

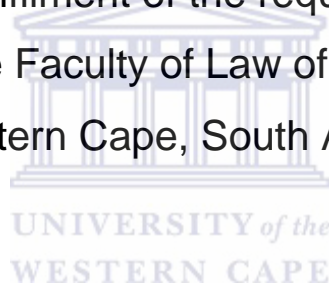
**Poverty, inequality and socio-economic rights: A theoretical
framework for the realisation of socio-economic rights in the
2010 Kenyan Constitution**

By

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Declaration

I, Nicholas Wasonga Orago, declare that *Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution* is my work, and that it has not been submitted for any degree or examination in any other university or institution. All the sources I have used, referred to or quoted have been indicated and duly acknowledged by complete references.

Nicholas Wasonga Orago

Signed:.....

Dated: 16 August 2013



Key words

Poverty and inequality

Social justice

2010 Kenyan Constitution

Justiciability

Purposive interpretation

Socio-economic rights

Progressive realisation

Minimum core content of socio-economic rights

Dialogical constitutionalism

Participation



Abstract

Poverty and inequality are deeply entrenched in Kenya, with the country being one of the most unequal countries in the world. To eradicate poverty and inequality, enhance the achievement of social justice, fast-track human development, as well as to entrench participatory democracy and a culture of justification in governance, Kenya has, for the first time, entrenched justiciable socio-economic rights (SERs) in its 2010 Constitution. In this thesis, I undertake a critical analysis of the prospects for the implementation and enforcement of the entrenched SERs as well as the probable challenges that Kenya may face in their realisation. In this endeavour, the thesis develops a theoretical and interpretive approach for the realisation of these entrenched SERs. It entails an expansive analysis of the nature, scope, content and extent of the SERs entrenched in the 2010 Kenyan Constitution, and especially the place of international human rights obligations contained in customs and ratified international human rights treaties due to the provisions of the 2010 Constitution which espouse the direct application of international law in Kenya's domestic legal system.

It is submitted in this thesis that in order to improve the socio-economic conditions of the poor, vulnerable and marginalised groups in Kenya, there is a need for their socio-economic as well as political empowerment to enable them to effectively take part in societal decision-making in both the public and private spheres with regard to resource (re)distribution. The theory of dialogical constitutionalism, based on the constitutionally entrenched principle of popular participation in governance and public decision-making, is aimed at the realisation of both political and socio-economic empowerment of these groups. Even though the theory of dialogical constitutionalism underscores the importance of litigation in the achievement of the transformative aspirations of the 2010 Kenyan Constitution contained in the entrenched SERs, it acknowledges that litigation is not the panacea of SER enforcement, and that other political and advocacy strategies play an important role in the emancipation of the socio-economically deprived groups in society. The thesis thus advocates a multi-pronged strategy which espouses the equal participation of all sectors of society in a collaborative and cooperative deliberative effort aimed at the full realisation of the entrenched SERs.

To accompany the above theoretical framework for the interpretation and implementation of the entrenched SERs, the thesis further proposes a transformative and integrated approach which combines the progressive aspects of the minimum core approach

and the reasonableness approach. This is an approach of purposive interpretation which, in the first instance, envisages the courts undertaking a strict and searching scrutiny of the SER implementation framework developed by the political institutions of the State to ensure that sufficient provision has been made for the basic necessities of the most poor and vulnerable groups in society, basically the espousal of a minimum core content approach. The approach entails the requirement that should the SER implementation framework fail to provide this basic minimum to vulnerable groups, and the political institutions do not provide a substantive justification as to the failure, then the courts should find the relevant SER implementation framework *per se* unreasonable and thus invalid. However, should the implementation framework provide sufficiently for the basic essentials for vulnerable groups, the courts should then proceed to review it using the reasonableness standards that have been developed by the South African Constitutional Court. The rationale for this searching analysis is the acknowledgement that if the needs and interests of the most indigent and marginalised in society are not catered for, the entire corpus of rights in the Bill of Rights becomes redundant.

The thesis then undertakes a case study of two rights, the right to food and the right to housing, using the theoretical and interpretive approaches developed in the previous chapters of the thesis. On food security, the thesis finds that Kenya is a food insecure country with a declining food production capacity. This is basically due to a lack of subsidy to farmers, global warming leading to intermittent rainfall, lack of investment in sustainable agriculture as well as a fragmented and contradictory legislative and policy agenda. In response to this situation, the thesis proposes the adoption of a livelihoods approach to food security in Kenya, based on the constitutionally entrenched right to food and other supporting rights. This approach advocates the enhancement of the food entitlements of the different sectors of the Kenyan society to ensure their access to adequate and nutritious food, be it through self-production or through the market.

On the right to housing, the thesis finds that housing plays a crucial role in ensuring that people are able to have a holistic, dignified and valuable existence. However, Kenya faces a dire housing situation, with the majority of Kenyans, both in rural and urban areas lacking adequate shelter and sanitary conditions, evidenced by the large informal settlements in urban areas and the squatter phenomenon in rural areas. With the entrenchment of a justiciable right to adequate housing in the 2010 Constitution, the study finds that several legislative and policy reforms are underway to improve the housing situation, with efforts being made to draft the

Landlord and Tenant Bill 2007, the Housing Bill 2011, the Evictions and Resettlement Guidelines and the Evictions and Resettlement Procedures Bill, 2012, among others. The thesis proposes that these legal reforms must be undertaken within an environment of cooperative and collaborative strategic partnership involving all sectors of society so as to ensure that the housing concerns as well as interests of all are catered for.



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First and foremost, I want to thank the almighty father for the gift of life, good health, faith, hope and humility, gifts without which this thesis would have remained a distant pipe dream. Secondly, I would like to acknowledge and appreciate the people who have guided me throughout the life of this thesis, especially my supervisor Professor Jacques de Ville of the University of the Western Cape, and my co-supervisor Professor Frans Viljoen of the University of Pretoria, for their efforts, insights, inspirations and patience in supervising this research. Without their prompt and critical comments to the draft chapters and the many phases of the full thesis draft, this research would not have been what it is now. Many thanks, in this regard, also go to Dr. Yonatan Fessha for his effort to get suitable readers for my thesis chapters presented at the Doctoral Colloquia, readers whose constructive comments have immensely helped improve the quality of this thesis.

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thank you for being the rock of our family and for teaching us the value of hard work and dedication in life. We will always be indebted to you.

All errors and mistakes remain my own.



List of abbreviations

AHRS	-	African Human Rights System
AU	-	African Union
CCC	-	Constitutional Court of Colombia
CEDAW	-	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	-	UN Committee on Economic, Social and Cultural Rights
CIC	-	Commission for the Implementation of the Constitution
COHRE	-	Centre on Housing Rights and Evictions
CPRs	-	Civil and Political Rights
CRC	-	Convention on the Rights of the Child
CRPD	-	Convention on the Rights of Persons with Disability
DFID	-	United Kingdom's Department for International Development
DPMF	-	Development Policy Management Forum
ECOSOC	-	United Nations Economic and Social Council
FAO	-	Food and Agricultural Organisation
GNP	-	Gross National Product
HDI	-	Human Development Index
HRC	-	United Nations Human Rights Committee
ICC	-	International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights

ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ	-	International Court of Justice
ICJ-Kenya	-	International Commission of Jurists, Kenyan Chapter
IDPs	-	Internally displaced persons
IFAD	-	International Fund for Agriculture and Development
ILO	-	International Labour Organisation
IMF	-	International Monetary Fund
KDHS	-	Kenya Demographic and Health Survey
KIHBS	-	Kenya Integrated Household and Budget Survey
KNHREC	-	Kenya National Human Rights and Equality Commission
MDGs	-	Millennium Development Goals
MNCs	-	Multinational Corporations
NER	-	Net Enrolment Rate
OHCHR	-	Office of the High Commissioner for Human Rights
OP-ICESCR	-	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SAC	-	The 1996 South African Constitution
SACC	-	South African Constitutional Court
SERs	-	Socio-economic rights
SID	-	Society for International Development
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations

- UNDP - United Nations Development Programme
- UNGA - United Nations General Assembly
- UNHRP - United Nations Housing Rights Programme
- WTO - World Trade Organisation



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Chapter one: Introduction

1.1 Background to the study

The historical divide between civil and political rights (CPRs) and socio-economic rights (SERs),¹ evidenced by the adoption in 1966 of two different international covenants,² has led to the general neglect of SERs in contradistinction to CPRs,³ with a detrimental effect on the overall realisation of the entire corpus of human rights.⁴ Commenting on the artificiality of the

¹ Even though cultural rights are also contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), this thesis will focus only on economic and social rights. P O'Connell, *Vindicating socio-economic rights: International standards and comparative experiences* (2012) 3-6, defines SERs as the rights concerned with the material bases of the well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for a particular society. They include the right to shelter, food, water, healthcare, education and work. These rights serve two important and related goals: equality of opportunity and social justice. O'Connell further emphasises that although these rights are relevant to all sectors of society, they are more pertinent in the protection of poor, marginalised and disadvantaged groups due to these groups' material deprivation as well as their lack of political voice (at 5).

² The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, GA resolution 2200A (XXI) of 16 December 1966.

³ See for example the Statement to the 1993 Vienna World Conference on Human Rights on behalf of the UN Committee on Economic, Social and Cultural Rights (seventh session; E/1993/22-E/C.12/1992/2, annex III), available at <http://www2.ohchr.org/english/bodies/cescr/statements.htm> (accessed on 26 October 2011) which stated that:

States and the international community as a whole continue to tolerate all too often breaches of [SERs] which, if they occurred in relation to [CPRs] would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action...violations of [CPRs] continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of [SERs] (paras. 5 & 7).

See also AR Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 26-27.

