.

<sup>16</sup> Dlamini (note 9 above) 5.

<sup>17</sup> Bades S. The negative Constitution: A critique 88 *MICH. L REV* 2271, 2272 (1990) see also W. Eno 'The African Commission on Human and People's Rights as an instrument for the protection of human rights in Africa (1998) LLM Thesis University of South Africa 7.

<sup>18</sup> *Ibid.*

<sup>19</sup> See generally Hertel S. & Minkler L. (eds), "*Economic Rights: the Terrain*" Economic Rights conceptual measurement and policy issues (2007) 1-35 New York: Cambridge University Press.

<sup>20</sup> Keba M'baye introduced the concept of 'the right to development' (Inaugural lecture, third teaching session, international institute of human rights, Strasbourg, July 1972 text in (1972) 13 *Revue des Droits del Homme* 505 Vasak later classified it together with other rights as " a third generation of rights' see Vsak K. pour une troisieme generation des draits del 'homme' in C Swinarski (ed) studies and essays in international humanitarian law and Red Cross Principles in honour of Jean Picet (1984) 837.

<sup>21</sup> Davidson S. Human Rights, London: Oxford University Press (1993) 43.

‘solidarity rights’.<sup>22</sup> These rights are usually concerned with the right to a clean environment, the right to development and the right to peace.

The classification of rights into various categories listed above should not be construed in a rigid manner since human rights ‘are universal, interdependent, indivisible and interrelated’.<sup>23</sup> One cannot purport to enjoy CPRs at the expense or exclusion of SERs. HRs must be treated on the same footing and with the same emphasis.<sup>24</sup>

Mubangizi<sup>25</sup> asserts that the principles of universality of HRs are founded on the notion that all HRs apply uniformly and with equal force throughout the world. The principle of interdependence of all HRs is founded on the assumption that all human rights have the same basic characteristics and should be upheld through the medium of equally potent enforcement mechanisms.<sup>26</sup>

From the foregoing discourse, it is clear that the nature or category of rights is immaterial since HRs are universal, interdependent, indivisible and interrelated. HRs have always been those liberties, immunities and benefits which by accepted contemporary values, all human beings are able to claim ‘as of right’ of the society in which they live.<sup>27</sup> They are not privileges granted by the State or society but are ideals and distinguishing marks of a civilized society.<sup>28</sup>

## 1.2 Problem Statement

A modern bill of rights (BORs) should be founded on certain general principles which include; human dignity, equality and human rights. Rights need to be crafted within the right

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<sup>22</sup> Ibid.

<sup>23</sup> This is the official position of the United Nations supported by both the General Assembly and office of the High Commissioner for Human Rights. See The 1968 Proclamation of the Teheran International Conference on Human Rights 13 U.N Doc.A/CONF 32/42 (1968) [www.untreaty.un.org/cod/aui/pdf/ha/atchr/Final\\_Act\\_of\\_Teheran\\_Conf.pdf](http://www.untreaty.un.org/cod/aui/pdf/ha/atchr/Final_Act_of_Teheran_Conf.pdf) accessed on 22/03/14 also see Mureinik, ‘Beyond a charter of luxuries Economic Rights in the Constitution’ (1992) 8 *SAJHR* 464 also see Vienna Declaration and Programme of Action. U.N GAOR, World Conference on Human Rights 48<sup>th</sup> session, 22<sup>nd</sup> plenary meeting part 1,5 U.N Doc. A/CONF.157/24 (1993) reprinted in 32 *I.L.M* 1661 (1993).

<sup>24</sup> Vienna Declaration (note 23 above).

<sup>25</sup> Mubangizi (note 1 above).

<sup>26</sup> Ibid.

<sup>27</sup> L Henkin ‘Human Rights’ in R Bernhardt (ed) *Encyclopedia of International Law* New York: North Holland Publishing Company (1985) 8 268.

<sup>28</sup> A Nasirimovu *Human Rights Education Techniques in Schools* (1994) 24.

environmental infrastructure such as Constitutional supremacy, democracy and the rule of law<sup>29</sup> to enable the rights have a practical or meaningful impact on the beneficiaries. This means that the absence of the said environmental infrastructure would render the rights unjusticiable.

CPRs have dominated the human rights landscape in Kenya since time in memorial. The importance of the inclusion of SERs in the Kenyan Constitution cannot be down played as these rights serve an important role in the creation of an egalitarian society. In the case of *John Kabui Mwai and 3 Others vs Kenya National Examinations Council & Others*, the court stated that the transformative agenda of the Constitution of Kenya is to reconstruct Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources.<sup>30</sup>

In fact Oloka<sup>31</sup> accurately captures the Kenyan context when he states that the arena of human rights discourse and practice in Africa has been dominated by attention to more commonly known CPRs and by contrast economic, social and cultural rights are much less known and only rarely do they form the subject of concerted political action, media campaigns or critical reportage.

Under the repealed 1963 Kenyan Constitution,<sup>32</sup> the BORs generously provided for CPRs. SERs were non-existent. The BORs was retrogressive because it was replete with limitations whose enormity rendered the enjoyment of human rights peripheral, making it a bill of exceptions rather than rights.<sup>33</sup>

The Constitution of Kenya 2010, which was promulgated on the 27<sup>th</sup> of August 2010 provides for SERs;<sup>34</sup> a stark contrast to the repealed Constitution. With the enactment of the 2010 Constitution,

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<sup>29</sup> Mutungi O K “Constitutionalization of Basic Rights” available at [http://www.commonlii.org/cgi\\_bin/dip.pl/ke/other/keckrc/200/4.htm](http://www.commonlii.org/cgi_bin/dip.pl/ke/other/keckrc/200/4.htm) accessed on 22/03/14.

<sup>30</sup> High Court of Kenya at Nairobi Petition No. 15 of 2011 [2011] eKLR. Page 5 para 2. This resonates with Yaccob’s sentiments in regard to the South African Constitution (SAC) where he argues that the inclusion of SERs in the SAC was a result of the effort to fashion the SAC as an effective, powerful reconstructive instrument which will enable South Africans break free from the apartheid era of inequality, exploitation and oppression. See Yaccob, ‘The Entrenchment and Enforcement of Socio- Economic Rights’ (2004) pg. 3 available at <http://housingjustice.ca/wp-content/uploads/2012/03/the-entrenchment-and-enforcement-of-socio-economic-rights.pdf> accessed on 25/03/14.

<sup>31</sup> Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*; J.26 *Cal. W. Int’l L.J. 1 (1995) 1.*

<sup>32</sup> The Constitution of Kenya 1963 Chapter 5 (Bill of Rights).

<sup>33</sup> J Mutakha-Kangu ‘The theory and design of limitation of fundamental rights and freedoms’ (2008) 4/1 *The Law Society of Kenya Journal 1.*

<sup>34</sup> Article 43 of the Constitution of Kenya 2010 provides for;

Kenya came of age in terms of recognising the importance of SERs and their role in democratic governance. SERs are now justiciable and enforceable in Kenya.<sup>35</sup>

Despite the fact that SERs are now justiciable in Kenya, these rights have not been fully embraced as a vehicle for social transformation in Kenya.<sup>36</sup> In the four years that the Kenyan Constitution of 2010 has been in force, there has been poor compliance with the decisions of the Constitutional court in regard to SERs by the executive arm of government. The government has also failed to embrace the importance of Article 43 of the Constitution and has severally stated that SERs cannot be claimed immediately because they are supposed to be realised progressively.<sup>37</sup> This situation calls for a re-evaluation of the enforcement mechanisms put in place by the courts in regard to SERs.

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- a) the right to the highest attainable standard of health, which includes the right to health care services including the reproductive health care.
  - b) the right to accessible and adequate housing and to reasonable standards of sanitation.
  - c) the right to be free from hunger and to have adequate food of acceptable quality.
  - d) the right to clean and safe water in adequate quantities.
  - e) the right to social security; and
  - f) the right to education.

Additionally under Article 43 (2) a person shall not be denied emergency medical treatment while Article 43 (3) obligates the State shall to provide appropriate social security to persons who are unable to support themselves and their dependants.

<sup>35</sup>Article 20 (1) provides that the Bill of Rights applies to all law and binds all State organs and Article 20(3) provides for principles, which ought to guide a court when interpreting rights under Article 43.

<sup>36</sup> See note 30 above.

<sup>37</sup> In the case of *Mitubell Welfare Society vs Attorney General and 2 others* Nairobi High Court Petition No 164 of 2011[2012] eKLR Mumbi Ngugi J. reacting to the Kenyan government's seemingly dismissive approach to social economic rights under Article 43 of the Constitution of Kenya stated that:

‘the argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores that fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be progressive realisation of social economic rights implying that the State must begin to take steps, and I might add, be seen to take steps, towards realisation of these rights’

The State has also raised the argument of ‘progressive realisation of socio – economic rights in the cases of *Satrose Ayuma and Others vs The Registered Trustees Kenya Railways Staff Retirement Benefit Scheme and 3 others*, High Court of Kenya at Nairobi Petition No. 65 of 2010 [2013] eKLR, *Mitubell Welfare Society vs Hon. Attorney General and 2 Others* High Court of Kenya at Nairobi Petition No. 164 of 2011 [2013] eKLR, *Susan Waithera Kariuki & 4 others vs Town Clerk of Nairobi and 3 Others* High Court of Kenya at Nairobi Petition No. 66 of 2010 [2013] eKLR, *Mathew Okwanda vs Minister of Health and Medical Services* High Court of Kenya at Nairobi Petition No. 94 of 2013 [2013] eKLR and *Michael Mutinda Mutemi vs The Permanent Secretary Ministry of Education & Others* High Court of Kenya at Nairobi Petition No. 133 of 2013 [2013] eKLR.

The above state of affairs notwithstanding, SERs have been recognised by Constitutions of various countries of the world.<sup>38</sup> According to Ibe,<sup>39</sup> there are two parallel regimes of SERs in Africa. The first is represented by South Africa specifically makes SERs enforceable in the courts. Kenya also belongs to this first type of regime. Under this regime, individuals and organizations alleging that their rights have been violated may approach the courts to seek redress.<sup>40</sup> The other regime aligns with most of the Western world in the claim that SERs are ‘no more than pious wishes’. Accordingly some States have adopted the Indian styled *fundamental objectives and directive principles of state policy*.<sup>41</sup>

Indeed SERs have been recognised by a number of international and regional human rights documents in the world. The Universal Declaration of Human Rights document (UDHR)<sup>42</sup> recognises the importance and centrality of SERs in the protection, promotion and realisation of human rights in the world.

