

**ENHANCING THE REALISATION AND ENFORCEMENT OF SOCIO-ECONOMIC
RIGHTS IN KENYA: THE MINIMUM CORE OBLIGATION AND THE
SUPERVISORY JURISDICTION OF THE COURTS.**

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INTRODUCTION

Since time in memorial, civil and political rights have taken precedence over socio-economic rights in Kenya. The promulgation of the Constitution of Kenya 2010 heralded the emergence of a novel category of justiciable human rights in Kenya known as socio-economic rights. Socio-economic rights are expressly provided for and are enforceable in Kenya by dint of the provisions of Article 43 of the Constitution of Kenya.¹

This paper endeavours to briefly trace the normative background of socio-economic rights in Kenya, analyse their enforcement mechanism and advance a strong and persuasive case for the requirement of a minimum core of socio-economic rights under the provisions of Article 43 of the Constitution of Kenya.² The paper also recommends that courts should adopt a strong

¹ Article 43 of the Constitution of Kenya 2010 provides for;

- 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.

² The UN Committee on Economic, Social and Cultural Rights General Comment number three: 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

supervisory jurisdiction to ensure that their judgments in socio-economic rights litigation are complied with and implemented.

1.1 Human Rights Defined

Defining human rights is not an easy task. Many scholars have attempted to identify and define human rights but it is widely accepted that there is no universal definition of human rights.³ According to Mubangizi there is far from universal agreement on definitional issues, let alone theorizing about the definition of a concept like human rights.⁴ He however defines human rights as those rights that one possesses by virtue of being human; one need not possess any other qualification to enjoy human rights other than the fact that he or she is a human being.⁵

Henkin on the other hand defines human rights as universal rights accruing on all human beings that are fundamental to human existence and can neither be transferred, forfeited, nor waived.⁶

The United Nations (UN) has described human rights 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

approach to the minimum core: Laying the foundations for future socio economic rights jurisprudence (2003) *South African Journal on Human Rights* 1-23.

³ 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.

⁴ 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.

⁵ Mubangizi (Ibid) 94 see also Brendalyn (note 3 above).

⁶ Henkin L *The Age of Rights* (1990) 2 New York: Columbia University Press.

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".⁷

According to the UN definition of human rights, denial of these rights is not only an individual and personal tragedy, but also creates conditions of sound and political unrest, sowing the seeds of violence and conflict within and between societies and nations. The nexus between peace and stability in communities and nations and human rights is further emphasized by the Universal Declaration of Human Rights (UDHR) which states that respect for human rights and human dignity is the foundation of freedom, justice and peace in the world.⁸

Human rights have been referred to by various names, phrases and categorizations; these include fundamental rights or 'common rights'.⁹ 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.¹⁰

⁷ United Nations Department of Public Information, Human Rights, *Questions and answers* (1987) 4 United Nations, New York.

⁸ See the preamble of the Universal Declaration of Human Rights, G.A res 217A (III) U.N Doc A/810 at 71 (1948).

⁹ See generally P.S Jaswal & N. Jaswal, *Human Rights and the Law* 3 APH Publishing Corporation, (1996).

¹⁰ Mubangizi (note 4 above) 94.

1.2 Classification of Human Rights

Human rights have also been categorized into three classes or categories namely; first generation rights, second generation rights and third generation rights.¹¹ First generation rights consist of the traditional civil and political rights which are basically the rights of the individual against the State and they reflect the *laissez –faire* doctrine of non-interference.¹² 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.¹³

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 trade and join unions; the right

¹¹ 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.chrgi.org/publications/docs/wp/Alston%20Spring%202009.pdf> accessed on 12/04/14, see also Jaswal & Jaswal (note 9 above) who categorically state that the modern notion of human rights describes them as ‘three human rights generations ‘ see also Davidson S. Human Rights, London: Oxford University Press (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.