⁴ International Commission of Jurists (ICJ) Report '*Courts and the legal enforcement of economic, social and cultural rights: Comparative experience of justiciability*' (2008) 1, available at <http://www.icj.org/dwn/database/ESCR.pdf> (accessed on 3 March 2011). See also S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 35-36; UO Umozurike *The African*

separation of SERs and CPRs, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that such a divide is arbitrary and is incompatible with the principle that the two sets of human rights are indivisible, interrelated and interdependent.⁵ The CESCR has acknowledged that the division has curtailed the capacity of national courts to enforce SERs, thus leaving the most vulnerable, marginalised and disadvantaged groups in society unprotected.⁶ It has further reminded the international community that the realisation of SERs will not follow automatically from the enforcement of CPRs, but only through the development, implementation and enforcement of specific legislative, policy and programmatic frameworks aimed at the full realisation of SERs.⁷

With the Second International Human Rights Conference in Vienna in 1993⁸ and the adoption of the Vienna Declaration and Programme of Action⁹ emphasising that rights are interdependent, interrelated and interconnected,¹⁰ international consciousness was re-awakened to the importance of the fulfilment of SERs. The Conference recognised the futility inherent in entrenching CPRs without the corresponding SERs, skewing the overall

Charter on Human and Peoples' Rights (1997) 41, who avers that the greatest impediment to the realisation of CPRs is the illiteracy, ignorance and poverty of the populace (resulting from the non-realisation of SERs) which makes them unable to assert their rights and free themselves from exploitative political regimes.

⁵ CESCR, General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 11, available at: <http://www.unhcr.org/refworld/docid/47a7079d6.html> (accessed 2 November 2011). See also C Young, *Constituting economic and social rights* (2012) 5-6.

⁶ As above. See also R Kunnemann 'A coherent approach to human rights' (1995) *Human Rights Quarterly* 323, at 332, who contends that SERs are the only means of self-defence for millions of impoverished and marginalised individuals and groups all over the world.

⁷ CESCR 'Statement to the World Conference on Human Rights on behalf of the Committee, E/1993/22-E/C.12/1992/2, annex III), available at <http://www2.ohchr.org/english/bodies/cescr/statements.htm> (accessed on 18 November 2011).

⁸ Report of the World Conference on Human Rights held in Vienna from 14 to 25 June 1993, A/CONF.157/24, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/A.CONF> (accessed 3 March 2011).

⁹ Vienna Declaration and Programme of Action, A/CONF.157/23 available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en> (accessed on 3 March 2011).

¹⁰ Vienna Declaration and Programme of Action, para 5.

implementation of human rights at the national and international level.¹¹ In the African context, the interrelatedness of rights and the importance of the realisation of SERs were captured in the preamble to the African Charter on Human and Peoples' Rights,¹² and in the incorporation of a catalogue of SERs on the same footing as CPRs,¹³ with the same implementation mechanisms.¹⁴ The renewed emphasis on the importance of SERs in the building of just, free,

¹¹ SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177, at 180.

¹² African Charter on Human and Peoples' Rights (adopted 17 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, preamble para 6 which provides that:

[i]t is henceforth essential to pay a particular attention to the right to development and that [CPRs] cannot be dissociated from [SERs] in their conception as well as universality and that the satisfaction of [SERs] is a guarantee for the enjoyment of [CPRs].

¹³ SERs are entrenched in the following provisions of the African Charter: articles 14 (right to property), 15 (right to work), 16 (right to health), 17 (right to education), 18 (right to the protection of the family, women's and children's rights), 22 (right to economic, social and cultural development), and 24 (right to satisfactory environment). The SERs in the African Charter were further elaborated, with regard to women, in the Protocol to the African Charter on the Rights of Women in Africa, and the SERs contained therein include: articles 12 (right to education and training), 13 (economic and social welfare rights which include employment, equal pay for equal work, freedom of choice in occupation and protection from exploitation, social insurance, minimum age of work and prohibition of exploitation of children), 14 (right to health and reproductive rights), 15 (right to food security encompassing right of access to clean drinking water, sources of domestic fuel, land and other means of food production), 16 (right to adequate housing), 17 (right to a positive cultural context), 18 (right to a healthy and sustainable environment), 19 (right to sustainable development) and 21 (right to inheritance).

¹⁴ See, the African Charter, article 1 which provides that '...parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them'. This obligation applies in relation to both CPRs and SERs, and mandates the African Commission on Human and Peoples' Rights (The African Commission), in accordance with articles 30 and 45 to monitor the implementation of both sets of rights. The African Court on Human and Peoples' Rights, created to complement the protective mandate of the African Commission by the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPRIPROT (III) (entered into force Jan. 25, 2004), also has the jurisdiction to deal with the entire corpus of rights, including the SERs catalogued in the African Charter and the African Women's Protocol. See SA Yeshanew 'Approaches to the justiciability of economic, social and cultural

equal, democratic and stable societies has seen many States in the world,¹⁵ some African States included,¹⁶ taking steps to enhance the realisation of SERs through their entrenchment in constitutions as justiciable rights.¹⁷ The constitutional entrenchment of SERs has ensured the availability of accessible and effective domestic remedies at the national level, especially for countries with a system of constitutional supremacy coupled with the availability of judicial review.¹⁸

On 27 August 2010, Kenya joined the small community of States¹⁹ that have thus far included justiciable SERs in their constitutions.²⁰ This step is in line with General Comment

rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317, at 318ff.

¹⁵ States with justiciable SERs in their constitutions include Germany, Portugal, Spain, and many of the South American States.

¹⁶ Several African countries have entrenched justiciable SERs in their constitutions such as The 1996 South African Constitution, 1980 Egyptian Constitution, the 1990 Constitution of Cape Verde, the 1991 Constitution of Gabon, and the 1990 Constitution of Sao Tome and Principe. For a more elaborate discussion on the SER provisions in African constitutions, see DM Chirwa 'An overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa (2001) 7-10, available at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights>(accessed on 26 October 2011).

¹⁷ See Young – Constituting SERs (n 5 above) 12-13; DA Desierto 'Justiciability of socio-economic rights: Comparative powers, roles, and practices in the Philippines and South Africa' (2009) 23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485555 (accessed on 3 March 2011).

¹⁸ S Liebenberg 'The domestic protection of economic and social rights in domestic legal systems" in A Eide *et al* (eds.) *Economic, social and cultural rights*, 2nd ed, (2001) 55, 57. Kenya is one such country, as the 2010 Constitution provides for the supremacy of the Constitution in article 2 and entrenches judicial review of legislative and executive acts with a plethora of available remedies as provided in article 23(3) of the Constitution.

¹⁹ The three phases leading to the entrenchment of SERs in the 2010 Kenyan Constitution are similar to the situation leading to the entrenchment of SERs in Latin American States' constitutions, and they are: first, transformation from an authoritarian to a relatively democratic political dispensation; secondly, the adoption of the "Washington consensus" which espoused the adoption of neo-liberal market reforms unsympathetic to social services and import restrictions; and thirdly, the incorporation of SERs into new or amended constitutions so as to bridge the gap between the requirements of public participation to enhance democratisation, and the emasculated economic capabilities of the majority of citizens as a result of liberalised markets. See DM Brinks & W Forbath 'Commentary - Social and economic rights in

Number 9 of the CESCR which enshrines the idea that the primary obligation for the protection and realisation of human rights is the duty of States.²¹ The General Comment further calls on domestic legal orders to provide appropriate means of redress and appropriate remedies to aggrieved persons as well as to put in place or enhance accountability systems to ensure that the State's SER obligations are fulfilled.²² This inclusion of SERs in the 2010 Constitution has been greeted by much optimism taking into account the Kenyan situation exemplified by a vast disparity in wealth distribution, socio-economic marginalisation and grinding poverty as discussed in section 1.2 below.²³

The pursuit of sustainable development and the enhancement of democratisation in Kenya are critically interlinked with the need to enhance the realisation of human rights. Due to the interrelatedness and interdependence of rights, for Kenya to achieve the overall realisation of CPRs, which was its major concern and focus in the former constitution,²⁴ it has to build a

Latin America: Constitutional courts and the prospects for pro-poor interventions' (2010-2011) 89 *Texas Law Review* 1943, at 1948.

²⁰ The justiciability of constitutionally entrenched SERs was confirmed by the South African Constitutional Court (SACC) in *re Certification of the Constitution of the Republic of South Africa (First Certification case)* 1996 (10) BCLR 1253 (CC) of 4 December 1996 even though this may have direct financial and budgetary implications, para 78. For an elaborate analysis of the justiciability of SERs both at the national and international level, see M Scheinin 'Justiciability and the indivisibility of human rights' in J Squires, M Langford & B Thiele (eds.), *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 17-20.

²¹ CESCR, General Comment No. 9, paras. 1 & 4.

²² General Comment No. 9, para.2.

²³ See Brinks & Forbath (n 19 above) 1943-1944, who contend, in the context of Latin American Constitutions, that the reason for the inclusion of SERs in the new constitutions was 'to match the democratic promise of participation in public life with a promise of participation in the material opportunities, public goods and social wealth of the State ...[and thus] protect [the poor, marginalised and vulnerable citizens] against the harshness and widening inequalities of market-based political economies'.

²⁴ The Bill of Rights in the 1963 Kenyan Constitution predominantly provided for the protection of CPRs, with the only notable SER provision being the protection of property rights in article 75. This was mainly inserted by the departing colonialists so as to protect their vast properties that had been acquired at the expense of native Kenyans. See O Opiata 'Litigation and housing rights in Kenya' in J Squires, M Langford & B Thiele (eds.), *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 155.

proper and stable governance foundation which depends a great deal on the fulfilment of SERs.²⁵ In entrenching SERs in the 2010 Constitution as justiciable rights, the first steps towards the realisation of this dream of a stable governance foundation have been taken.²⁶ The 2010 Constitution enshrines SERs in the following articles: 21(2),²⁷ 43,²⁸ 53(1)(a)²⁹ and (b)³⁰ and

²⁵ N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 452. He further avers that for a constitution to have a meaningful place in the hearts and minds of citizens, and for it to have lasting resonance among them, it must address their pressing survival needs through the entrenchment of justiciable SERs, at 454.