The African Charter on Human and Peoples Rights (ACHPR)<sup>43</sup> in its preamble recognises that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African People.<sup>44</sup> The Charter further takes cognizance of the fact that CPRs cannot be dissociated from SERs in their conception as well as universality and satisfaction of SERs is a guarantee for the enjoyment of CPRs.<sup>45</sup> In a nutshell, the drafters of the ACHPR argue that all the generations of rights have to be accessed and enjoyed in their entirety by all in a just, equitable and egalitarian society.

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<sup>38</sup> For example the South African Constitution Act No. 108 of 1996, which expressly provides for SERs under section 26 and 27.

<sup>39</sup> Ibe S. ‘Beyond justiciability: Realizing the promise of socio-economic rights in Nigeria’(2007) 7 *African Human Rights Journal* 226. Other countries in the first regime include Kenya (2010), Lesotho (1993), Malawi (1994), Namibia (1990), Sierra Leone (1991), and Tanzania. Countries with declaratory SERs provisions in their constitutions (second regime) are Ethiopia (1996), Ghana (1992) and Uganda (1995).

<sup>40</sup> See Pieterse ‘Coming to terms with Judicial Enforcement of Socio Economic Rights’ 2004 *SAJHR* 383 – 388 where he asserts that in many constitutional democracies, citizens have increasingly turned to courts to protect their rights in the realm of socio-economic interests.

<sup>41</sup> See Ibe (note 39 above).

<sup>42</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>43</sup> African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

<sup>44</sup> See Paragraph 3 of the Preamble.

<sup>45</sup> See Paragraph 8 of the Preamble.

The ICESCR<sup>46</sup> expressly recognises a SERs and underscores the importance of these rights in realising the fundamental objective of the UDHR, that is; free human beings enjoying freedom from fear and want. The Covenant reiterates that this ideal can only be achieved if conditions are created to enable everyone to enjoy their economic, social and cultural rights, as well as their CPRs.

Kenya in general, has a strong record of ratifying major international and regional human rights instruments. It is a party to six of the seven core UN HRs treaties, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>47</sup> Additionally, Kenya is a party to five regional HRs treaties.<sup>48</sup> Article 2(6)<sup>49</sup> of the Constitution of Kenya 2010 changed the Republic of Kenya from a dualist State to a monist State<sup>50</sup> meaning that any international or regional treaty that has been ratified by Kenya automatically applies in the national plane. Kenya does not have to enact local legislation to operationalize an international treaty locally.<sup>51</sup> This therefore means that all SERs contained in the ACHPR and ICESCR are directly enforceable in Kenya.

In light of the foregoing, it is crystal clear that SERs form an intricate part of the HRs paradigm in Kenya thus their relevance and importance cannot be down played.

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<sup>46</sup>International Covenant on Economic, Social and Cultural Rights (note 13 above).

<sup>47</sup>Towards Equality And Anti-Discrimination, *An Overview of International and Domestic Law on Anti-Discrimination in Kenya* Kenya National Human Rights Commission report page 1 available at <http://www.khrc.or.ke> accessed on 20/03/14.

<sup>48</sup> These are; OAU Convention Governing Specific Aspects of Refugee Problems in Africa, African Charter on Human and Peoples Rights, OAU DOC CAB/LEG/67/3, rev 5, 27 June 1981, African Charter on the Rights and Welfare of the Child adopted in July 1990, entered into force on 29<sup>th</sup> November 1999, OAU DOC CAB /LEG 153 /REV 2, Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights OAU DOC OAU /LEG /EXP/AFCHPR/PROT (III), Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa adopted by the second ordinary session of the Assembly of the Union in Maputo on the 11<sup>th</sup> of July 2003 available at <http://www.au.int/en/treaties> accessed on 20/03/14.

<sup>49</sup> Article 2 (5) & (6) provides that ‘The general rules of international law shall form part of the law of Kenya and Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’.

<sup>50</sup> F Viljoen *International human rights law in Africa* (2012) 522; M Killander & H Adjolahoun ‘Introduction’ in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3 11. Dualism envisages the complete separation of national and international legal systems, and that for rules of international law to apply in the national legal system, they must be transformed, through domestication, and thus apply as part of domestic national law and not as international law. Monism, on the other hand, envisages international law and national law as part of one legal system, and that international law is directly incorporated into the national legal system without any difficulty in its application as international law within the domestic legal system. Cited in Orago W.N *The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective* (2013) 13 *African Human Rights Law Journal* 416.

<sup>51</sup> *Ibid* 419.

### 1.3 Aims and Objectives of the Study

As argued above, SERs have been given little if any attention and emphasis in Kenya mainly because this group of rights was not recognised in the bill of rights contained in the 1963 repealed Constitution. The Constitution of Kenya 2010 recognises these rights and opens up a whole world of possibilities in terms of accessibility to and enforcement of SERs in Kenya.

The overall aim of this paper therefore is to discuss the accessibility to and enforcement of SERs in Kenya in light of the Kenyan Constitutional provisions. The paper endeavours to achieve the following objectives;

- a) promote awareness of SERs and their justiciability in Kenya,
- b) analyse the enforcement mechanism of SERs in Kenya,
- c) advance a strong and persuasive case for the requirement of a minimum core of SERs in Kenya,<sup>52</sup> and
- d) recommend that courts should adopt an active supervisory jurisdiction to ensure that their judgments are complied with and implemented by the State.

The South African BORs is quite similar to the Kenyan BORs. At a different chapter in this paper, I shall argue that Article 20(5)<sup>53</sup> in the Constitution of Kenya, which addresses the enforcement of

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<sup>52</sup> The UN Committee on Economic, Social and Cultural Rights General Comment 3 'The nature of State Parties Obligations (1990) Para 10 which states that State parties must ensure at the very least a minimum level of social and economic rights. See also generally Young G.K The Minimum Core of Economic and Social Rights: A Concept in Search of Content, (2008) 33 Journal of International Law 133-174, Bilchitz, D "Towards a reasonable approach to the minimum core: Laying the foundations for future socio economic rights jurisprudence (2003) *South African Journal on Human Rights* 1-23.

<sup>53</sup> Article 20(5) of the Constitution of Kenya provides; In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court tribunal or other authority shall be guided by the following principles-

- a) It is the responsibility of the State to show that the resources are not available;
- b) In allocating resources, the State shall give priority to ensuring that the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- c) The court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.

These guiding principles were largely influenced by the South African Constitutional Court's decision in the case of *Government of the Republic of South Africa vs Grootboom* 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC) where the court engaged in 'priority setting' in regard enforcement of SERs which mirrors Article 20(5) of the Constitution

SERs, borrowed heavily from the jurisprudence of the South African Constitutional Court (SACC). In the circumstances, a comparative analysis of the SAC will be apt in a bid to generate proposals aimed at improving understanding, awareness, accessibility and enforcement of SERs in Kenya.

#### **1.4 The Research Methodology**

The research involves a review of the provisions in the BORs in the Constitution of Kenya, which provide for the enforcement of SERs in Kenya. Regional and international treaties have also been reviewed. The research critically examines awareness, accessibility and enforceability of SERs in Kenya.

Jurisprudential issues and various court decisions are also analysed with a view of making a finding on whether SERs have been fully embraced in Kenya and whether the Kenyan courts have played an effective role in the enforcement of these rights.

The challenges of accessibility and enforcement of SERs in Kenya have also been discussed and recommendations proffered. In depth internet research was carried out, selected works of legal scholars and authorities were also referred to. Judicial discussions touching on SERs from Kenya, South Africa and other relevant jurisdictions have been referred to.

#### **1.5 Limitations Of Study**

Given the historical background of SERs in Kenya, one can argue that this class of rights is fairly novel in Kenya and the Kenyan courts have a long way to go in terms of developing a repository of jurisprudence in this area of rights.<sup>54</sup>

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of Kenya. See generally Roux, T “Understanding Grootboom – A Response to Cass R Sunstein” (2002) *Constitutional Forum* 41- 47.

<sup>54</sup> Mbondenyi and Ambani in M.K Mbondenyi and J.O Ambani *The Constitution of Kenya: Principles, Government and Human Rights Law Africa* (2013) 207 note that it is highly expected that the most contentious issue on the 2010 Constitution’s economic and social rights provisions will be their enforceability.

Article 21 of the Constitution of Kenya provides for progressive realisation of SERs since the realisation of these rights is largely dependent of the decisions of policy makers and not the courts. The courts only assess the reasonableness of these decisions in light of the circumstances surrounding each case.<sup>55</sup> This has formed the basis of the government's default argument that SERs cannot be claimed immediately, an argument that has been trashed by the court on several occasions.<sup>56</sup>

This paper will endeavor to sound the clarion call that;

“Article 43 of the Constitution of Kenya does not sit like a defected football player who has lost a match. It is indeed alive and has started to run towards full realisation as opposed to the slow shuffle in the name of progressive realisation”.<sup>57</sup>

## 1.6 Sequence of Chapters

Chapter one deals with the introduction and a definitional background of HRs and the theory of three generations of rights. It will also cover a background of the research problem and discusses the methodology employed to achieve the intended goal of the study.

Chapter two covers SERs in Kenya focusing on domestic legal provisions, regional and international treaty provisions. Jurisprudence and judicial decisions covering SERs are discussed in a bid to analyse awareness, access and enforceability of these rights.

Chapter three involves a comparative analysis of the Constitutional provisions on SERs in the SAC *vis a vis* the Kenyan Constitution. Relevant case law has been discussed and analysed.

Chapter four focuses on drawing relevant conclusions and provides recommendations on the specific areas of study like adoption of the minimum core of rights and an active supervisory jurisdiction by the Courts.

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<sup>55</sup> See the courts reasoning the case of *Michael Mutinda Mutemi* (note 37 above), where the Petitioner was seeking for an order compelling the State to award his son a full bursary for his high school education. The court held that there was a need for the State to set out clear policies that are indicative of progressive realisation of SERs.

<sup>56</sup> *Michael Mutinda Mutemi* case (note 37 above).

<sup>57</sup> Lenaola J. in the case of *Michael Mutinda Mutemi* page 6 para. 21 Ibid.

## **Chapter 2: Social and Economic Rights in Kenya: Application and Enforcement of Article 43 of the Constitution of Kenya 2010**

### **2.1 Introduction**

SERs in Kenya are justiciable by dint of provisions of Article 43 of the Constitution of Kenya, which works hand in hand with various regional and international HRs treaties that have been ratified by Kenya as discussed herein below. All these laws complement each other in the enforcement of SERs in Kenya.