¹² Basu D.D Human Rights in Constitutional Law, Prentice Hall of India (Pvt) Ltd (1994) 82.

¹³ 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, 5th ed) 32.

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.¹⁴

Socio-economic rights 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.¹⁵ 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.¹⁶

Mubangizi¹⁷ argues that second generation rights contain rights founded upon the status of an individual as a member of the society.¹⁸ It has been argued that unlike first generation rights, socio-economic rights 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.¹⁹ 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

¹⁴ Mbondenyi M.K International Human Rights and their Enforcement in Africa, Law Africa Publishing (K) Ltd (2011) 20.

¹⁵ 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.

¹⁶ 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.

¹⁷ Mubangizi (note 4 above) 95.

¹⁸ Basu (note 12 above) 82.

¹⁹ Dlamini (note 11 above) 5.

services.²⁰ 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.²¹

Third generation rights on the other hand belong to a category that is quite recent.²² 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.²³ 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 ‘solidarity rights’.²⁴ Examples of these rights include the right to a clean environment, the right to development and the right to peace.

²⁰ Bandes 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.

²¹ *Ibid.*

²² 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 Vasak 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.

²³ Davidson S. (note 11 above) 43.

²⁴ *Ibid.*

1.3 Indivisibility and Interrelated Nature of Human Rights

The classification of rights into various categories listed above should not be construed in a rigid manner because human rights ‘are universal, interdependent, indivisible and interrelated’.²⁵ One cannot purport to enjoy civil and political rights at the expense or exclusion of socio-economic rights. Human rights must be treated on the same footing and with the same emphasis.²⁶

Mubangizi²⁷ asserts that the principles of universality of human rights are founded on the notion that all human rights apply uniformly and with equal force throughout the world. The principle of interdependence of all human rights 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.²⁸

The nature or category of rights is therefore immaterial since human rights are universal, interdependent, indivisible and interrelated. Human rights have always been those liberties, immunities and benefits which by accepted contemporary values, all human beings are able to

²⁵ 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 accessed on 22/11/14 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 48th session, 22nd plenary meeting part 1,5 U.N Doc. A/CONF.157/24 (1993) reprinted in 32 *I.L.M* 1661 (1993).

²⁶ Vienna Declaration Ibid.

²⁷ Mubangizi (note 4 above).

²⁸ Ibid.

claim ‘as of right’ of the society in which they live.²⁹ They are not privileges granted by the State or society but are ideals and distinguishing marks of a civilized society.³⁰

According to Professor Mutungi,³¹ rights need to be crafted within the right environmental infrastructure such as Constitutional supremacy, democracy and the rule of law 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.

2.0 A HISTORICAL OVERVIEW OF SOCIO-ECONOMIC RIGHTS IN KENYA

As stated earlier, since time in memorial, there has been a lot of emphasis on civil and political rights in Kenya. This can be attributed to the fact that under the repealed 1963 Constitution of Kenya,³² the bill of rights generously provided for civil and political rights. Socio-economic rights were non-existent. Mutakha argues that the said bill of rights 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.³³

²⁹ L Henkin ‘Human Rights’ in R Bernhardt (ed) *Encyclopedia of International Law* New York: North Holland Publishing Company (1985) 8 268.

³⁰ A Nasirimovu *Human Rights Education Techniques in Schools* (1994) 24.

³¹ Mutungi O K “Constitutionalization of Basic Rights” available at http://www.commonlii.org/cgi_bin/dip.pl/ke/other/keckrc/200/4.htm accessed on 22/10/14.

³² The Constitution of Kenya 1963 Chapter 5 (Bill of Rights).