²⁶ See J Nedelsky & C Scott 'Constitutional dialogue' in J Bakan & D Schneiderman (eds.) *Social justice and the Constitution: Perspectives on a social union for Canada* (1992) 59, at 59-60, who affirm that the entrenchment of SERs is a formal constitutional recognition of the existence of disadvantaged groups in a society, and thus giving their voices and claims a formal priority by acknowledging that marginalisation is caused by structural injustices. It thus provides an opportunity for the use of the language of rights coupled with the structural institutions of power to advance the cause of the vulnerable and marginalised groups.

²⁷ Article 21 deals with the implementation of rights and fundamental freedoms and sub-article 2 requires the State to 'take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43'.

²⁸ Article 43 is entitled "Economic and social rights" and it provides in article 43(1) that 'Every person has the right –

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

Article 43(2) prohibits the denial of emergency medical treatment;

Article 43(3) requires the State to provide social security to persons who are unable to support themselves and their dependants.

²⁹ Every child's right to free and compulsory education.

³⁰ Every child's right to basic nutrition, shelter and healthcare.

they encapsulate the major SERs that have been captured by the constitutions of countries that have entrenched SERs.³¹

The entrenchment of these rights will not, however, lead to the automatic emancipation, empowerment as well as the upliftment of the standards of living of the poor and vulnerable groups in Kenya.³² If the rights are to serve their purpose, a number of pressing questions will have to be addressed, such as: how are these rights to be interpreted? What is the content of each of the entrenched rights and who has the competency to determine that content? What is the nature, scope and extent of these rights and what is the nature, scope and extent of the obligations that they place on the State? How can these rights be implemented in practice so as to enhance the standard of living and the general well-being of the Kenyan people? These issues, as are further extrapolated in the research questions in section 1.3 below, provide the main focus of this thesis.

In interrogating and responding to the above issues, the thesis will thus critically analyse the jurisprudence developed by international and regional human rights mechanisms concerning SERs, and progressive jurisprudence on the implementation and enforcement of SERs at the national level, such as those from South Africa, Colombia and India. The aim of this comparative critical analysis will be to appraise the prospects for the enforcement and the probable challenges for the implementation of these rights in Kenya, taking into account Kenya's historical, institutional, political and economic peculiarities.³³

³¹ See for example the 1996 South African Constitution, Act 108 of 1996 (SAC), sections 26, 27 and 28.

³² The 2010 Kenyan Constitution, article 19(2) provides that the purpose for the realisation and protection of human rights and fundamental freedoms is to preserve the dignity of individuals and communities, as well as to promote social justice and the realisation of the potential of all human beings. See also Kenya National Commission on Human Rights Positional Paper 'Enhancing and operationalising economic, social and cultural rights in the Constitution of Kenya' (2006) paras. 7 & 25, available at <http://www.knchr.org/Portals/0/EcosocReports/PP%20on%20socio-economic%20rights%20-%20final.pdf> (accessed on 15 September 2011) who, in calling for the entrenchment of justiciable SERs in the Constitution, affirm that the aim of these rights are to alleviate poverty and inequality, improve the livelihoods and living conditions of the Kenyan people, enhance social justice as well as to ensure government accountability.

³³ Mark Tushnet, in his exposition of comparative constitutionalism, has expounded contextualism as an important approach emphasising that constitutional law is deeply embedded in the institutional, doctrinal,

1.2 Statement of the problem

1.2.1 Kenya's factual and contextual situation in relation to socio-economic deprivation

Kenya is a country with a high level of inequality, political, economic and social marginalisation, and a massive gap between the rich and the poor, with adverse consequences for human development.³⁴ The poverty³⁵ level is among one of the world's highest with a population of approximately 46-56 per cent living below the poverty line,³⁶ showing very little improvement

social and cultural contexts of each nation and context must thus be appreciated when undertaking comparative constitutional analysis, M Tushnet *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2008) 10-15.

³⁴ According to the United Nations Development Programme (UNDP), human development entails the enlargement of people's choices through the creation of an enabling environment for the enjoyment of long, healthy and creative lives; receipt of quality education; and the enjoyment of decent standards of living, political freedoms, guaranteed human rights and self-respect. UNDP emphasises that for the above to be achieved, there must be an equality of opportunity for all people in society, as people are both the beneficiaries and agents of development. See S Alkire 'UNDP Human development research paper 2010/01 – Human development: definitions, critiques and related concepts' (June 2010) 4ff, available at http://hdr.undp.org/en/reports/global/hdr2010/papers/HDRP_2010_01.pdf (accessed on 7 November 2011).

³⁵ Poverty is defined by the CESCR Statement 'Poverty and the International Covenant on Economic, Social and Cultural Rights, 10/05/2001. E/C.12/2001/10' (May 2001) para. 8, available at http://www.acpp.org/RBAVer1_0/archives/CESCR%20Statement%20on%20Poverty.htm (accessed on 13 November 2011) as 'a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'. Poverty, as a multi-dimensional phenomenon, should be understood in terms of the qualitative approach that views it (poverty) not only in terms of household income and consumption (quantitative approach) but holistically to capture the processes and interactions between social, political, cultural and economic factors. Such factors include vulnerability, isolation, powerlessness, survival, personal dignity, security, self-respect, basic needs and ownership of assets. See S Carvahlo & H White 'Combining the qualitative and the quantitative approaches to poverty measurement and analysis: The practice and the potential' World Bank Technical Paper No. 366 (1997) 7, available at <http://elibrary.worldbank.org> (accessed on 4 November 2011).

³⁶ Government of Kenya 'Poverty reduction strategy paper: First medium term plan 2008-2012' submitted to the International Monetary Fund (IMF) at ii, available at <http://www.imf.org/external/pubs/ft/scr/2010/cr10224.pdf> (accessed on 8 June 2011). However, many

from the officially estimated poverty rate of 48 per cent in 1981.³⁷ According to data from the International Fund for Agriculture and Development (IFAD), the overall poverty levels are increasing rather than reducing, with estimates that since the post-election crisis of 2008, the poverty headcount has increased by 22 per cent and the measure of severe poverty has gone up by a startling 38 per cent.³⁸ The United Nations Development Programme (UNDP)'s Human Development Index (which measures development in terms of life expectancy, educational attainment and standards of living) ranks Kenya as a low income country at position 143 among the 187 ranked countries in 2011³⁹ showing almost negligible improvement as compared to its ranking in position 128 among the 169 ranked countries in 2010.⁴⁰

commentators have argued that the actual percentage of people living below the poverty line is higher than the government estimates, with the percentage placed at between 56-65 per cent and rising. See Foundation for Sustainable Development 'Kenya: A development overview' para. 4, available at <http://www.fsdinternational.org/country/kenya/devissues> (accessed on 8 June 2011); J Kiringai *et al.* 'Feminisation of poverty in Kenya: Is fiscal policy the panacea or achilles' heel?' A paper presented during the 5th PEP Research Network General Meeting held on 18-22, 2006 at Addis Ababa, Ethiopia, available at http://www.pep.net.org/fileadmin/medias/pdf/files_events/5th_ethiopia/Kiringai.pdf (accessed on 8 June 2011).

³⁷ See The World Bank Poverty Reduction and Economic Management Unit Africa Region Report 'Kenya poverty and inequality assessment: Executive summary and synthesis report' (June 2008) 3, available at http://marsgroupkenya.org/pdfs/2011/01/AID_EFFECTIVENESS/Documents/Donor_works/Executive_Summary-KPIA_Report.pdf (accessed on 6 November 2011).

³⁸ See, International Fund for Agriculture and Development (IFAD) 'Kenya: Programme for rural outreach of financial innovations and technologies (PROFIT) programme design document – Main Report – Volume 1' (May 2010) 5, available at <http://www.ifad.org/operations/projects/design/100/kenya.pdf> (accessed on 8 November 2011).

³⁹ United Nations Development Programme (UNDP) Human Development Report 2011 'Sustainability and equity: A better future for all' (2011) 126, available at <http://hdr.undp.org/en/reports/global/hdr2011/> (accessed on 3 November 2011). According to the rankings, the country in the first position has the overall best human development record and that in the last position has the poorest human development record.

⁴⁰ United Nations Development Programme (UNDP) 'International human development indicators-Kenya' available at <http://hdrstats.undp.org/en/countries/profiles/KEN.html> (accessed on 9 June 2011). In accordance with the explanatory notes on the 2011 HDI for Kenya, UNDP contends that the ranking for Kenya in the 2010 HDI, based on the data available and methods used in 2011 is 144 out of 187

Poverty in Kenya has a political and regional tilt, with statistical figures indicating that regions that have traditionally benefitted from ruling elite practices continue to be characterised by the lowest levels of poverty. A Report by the Development Policy Management Forum (DPMF), relying on data emanating from a report by the Central Bureau of Statistics (Geographic Dimensions of Wellbeing in Kenya: Who are the poor (2007)), shows the level of poverty as being 65 per cent in Nyanza, 64 per cent in North Eastern, 61 per cent in Western, 58 per cent in Eastern, 57.6 per cent in Coast, 45 per cent in Rift Valley, 44 per cent in Nairobi, and 31 per cent in Central.⁴¹ Regional disparities are further indicated by a look at the poverty levels in the different counties, with the richest county, Kajiado (according to the government statistic) having a relatively impressive poverty rate of only 12.1 per cent while the poorest county, Turkana has a depressing poverty rate of 92.9 per cent.⁴²

Poverty and socio-economic marginalisation has been exacerbated in the recent past by the explosion of ethnic violence following the bungling of the 2007 presidential elections;⁴³ rampant and runaway corruption that has debilitated government's resource capacity to provide basic services; climate change which has led to increased drought, crop failure and an

countries, an improvement by only one. See UNDP Human Development Report 2011 "Sustainability and equity: A better future for all - Explanatory note on 2011 HDR composite indices, Kenya' 2 available at <http://hdrstats.undp.org/images/explanations/KEN.pdf> (accessed on 4 November 2011).