#### **2.1.1 Regional Treaty Provisions**

Kenya ratified the ACHPR on the 23<sup>rd</sup> of January 1992.<sup>58</sup> The focus of my discourse herein shall be the ACHPR because it is the main normative instrument of the African HRs system.<sup>59</sup>

The charter does expressly guarantee the protection of a number of SERs. Its approach with regard to this category of rights is a marked departure from that of other regional human rights systems because it puts SERs at par with other rights such as CPRs.<sup>60</sup>

Article 15 provides for the right of every individual to work under equitable and satisfactory conditions and receive equal pay for equal work. This provision obligates States to adopt programs and other measures to create job opportunities for every person.<sup>61</sup> However according to Umozurike, the charter does not literally guarantee the right to work for every person because it would have been impossible to actualize this right given the economic situation of most African countries.<sup>62</sup>

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<sup>58</sup> <http://www.achpr.org/instruments/achpr/ratification/> accessed on 18/06/2014.

<sup>59</sup> Mbondenyi (note 12 above) 139.

<sup>60</sup> Ibid 193.

<sup>61</sup> E. Ankumah *The African Commission on Human and People's Rights* The Hague/ London/ Boston: Martinus Nijhoff Publishers (1996) 144.

<sup>62</sup> U O Umozurike ' The African Charter on Human and People's Rights' (1983) 77 *American Journal of International Law* 65.

Article 16 gives every individual the right to enjoy the best attainable state of physical and mental health obligating State parties to take all the necessary steps and measures to protect the health of their people and to ensure that they receive medical attention when they are sick.<sup>63</sup> The measures contemplated in this Article include but are not limited to; elimination of epidemics, availing health services to people through construction of adequate hospitals and health centers, promulgation of appropriate health policies, establishing appropriate legal standards that empower people to demand action against the violation of their right to health and provision of free vaccinations drugs and other healthcare services.<sup>64</sup>

Article 17 (1) provides for the right to education. The African Commission emphasized the importance of this right in the *Free Legal Assistance Group case*<sup>65</sup> where it was stated that closure of universities and secondary schools constituted a violation of Article 17 of the charter.

Article 27 guarantees the right to freely dispose of wealth and natural resources as well as the right to recovery and / or compensation in instances where one is dispossessed of their property. These rights have been regarded as a component of self-determination since the adoption of the UN Resolution on Permanent Sovereignty Over Natural Resources in which the UN General Assembly recognised the right of under developed countries to determine freely the use of their natural resources in order to be in a position to further the realisation of their plans of economic development in accordance with their national interests.<sup>66</sup>

In the case of *Social and Economic Rights Action Centre (SERAC) & Another vs Nigeria*<sup>67</sup> (the *Ogoni case*) the African Commission held that the Nigerian government had violated Article 21 of the charter because the government had given a green light to oil companies to devastatingly

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<sup>63</sup> In the case of *Free Legal Assistance Group, Lawyers' Committee for Human rights, Union Interafricaine des Driots de l'Homme, Les Temoins de Jehova vs Zaire Communications 25/89, 47/90, 56/91 and 100/93, Ninth Activity Report of the African Commission on Human and Peoples' Rights (Annex VIII)* the Commission found that failure by the government of Zaire to provide the complainants with basic services such as safe drinking water and electricity constituted a violation of the right to health. It was also held that the shortage of medicines was a breach of the duty to protect the health of the people under Article 16 of the charter.

<sup>64</sup> Umozurike (note 62 above) 902.

<sup>65</sup> *Free Legal Assistance Group case* (note 63 above).

<sup>66</sup> G.A res. 1803 (XVII), 17 UN GAOR Supp (no: 17) 15, UN Dec. A/5217 (1952) cited in M.K Mbondenyi (note 12 above) 209.

<sup>67</sup> Communication 155/96, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

affect the well-being of the Ogonis; a practice that falls short of the minimum conduct expected of the government.

Article 22 of the charter provides for the right to development, a relatively new right which was pioneered by Keba M'Baye.<sup>68</sup> The UN also confirmed the existence of the right to development.<sup>69</sup> The right includes political, economic, social and cultural processes aimed at the constant improvement of the well-being of all individuals<sup>70</sup> and guarantees all people free participation in the economic, social and cultural processes of their States and the fair distribution of the proceeds.<sup>71</sup> The charter however fails to precisely state the scope of the duty to ensure the exercise of the right to development and how this right can be exercised.<sup>72</sup>

Other regional treaties like the African Charter on the Rights and Welfare of the Child<sup>73</sup> and The Protocol to the ACHPR on the Rights of Women in Africa<sup>74</sup> also contain provisions that touch on SERs with specific application to specific groups of people like women and children.

### 2.1.2 International Treaty Provisions

The ICESCR<sup>75</sup> is the main international HRs treaty that directly provides for SERs. Kenya has ratified the ICESCR.<sup>76</sup> The covenant recognises the indivisibility and interrelated nature of human rights.<sup>77</sup>

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<sup>68</sup> See M'Baye (note 20 above)

<sup>69</sup> Ibid. See also UN Doc. E/CN/4/1334 (1979) para 305.

<sup>70</sup> J Swanson 'The emergence of new rights in the African Charter' (1991) 12 *New York Law School Journal of International & Comparative Law* 317.

<sup>71</sup> Mbondenyi (note 12 above) 212.

<sup>72</sup> Ibid.

<sup>73</sup> Adopted 11<sup>th</sup> July 1990; entered into force 29<sup>th</sup> November 1999. OAU Doc CAB/LEG/249/49 (1990). Right to education Article 11(2)(a)-(h), leisure and recreation Article 11(6), health Article 14, family relationships Articles 18, 19, 20, 24 and 25, protection against harmful social and cultural practices Article 21.

<sup>74</sup> OAU Doc. CAB/LEG/67/3 REV. 5; adopted 27<sup>th</sup> June 1981; entered into force 21<sup>st</sup> October 1986. Right to education and training Article 12(1)(a), work rights Article 13, health and reproductive rights Article 14(1)(a), food security Article 15(a), housing and healthy environment Article 18.

<sup>75</sup> International Covenant on Economic, Social and Cultural Rights (note 13 above).

<sup>76</sup> Kenya ratified the treaty on 1<sup>st</sup> May 1972 available at

[https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtmsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtmsg_no=iv-3&src=treaty) accessed on 18/04/2014.

<sup>77</sup> This is the UN official position (note 23 above).

General comment number 9 of the UN Committee on Economic, Social and Cultural Rights (CESCR) recommends the immediate and direct application of binding international instruments in the domestic legal systems of States so as to enhance the ability of individuals to seek effective, accessible, affordable and timely enforcement of their rights in domestic courts and tribunals.<sup>78</sup> As discussed earlier,<sup>79</sup> international law is now directly applicable in Kenya meaning that the rights provided for in the ICESCR are enforceable in the domestic plane.

Article 6 of the covenant provides for the right to work and Article 7 recognises the right to just and favorable conditions of work. Article 8 recognises the collective form of the right to work by formation of trade unions and the right to strike.

The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.<sup>80</sup>

Article 9 recognises the right to social security including social insurance. The right encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from; lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; unaffordable access to health care and insufficient family support, particularly for children and adult dependents.<sup>81</sup>

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<sup>78</sup> CESCR general comment 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998) para 4 available at <http://www1.umn.edu/humanrts/gencomm/escgencom9.htm> accessed on 20/09/14.

<sup>79</sup> Orago (note 51 above).

<sup>80</sup> CESCR, general comment 18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006) para 4 available at [http://www1.umn.edu/humanrts/gencomm/escgencom18.html#\\_edn1](http://www1.umn.edu/humanrts/gencomm/escgencom18.html#_edn1) accessed on 20/09/14.

<sup>81</sup> CESCR, general comment 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008) available at <http://www1.umn.edu/humanrts/gencomm/escgencom19.html> accessed on 20/09/14.

Article 10 obligates State parties to accord the family the widest possible protection and assistance being the natural and fundamental group unit of society. Special protection should be accorded to mothers, children and young persons.

Article 11 recognises the right to an adequate standard of living for individuals and their families including adequate food, clothing and housing and to the continuous improvement of living conditions. The right to housing has been extensively elaborated by the CESCR vide general comment 4<sup>82</sup> which defines the right to housing and general comment 7<sup>83</sup> which addresses forced evictions in light of the right to housing under the covenant.

The right to housing is defined under general comment 4 broadly as the right to live somewhere in peace and dignity.<sup>84</sup> At the same time the reference in Article 11(1) must be read as referring not to housing but to adequate shelter. Adequate shelter means adequate privacy, space, security, lighting, and ventilation, infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost.<sup>85</sup>

The right to adequate food is an integral component of the right to an adequate standard of living and Article 11 not only incorporates the right to adequate food but also goes further to recognise the fundamental right of everyone to be free from hunger.<sup>86</sup>

The right to health under Article 12 of the ICESCR is defined as a fundamental human right indispensable for the exercise of other human rights. It contains both freedoms and entitlements. Freedoms include the right to control one's health and body and the right to be free from interference. Entitlements include the right to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.<sup>87</sup> Essential elements to the

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<sup>82</sup> CESCR, general comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 available at <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm#one> accessed on 20/09/14.

<sup>83</sup> CESCR, general comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997) available at <http://www1.umn.edu/humanrts/gencomm/escgencom7.htm> accessed on 20/09/14.

<sup>84</sup> General comment 4 (note 82 above).

<sup>85</sup> Ibid.

<sup>86</sup> Article 11 (e).

<sup>87</sup> CESCR, general comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) para 8 available at <http://www1.umn.edu/humanrts/gencomm/escgencom14.htm> accessed on 13/09/14.

right to health, subject to the prevailing conditions of a State party, include; accessibility, availability, acceptability, and quality of health facilities, goods and services.<sup>88</sup>

Article 13 of the ICESCR recognises the right to education. This right must have the following interrelated and essential features; accessibility, acceptability and adaptability.<sup>89</sup> When considering the appropriate application of these features, the best interests of the student shall be a primary consideration.<sup>90</sup> Under the covenant, State parties are generally obligated to ensure that all forms of education at all levels are accessible and available to all persons.<sup>91</sup>

### 2.1.3 Domestic Law

SERs are expressly provided for under Article 43 of the Constitution of Kenya<sup>92</sup> which is the primary document or rule of recognition and enforcement of HRs in Kenya.<sup>93</sup> SERs are also included in group rights enumerated for women; consumers; children, persons with disabilities, youth, older persons, minorities and marginalized groups; and solidarity rights (rights applying to the whole community rather than to an individual).<sup>94</sup> SERs play a paramount role in promoting social justice in Kenya by forging a framework for creation of socio-economic policies of a transformative nature.<sup>95</sup>

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<sup>88</sup> Ibid para 12.

<sup>89</sup> CESCR, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999) at para 6 available at <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> accessed on 13/09/2014.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> See note 34 above for the provisions of Article 43.