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

In fact Oloka 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 as civil and political rights 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.³⁴

The Constitution of Kenya 2010, which was promulgated on the 27th of August 2010 provides for socio-economic rights; a stark contrast to the repealed Constitution. With the enactment of the 2010 Constitution, Kenya came of age in terms of recognising the importance of socio-economic rights and their role in democratic governance. Article 43 of the Constitution of Kenya provides for the right to the highest attainable standard of health, accessible and adequate housing, sanitation, food, clean and safe water, social security and education. The bill of rights in the Constitution of Kenya applies to all law and binds all State organs meaning that socio-economic rights are now justiciable and enforceable in Kenya.³⁵

The importance of the inclusion of socio-economic rights 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*³⁶

³⁴ 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.

³⁵ 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.

³⁶ High Court of Kenya at Nairobi Petition No. 15 of 2011 [2011] eKLR. Page 5 para 2. This resonates with Yacob's sentiments in regard to the South African Constitution (SAC) where he argues that the inclusion of Socio-

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. Socio-economic rights therefore play a major role in the realization of this transformative agenda.

3.0 ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN KENYA

Despite the fact that socio-economic rights are now justiciable in Kenya, these rights have not been fully embraced as a vehicle for social transformation in Kenya.³⁷ In the four and a half years that the Kenyan Constitution of 2010 has been in force, there has been poor compliance with the decisions of the Constitutional court in socio-economic rights litigation by the executive arm of government. The government has also failed to fully embrace the importance of Article 43 of the Constitution and has severally stated that socio-economic rights cannot be claimed immediately because they are supposed to be realised progressively.³⁸ This situation calls for a

economic rights 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 Yacob, '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 25/11/14.

³⁷ See note 36 above.

³⁸ 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

re-evaluation of the enforcement mechanisms put in place by the courts in regard to socio-economic rights.

It is worth noting that socio-economic rights are not entirely novel. These rights have been recognised by Constitutions of various countries of the world.³⁹ According to Ibe,⁴⁰ there are two parallel regimes of socio-economic rights in Africa. The first is represented by South Africa specifically makes socio-economic rights 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.⁴¹ The other regime aligns with most of the Western world in the claim that socio-economic rights are ‘no more than pious wishes’. Accordingly some States have adopted the Indian styled *fundamental objectives and directive principles of state policy*.⁴²

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.

³⁹ For example the South African Constitution Act No. 108 of 1996, which expressly provides for Socio-economic rights under section 26 and 27.

⁴⁰ 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 Socio-economic rights provisions in their constitutions (second regime) are Ethiopia (1996), Ghana (1992) and Uganda (1995).

⁴¹ 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.

⁴² See Ibe (note 40 above).

3.1 Regional and International Treaties

Socio-economic rights have been recognised by a number of international and regional human rights documents in the world. The following are relevant to the Kenyan scenario.

3.1.1 Universal Declaration of Human Rights

Kenya is a party to the Universal Declaration of Human Rights document (UDHR)⁴³. The UDHR recognises the importance and centrality of socio-economic rights in the protection, promotion and realisation of human rights in the world. The treaty in Articles 22, 23, 24 and 25 recognises socio-economic rights such as the right to food, shelter, clothing, housing, medical care, social services, work and leisure among others.

3.1.2 African Charter on Human and People's Rights

On the regional plane, Kenya is a party to the African Charter on Human and Peoples Rights (ACHPR)⁴⁴ which is the main normative human rights treaty in Africa. The preamble of the Charter recognises that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African People.⁴⁵ The Charter further takes cognizance of the fact that civil and political rights cannot be dissociated from socio-economic rights in their conception as well as universality and satisfaction of socio-economic rights is a guarantee for the enjoyment of civil and political rights.⁴⁶ The drafters of the ACHPR therefore

⁴³ Universal Declaration of Human Rights (note 8 above). Kenya ratified the declaration on 31/07/1990.

⁴⁴ 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. Kenya ratified the treaty on 23/01/1992.

⁴⁵ See Paragraph 3 of the Preamble.

⁴⁶ See Paragraph 8 of the Preamble.

argue that all the generations of rights or classes of rights have to be accessed and enjoyed in their entirety by all in a just, equitable and egalitarian society.