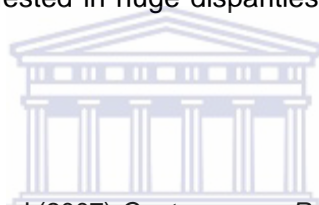
⁴¹ L Keriga and A Bujra (Development Management Policy Forum (DPMF) Report) 'Social policy, development and governance in Kenya: An evaluation and profile of education in Kenya' (March 2009) 7, available at <http://www.dpmf.org/dpmf/downloads/Evaluation%20&%20Profile%20of%20Education.pdf> (accessed on 9 November 2011).

⁴² Kenya Open Data 'County poverty rates' available at <http://opendata.go.ke/Counties/County-Poverty-Rates/rfxq-gvgu> (accessed on 10 November 2011).

⁴³ The Committee on the Convention on Elimination of all Forms of Racial Discrimination (CERD Committee) has noted that ethnic tensions and continued ethnic violence is due to the failure by the State to address ethnic and regional disparities in the enjoyment of economic and social rights leading to resentment. The Committee has thus urged the State to enhance resource allocation to address disparities in access to socio-economic goods and services, especially in the historically marginalized areas and communities. This should be aimed at the reduction of inequality through employment and education, and this effort should be anchored in the State's poverty reduction policies and strategies. See, CERD Committee 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Kenya, CERD/C/KEN/CO/1-4, September 2011, para. 23, available at <http://www2.ohchr.org/english/bodies/cerd/cerds79.htm> (accessed on 26 February 2012).

exponential increase in the prices of basic commodities,⁴⁴ international forces of globalisation; skewed international trade, and the international economic downturn of 2008-2009.⁴⁵

Despite substantial economic growth levels in the recent past,⁴⁶ inequality⁴⁷ is still highly entrenched in the Kenyan political, economic, social and cultural spheres, with Kenya ranking among the most unequal countries in the world.⁴⁸ An exacerbation of the inequality situation is further evidenced by an assessment by the United Kingdom's Department for International Development (DFID) which indicates that in the period between 2009-2010, inequality had increased in Kenya by 20 per cent.⁴⁹ Inequality and deep human development disparities in Kenya exists between rich and poor people, men and women, rural and urban areas, uptown and informal settlements, and between different regions and groups. The high inequality is intricately linked to the skewed distribution of State resources among the different geographical areas and the different communities in Kenya, leading to increased exclusion and marginalisation. Inequality is manifested in huge disparities in income, lack of equal access to



⁴⁴ See M Barasa 'Rural poverty in Kenya' (2007) *Contemporary Review* 294.

⁴⁵ CS Adam *et al*, *Kenya: Policies for prosperity* (2010) 1.

⁴⁶ UNDP Indicators show that Kenya's Gross National Income (GNI) per capita increased by about 11 per cent between 1980 and 2011, see UNDP HDR 2011 - Explanatory note on 2011 HDR composite indices, Kenya (n 40 above) 2.

⁴⁷ According to the Society for International Development (SID) 'Pulling apart: Facts and figures on inequality in Kenya', popular version (2004) 1 available at <http://www.sidint.net/docs/pullingapart-mini.pdf> (accessed on 4 November 2011), inequality is:

[t]he degree to which distribution of economic welfare generated in an economy differs from that of equal shares among its inhabitants... It is observed not only in incomes but also in terms of social exclusion and the inability to access social services and socio-political rights by different population groups, genders and even races.

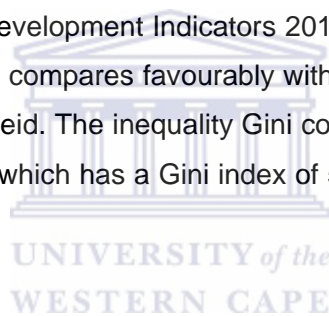
⁴⁸ Egerton University, Tegemeo Institute Agricultural Policy and Development 'Rural incomes, inequality and poverty dynamics in Kenya' (2009) 2, available at <http://www.tegemeo.org/documents/work/Tegemeo-WP30-Rural-incomes-inequality-poverty-dynamics-Kenya.pdf> (accessed on 11 November 2011).

⁴⁹ See DFID 'Kenya-Key facts' available at <http://www.dfid.gov.uk/Where-we-work/Africa-Eastern--Southern/Kenya1/Key-facts1/> (accessed on 7 November 2011).

productive assets, social and political exclusion, and the inability of certain groups in society to access key social services.⁵⁰

A study by the Society for International Development (SID) paints a grim picture of inequality in Kenya. The study shows that Kenya's top 10 per cent households control 42 per cent of the total income while the bottom 10 per cent control less than 1 per cent of the income; the difference in life expectancy between two regions of the State (formerly Central and Nyanza provinces) is a glaring 16 years.⁵¹ The high level of income inequality in Kenya is also confirmed by the Development Policy Management Forum (DPMF) who contend that of the 14 per cent wage earners in Kenya, 0-90 per cent of them earn Kshs. 15, 000 (approximately 179 US dollars) or less, 91-99 per cent (the middle income 9 per cent) earn between Kshs. 15, 000 to 100, 000 (approximately 1136 US dollars), and the elite 1 per cent (99-100) earn above Kshs. 100, 000.⁵²

The World Bank's World Development Indicators 2011 indicates that inequality in Kenya is so high that in the region, it only compares favourably with that in South Africa, a country that had suffered many years of apartheid. The inequality Gini coefficient index⁵³ for Kenya is 48 per cent as compared to South Africa which has a Gini index of 57.8 per cent, Tanzania at 37.6 per



⁵⁰ Egerton University, Tegemeo Institute Agricultural Policy and Development (n 48 above) 4.

⁵¹ SID Report (n 47 above) v & 3.

⁵² Development Policy Management Forum (DPMF) 'A brief general overview of inequality in Kenya' para 2, available at <http://www.dpmf.org/dpmf/index.php> (accessed on 9 November 2011).

⁵³ The Gini coefficient varies from a range of zero (0) to 1 with zero indicating perfect equality between households, while the value of 1 indicates perfect inequality. The Gini coefficient of most African countries range from about 0.40 to 0.50, while most developed countries have a Gini ranging from 0.20 to 0.30, indicating that developed countries have less inequality than developing countries. See Egerton University, Tegemeo Institute Agricultural Policy and Development (n 48 above) 8. Oxfam GB indicates that the Gini coefficient for the rural areas in Kenya is 0.38 while that of Nairobi is a staggering 0.59, indicating similar inequality levels to those in Johannesburg (South Africa) in the mid-1990s, see Oxfam Great Britain (GB) 'Urban poverty and vulnerability in Kenya: Background analysis for the preparation of an Oxfam GB urban programme focused on Nairobi' (September 2009) 3, available at http://www.irinnews.org/pdf/Urban_Poverty_and_Vulnerability_in_Kenya.pdf (accessed on 13 November 2011).

cent and Ethiopia at 29.8 per cent.⁵⁴ The above dire inequality indicators are confirmed by the World Bank Poverty and Inequality Assessment Report which indicates that the ratio of consumption between the top and bottom 10 per cent of the Kenyan population stood at 20:1 in the urban areas, and 12:1 in rural areas. This compares adversely to the ratio of consumption in Tanzania which stood at 5:1 and that in Ethiopia which stood at 3.3:1.⁵⁵

The lie in improved economic growth indicators in Kenya *vis-à-vis* the overall well-being of the people is brutally exposed by the UNDP Inequality Adjusted Human Development Index. Even though Kenya ranks 143 out of the 187 ranked countries with an HDI index of 0.509, a discounting of that value for inequality using the Inequality Adjusted HDI brings the index down to 0.338, a loss of 33.6 per cent, a loss higher than the average 33.3 per cent for low HDI countries.⁵⁶

Gender inequality is deeply entrenched in Kenya's social, economic and cultural spheres. Poverty and socio-economic deprivation is feminised in Kenya, both at the household, sectoral, occupational and locational levels. Women are heavily marginalised in relation to ownership of land and available data indicates that only 1 per cent of land titles in Kenya are held by women while 5-6 per cent is jointly held,⁵⁷ denying women the means of production and collateral in accessing credit. This situation is made worse by the fact that women are disproportionately discriminated against when it comes to access to formal employment. Statistical data indicates that women are five times more likely to be unemployed than men, with an Oxfam GB Assessment, relying on a 2006 World Bank Study, indicating that the unemployment rate is 48 per cent for women as compared to 10 per cent for men.⁵⁸ Even though Kenya has a high literacy level at 71.4 per cent, the gender literacy difference at the

⁵⁴ The World Bank 'World Development Indicators 2011' (April 2011) 67-70, available at <http://elibrary.worldbank.org/> (accessed 9 November 2011).

⁵⁵ See the World Bank Poverty Reduction and Economic Management Unit Africa Region Report (n 37 above) 3.

⁵⁶ UNDP HDR 2011 - Explanatory note on 2011 HDR composite indices, Kenya (n 40 above) 4.

⁵⁷ Institute of Economic Affairs 'Profile of women's socio-economic status in Kenya' June 2008, available at <http://www.ieakenya.or.ke/documents/Profiling%20Women%20in%20Kenya.pdf>, (accessed on 9 June 2011) 42.