<sup>93</sup> According to HLA Hart, every developed legal system has at its foundation, the rule of recognition that is normally used to identify those other rules that are valid as law. Thus to say that a given rule is valid is to recognise it as passing all the tests provided by the rule of recognition. See HLA Hart *The Concept of Law* (1996) 92-93 cited in M.K Mbondenyi and J.O Ambani *The Constitution of Kenya: Principles, Government and Human Rights* (2013) Law Africa 21-23.

<sup>94</sup> Mbondenyi and Ambani *ibid*.

<sup>95</sup> *John Kabui Mwai and 3 Others vs Kenya National Examinations Council & Others* (note 30 above).

## 2.2 Socio-economic Rights Under Article 43 of the Constitution of Kenya: An Analysis of Case Law.

### 2.2.1 The Right to Housing, Shelter and Clean Water Article 43(1)(b).

#### *Satrose Ayuma & 11 others vs The Registered Trustees of Kenya Railways Staff Retirement Benefits Fund Scheme and 3 others.*<sup>96</sup>

In this case the Petitioners sued the Respondents for violating their right to adequate housing and reasonable standards of sanitation. The Petitioners were residents in a housing complex known as Muthurwa Estate owned by the Kenya Railways Corporation and had lived there for more than 50 years. The Respondents issued the residents with a notice to vacate the estate within 90 days and simultaneously disconnected social amenities like water and sanitation. Demolitions also begun before the notice lapsed.

In interpreting the right to adequate housing, the court stated that the said right has been recognised as a fundamental right since the adoption of the UDHR.<sup>97</sup> The right has also been expressly recognised by the other international and regional human rights instruments.<sup>98</sup> The court further observed that by dint of the provisions of Article 43 (1) (b), the right to housing had finally come of age in Kenya<sup>99</sup> and referred to the CESCR general comments No. 4<sup>100</sup> and 7<sup>101</sup> in expounding on the interpretation of the right to adequate housing.<sup>102</sup>

The court stated that under general comment 4, the right to adequate housing should not be interpreted narrowly as a right to basic shelter or roof over one's head but rather as the right to

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<sup>96</sup> *Satrose Ayuma case* (note 37 above).

<sup>97</sup> Article 25 of the UDHR (note 5 above).

<sup>98</sup> Article 11 of ICESCR see note 46 above, Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination (CERD) adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4<sup>th</sup> January 1969, Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the United Nations General Assembly on 18<sup>th</sup> December 1979 and entered into force as an international treaty on 3<sup>rd</sup> September 1981, Article 27 of the Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20<sup>th</sup> November 1989 entry into force 2<sup>nd</sup> September 1990, Article 16 of the ACHPR (note 43 above).

<sup>99</sup> Page 17 paragraph 68.

<sup>100</sup> General Comment No. 4 (note 82 above).

<sup>101</sup> General Comment No. 7 (note 83 above).

<sup>102</sup> Page 17 paragraph 69.

live somewhere in security, peace and dignity.<sup>103</sup> Thus the court agreed with the submissions of the 11<sup>th</sup> Petitioner that human rights are interrelated and indivisible<sup>104</sup> and that the right to housing is linked to the inherent dignity of the human person thus the right to dignity is an interpretive principle to assist the further explication of the catalogues of rights, meaning that all rights have to be seen as best interpreted through the laws of right to dignity.<sup>105</sup>

The court also held that the right to housing should be ensured to all persons irrespective of their income or access to economic resources.<sup>106</sup> The court referred to general comment number 4 in which key features when assessing the adequacy of housing were spelt out.<sup>107</sup>

The Petitioners relied on the South African case of *The Government of South Africa & others vs Grootboom & others*<sup>108</sup> to argue that the State has a Constitutional obligation under Article 43 (1) (b) to ensure that it has a reasonable housing policy, which will guarantee housing for all.<sup>109</sup> The Petitioners also argued that the evictions without prior notice and provision of alternative accommodation was a violation of Article 43 (1) (b) and Article 53 (1) (c) in the context of the rights of children to shelter.<sup>110</sup> They also argued that the State has to ensure that members of families are not separated as a result of evictions.<sup>111</sup>

The court cited with approval the SACC's dictum in the case of *Grootboom*<sup>112</sup> where it expounded the meaning of adequate housing as follows:

“The right delineated in Section 26(1) is a right to 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of sewage and the financing of all of these, including the building of the house

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<sup>103</sup> Page 17 paragraph 70.

<sup>104</sup> Human rights are interrelated (note 23 above).

<sup>105</sup> *Dawood vs Minister for Home Affairs* (2000) (3) S.A 936 (CC) where it was stated that human dignity informs Constitutional adjudication and interpretation of many other rights and also of central significance in the limitation analysis.

<sup>106</sup> Page 17 para. 71.

<sup>107</sup> General Comment No. 4 (note 85 above).

<sup>108</sup> (2000) (11) BCCR 1169.

<sup>109</sup> Page 18 para. 73.

<sup>110</sup> Article 53 (1) (c) provides ‘every child has the right to basic nutrition, shelter and health care.

<sup>111</sup> They relied on the *Ogoni People Case* (note 67 above) available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> accessed on 14/02/2014 and the case of *Occupiers of 51 Olivia Road Berea Township and 197 Main street Johannesburg vs City of Johannesburg case CCT 24/07 (2008) ZACCI*.

<sup>112</sup> Page 18 para. 73.

itself. For a person to have access to adequate housing all of these conditions need to be met [and] there must be land, there must be services, there must be a dwelling. Access to land for the purposes of housing is therefore included in the right of access to adequate housing in Section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.”

The court finally held that the Petitioners right to adequate housing and clean water had been violated primarily because the evictions were carried out without providing the Petitioners with alternative accommodation and without following the U.N guidelines on forced evictions at the very minimum<sup>113</sup> since Kenya did not have any legislation to govern forced evictions.<sup>114</sup> The court also agreed with the holding in South African case of *Occupiers of 51 Olivia Road, Berea Township Case*<sup>115</sup> that mass evictions without a proper plan for resettlement would only result in increased levels of homelessness.

### **2.2.2 Health Rights Article 43(1)(a) and (2)**

#### ***Mathew Okwanda vs The Minister of Health and Medical Services*<sup>116</sup>**

The Petitioner in this case was a 68 year old retired trade unionist who was diagnosed with a life threatening terminal disease known as benign hypertrophy, which required special medical attention particularly in view of his advanced age. He sought an order compelling the State to provide him with specific drugs or in the alternative pay for the cost of his monthly treatment basing his claim on the provisions of Article 43 (1) of the Constitution of Kenya and Article 11 of the ICESCR<sup>117</sup> as read with Articles 2 (5) and (6) of the Constitution of Kenya.

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<sup>113</sup> United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement A/HRC/4/18 available at [http://www2.ohchr.org/english/issues/housing/docs/guidelines\\_en.pdf](http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf)

<sup>114</sup> Page 23 paragraph 92.

<sup>115</sup> *Occupiers of 51 Olivia Road case* (note 111 above).

<sup>116</sup> *Mathew Okwanda case* (note 37 above).

<sup>117</sup> International Covenant on Economic, Social and Cultural Rights (note 13 above).

The court noted that apart from Constitutional provisions, which expressly provide for SERs, Kenya had ratified the ICESCR,<sup>118</sup> UDHR<sup>119</sup> and the ACHPR<sup>120</sup> thus by dint of the provisions of Article 2(b), these treaties and conventions form part of the laws of Kenya.

The court affirmed that the inclusion of SERs in the Constitution sums up the desire of Kenyans to deal with issues of poverty, unemployment, ignorance and disease thus agreeing with the findings of a three judge bench comprising Justices J. Gacheche, G. Dulu and A. Muchelule the *John Kabui Mwai Case*<sup>121</sup> where the court reiterated the Constitution's transformative agenda;

‘to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources’.<sup>122</sup>

The court also referred to general comment No. 14 of the CESCR<sup>123</sup> wherein the right to the highest attainable standard of health was defined as a fundamental human right indispensable for the exercise of other human rights.

The court rejected the Respondent's argument that SERs cannot be claimed immediately because these rights ought to be realised progressively and reiterated Lady Justice Mumbi Ngugi's dictum in the case of *Mitubell Welfare Society*<sup>124</sup> where she stated;

“the argument that SERs cannot be claimed at this point that is, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its Constitutional obligations.”<sup>125</sup>

The court however observed that the State has to manage its limited resources in order to address all claims for SERs and there will be times when this requires it to adopt a holistic approach to the larger needs of the society rather than focus on the specific needs of particular individuals.<sup>126</sup>

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<sup>118</sup> Page 4 at para. 12

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> *John Kabui Mwai case* (note 30) above.

<sup>122</sup> Page 4 para. 13.

<sup>123</sup> Page 4 para. 14. CESCR general comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4) available at <http://www.refworld.org/docid/4538838d0.html> accessed on 18/06/14.

<sup>124</sup> *Mitubell case* (note 37 above).

<sup>125</sup> Page 4-5 para. 15.

This position was also adopted in the *John Mwai case*<sup>127</sup> wherein the court observed that the realisation of SERs means that the realisation of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need.<sup>128</sup> However, one of the limitations to the realisation of this objective is limited financial resources on the part of the government thus the need to focus on a holistic rather than individualistic approach.<sup>129</sup>

The court ultimately held that there was evidence that the government hospitals do provide health care to the Petitioner at a cost. Whether the form of health care provided in these circumstances meets the minimum core obligation or the highest standard was not the subject of evidence or argument before the court. The Petitioner's claim was based on a specific need rather than taking a holistic approach to the issue thus no evidence of a violation of the Petitioner's rights was found.<sup>130</sup>

### 2.2.3 The Right To Education

#### *Michael Mutinda vs Permanent Secretary Ministry of Education & 2 Others*<sup>131</sup>

The Petitioner sued the Respondents seeking an order to compel them to award his son an entire high school bursary.<sup>132</sup> He argued that the high cost of school fees demanded by a public school wherein his son had been granted admission amounted to a violation of his right to education under Article 43 (f) of the Constitution of Kenya because he could not afford to pay the said school fees. He tried to apply for a bursary from the Constituency Development Fund but the kitty only offered a maximum of Kshs 4,000/= which was a paltry sum compared to the Kshs. 50,000/= required for his son's school fees.<sup>133</sup>

The Respondent in demonstrating that it had done everything within its resources to meet its Constitutional obligation under Article 43(f) relied on the case of *Mathew Okwanda vs Minister*

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<sup>126</sup> The court cited with approval the case of *Soobramoney vs Minister of Health Kwazulu-Natal* (CCT32/97) [1997] ZACC 17

<sup>127</sup> *John Kabui Mwai case* (note 30 above).

<sup>128</sup> Page 5 para. 16.