3.1.3 International Covenant on Economic Social and Cultural Rights

Kenya is a party to the International Covenant on Economic Social and Cultural rights (ICESCR)⁴⁷. The Covenant expressly recognises a socio-economic rights 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 civil and political rights.⁴⁸

3.2 Conclusion

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 United Nations human rights treaties, with the exception being the International Convention on the Protection of the Rights of All Migrant

⁴⁷International Covenant on Economic, Social and Cultural Rights (note 15 above). Kenya acceded to the Covenant in May 1972.

⁴⁸ See the paragraph 3 of the preamble.

Workers and Members of Their Families.⁴⁹ Additionally, Kenya is a party to five regional human rights treaties.⁵⁰

Article 2(6)⁵¹ of the Constitution of Kenya 2010 changed the Republic of Kenya from a dualist State to a monist State⁵² 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.⁵³ This therefore means that all socio-

⁴⁹Towards 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 20/11/14.

⁵⁰ 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 29th 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 11th of July 2003 available at <http://www.au.int/en/treaties> accessed on 20/11/14.

⁵¹ 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’.

⁵² F Viljoen International human rights law in Africa (2012) 522; M Killander & H Adjolohoun ‘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.

⁵³ Ibid 419.

economic rights contained in the ACHPR, UDHR and ICESCR are directly enforceable in Kenya.

4.0 CONCLUSIONS AND RECOMMENDATIONS

In the preceding sections, I have endeavored to explicate the place of socio-economic rights in Kenya and the fact that socio-economic rights are now justiciable and rank equal to civil and political rights. Socio-economic rights in essence are meant to catalyze social transformation in keeping with the transformative vision of the Constitution of Kenya.⁵⁴ 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 socio-economic rights.
- b) Exercise of supervisory jurisdiction by courts to ensure compliance with judgments arising out of socio-economic rights litigation.

4.1 Minimum Core Obligation

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.⁵⁵ The concept of a minimum core obligation emanates from general

⁵⁴ 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 226 – 253 available at http://etd.uwc.ac.za/bitstream/handle/11394/2174/Orago_LLD_2013.pdf?sequence=1 (last accessed on 8/11/14). See also the court's dictum in the *John Kabui Mwai Case* (note 36 above).

⁵⁵ D Bilchitz (note 2 above) 13.

comment 3⁵⁶ 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*.⁵⁷

In support of the minimum core obligation, Philip Alston argues that the logical implication of terming socio-economic rights as rights is that socio-economic rights must give rise to some minimum entitlements, the absence of which must be considered a violation of the socio-economic rights obligation of States.⁵⁸ 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 socio-economic rights.⁵⁹ This means that with the adoption of the minimum core obligation, the realisation of socio-economic rights by the State becomes a more deliberate undertaking especially in regard to the vulnerable in society.

⁵⁶ CESCR 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 4/11/14)

⁵⁷ Ibid.

⁵⁸ 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.

⁵⁹ S. Liebenberg "The value of human dignity in interpreting socio-economic rights"(2005) 21 *SAJHR* 436 – 472.

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.⁶⁰ Kenya having ratified the ICESCR,⁶¹ 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.⁶² This Constitutional provision transformed Kenya from a dualist State to a monist State⁶³ 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 locally⁶⁴ meaning that the ICSECR is directly enforceable in Kenya.⁶⁵

⁶⁰ 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.

⁶¹ International Covenant on Economic, Social and Cultural Rights (note 15 above).

⁶² Article 2 (5) & (6). In comparison with South Africa, the minimum core has been rejected by the South African Constitutional court (SACC) because South Africa does not have a similar provision meaning that the ICSECR is not directly enforceable in South Africa. The SACC rejected the adoption of the minimum core approach because it was difficult to determine the substantive content of the socio-economic rights and how that substantive content would be beneficial to all persons. See the case of *The Government of South Africa & others vs Grootboom & others* (2000) (11) BCCR 1169.