⁵⁸ Oxfam Great Britain (GB) 'Urban poverty and vulnerability in Kenya (n 53 above) 12.

national level is 10.8 per cent with the least urbanised regions such as Coast and North Eastern recording gender literacy difference of 20.8 per cent and 25.9 per cent respectively.⁵⁹

With regard to primary, secondary and tertiary enrolment, even though an almost equal number of boys and girls enrol at primary school with boys at 119.0 per cent of the Net Enrolment Rate (NER)⁶⁰ and girls at 114.8 per cent of the NER, retention of girls in secondary and tertiary institutions is poor with girls only forming 37.5 per cent of the NER as compared to 42.2 per cent of the NER for boys at the secondary level, and 9.3 per cent of the NER as compared to boys' 10.4 per cent of the NER at the tertiary level.⁶¹ On life expectancy, even though it is almost the same for male and female through most of the age groups, in the age groups between 20-24 and 25-29 there is a higher mortality rate for women than men and this is related to issues of child bearing, lack of access to adequate healthcare, especially reproductive healthcare and lack of control over their sexuality, leading to uncontrolled childbearing.⁶² There is a high dependency ratio in Kenya at 45 per cent and this puts even more strain on women as they are mostly the caregivers, eroding their socio-economic resources and stagnating their development.⁶³

⁵⁹ UNDP-Kenya National Human Development Report, 2009 'Youth and Human Development, Tapping the Untapped Resources' June 2010, at 10, available at <http://planipolis.iiep.unesco.org/upload/Kenya/KenyaNationalHumanDevelopmentReport2009.pdf> (accessed on 18 June 2011).

⁶⁰ Net Enrolment Rate (NER) is defined as the number of children of official primary school age who are enrolled in primary education as a percentage of the total children of the official school age population. On the method of computation of the NER, see <http://unstats.un.org/unsd/mdg/Metadata.aspx?IndicatorId=0&SeriesId=589> (accessed on 1 February 2013).

⁶¹ UNDP-Kenya Human Development Report 2009 (supra n 59 above) 12, table 2.2.

⁶² UNDP-Kenya Human Development Report 2009 (supra n 59 above) 14, table 2.4.

⁶³ Institute of Economic Affairs (supra n 57 above) 17. Dependency statistics are made starker by World Bank data which indicates that in 2009, persons between the ages of 0-14 years formed 43 per cent of the Kenyan population, and people between the ages 15-64 years formed 55 per cent of the Kenyan population. This taken together with the statistics indicating that 80 per cent of the unemployed people in Kenya are the youth gives an indication that a huge chunk of the population is dependant. See World Bank – World Development Indicators 2011 (n 54 above) 37.

Poverty and inequality are specifically rampant in the rural areas in Kenya where the majority of the poor (82 per cent), around 14 million people, live.⁶⁴ The poverty headcount ratio in the rural areas is over 50 per cent as compared to the urban poverty headcount ratio of 34.4 per cent and the national poverty headcount ratio of 46.7 per cent,⁶⁵ a clear indicator that poverty is more pronounced in the rural areas. Kenya's rural poverty profile reveals strong regional disparities and IFAD, relying on the 2005/06 Kenya Integrated Household and Budget Survey (KIHBS) data, indicates that 'the lowest incidence of rural poverty was in Central province (30.3 percent), followed by Nyanza (47.9 percent, Rift Valley (49.7 per cent), Eastern (51.1 percent), Western (53.2 percent), Coast (69.7 percent), and North Eastern province (74.0 percent)'.⁶⁶ Poverty and inequality have specifically been exacerbated in the rural areas, whose economic mainstay is agriculture, by the declining agricultural productivity and competitiveness in both domestic and export markets, with a recorded decline of 5 per cent in 2008 and a further decline of 2.3 per cent in 2009.⁶⁷ Decline in agricultural production augurs badly for the efforts at poverty reduction in Kenya as an Agricultural Policy Review (APR) conducted in 2008 by the World Bank has affirmed that agriculture-led growth in Kenya is more than twice as effective in reducing poverty as compared to industry-led growth.⁶⁸

Rural poverty and socio-economic marginalisation has led to the phenomenon of rural urban migration leading to the exponential growth in Kenya's urban population (at a growth rate of 1.2 per cent),⁶⁹ with the projection that 50 per cent of the Kenyan population will be living in

⁶⁴ See the World Bank Poverty Reduction and Economic Management Unit Africa Region Report (n 37 above) 3.

⁶⁵ Institute of Economic Affairs (supra n 57 above) 18.

⁶⁶ International Fund for Agriculture and Development (IFAD) (n 38 above) 5.

⁶⁷ International Fund for Agriculture and Development (IFAD) (n 38 above) 1.

⁶⁸ World Bank Project Appraisal Document 'Kenya agricultural productivity and agri-business project' (May 2009) 1 available at http://www.kapp.go.ke/kappdoc/docs/KAPAP_Project_Appraisal_Document.pdf (accessed on 8 November 2011).

⁶⁹ A Abdulla *et al* (Institute of Development Studies, UK) 'Towards sustainable vulnerability reduction for Kenya's ultra-poor living in urban slums' (April 2011) 1, available at <http://www.ids.ac.uk/files/dmfile/Abdullaetal2011VulnerabilityreductioninKenyasurbanslumsCSPconferenc edraft.pdf> (accessed on 14 November 2011).

urban areas by the year 2020.⁷⁰ The phenomenon has witnessed a trebling of the urban population from 2.5 million in the 1980s to 7.6 million currently, with the majority (over 60 per cent)⁷¹ of these people living in overcrowded informal settlements and facing dire socio-economic deprivation.⁷² Statistical data indicates that 70 to 75 per cent of informal settlement dwellers are defined as poor, as compared to the 46.7 per cent national average.⁷³ An analysis of urban poverty by Oxfam GB indicates that urban poverty is inextricably linked with the process of rapid urbanisation and estimates that by 2020, urban poverty will represent half of the total poverty in Kenya.⁷⁴ The deprivation in the informal settlements has increased the violations of other important and cross-cutting rights such as the right to life, property, as well as the right to a clean and healthy environment.⁷⁵

An important question to ask at this juncture is, how did Kenya get to have these very adverse poverty and inequality statistics? The answer is basically to be found in colonialism and the resultant ethnic-based capitalist political dispensation that Kenya adopted after independence in 1963. Development, or underdevelopment as is the prevailing situation in Kenya, is critically linked to the political dispensation present in a State as it embodies the dominance of different combinations of class interests.⁷⁶ In Kenya, politics has been used to enhance the interests of the political and economic elite, those who own the means of production and exploit the labour of others, and the advantages that accrue from that relationship.⁷⁷ Inequality has thus been evidenced in the distribution of farmland and the

⁷⁰ Oxfam GB 'Urban poverty and vulnerability in Kenya: The urgent need for coordinated action to reduce urban poverty' 10 September 2009, 2, available at http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/bn_urban_poverty_kenya.pdf (accessed on 31 October 2011).

⁷¹ Oxfam GB – Need for coordinated action (n 70 above) 1.

⁷² Adams *et al* (n 45 above) 4.

⁷³ Abdulla *et al* (Institute of Development Studies, UK) (n 69 above) 1.

⁷⁴ Oxfam GB 'Urban poverty and vulnerability in Kenya (n 53 above) v & 1.

⁷⁵ See Oxfam GB 'Urban poverty and vulnerability in Kenya (n 53 above) 5; Abdulla *et al* (Institute of Development Studies, UK) (n 69 above) 3.

⁷⁶ C Leys *Underdevelopment in Kenya: The political economy of neo-colonialism 1964-1971* (1975) x.

⁷⁷ Leys – underdevelopment in Kenya (n 76 above) xii.

unequal flow of income into and out of the agricultural economy.⁷⁸ This system, which thrives on the impoverishment and the marginalisation of the majority, was entrenched during colonisation by British settlers through the annexation of land belonging to Africans and the relocation of Africans into unproductive and congested reserves, as well as by forcing Africans to provide cheap labour in settler farms through the introduction of taxes.⁷⁹ Similar structures have been retained since independence with the entrenchment of the mechanisms which have ensured dominance for the political and economic elite, and a marked absence of effective and powerful redistributive mechanisms to engender in-country equality.⁸⁰

Poverty and inequality greatly determine access to socio-economic goods and services such as education,⁸¹ health, water,⁸² access to employment and income generating opportunities, access to political or decision-making power to determine the distribution or redistribution of national resources and wealth. Statistics indicate that the richest 20 per cent have a primary school attendance ratio of 86 per cent while the poorer 20 per cent only have a 61 per cent access ratio, the disparity growing even larger in the access to secondary and tertiary education.⁸³ On health, and taking the infant mortality rate as an indicator, the poorest

⁷⁸ YW Bradshaw 'Perpetuating underdevelopment in Kenya: The link between agriculture, class and State' (1990) 33 (1) *African Studies Review* 1.

⁷⁹ Leys – Underdevelopment in Kenya (n 76 above) 30-31

⁸⁰ C Leys 'Interpreting African underdevelopment: Reflections on the ILO report on employment, incomes, and equality in Kenya' (1973) 72 *Journal of African Affairs* 419 at 420. See also J Arwa 'Litigating socio-economic rights in domestic courts: The Kenyan experience' A paper presented at The Colloquium on the African Charter on Human and Peoples Rights held in Cape Town South Africa from 7 – 10 November 2012, 2-5, available at <http://kelinkkenya.org/wp-content/uploads/2010/10/LITIGATING-SOCIO-ECONOMIC-RIGHTS-3.pdf> (accessed on 2 April 2013).

⁸¹ Lack of access to education and poverty are cyclic in nature, with statistical data indicating that the level of education of the household head is inversely related to the incidence of poverty; with poverty levels of nearly 69 per cent in households where the head has no education, 48 per cent where the household head had primary education and 22 per cent for households where the head had secondary education. See Oxfam GB 'Urban poverty and vulnerability in Kenya (n 53 above) 9.

⁸² Available data indicates that poor people often pay between three to eight times as much as the rich for water as they are forced to buy water from private vendors, as 90 per cent of the poor, especially in the slum areas have no access to piped water. See Oxfam GB 'Urban poverty and vulnerability in Kenya (n 53 above) 14.

⁸³ SID Report (n 47 above) 6.