<sup>129</sup> Ibid.

<sup>130</sup> Page 6 para. 21.

<sup>131</sup> *Michael Mutinda case* (note 37 above).

<sup>132</sup> Page 2 para. 8.

<sup>133</sup> Page 2 para. 7.

*for Health*<sup>134</sup> to argue that there are many parents who are struggling to keep their children in school and the Petitioner should not be an exemption since realisation of SERs by the State is subject to the availability of resources at the State's disposal thus the State must adopt a holistic approach rather than an individualistic one in addressing demands that arise out of SERs.<sup>135</sup>

The court in its findings referred to Article 21(2) of the Constitution which provides for progressive realisation of SERs and Article 20 (5) which obligates the State to apply as much practicability as possible in the realisation of these rights and within the available resources and allocation thereof.<sup>136</sup> The court however was quick to agree with the holding of Mumbi J in the *Mitubell Welfare Society Case*<sup>137</sup> where the argument that SERs cannot be demanded immediately on account of "progressive realisation" was rejected by the court.<sup>138</sup>

The court observed that it is therefore fundamental and important that the government demonstrates its political and financial commitment in that regard and the actions taken towards the progressive realisation of the right to education in a holistic manner since its 'free primary school' policy does not cover all levels of education.<sup>139</sup> The court adopted the court's holding in the South African case of *Grootboom*<sup>140</sup> where the court stated that progressive realisation of SERs must be read in light of the overall objective of the ICESCR which is to establish clear obligations for State parties in respect of full realisation of SERs.<sup>141</sup>

According to the court, the following issues ought to be taken into consideration by the Respondents as they formulate policies towards realisation of the right to education under Article 43 (f):<sup>142</sup>

- i. The obligation of progressive realisation exists independently of the increase in resources.<sup>143</sup>

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<sup>134</sup> *Mathew Okwanda case* (note 105 above).

<sup>135</sup> Page 2-3 para. 11

<sup>136</sup> Page 4 para. 15.

<sup>137</sup> *Mitubell case* (note 125 above).

<sup>138</sup> Page 4 paras. 16-17.

<sup>139</sup> Page 4 para. 18.

<sup>140</sup> *Grootboom* (note 108 above).

<sup>141</sup> Page 5 paras. 18-20.

<sup>142</sup> *Ibid.*

<sup>143</sup> Para 23 of the Limburg Principles. In 1986 a group of distinguished international law experts meeting at the university of Limburg Maastricht in the Netherlands developed a set of principles on obligations in relation to economic, social and cultural rights, the Limburg Principles on the implementation of the ICESCR. These principles

- ii. It's no excuse for the State to claim that one socio-economic right is subordinated to another.
- iii. The need to adopt an incremental approach to implementation that is structured and a publicized.

The court also stated that the Respondents can avoid an avalanche of litigation by setting out clear policies that are indicative of progressive realisation of SERs and should start working towards full realisation of these rights. The court referred to the South African case of *Section 27 and 2 others vs Minister of Education*<sup>144</sup> where the court held that failure by the State agents to provide text books to schools in Limpompo was a violation of their right to basic education.

The court observed the question whether the amount that the Petitioner can access through the bursary kitty is reasonable is a question that can only be answered by the policy makers because certain considerations must have been put in place to establish the said criteria. Further, the financial circumstances of the Petitioner depict a typical scenario that majority of Kenyan families go through.<sup>145</sup>

Taking into account the fact that the petitioner's son had already secured a slot in high school and the Petitioner had applied for a bursary through the Ministry of Education and the Constituency Bursary Committee before he moved to court, the court proceeded to dismiss the Petition.<sup>146</sup>

### **2.3 Conclusion:**

It is no longer debatable that SERs are justiciable in Kenya; a significant departure from the pre - 2010 Constitutional dispensation. Kenyan courts have relied heavily on international law, notably; the CESCR general comments, U.N guidelines on forced evictions, the Limburg principles and

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set out views on the implementation of key provisions of the Covenant. They provide comprehensive framework for identifying the legal nature of the norms found in the Covenant and are widely used as a means of interpreting these norms. see Economic, Social and Cultural Rights Hand Book for National Human Rights Institutions, United Nations, New York and Geneva (2005) 7 & 125 available at <http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed on 18/06/14.

<sup>144</sup> (24565 of 2012) [2012] ZAGPPHC 114.

<sup>145</sup> Page 6 para. 23.

<sup>146</sup> Page 6 para. 25.

the ACHPR in interpreting SERs. Jurisprudence from the SACC has also been extensively referred to by Kenyan courts when interpreting these rights owing to the similarity between the SAC and the Kenyan Constitution in regard to SERs. In the proceeding chapter, I shall undertake a comparative analysis between the Kenyan Constitution and SAC in which some of these similarities and differences will be highlighted.

## Chapter 3: Socio-Economic Rights In South Africa: A Comparative Analysis

### 3.1 Introduction

The South African Constitution (SAC)<sup>147</sup> was signed into law on 10<sup>th</sup> December 1996. It has been described as the most sophisticated and comprehensive system of protection of SERs of all Constitutions in the world today.<sup>148</sup> In carrying out a comparative analysis, I will discuss general similarities and differences in the SAC and the Kenyan Constitution after which I shall discuss progressive realisation of rights, limitation and interpretation of rights.

### 3.2 General Similarities and Differences

SERs are expressly provided for under Sections 26, 27 and 29 of the SAC.<sup>149</sup> One notable difference between the SAC and the Kenyan Constitution is the manner of drafting. The SAC divides SERs into three sections, that is; Section 26, 27, and 29. The Kenya Constitution on the other hand groups these rights under one Article (Article 43) under the heading 'economic and social rights'.

The wording used in regard to the right to shelter is quite similar to the Kenyan Constitution. The SAC provides for 'the right to access adequate housing' while the Kenyan Constitution provides for the right to accessible and adequate housing and reasonable standards of sanitation. In as much as the SAC does not refer to sanitation, the Kenya courts have used the South African Constitutional Court's (SACC's) interpretation of the right to housing to interpret the same right because of the similarity in the wording.<sup>150</sup>

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<sup>147</sup> South African Constitution (note 38 above).

<sup>148</sup> D Brand 'Introduction to Socio-economic rights in the South African Constitution' in D Brand & C Heyns in *Socio-economic rights in South Africa* Pretoria University Press, Pretoria (2005) 1.

<sup>149</sup> Section 26 provides for the right to have access to adequate housing and that no one may be evicted from their home or have their home demolished without an order of the court made after considering all the relevant circumstances and legislation that permits arbitrary evictions is prohibited. Under Section 27 everyone has a right to have access to: health care services including reproductive health care, sufficient food and water, social security including, if they are unable to support themselves and their dependants, appropriate social assistance. The State is obligated to take reasonable legislative and other measures to ensure progressive realisation of each of the rights under Sections 26 and 27. Section 27 (3) provides that no one may be refused emergency medical treatment. Section 29 provides for the right to education in a very detailed manner.

<sup>150</sup> *Satrose Ayuma* case (note 96 above) page 18 at para. 74 wherein the court cited with approval the SACC's dictum in the *Grootboom case* (note 108 above) in regard to the meaning of adequate housing.

In regard to health rights the Kenyan Constitution refers to “the highest attainable standard of health” while the SAC merely refers to the right to have access to health care services. By including the words “highest attainable standard of health,” the Kenyan Constitution perhaps attempts to protect Kenyans from being subjected to some basic or rudimentary health care. The Kenyan courts have referred to SACC’s jurisprudence when interpreting health rights.<sup>151</sup>

The SAC provides for the right to have access to sufficient food and water while the Kenyan Constitution splits this right into two sub-Articles and uses slightly different wording. Article 43 (1) (b) provides for the right to be free from hunger and to have adequate food of acceptable quality while Article 43 (1) (c) provides for the right to clean and safe water in adequate quantities.

The Kenyan Constitution is more detailed and generous in its wording and it appears as though the drafters made a deliberate and conscious decision to set minimum standards when it comes to the right to food and water. It is arguable that mere provision of food and water cannot discharge the State from its legal obligations under Article 43 (i) (b) and (c). The food has to be of ‘acceptable quality’ and water has to be ‘clean, safe and of adequate quantity’.

The right to social security under Section 27 (c) in the SAC is quite similar to Article 43 (i) (e) and 43 (3) of the Kenyan Constitution thus their interpretation would not differ. The only difference is in the manner of drafting. In the Kenyan Constitution, the right to social security is split into two sub – articles; Article 43 (i) (e) guarantees social security to any citizen while Article 43 (3) guarantees social security to persons who are unable to support themselves. In the SAC, these two groups are combined and covered under the provisions of Section 27 (c).

The right to education in the Kenyan Constitution is provided for Under Article 43 (1) (f)<sup>152</sup> while the SAC devotes the whole of section 29 to the right to education. One can argue that this is because of the unique history of the South African education system that was closely linked to apartheid and thus there was need to consciously undo the wrongs of the past in keeping with the

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<sup>151</sup> In the *Mathew Okwanda case* (note 116 above) para. 16, while addressing health rights, the court referred to the *Soobramoney case* (note 126 above) when it stated that the State has to adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals within society.

<sup>152</sup> Every person has the right to education.

transformative agenda of the SAC.<sup>153</sup> Kenya did not have a history of an education system that was riddled with inequalities thus its rather undetailed Constitutional provisions in regard to the right to education.

Both the Kenyan Constitution and SAC have the same provisions in regard to the right not to be denied emergency medical treatment<sup>154</sup>. The courts have also interpreted this right in the same way as evidenced in the case of *Mathew Okwanda*<sup>155</sup> wherein, while addressing health rights, the court referred to the *Soobramoney case*<sup>156</sup> when it stated that the State has to adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals within society.

### 3.3 Progressive Realisation

The principle of progressive realisation of SERs is a common feature in both the Kenyan Constitution and SAC. Section 26 (2) and 27 (2) of the SAC obligates the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of SERs. Article 21 (2) of the Constitution of Kenya on the other hand provides that the State shall take legislative, policy and other measures including the setting of standards to achieve the progressive realisation of SERs.

While the SAC uses the word “reasonable legislative and other measures....” The Kenya Constitution is more detailed; it uses the words “legislative, policy and other measures including setting of standards to achieve progressive realisation of SERs”. Progressive realisation of SERs takes cognizance of the fact that not all SERs have to be implemented immediately.<sup>157</sup>

The ICESCR also recognises this principle by requiring States to take steps to ‘the maximum of their available resources with a view to progressively achieving the full realisation of

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<sup>153</sup> See generally *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* (CCT58/00) [2002] ZACC 2.

<sup>154</sup> See article 43(2) of the Constitution of Kenya and section 27(3) SAC.