⁶³ Orago (note 52 above).

⁶⁴ Ibid.

⁶⁵ 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 Socio-economic rights must be interpreted as incorporating the minimum core obligation.

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 socio-economic rights to achieve the purpose for which they were intended, in accordance with Article (19) (2)⁶⁶ of the Constitution, the minimum core obligations envisaged by the entrenched socio-economic rights must be upheld.⁶⁷

Kenyan courts have not interpreted Article 43 as giving rise to a minimum core obligation in socio-economic rights litigation.⁶⁸ 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*⁶⁹ 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.”⁷⁰

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

⁶⁶ 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.

⁶⁷ Orago (note 54 above) 101.

⁶⁸ An analysis of the jurisprudence of the Kenyan Constitutional court shows that the court has not applied the minimum core obligation to socio-economic rights and has largely relied on the reasonableness approach as advanced by the SACC. See the courts reasoning in the *Satrose case*, *Michael Mutinda Mutemi case* and *Mathew Okwanda case* (note 38 above).

⁶⁹ *Mathew Okwanda case* (note 38 above).

⁷⁰ Page 6 para. 21.

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*⁷¹ is because the minimum core obligation was not one of the issues for determination by the court.

A clear example of the Kenyan government's failure to meet its minimum core obligation under Article 43 of the Constitution of Kenya is the perennial drought problem in the north-eastern region of Kenya. The government is always caught flat-footed every time the rains fail resulting in a famine. One wonders why the government has not been able to come up with lasting solutions to the problem. It is my submission that one of the reasons Kenyans are caught up in this vicious circle is that the courts have not strongly interpreted Article 43 of the Constitution of Kenya as giving rise to the minimum core obligation. The adoption of the minimum core obligation will push the government to cease taking a reactionary stance to adopting a proactive strategy which will result in long-term solutions to the perennial drought problem in the north-eastern region of Kenya.

Colombia is an example of one of the countries that have adopted the minimum core obligation. Kenya can borrow invaluable ideas from Colombian 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.⁷² The Colombian Constitutional

⁷¹ *Mathew Okwanda case* (note 38 above).

⁷² Chowdhury affirms that the CCC has adopted the minimum core approach as expounded by the CESCR see J Chowdhury 'Judicial adherence to minimum core approach to socio-economic rights - a comparative perspective

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 the right to life, human dignity, health, work and social security.⁷³ 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 14.⁷⁴

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.⁷⁵ 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.⁷⁶

(2009) Cornell Law School Inter University Graduate Student Conference Papers. Paper 27 7-8, available at http://scholarship.law.cornell.edu/lps_clacp/27/ accessed on 28/11/14.

⁷³ 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.

⁷⁴ 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 accessed on 28/11/14.

⁷⁵ 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 28/11/14.

⁷⁶ Rodriguez - Gravito Ibid.

According to Orago, the adoption of the minimum core approach in Kenya necessitates the development of the substantive content of socio-economic rights. 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 socio-economic rights will be beneficial to Kenyans especially the poor, vulnerable and marginalized.⁷⁷ Orago proposes the 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.⁷⁸

In regard to determining the contents of Socio-economic rights, 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 socio-economic rights taking into account Kenya's peculiar historical context, priorities and long term objectives.⁷⁹ If this process is done in accordance with Article 10 of the Constitution of Kenya,⁸⁰ the State will be able to develop a detailed and comprehensive standard detailing the minimum core content of socio-economic rights that is inclusive and that is acceptable to all Kenyans.⁸¹

⁷⁷ Orago (note 54 above) 101.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ National values and principles of governance, which include participation of the people Article 10(2) (a).

⁸¹ Orago (note 54 above).

According to Liebenberg, 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 socio-economic rights.⁸²

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 socio-economic rights.⁸³ This means that the government will continuously work towards meeting its minimum obligations in relation to socio-economic rights.