20 per cent lose 149 children before their fifth birthday, in every 1000 live births, as compared to only 91 children for the richest 20 per cent.⁸⁴ These huge disparities occur in relation to access to all the other socio-economic goods and services, and unfairly constrain the life choices of people marginalised by poverty and inequality, leading to social destabilisation⁸⁵ and the absence of human security.⁸⁶ The 2005 UNDP Human Development report indicates that:⁸⁷

[o]vercoming the structural forces that create and perpetuate extreme inequality is one of the most efficient routes for overcoming extreme poverty, enhancing the welfare of society and accelerating progress towards the MDGs.

This shows that if Kenya is to achieve real and sustainable development, the entrenched inequalities must be addressed and the capabilities of all people must be uplifted to the level that they can participate actively and beneficially in the process of development.

1.2.2 Poverty eradication and the potential of the entrenched socio-economic rights

Transformative social policy, in the form of constitutional interventions that directly affect social welfare, institutions and relations, and involves overarching concerns with redistribution, production, reproduction and protection,⁸⁸ is key in the enhancement of accessibility, availability

⁸⁴ As above.

⁸⁵ For an account of how horizontal political and socio-economic inequality in Kenya were the root causes and led to the social destabilisation and conflict after the 2007 bungling of the Presidential elections in Kenya, see F Stewart (Centre for Research on Inequality, Human Security and Ethnicity (CRISE), University of Oxford) 'Note for discussion: Kenya, horizontal inequalities and the political disturbances of 2008' (March 2008), available at http://www.crise.ox.ac.uk/copy/kenya_note.pdf (accessed on 8 November 2011).

⁸⁶ Alkire (n 34 above) 18. According to the 2005 UNDP Human Development Report, where political institutions are unresponsive and are seen as tools for the perpetuation of unjust inequalities or the advancement of the interests of the elite, democratisation is undermined, creating conditions for State breakdown. This relates closely to the conflict in Kenya following the bungling of the 2007 Presidential Elections which nearly degenerated to civil war and which was majorly sparked by the inequality and the huge regional disparities that have been entrenched in the governance of the country. See UNDP Human Development Report 2005 'International cooperation at a crossroads: Aid, trade and security in an unequal world' (2005) 54, available at http://hdr.undp.org/en/media/HDR05_complete.pdf (accessed on 7 November 2011).

⁸⁷ UNDP HDR 2005 (n 86 above) 5.

⁸⁸ Keriga & Bujra -DPMF Report (n 41 above) iv.

and accountability in the provision of socio-economic goods and services.⁸⁹ The above realities led to the entrenchment in the 2010 Constitution of justiciable SERs, as is discussed in section 1.1 above. The entrenchment of SERs is an affirmation of the internationally-acknowledged fact that pro-poor growth policies that enhance social transformation through the improvement in distribution and enhancement of wealth redistribution are a powerful weapon in the fight against poverty and inequality.⁹⁰ The close link between social protection and economic growth is further elaborated by Abdulla, MacAuslan and Schofield who list six ways in which social protection can support economic growth as follows:⁹¹

First, measures that help individuals to manage risk allow them to invest in activities that have higher risk but higher returns, raising economic productivity...Second, small transfers or loans to very poor households can enable them to overcome liquidity constraints, invest and generate positive returns. Third, transfers to low income areas or households can generate economic multipliers as individuals spend their transfers in local businesses. Fourth, social protection programmes may create productive assets – as public works programmes. Fifth, measures that help individuals to maintain their health can permit them to participate more actively in the economy. Finally, ensuring that households have sufficient resources to send their children to school means that those children have better chances of being productive members of society.

The potential of redistribution and reduction of inequality in ensuring sustained economic growth is also confirmed by Adams, Collier and Ndung'u who contend that redistribution enhances the

⁸⁹ UNDP HDR 2005 (n 86 above) 62-64. The key agenda for the entrenchment of SERs is 'to shield the most vulnerable from the uncertainties and harshness of a pure market model, and to extend the benefits of public services and public goods to the most vulnerable,' see Brinks & Forbath (n 19 above) 1949.

⁹⁰ UNDP HDR 2005 (n 86 above) 69. An analysis of the Kenya situation with regard to the achievement of MDG number 1 'Eradication of extreme poverty and hunger' shows that Kenya is unequivocally off track in the achievement of the above goal. The analysis affirms that:

If Kenya were to achieve a 1% per capita growth rate on current distribution patterns, it would not halve poverty until 2030. Doubling the share of the poor in future growth even at the 1% per capita growth rate would enable Kenya to halve poverty by 2013, meeting the MDG target. In other words pro-poor growth would reduce the time horizon for halving poverty by 17 years.

See UNDP HDR 2005 (n 86 above) 66.

⁹¹ Abdulla *et al* (Institute of Development Studies, UK) (n 69 above) 6.

poverty reduction impact of growth as it ensures social and political stability, and also enhances the capacity of the poor to realise their productive potential.⁹²

Further, the very entrenchment of justiciable SERs is recognition, according to Robert Alexy, that legal freedom is worthless without actual freedom, that is, the real possibility of choosing between permitted alternatives, and that access to social entitlements for the poor and vulnerable individuals and groups depends on government activities.⁹³ Thus, in the provision of services as well as the apportionment of life opportunities through the guaranteed SERs, the State makes it possible for people to have a dignified existence, therefore providing them with the requisite conditions for the equal exercise of individual liberties.⁹⁴

While the entrenchment of SERs in a democratic, progressive and transformative Constitution is not the panacea for the implementation and enforcement of this rights in Kenya, their inclusion is an important symbolic gesture of intent, and a platform for advocacy and monitoring of the political institutions of the State. As was aptly stated by Craig Scott and Patrick Macklem:⁹⁵

Whereas the constitutionalisation of social rights would be a recognition of the fact that adequate nutrition, housing, health, and education are critical components of social existence... [their] exclusion will result in the suppression of certain societal voices... A constitution only containing [CPRs] projects an image of truncated humanity. Symbolically, but still brutally, it excludes those segments of society for whom autonomy means little without the necessities of life.

It is submitted, therefore, that in order to achieve the promise entailed in the entrenchment of SERs, and for the social policies emanating from the entrenchment to be successful in enhancing social justice, reducing poverty and inequality, and to lead to the emancipation of the poor, vulnerable and marginalised groups in Kenya, a political framework of real participatory democracy and good governance at the national and county levels is a necessity.⁹⁶

⁹² Adams *et al* (n 45 above) 35-36.

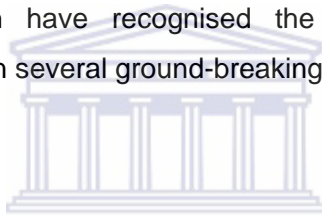
⁹³ R Alexy, *Theorie Der Grundrechte* 458 (1985), quoted in J Habermas 'Paradigms of law' (1995-1996) 17 *Cardozo Law Review* 771, at 773.

⁹⁴ Habermas – Paradigms of law (n 93 above) 775.

⁹⁵ C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 28-29.

⁹⁶ Keriga & Bujra - DPMF Report (n 41 above) iv.

However, despite the entrenchment of these SERs, there is no guarantee of their effective implementation and enforcement, if the mere rhetorical commitment of Kenya's political establishments to human rights in the past is anything to go by. The concerns about the ornamental use of entrenched SERs to beautify the Constitution without their effective implementation and enforcement are not far-fetched, and have been witnessed in several countries that have justiciable SERs in their constitutions. A case in point is the 1987 Philippine Constitution which had not only entrenched SERs in Article II sections 8-24 and Articles XIII-XV but the Supreme Court of the Phillipine had also declared those rights to form "the heart of the new charter".⁹⁷ The practice in the Philippines, as can be extracted from the jurisprudence of its Supreme Court, is, however, that SERs are still treated as no more than aspirations which are non-self-executing and which ultimately only reflect hortatory guidelines for the political institutions of the State.⁹⁸ The less than stellar jurisprudence from the Supreme Court of the Philippines can be contrasted with the more progressive attitude of the Colombian Constitutional Court (CCC) and SACC which have recognised the justiciability and actionability of constitutionally entrenched SERs in several ground-breaking judgments.⁹⁹



⁹⁷ *ARIS (Phil) Inc. v National Labour Relations Commission and others*, G.R. No. 90501, August 5, 1991, para. 28, available at http://www.lawphil.net/judjuris/juri1991/aug1991/gr_90501_1991.html (accessed on 14 November 2011). For an analysis of the case, see Desierto (n 17 above) 1.

⁹⁸ Desierto (n 17 above) 11 referring specifically to the case of *Basco et al. v Philippine Amusements and Gaming Corporation*, G.R. No. 91649, May 14, 1991, where the Supreme Court expressly held that 'several provisions of Article XIII (*Social Justice and Human Rights*) and XIV (*Education, Science and Technology, Arts, Culture and Sports*) of the 1987 Constitution "are merely statements of principles and policies. As such, they are basically not self-executing, meaning a law should be passed by Congress to clearly define and effectuate such principles".

⁹⁹ Examples of such judgments include: *Government of the Republic of South Africa v Grootboom & Others* 2000 2001 (1) SA 46 (CC); *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W); *Van Biljon v Minister of Correctional Services* 1997 6 BCLR 789 (C); *Khosa v Minister of Social Development*, 2004 (6) SA 505 (CC); *Mazibuko and others v The City of Johannesburg and others* High Court of South Africa (Witwatersrand Local Division) Case No: 06/1386; CCC *Decision T-025 of 2004* (IDP Case); and CCC *Constitutional Claim Decision C- 355 of 2006* (The Colombian Abortion case). For a discussion of SER cases of the CCC, see chapters two and four below.

Kenya, with its past history of rhetorical commitment to human rights, can easily take the path of the Philippines if the midwifing of the new constitutional dispensation, especially with regard to the entrenched SERs, is not undertaken properly. Even though the entrenchment of SERs in the Constitution has a strong symbolic value, the mammoth challenge will be the bridging of the gap between the precepts and actual practice with the aim of ensuring substantial transformation of Kenyan society into an equal, free and just society.¹⁰⁰ There is, therefore, a need for intense dialogue and awareness raising among the two levels of government, national and county, and also within the three institutions of the national government, the executive, legislature and the judiciary, to ensure that political will for the realisation and enforcement of the SERs is harnessed. The need to build capacity and to harness financial resources to enhance the implementation of the SERs, together with the need to build strong, transparent, accountable and responsive institutions, are thus important building blocks that must be put in place to ensure the substantive realisation of the entrenched SERs.