<sup>155</sup> Note 116 above at para 16.

<sup>156</sup> Note 151 above.

<sup>157</sup> C. Mbazira ‘A path to realizing economic, social and cultural rights in Africa? A critique of New Partnership for Africa’s Development’ (2004) 4 *African Human Rights Journal* 36.

SERs.<sup>158</sup> This principle has its foundation on the argument that realisation of these rights usually requires vast resources for their implementation and more often than not, they will have budgetary implications. Although the CESCR has said that some of the obligations are of immediate effect, this does not necessarily mean that States are compelled to do the impracticable.<sup>159</sup>

In South Africa, the principle of progressive realization was affirmed in the cases of *Soobramoney*<sup>160</sup> and *Grootboom*<sup>161</sup> the SACC stated that SERs cannot be available immediately upon demand since they have to be realised progressively depending on the available resources.

The inclusion of the principle of progressive realisation of SERs in both the Kenyan and SAC was meant to ensure that these rights are enforceable in practice in the sense that the government can be compelled to take practical steps in the form of legislation, policy and setting of standards among others, towards the progressive realisation of SERs.<sup>162</sup>

### 3.4 Limitation

HRs can be limited in two ways: by way of internal limitations assigned to particular rights and through a general limitation clause.<sup>163</sup> The SAC has a central limitation clause<sup>164</sup> with similar provisions to those in Article 24 (1) of the Constitution of Kenya. According to Orago<sup>165</sup> section 36 of the SAC has been subject to a comprehensive judicial and academic interpretation over the years and the jurisprudence emanating from that interpretation can be used to enhance the understanding of limitation in the Kenyan context.

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<sup>158</sup> Article 2 (1) ICESCR.

<sup>159</sup> Mbazira note 157 above. See also General Comment No. 3 (Fifth Session 1990) [UN doc E/1991/23]. The nature of states' obligations available at <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm> (last accessed on 4/09/14).

<sup>160</sup> *Soobramoney case* (note 126 above).

<sup>161</sup> *Grootboom case* (note 108 above).

<sup>162</sup> *Mitubell case* (note 37 above) at para 53.

<sup>163</sup> Mbondenye and Ambani (note 93 above) 228.

<sup>164</sup> Section 36(1) provides: The rights in the BORs may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and less restrictive means to achieve its purpose.

Section 36(2) provides: Except as provided in sub-section (1) or any other provision of the Constitution, no law may limit any right entrenched in the BORs.

<sup>165</sup> N W Orago 'Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution' (2013) LL.D Thesis University of Western Cape 112 available at [http://etd.uwc.ac.za/bitstream/handle/11394/2174/Orago\\_LLD\\_2013.pdf?sequence=1](http://etd.uwc.ac.za/bitstream/handle/11394/2174/Orago_LLD_2013.pdf?sequence=1) (last accessed on 8/07/14)

The SACC has utilized the limitation clause in a two-staged Constitutional analysis,<sup>166</sup> which looks first, at whether there has been a contravention of the guaranteed right and secondly whether the contravention is justified under the limitation clause.<sup>167</sup> The first part of the test entails the responsibility of the Applicant<sup>168</sup> while the second part of the test burdens the person or authority that seeks to limit rights to justify the limitation.<sup>169</sup>

Note worthy is that under Section 36 (1) of the SAC, it is a requirement that for limitation of rights to be legitimate, it has to be entrenched in a law of general application and not on a policy or executive act.<sup>170</sup> The same requirement also applies to Article 24 (1)<sup>171</sup> of the Constitution of Kenya meaning that one can persuasively argue that the limitation clause in the Kenyan Constitution borrowed heavily from the SAC.<sup>172</sup> The limitation clause has not been used in the SACC jurisprudence on SERs as evidenced by the *Grootboom*<sup>173</sup> and *TAC cases*<sup>174</sup> because of the requirement that limitation of rights to be must be contained in a law of general application.<sup>175</sup>

The first part of the limitation analysis involves interpretation and development of the meaning, nature, content and extent of the right in question and the assessment of whether the offending legislation impairs or limits the defined contents of the right.<sup>176</sup>

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<sup>166</sup> Ibid.

<sup>167</sup> *S V. Zuma & Others 1995 (2) SA 642 (CC) at 4.4: S.V Makwanyane & Another (1995 SA 91 (CC) para 100*. See also S Woolman & H Botha 'Limitations' in Woolman *et al* Constitutional Law of South Africa (2<sup>nd</sup> ed) Juta & Co 2 (2009) 34-3 – 34-4.

<sup>168</sup> During this first stage of the two - stage limitation analysis, the SACC has adopted an objective approach of unconstitutionality, which holds that the finding of invalidity is not dependent on the parties before the court (subjective approach). See Woolman & Botha *ibid*.

<sup>169</sup> *Moise vs Transitional Local Council of Greater Germiston 2001 (4) SA 491 CC* para. 19 once limitation is proven, the burden of justification rests on the party seeking to rely on the limitation and the analysis of justification will depend on the balancing of competing interests.

<sup>170</sup> This is to guarantee rights by only giving the legislature power to limit rights see; H Cheadle 'Limitation of rights' in H Cheadle, D M Davis, N Haysom (eds.) *South African Constitutional Law: The Bill of Rights* Butterworths (2002) 30-8, 30-9.

<sup>171</sup> Mbondenyi & Ambani (note 193 above) 230.

<sup>172</sup> Orago (note 165 above). Also Mbondenyi & Ambani *Ibid* argue that the phraseology in Article 24(1) is adopted entirely from Section 36(1) the SAC.

<sup>173</sup> *Grootboom case* (note 108 above).

<sup>174</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) [2002] ZACC 16*.

<sup>175</sup> Currie & J de Waal, *The Bill of Rights Hand book* 5<sup>th</sup> edition (2005) 187 cited in Orago (note 165 above).

<sup>176</sup> Ackermann J in *Ferreira v Levin and 2 others and Vryenhoek & Others VS Powell NO & Others 1996 (1) BCLR 1 (CC)* at paragraph 252 cited in Orago (note 165 above) 112.

The second part of the analysis which emphasizes the proportionality test entails an analysis of the reasonableness and justification of the limitation in the context of a democratic society based on human dignity, equality and freedom using the factors listed in section 36 (1) (similar to Article 24 (1) of the Constitution of Kenya).<sup>177</sup>

According to Cheadle, the second analysis should be an analysis of the propriety and viability of the means used to limit the right<sup>178</sup> which not only calls for the proportionality test after a sufficiently significant objective of the limitation has been established, but also details three important components of the proportionality test which include;

- a) Measures adopted must be carefully designed to achieve the objective in question.
- b) The means should impair as little as possible the right or freedom in question.
- c) There must be proportionality between the effects of the limiting measures and the objective which has been identified as of sufficient importance.

Orago therefore argues that it is important for Kenyan courts to take the above preceding factors into consideration when determining the justifiability of legislation limiting rights.<sup>179</sup>

It is worth noting that the SAC also has internal limitations contained in the rights themselves which includes the right to access adequate housing, the right to access health care services including reproductive health care, the right to sufficient food, water and social security.<sup>180</sup> All these rights are subject to internal limitation; by this limitation, the State is required to take reasonable legislative and other measures within its available resources to achieve progressive realisation of each of these rights.<sup>181</sup>

Limitation of HRs in the Constitution of Kenya is mainly served by one general clause; Article 24(1).<sup>182</sup> This therefore means that SERs are not absolute but may be limited on a case-by-case

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<sup>177</sup> Orago (note 165 above) 113.

<sup>178</sup> Cheadle (note 186 above), he quotes the Canadian case of *R vs Oakes (1986) 26 DLR (4<sup>th</sup>) 200 at 227* cited in Orago *ibid*.

<sup>179</sup> Orago (note 165 above) 114.

<sup>180</sup> C Mbazira Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice Pretoria University Press (PULP) (2009) 3.

<sup>181</sup> *Ibid*.

<sup>182</sup> A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to be extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom taking into account all relevant factors including:-

basis as long as the limitation can pass the requirements of Article 24 (1). According to Mbondenyi and Ambani<sup>183</sup> several issues can be gleaned from the limitation clause;

- a) Limitation can only be by way of law.<sup>184</sup> Limitation by executive or military decree or other extra judicial devices have no place in the new legal dispensation.
- b) Where limitation is sanctioned by law, it has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and subjected to the balancing act in Article 24 (1).
- c) Human rights cannot be limited by inference or implication. Legislation limiting the bill of rights must specifically and expressly state the intention to limit a particular right or fundamental freedom as well as the nature and extent of the limitation in question.<sup>185</sup>
- d) No limitation may go so far as to derogate from the core essential content of the right in question.<sup>186</sup>
- e) The burden of demonstrating before courts, tribunals and other authorities that a limitation meets the above requirements is vested in the State or persons is justifying the limitation<sup>187</sup> and not the individual(s) or group(s) entitled to a particular right.
- f) The limitation clause appreciates that human rights face a global challenge of the ‘margin of appreciation’ when it comes to application of these rights to different categories of persons. The Constitution concedes that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before Kadhis’ courts to persons who profess the Muslim religion in matters relating to personal status, marriage divorce and inheritance.<sup>188</sup>

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- a) The nature of the right or fundamental freedom
  - b) The importance of the purpose of limitation
  - c) The nature of the extent of the limitation
  - d) The need to ensure that enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.
  - e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

<sup>183</sup> Mbondenyi and Ambani (note 93 above) 228.

<sup>184</sup> Article 24(1).

<sup>185</sup> Article 24 (2)(a) – (b).

<sup>186</sup> Article 24 (2)(c).

<sup>187</sup> Article 24 (3).

<sup>188</sup> Article 24 (5).

Mbondenyi and Ambani<sup>189</sup> argue this qualification can be justified because as cultural relativists argue, global human rights standards that are greatly influenced by the new bill of rights often fail to be taken into consideration that each region has its own unique rights problems or priorities. Consequently, regional specificities often are the victims in processes of universal consensus seeking<sup>190</sup> and the provision under investigation could be understood as an effort towards practical cultural equilibrium.

### 3.6 Interpretation of Rights; The Reasonableness Approach

The reasonableness approach as an interpretative tool for the enforcement of SERs has been adopted by the SACC as a standard scrutiny for the positive obligations arising from entrenched SERs.<sup>191</sup> In the *Grootboom case*,<sup>192</sup> the court held that measures aimed at the realisation of SERs must be reasonable, coherent, well-coordinated and comprehensive.<sup>193</sup> It was further emphasized that the court was not bound to inquire whether more desirable or favourable measures could have been adopted by the government or whether public money could have been better spent as the State had a wide variety of options to choose from in implementing its obligations under the Constitution.<sup>194</sup>

In the case of *Lindwe Mazibuko and others vs City of Johannesburg and others*<sup>195</sup> which involved the right to access water under section 27 of the SAC, the SACC employed the reasonableness test where the reasonableness of the city's policy regarding water was questioned. The court noted that a reasonableness challenge requires the government to explain the choices it has made by

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<sup>189</sup> Mbondenyi and Ambani (note 93 above) 231.