Orago⁸⁴ argues that such criteria will involve the development of the content of abstract socio-economic rights 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.

⁸² S. Liebenberg 'The interpretation of socio-economic rights in Woolman *et al* Constitutional Law of South Africa (2nd Ed) 2 (2009) Juta & Co 33-42.

⁸³ Orago (note 54 above) 103.

⁸⁴ *Ibid.*

4.2 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.⁸⁵ This therefore requires courts in certain cases to exercise supervisory jurisdiction for purposes of ensuring that their orders are implemented in socio-economic rights litigation.⁸⁶

For instance in the case of *Michael Mutinda Mutemi*⁸⁷ 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.⁸⁸ Almost one year down the road, the State has not complied with this order, which raises a serious concern as to the justiciability of socio-economic rights in Kenya.⁸⁹ Similarly in the *Satrose Case*⁹⁰ 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.⁹¹ Similarly in the *Mitubel Case*⁹² 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

⁸⁵ 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.

⁸⁶ M Wesson 'Grootboom and Beyond Reassessing the Socio – economic jurisprudence of the South African Constitutional Court' (2004) SAJHR 306.

⁸⁷ *Michael Mutemi case* (note 38 above).

⁸⁸ Page 7 para. 29.

⁸⁹ The judgment in this case was delivered on 6/12/13 and I perused the court file on 27/11/14.

⁹⁰ *Satrose Ayuma case* (note 38 above).

⁹¹ The judgment in this case was delivered on 30/08/13 and I perused the court file on 27/11/14.

⁹² *Mitubell case* (note 38 above).

also engage with the petitioners with a view to resolving their grievances following their eviction.⁹³ The State to date has not complied with the orders of the court.⁹⁴

The same challenge of non-compliance of court orders in socio-economic rights litigation has been experienced in South Africa and is evident in the *Grootboom*⁹⁵ and *Treatment Action Campaign*⁹⁶ cases.⁹⁷ 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.⁹⁸ This fact is apparent in recent cases like *Schubart Park Residents Association and Others vs City of Tshawane and Others*⁹⁹ where the Constitutional court reversed an eviction of residents from their homes and the *Johnson Matotoba Nokotyana and Others vs Eturheleni Metropolitan Municipality and Others*¹⁰⁰ 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 be upgraded to a formal township.

It is notable that in 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

⁹³ Page 17 para. 79

⁹⁴ 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.

⁹⁵ *Grootboom case* (note 62 above).

⁹⁶ *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16.

⁹⁷ Wesson (note 85 above) 306.

⁹⁸ K Pillay 'Implementing Grootboom: Supervision Needed' (2002) 3 *Economic and Social Rights Review* 1-2.

⁹⁹ [2012] ZACC 26.

¹⁰⁰ CCT 31/09 [2009] ZACC 33.

similar situations.¹⁰¹ This means that the judgments in socio-economic rights 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.¹⁰² 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 socio-economic rights.¹⁰³

In Kenya the wider implication of the *Satrose case*¹⁰⁴ 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

¹⁰¹ Ibid 26.

¹⁰² Wesson (note 85 above) 307.

¹⁰³ Ibid.

¹⁰⁴ *Satrose Ayuma case* (note 38 above).

evictions and resettlement. To date, the only trace of such an effort is the Eviction and Resettlement Bill 2012,¹⁰⁵ 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 socio-economic rights 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 socio-economic rights litigation but fail to implement and enforce the judgments arising therefrom. This means that the entrenched rights will be reduced to pious wishes defeating the whole purpose of incorporating them in the bill of rights in the first place.

4.3 Conclusion

The full potential of socio-economic rights 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 socio-economic rights litigation. Access, awareness and enforcement of socio-economic rights will therefore be greatly improved if the Kenyan courts adopt the minimum core and take up a proactive role in the supervision of their judgments.

¹⁰⁵ 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 30/11/14.

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