This study, therefore, aims to direct Kenya not only towards the progressive jurisprudence and purposive interpretation of SERs that has been developed by the CCC, SACC and the Indian Supreme Court, but is also intended to urge Kenya to surpass that protection by adopting a transformative and integrated approach to constitutional interpretation of SERs that incorporates the positive aspects of the minimum core content approach and reasonableness approach in the implementation of the entrenched SERs.¹⁰¹

¹⁰⁰ S Siebert 'Beyond changing the face of power and altering the structure of oppression: Socio-economic rights, constitutional jurisprudence and social transformation in South Africa' (2000) *Trinity College Law Review* 131.

¹⁰¹ Unlike South Africa, Kenya is a party to the ICESCR and should be bound to adopt the minimum core content of SERs as developed by the CESCR in accordance with articles 2(5) & (6) of the 2010 Constitution which provides that treaties or conventions ratified by Kenya forms part of Kenyan law. For a more elaborate discussion, see chapter two, section 2.2 on the place of international law in the Kenyan domestic legal system, as well as chapter two, section 2.5 and chapter five, section 5.3.2 on the place of the minimum core approach in the Kenyan domestic legal system. See also Yeshanew (n 14 above) 329-330, who acknowledges the possibility of combining these two approaches in the interpretation, implementation and enforcement of SERs.

1.3 Research questions

Poverty, inequality and massive socio-economic deprivation are endemic in Kenya, and have led to social injustices, the exclusion and marginalisation of large numbers of people from both the political and the socio-economic spheres of society, the stagnation of development, as well as the deterioration of human security as is set out in section 1.2 above. The importance of a firm constitutional, legislative and institutional framework to tackle these challenges is reflected in the entrenchment of justiciable SERs, as well as other interrelated and mutually supportive human rights, in the 2010 Kenyan Constitution. The objective of this study is to undertake a critical analysis of the entrenched SERs and their potential to respond to the challenges mentioned above.

In this vein, therefore, the main question that this study aims to answer is the following: which theoretical and interpretive approach for the realisation of SERs should Kenya adopt to enhance the achievement of the transformative aspirations of the 2010 Kenyan Constitution? In proposing an answer to this main question, the study will undertake an analysis of the following interrelated issues: Kenya's political and socio-economic context leading to the entrenchment of justiciable SERs in the 2010 Constitution; the nature, scope, content and extent of the entrenched SERs as well as Kenya's national and international obligations emanating from these entrenched SERs; whether these obligations are extensive enough to realise the goal of achieving substantive equality, social justice and dignity for all the Kenyan people; which approaches to the interpretation of SERs should be adopted in Kenya to enhance the implementation and enforcement of these rights with the aim of achieving the transformative potential of the 2010 Constitution; as well as an analysis of the probable gaps and challenges that may hinder the effective implementation of the entrenched SERs.

1.4 Significance of the study: Literature survey

Even though Kenya has entrenched, in its 2010 Constitution, several progressive provisions aimed at enhancing proper governance and accelerating development,¹⁰² the SER provisions have the most potential to ensure the realisation of Kenya's developmental goal of being an

¹⁰² For a discussion of this progressive provisions which in essence qualify the 2010 Kenyan Constitution as a transformative constitution, see chapter five, section 5.2.

industrialising middle-income State by the year 2030.¹⁰³ This is because the implementation and enforcement of SERs is crucial to the equitable distribution of national resources, reduction of poverty, and the reduction of the gap between the rich and the poor.¹⁰⁴ Further, and in line with the principle of interdependence and interrelatedness of rights, the realisation of SERs is critical in the achievement of substantive equality, dignity, freedom and democracy, fundamental values that augment the entire constitutional project;¹⁰⁵ as well as the realisation of other CPRs such as the right to political participation, the foundational bedrock upon which the theory of dialogical constitutionalism proposed in this thesis is premised.¹⁰⁶

Extensive research has been undertaken on the implementation and enforcement of constitutionally entrenched justiciable SERs in general,¹⁰⁷ and specifically in relation to the 1996 South African Constitution.¹⁰⁸ Such a comprehensive debate has not yet taken place in Kenya, it

¹⁰³ Government of Kenya 'Vision 2030 – Popular version' (2007) available at <http://www.vision2030.go.ke/> (accessed on 2 February 2012).

¹⁰⁴ DM Chirwa, Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms (2005) 27-29, a thesis submitted at the University of the Western Cape (on file with author).

¹⁰⁵ The 2010 Kenyan Constitution, preamble para. 6 & article 10.

¹⁰⁶ For an extensive discussion of the theory of dialogical constitutionalism and how it is augmented by the right to political participation, see chapters three and four below.

¹⁰⁷ See for example: Y Ghai and J Cottrell (eds.), *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004); F Coomans (ed.) *Justiciability of economic and social rights: Experiences from domestic systems* (2006); Centre on Housing Rights and Evictions (COHRE), *Litigating economic, social and cultural rights: Achievements, challenges and strategies* (2003); COHRE, *Leading cases in economic, social and cultural rights: Summaries* (2006); M Langford (ed.) *Social rights jurisprudence: Emerging trends in comparative and international law* (2008); M Tushnet, *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2008); and C Bateup 'The dialogical promise: Assessing the normative potential of theories of constitutional dialogue' (2006) 73(3) *Brooklyn Law review* 1109-1180.

¹⁰⁸ See for example: S Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010); S Liebenberg 'The interpretation of socio-economic rights' in S Woolman *et al* (eds.), *Constitutional law of South Africa* (2nd Edition) 2 (2009) 33-1; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 436; S Fredman, *Human rights transformed: Positive rights and positive duties* (2008); C Mbazira, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009); S Liebenberg

having only promulgated its new Constitution in August 2010.¹⁰⁹ Most of the available literature have dealt with the interpretation and implementation of the 2010 Constitution in general and have not been specific to SERs.¹¹⁰

An exception to this general trend has been the International Commission of Jurists, ICJ-Kenya's Judiciary Watch Report Volume 10 titled *Judicial Enforcement of Economic, Social and Cultural Rights: Challenges and Opportunities for Kenya*, which contains a collection of chapters addressing different aspects of the entrenched SERs.¹¹¹ The publication analyses the

'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in S Woolman & M Bishop (eds.) *Constitutional conversations* (2008) 303; M Pieterse 'On dialogue, translation and voice: A reply to Sandra Liebenberg' in S Woolman & M Bishop (Eds.), *Constitutional conversations* (2008) 331; D Bilchitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007); D Bilchitz 'Health' in S Woolman et al (eds.), *Constitutional law of South Africa* (2nd Edition) 2 (2009) 56A-1; D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *South African Law Journal* 484; D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 9; D Brand and C Heyns (eds), *Socio-economic rights in South Africa* (2005); JC Mubangizi, *The protection of human rights in South Africa: A legal and political guide* (2004); J De Waal, I Currie and G Erasmus, *The Bill of Rights handbook* (2001); B De Villiers, 'Social and economic rights' in D Van Wyk et al (eds) *Rights and constitutionalism: The new South African legal order* (1994); S Liebenberg & K Pillay (eds), *Socio-economic rights in South Africa: A resource book* (2000); D Brand and S Russel (eds), Exploring the core content of socio-economic rights: South African and international perspectives (2002); and R Dixon 'Creating dialogue about socio-economic rights: Strong v weak form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391.

¹⁰⁹ The paucity of legal material in the Kenyan domestic legal system on the interpretation, implementation and enforcement of SERs was acknowledged by the current Chief Justice of Kenya, Dr. Willy Mutunga in his address at the book launch of the International Commission of Jurist – ICJ Kenya Judiciary Watch Report, Volume 10 which undertook an exposition of SERs in the Kenyan Constitution. The speech is available at <http://www.icj-kenya.org/index.php/media-centre/news/460-cj-jwr-launch> (accessed on 15 September 2012).

¹¹⁰ YP Ghai & JC Ghai *Kenya's Constitution: An instrument for change* (2011); PLO Lumumba, MK Mbondeny & SO Odero *The Constitution of Kenya: Contemporary readings* (2011).

¹¹¹ J Biegon & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011).

conceptual and practical issues in relation to SERs,¹¹² reflects on the issue of resources in the implementation of SERs,¹¹³ examines the prospects and challenges for public interest litigation in the enforcement of SERs,¹¹⁴ analyses specific SERs in the Constitution such as the right to health,¹¹⁵ housing,¹¹⁶ the right to water,¹¹⁷ as well as the right to education.¹¹⁸ This publication is a timely intervention in the quest to build a domestic legal literature on the implementation and enforcement of SERs. However, it has several shortcomings in that it concentrates solely on the judicial enforcement of entrenched SERs, and fails to sufficiently and comprehensively acknowledge the role of other organs of the State, non-state actors as well as the society in the interpretation, implementation and enforcement of SERs. Further, the publication fails to set out a clear theoretical framework in which the interpretation, implementation and enforcement of the entrenched SERs is to be based. It also fails to comprehensively set out the best interpretive approach for the courts to adopt in interpreting and enforcing SERs during litigation. In one of the chapters of the publication, the current author proposes and lays the basis for the

¹¹² J Biegón 'The inclusion of socio-economic rights in the 2010 Constitution: Conceptual and practical issues' in J Biegón & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 13.

¹¹³ W Kaguongo 'Reflections on the complexities in adjudicating socio-economic rights from the perspective of resource allocation and budgetary issues' in J Biegón & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 89.