<sup>190</sup> F. Viljoen (note 50 above) 531.

<sup>191</sup> D Bilchitz, *Poverty and Fundamental Rights; The justification and enforcement of socio-economic rights* (2007) 142; D Brand 'The Proceduralisation of South African jurisprudence or 'What are socio-economic rights for?' in H. Botha, A Van der Walt (eds.), *Rights and Democracy in a Transformative Constitution* (2003) 33, at 39; C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence (2006) 123 *South African Law Journal* 264 at 265 cited in Orago note 165 above 255. For a more detailed discussion major components of the reasonableness approach see S. Liebenberg 'The implementation of socio-economic rights' in S Woolman *et al* (eds) *Constitutional Law of South Africa* Juta & Co (2<sup>nd</sup> ed) 2 (2009) at 33-34.

<sup>192</sup> *Grootboom case* (note 110 above).

<sup>193</sup> Paragraphs 21 & 34.

<sup>194</sup> Paragraph 41.

<sup>195</sup> [2009] ZACC 28. Similarly in *Johnson Matatoba Nokotyana and others vs Eturheleni Metropolitan Municipality and other* [2009] ZACC 33 the court declined to make a finding on the reasonableness of the municipality's new policy as the policy had fundamentally changed on appeal.

providing the information it has considered and the process it followed to determine its policy.<sup>196</sup> It was held that the city repeatedly reviewed and revised its policies to ensure that they do promote the progressive achievement of the right to access sufficient water.<sup>197</sup>

Article 20 (5) of the Constitution of Kenya provides for principles that would guide a court or tribunal in instances where the State claims that it does not have resources to implement SERs. The principles entail the following;

- a) It is the responsibility of the State to show that resources are not available.
- b) In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances including the vulnerability of particular groups of individuals.
- c) The court or tribunal or other authority may not interfere with the decision of a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion i.e. courts should accord deference to the political institutions in relation to the choice of policies and programmes aimed at the realisation of SERs.<sup>198</sup>

According to Orago, Article 20(5) entrenches the reasonableness test into the Kenyan Constitutional framework.<sup>199</sup> Indeed Kenya's Constitutional court has embraced reasonableness approach and this is evident in its jurisprudence. In the *Mitubell case*<sup>200</sup> and the *Satrose case*<sup>201</sup> the Constitutional court found that the State lacked policies and programmes on provision of shelter and access to housing for marginalized groups such as residents of informal and slum settlements.<sup>202</sup> Further, in the *Satrose case* the court found that failure by the State to engage with and provide alternative accommodation and shelter to persons affected by evictions amounted to a violation of their Constitutional rights. The court directed the State to convene a meeting with the affected persons to design a programme of eviction in compliance with the UN guidelines on evictions.<sup>203</sup>

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<sup>196</sup> Para. 71

<sup>197</sup> Para. 163.

<sup>198</sup> Orago (note 165 above) 247.

<sup>199</sup> Ibid 255.

<sup>200</sup> *Satrose Ayuma case* (note 37 above).

<sup>201</sup> Ibid.

<sup>202</sup> Para. 79 in the *Mitubell case* (note 37 above) and para.111 in *the Satrose case* (Ibid).

<sup>203</sup> *Satrose Ayuma case* (note 37 above) para 111.

### **3.7 Conclusion:**

In light of the foregoing, it is clear that both the SACC and the Kenyan Constitutional court have both embraced the reasonableness approach in interpretation and enforcement of SERs. The SACC's jurisprudence on progressive realization, limitation of SERs and reasonableness approach in interpretation and enforcement of SERs is invaluable in the Kenyan context. The SACC has therefore played a major role in developing the jurisprudence of the Kenyan jurisprudence in regard to enforcement of SERs.

## Chapter 4: General Conclusions and Recommendations

### 4.1 Introduction

In the preceding chapters, I have endeavored to explicate the place of SERs in Kenya and the fact that SERs are now justiciable and rank equal to CPRs. SERs in essence are meant to catalyze social transformation in keeping with the transformative vision of the Constitution of Kenya.<sup>204</sup>

For Kenya to achieve this, I propose the following;

- a) Adoption of a minimum core obligation in regard to the interpretation and enforcement of entrenched SERs.
- b) Courts should exercise supervisory jurisdiction to ensure compliance with their judgments in SERs litigation.

### 4.2 Minimum Core Obligations

The idea of a minimum core rights obligation suggests that there are degrees of fulfillment of a right and that a certain minimum level of fulfillment takes priority over a more extensive realisation of the right.<sup>205</sup> The concept of a minimum core obligation emanates from general comment 3<sup>206</sup> where the CESCR stated that a minimum core obligation to ensure the satisfaction of, at the very least, essential levels of each of the right is incumbent upon every State party. Thus for example, a State party in which a significant number of individuals are deprived of essential primary healthcare, basic shelter and housing, or of the most basic form of education, is *prima facie* failing to discharge its obligations under the covenant. The committee further stated that a reading of the covenant obligations devoid of the minimum core is tantamount to depriving it of its *raison d'être*.<sup>207</sup>

In support of the minimum core obligation, Alston argues that the logical implication of terming SERs as rights is that SERs must give raise to some minimum entitlements, the absence of which

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<sup>204</sup> Orago (note 165 above) 226 – 253. See also the court's dictum in the *John Kabui Mwai Case* (note 30 above).

<sup>205</sup> D Bilchitz (note 52 above) 13.

<sup>206</sup> CESCR general comment 3 (159 above) para. 10

<sup>207</sup> Ibid.

must be considered a violation of the SERs obligation of States.<sup>208</sup> According to Liebenberg, the minimum core calls for prioritization of resource allocation in the realisation of the minimum essential to the most vulnerable in society and also entails a stricter standard of judicial review in relation to the courts enforcement of entrenched SERs.<sup>209</sup> This means that with the adoption of the minimum core obligation, the realisation of SERs by the State becomes a more deliberate undertaking especially in regard to the vulnerable in society.

General comments are authoritative and to a large extent binding because they have been used by the CESCR to interpret the provisions of the ICESCR.<sup>210</sup> Kenya having ratified the ICESCR,<sup>211</sup> has in good faith undertaken to accept the authenticity and legitimacy of the general comments by the CESCR and be bound by the same, or at least be persuaded by the said general comments. The Constitution of Kenya acknowledges that general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya.<sup>212</sup> This Constitutional provision transformed Kenya from a dualist State to a monist State<sup>213</sup> meaning that any international or regional treaty ratified by Kenya automatically applies in the domestic plane. Kenya therefore does not have to enact local legislation to operationalise an international treaty locally<sup>214</sup> meaning that the ICESCR is directly enforceable in Kenya.<sup>215</sup>

Article 20 (2) of the Constitution of Kenya provides for the enjoyment of rights to the greatest extent consistent with the nature of the rights. This is further buttressed by Article 20 (3) (b) which calls for the adoption of an interpretation that most favours the enforcement of rights. For the entrenched SERs to achieve the purpose for which they were intended, in accordance with

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<sup>208</sup> P Alston 'Out of the abyss: The challenges confronting the new United Nations Committee of Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 352-353.

<sup>209</sup> S. Liebenberg socio-economic rights" (2005) 21 *SAJHR* 436 – 472.

<sup>210</sup> See P Alston & G Quinn 'The nature and scope of state parties obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 160-161.

<sup>211</sup> International Covenant on Economic, Social and Cultural Rights (note 46 above).

<sup>212</sup> Article 2 (5) & (6). The SAC does not have a similar provision meaning that the ICESCR is not directly enforceable in South Africa.

<sup>213</sup> Orago (note 50 above).

<sup>214</sup> Ibid (note 51 above).

<sup>215</sup> It is worth noting that the Limburg principles, principle 5, Maastricht Guidelines, guideline 8 (note 143 above) and CESCR general comment 9 paras. 3 & 15 (note 78 above) require States to interpret domestic legal provisions in a manner that gives credence to their international law obligations and discourages reliance on national law to defeat international legal obligations thus the Constitutional provisions on SERs must be interpreted as incorporating the minimum core obligation.

Article (19) (2)<sup>216</sup> of the Constitution, the minimum core obligations envisaged by the entrenched SERs must be upheld.<sup>217</sup>

It is worth noting that the Kenyan courts have not interpreted Article 43 as giving rise to a minimum core obligation in SERs litigation.<sup>218</sup> It is arguable however that the Kenyan courts are aware of the minimum core obligation but have not made a finding on whether the same applies in the Kenyan context. Majanja J. in the *Mathew Okwanda case*<sup>219</sup> stated as follows;

“Whether the form of healthcare provided in these circumstances meets the minimum core obligation or the highest standard is not one that was the subject of evidence before me.”<sup>220</sup>

Majanja J’s dictum above seems to suggest that the Kenyan Constitution supports the argument that Article 43 of the Constitution of Kenya has to be interpreted in tandem with the ICESCR thus giving rise to the minimum core obligation. The reason as to why the court refrained from addressing the minimum core obligation in the *Mathew Okwanda case*<sup>221</sup> is because the minimum core obligation was not one of the issues for determination by the court.

Colombia is an example of one of the countries that have adopted the minimum core obligation. Kenya can borrow invaluable ideas from Columbian jurisprudence. The country has a similar Constitutional provision to Kenya that incorporates international human rights law in ratified treaties into the national jurisdiction as part of national law.<sup>222</sup> The Colombian Constitutional Court’s (CCC) commitment to the minimum core approach has been exemplified by its development of the concept of ‘minimum conditions for dignified life’ a concept constituted from

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<sup>216</sup> The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and realisation of the potential of all human beings.

<sup>217</sup> Orago (note 165 above) 101. The SACC rejected the adoption of the minimum core approach because it was difficult to determine the substantive content of the SERs and how that substantive content would be beneficial to all persons. See the case of *Grootboom* (note 108 above) 32-33.

<sup>218</sup> An analysis of the jurisprudence of the Kenyan Constitutional court shows that the court has not applied the minimum core obligation to SERs and has largely relied on the reasonableness approach as advanced by the SACC. See case law discussion in chapter 2 above.

<sup>219</sup> *Mathew Okwanda case* (note 116 above).

<sup>220</sup> Page 6 para. 21.

<sup>221</sup> *Mathew Okwanda case* (note 116 above).

<sup>222</sup> Chowdhury affirms that the CCC has adopted the minimum core approach as expounded by the CESCRC see J Chowdhury ‘Judicial adherence to minimum core approach to socio-economic rights - a comparative perspective (2009) Cornell Law School Inter University Graduate Student Conference Papers. Paper 27 7-8, available at [http://scholarship.law.cornell.edu/lps\\_clacp/27/](http://scholarship.law.cornell.edu/lps_clacp/27/) accessed on 28/08/14.

the right to life, human dignity, health, work and social security.<sup>223</sup> For instance the CCC has been able to restructure the entire Colombian health system by giving content to the right to health as expounded by the CESCR in general comment 14.<sup>224</sup>

In another case concerning the situation of internally displaced persons (IDPs), the CCC ordered the government to guarantee the protection of the survival level content (essential core) of the most basic rights such as the right to food, education, health care, housing and land within a stringent period of six months from the date of the decision.<sup>225</sup> The adoption of the minimum core led to an improvement in access to education and health care for the IDPs with nearly 80% of them benefiting.<sup>226</sup>

According to Orago, the adoption of the minimum core approach in Kenya necessitates the development of the substantive content of SERs. This however raises another set of questions, which are; how to programmatically determine the substantive content of the rights and how a determination of the substantive contents of SERs will be beneficial to Kenyans especially the poor, vulnerable and marginalized.<sup>227</sup> Orago proposes an adoption of relevant legislative policy and programmatic framework by the State to allow people to meet their basic socio-economic needs using their own resources or provision of the basic socio-economic goods and services to vulnerable groups.<sup>228</sup>

In regard to determining the contents of SERs, Orago argues that the State should use the available international material, for instance, the CESCR general comments to develop the minimum essentials to the entrenched SERs taking into account Kenya's peculiar historical context, priorities and long term objectives.<sup>229</sup> If this process is done in accordance with Article

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<sup>223</sup> M Sepulveda 'The Constitutional Courts role in addressing social injustice' in M Langford (ed) *Social rights jurisprudence: Emerging Trends in International and Comparative Law* Cambridge: Cambridge University Press (2008) 144 – 146.

<sup>224</sup> CCC decision T-760 of 2008 discussed in M.A Olaya 'The right to health as a fundamental and judicially enforceable right in Columbia' (2009) 10 (4) *ESR Review* 16 – 17 available at [http://reference.sabinet.co.za/webx/access/electronic\\_journals/esrrev/esrrev\\_v10\\_n4\\_a6.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/esrrev/esrrev_v10_n4_a6.pdf) accessed on 28/08/14.

<sup>225</sup> Sentence T – 025/04 discussed in C Rodriguez - Garavito 'Beyond the courtroom: The impact of judicial activism on socio-economic rights in Latin America (2010-2011) 89 *Texas Law Review* 1669 available at <http://www.texaslrev.com/wp-content/uploads/Rodriguez-Garavito-89-TLR-1669.pdf> accessed on 28/08/14.

<sup>226</sup> Rodriguez - Gravito Ibid.

<sup>227</sup> Orago (note 165 above) 101.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

10 of the Constitution of Kenya,<sup>230</sup> the State will be able to develop a detailed and comprehensive standard detailing the minimum core content of SERs that is inclusive and that is acceptable to all Kenyans.<sup>231</sup> The State must incorporate the requisite achievable targets, indicators, benchmarks and specific timelines to provide guidance in implementation, monitoring and evaluation of the plan of action as well as enabling the public and other watchdog institutions to monitor progress as part of the process of developing the minimum core content of SERs.<sup>232</sup>

The adoption of the minimum core approach in Kenya will be beneficial to the poor, vulnerable and marginalized individuals, groups and communities because it will breathe life into the abstract constitutional provisions and ensure that the government has clear criteria within which to structure its legislation, policies and programs aimed at implementing the entrenched SERs.<sup>233</sup> This means that the government will continuously work towards meeting its minimum obligations in relation to SERs.

Orago argues that such criteria will involve the development of the content of abstract SERs in the Constitution to ensure that both the citizenry and the government have a clear understanding of the nature, content and extent of the rights provided by the Constitutional provisions and clear understanding of duties imposed on State institutions by the provisions.

### **4.3 Supervisory Jurisdiction**

There is a need to heighten monitoring of implementation of court orders since there is often lack of follow up following successful court action.<sup>234</sup> This therefore requires courts in certain cases to exercise supervisory jurisdiction for purposes of ensuring that their orders are implemented in SERs litigation.<sup>235</sup>

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<sup>230</sup> National values and principles of governance, which include participation of the people Article 10(2) (a).

<sup>231</sup> Orago (note 165 above).

<sup>232</sup> S. Liebenberg 'The interpretation of socio-economic rights in Woolman *et al* Constitutional Law of South Africa (2<sup>nd</sup> Ed) 2 (2009) Juta & Co 33-42.

<sup>233</sup> Orago (note 165 above) 103.

<sup>234</sup> C Mbazira 'You are the "weakest link" in realizing socio economic rights. Goodbye, Strategies for effective implementation of court orders in South Africa' (2008) Community Law Center (University of Western Cape) 37.

<sup>235</sup> M Wesson 'Grootboom and Beyond Reassessing the Socio – economic jurisprudence of the South African Constitutional Court' (2004) SAJHR 306.

For instance in the case of *Michael Mutinda Mutemi*<sup>236</sup> the court directed the State to file affidavits within 30 days from the date of the judgment indicating the measures it has taken upon the receipt of the petitioner's application for bursary for his son's school fees.<sup>237</sup> Almost one year down the road, the State has not complied with this order, which raises a serious concern as to the justiciability of SERs in Kenya.<sup>238</sup> Similarly in the *Satrose Case*<sup>239</sup> the parties were ordered to file an agreed programme of evictions within 90 days from the date of judgment. The State had not complied with the orders of the court more than one year after the date of judgment.<sup>240</sup> Similarly in the *Mitubel Case*<sup>241</sup> the State was ordered to provide by of an affidavit the policies and programmes on provision of shelter and access to housing for marginalized groups such as residents of informal settlements within 60 days from the date of judgment and also engage with the petitioners with a view to resolving their grievances following their eviction.<sup>242</sup> The State to date has not complied with the orders of the court.<sup>243</sup>

The same challenge of non-compliance of court orders in SERs litigation has been experienced in South Africa and is evident in the *Grootboom*<sup>244</sup> and *TAC*<sup>245</sup> cases.<sup>246</sup> According to Pillay, the judgment in *Grootboom* has been interpreted narrowly with the result that there has been little or visible change in the housing policy so as to cater for people who find themselves in desperate and crisis situations.<sup>247</sup> This is fact is apparent in recent cases like *Schubart Park Residents Association and Others vs City of Tshawane and Others*<sup>248</sup> where the Constitutional court reversed an eviction of residents from their homes and the *Johnson Matotoba case*<sup>249</sup> in which the applicants wanted the municipality to install water, sanitation facilities, refuse collection facilities and high mast lighting awaiting a decision on whether the settlement can upgraded to an formal township.

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<sup>236</sup> *Michael Mutemi case* (note 131 above).

<sup>237</sup> Page 7 para. 29.

<sup>238</sup> The judgment in this case was delivered on 6/12/13 and I perused the court file on 27/11/14.

<sup>239</sup> *Satrose Ayuma case* (note 37 above).

<sup>240</sup> The judgment in this case was delivered on 30/08/13 and I perused the court file on 27/11/14.

<sup>241</sup> *Mitubell case* (note 37 above).

<sup>242</sup> Page 17 para. 79

<sup>243</sup> The judgment in this case was delivered on 11/04/13 and I perused the court file on 27/11/14. The State had filed a general document, which enumerated the government's national housing policy with no specific reference to the plight of the Petitioners in this case.

<sup>244</sup> *Grootboom case* (note 108 above).

<sup>245</sup> *TAC case* (note 174 above).

<sup>246</sup> Wesson (note 235 above) 305.

<sup>247</sup> K Pillay 'Implementing Grootboom: Supervision Needed' (2002) 3 *Economic and Social Rights Review* 1-2.

<sup>248</sup> [2012] ZACC 26.

<sup>249</sup> *Johnson Matotoba case* (note 195) above.

It is notable the *Johnson Matotoba case*, the court expressly held that it would not be just and equitable to make an order benefiting only the parties in the suit and not the many others in similar situations.<sup>250</sup> This means that the judgments in SERs cases are meant to have an impact on the government's general housing policy and not restricted to those directly affected by litigation. This impact can only be felt if the government complies and implements court orders.

Wesson asserts that if the court were to exercise supervisory jurisdiction in cases of this nature (*Grootboom* and *TAC*) by asking the State to report back to it at a later stage with an outline of the measures that it regards appropriate, that would then be evaluated by the court, it would be able to ensure that such judgments are given their full effect.<sup>251</sup> He however clarifies that supervisory jurisdiction should not be regarded as an unwarranted assertion of authority on the part of the judiciary but it establishes a relationship of collaboration between the state and the judiciary in terms of which branch of government brings its particular skills to bear on the problems of realizing SERs.<sup>252</sup>

The wider implication of the *Satrose case*<sup>253</sup> was to make the State aware of the fact that it needs to come up with a comprehensive plan to provide shelter and social amenities like water and sanitation to the most vulnerable in society and to enact legislation to govern forced evictions and resettlement. To date, the only trace of such an effort is the Eviction and Resettlement Bill 2012,<sup>254</sup> which has not yet been enacted into law.

The court has to adopt a supervisory role to ensure that its judgments are in fact implemented within a reasonable time by the State or else SERs in Kenya stand the risk of failing to achieve their intended purpose, which is to transform the society from poverty to economic freedom. It would be counterproductive to have successful SERs litigation but fail to implement and enforce the judgments arising therefrom.

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<sup>250</sup> Page 26

<sup>251</sup> Wesson (note 235 above) 307.

<sup>252</sup> Ibid.

<sup>253</sup> *Satrose Ayuma case* (note 96 above).

<sup>254</sup> The bill seeks to provide for laws governing forced evictions in accordance with the United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement. The bill is available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2012/EvictionsandResettleBill2012.pdf> accessed on 30/08/14.

#### **4.4 Conclusion**

The full potential of SERs to catalyze social transformation has not yet been realised in Kenya despite the existence of an elaborate normative framework. The State has not fully grasped the importance of legal obligations arising out of Article 43 of the Constitution of Kenya and continues to hide behind the principle of progressive realisation of rights. The State has also failed to take seriously and / or comply with court orders emanating from SERs litigation. Access, awareness and enforcement of SERs will therefore be greatly improved if the Kenyan courts adopt the minimum core obligation and take up a proactive role in the supervision of their judgments.

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