¹¹⁴ BJ Mwimali 'Public interest litigation and the judicial enforcement of socio-economic rights: Prospects and challenges under the Constitution of Kenya' in J Biegón & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 247.

¹¹⁵ C Mbazira 'The judicial enforcement of the right to the highest attainable standard of health under the Constitution of Kenya' in J Biegón & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 113.

¹¹⁶ I Ndegwa 'A roof over Wanjiku's head: Judicial enforcement of the right to housing under the Constitution of Kenya' in J Biegón & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 143.

¹¹⁷ K Moyo 'False hopes or realisable rights: The right to clean and safe water under the Constitution of Kenya' in J Biegón & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 179.

¹¹⁸ LC Murungi 'The right to education under the Constitution of Kenya: Scope and prospects for enforcement' in J Biegón & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 217.

transformative and intergrated approach for the interpretation, implementation and enforcement of the entrenched SERs, but the approach is developed more fully and comprehensively in this thesis.¹¹⁹

Therefore, even though the interpretation, implementation and enforcement of justiciable SERs has been in discussed extensively in comparative jurisdictions such as South Africa as mentioned above, there is need for a Kenyan-specific study due to Kenya's unique and different historical, cultural, social, political and institutional context compared with other countries that have entrenched justiciable SERs in their constitutions. This study will thus undertake a critical analysis of the interpretive opportunities presented by the entrenchment of SERs in the 2010 Constitution, and how these opportunities can be harnessed to enhance the prospects for the protection, promotion and fulfilment of SERs in Kenya. The study is intended to provide the Kenyan political and judicial institutions with critical information and research to guide them in the development of the legislative, policy and programmatic frameworks for the implementation and enforcement of the entrenched SERs, with the overall aim of enhancing equality and the achievement of social justice for the Kenyan people.

1.5 Research methodology

With the entrenchment of justiciable SERs in the 2010 Kenyan Constitution and the important role their interpretation, implementation and enforcement plays in achieving the transformative aspirations of the Constitution, there is a dire need for a comprehensive study of these rights. This thesis conducts a broad study of the nature, scope, content and extent of these rights, as well as proposes the theory of dialogical constitutionalism and a transformative and integrated approach for their realisation. The ultimate aim of the thesis is to provide critical research on SERs to guide scholars, legal practitioners and judicial officers on how best to interpret, implement and enforce the entrenched SERs with the objective of achieving the transformative potential of the Constitution.

¹¹⁹ N Orago 'A gender perspective of socio-economic rights under the 2010 Kenyan Constitution: A mirage or a path towards gender equality and women empowerment in Kenya' in J Biegon & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 275.

The thesis intends to achieve the above objectives by undertaking a review and an analysis of both primary and secondary literature that is relevant to the subject-matter of this study. The primary sources include international legal instruments (both “soft law” and “hard law”) such as conventions, charters, resolutions, declarations, general comments, as well as State Party reports under the various international and regional human rights instruments. At the national level, primary sources include constitutions, Acts of Parliament, Bills and policy documents. Great reliance has further been placed on comparative case-law from jurisdictions such as South Africa, Colombia, India, Canada and the United States of America. The comparative analysis of these jurisdictions has been used to deduce lessons, experiences and approaches that are useful in the interpretation, implementation and enforcement of constitutionally entrenched SERs. Inevitably, the study also places considerable reliance on relevant secondary literature such as books, articles and academic commentaries in the area of human rights in general and SERs in particular. Conclusions drawn from an analysis of this information is then applied towards answering the research questions.

Despite the reliance on the legal material and progressive jurisprudence emanating from the courts in South Africa, Colombia, India, Canada and the United States, this study is not a comparative study strictly speaking, where the three successive stages of description, comparison and explanation are followed. It is basically a study of Kenya and its prospective interpretation, implementation and enforcement of the constitutionally entrenched SERs, with these five jurisdictions being used in a supplemental manner to augment the discussions as well as to provide guidance and best practices aimed at enhancing the realisation of SERs in Kenya.

1.6 Structure of the thesis

This study is divided into eight chapters. The chapters are broadly divided into three interrelated thematic areas. Thematic area 1 (chapters one and two), provides the historical, contextual and substantive framework for the SERs discussed in the subsequent chapters. It commences with a historical discussion of the endemic poverty and inequality in Kenya resulting from entrenched socio-economic deprivation for the majority of Kenyans (chapter one, section 1.2). It further entails a preliminary discussion of the nature, scope, content and extent of the SERs entrenched in the 2010 Kenyan Constitution as well as Kenya’s national and international obligations arising from these rights. Thematic area 2 (chapters three, four and five) then sets out the theoretical framework for the realisation of the obligations arising from the

constitutionally entrenched SERs. It delves into an analysis of the philosophical underpinnings of the study, both at a general level and with specific reference to the 2010 Kenyan Constitution. It also proposes an approach for the interpretation, implementation and enforcement of the 2010 Constitution. Thematic area 3 (chapters six and seven) entails case studies of the interpretation, implementation and judicial enforcement of two selected SERs entrenched in the 2010 Kenyan Constitution: the right to food and the right to housing. It expounds on the SER obligations discussed in thematic area 1 and uses the theoretical framework developed in thematic area 2 in relation to the two selected rights with the aim of exploring the practical realisation of SERs. Taking into account these three interrelated thematic areas, the specific chapters will deal with the issues illustrated below.

Chapter one, which is the introductory chapter, provides a context to the study, and sets the background, problem question, justification, methodology, and the structure of the study.

Chapter two undertakes a general analysis of the nature, scope, content and extent of the SERs entrenched in the 2010 Kenyan Constitution. It commences with an extensive analysis of the place of international law in the Kenyan domestic legal system and the impact international law has on the understanding of the SER obligations of the State. The main thrust of the arguments in this section is that ratified international law as well as customary international law have been incorporated and have direct application in the Kenyan domestic legal system taking into account the provisions of article 2(5) and (6) of the 2010 Kenyan Constitution. The chapter then engages in an analysis of the nature of Kenya's SER obligations at the international, regional and national level. It calls for the development of a substantive normative content of SERs, taking into account the minimum core approach as developed internationally by the CESCR so as to enhance the realisation of the entrenched SERs. Lastly, the chapter acknowledges that SERs are not absolute and can be legitimately limited by the State. However, it argues, taking into account article 24 of the 2010 Kenyan Constitution, that any limitation of the entrenched SERs must scrupulously meet all the constitutional requirements set out in that article if the limitation is to be considered legitimate.

Chapters three and four provide the theoretical framework upon which the entire thesis is premised, with chapter three entailing a general analysis of the theory of dialogical constitutionalism, and chapter four undertaking a specific analysis of dialogical constitutionalism in the Kenyan context. In this scheme of things, chapter three provides an analysis of the historical and philosophical foundations of the theory of dialogical constitutionalism, tracing the

theory from the writings of Mikhail Bakhtin and Paulo Freire. It then engages in an analysis of the theory in the writings of two prominent contemporary thinkers in the field, Jürgen Habermas and Frank Michelman. The chapter then undertakes a comparative analysis of the practical use of aspects of the theory of dialogical constitutionalism in three jurisdictions, Canada (the “dialogic metaphor”), the United States of America (coordinate construction) and South Africa (meaningful engagement). The three jurisdictions are chosen due to the rich jurisprudence that has emanated both from the courts and from academic commentators on the importance of dialogue and deliberation in the interpretation, implementation and enforcement of constitutionally entrenched human rights in these jurisdictions.

Chapter four is a continuation of the analysis of the theory of dialogical constitutionalism in chapter three, but focussed specifically on the Kenyan context, taking into account the provisions of the 2010 Kenyan Constitution that point to the need for dialogue in the interpretation, implementation and enforcement of the entrenched SERs. The main import of the chapter is to fashion a model of dialogical constitutionalism for Kenya. This model is developed at three levels, first, at the political level in the development of the legislative, policy and programmatic framework for the implementation of the entrenched SERs; secondly, at the level of constitutional litigation in the courts; and thirdly, in the fashioning of judicial remedies subsequent to constitutional litigation. These three levels of dialogue are intertwined by the requirement of public participation in societal decision-making at all levels of government, a requirement that populates the entire constitutional structure.

Chapter five undertakes an analysis of the 2010 Kenyan Constitution as a transformative Constitution, detailing the elements of the Constitution which are aimed at the transformation of the Kenyan society to enhance social justice and human development, as well as to ensure improved living conditions for every Kenyan. The requirement for transformation leads to the proposal that Kenya adopts an integrated approach in the interpretation, implementation and enforcement of the entrenched SERs, an approach which marries the progressive as well as dialogic elements of the reasonableness approach with the protective aspect of the minimum core approach, with the aim of achieving the transformative aspirations of the 2010 Kenyan Constitution.

Chapter six, which deals with the right to adequate food, is the first component of the case studies which forms part 3 of the thesis. This chapter undertakes an analysis of the food security situation in Kenya in the first instance. It then develops the meaning, content and the

scope of Kenya's obligations in the realisation of the right to food, an SER which has been entrenched in the Constitution. It further engages in an analysis of the mandate of the Courts in the realisation of the right to food in Kenya, and proposes that Kenya adopts the integrated approach as well as a livelihoods approach, based on the concept of the indivisibility, interrelatedness and interdependence of human rights, in relevant circumstances when food entitlements of poor, vulnerable and marginalised groups are threatened. The right to food was chosen as a case study due to the precarious food security situation prevailing in Kenya currently due to droughts and the spike in the global food and oil prices which have driven many Kenyans to the brink of starvation and abject poverty. The seriousness of the food insecurity situation has been recognised at the highest level of political government, with the President of the Republic declaring the situation a national emergency on 16 January 2009. The right to food has also been chosen as a case study due to the importance of food in the life of human beings, as without food, other important rights such as the right to life, health, labour, education, adequate standards of living, dignity and equality cannot be realised.

Chapter seven, which deals with the right to accessible and adequate housing, forms the second component of the case studies in part 3 of the thesis. The chapter commences with an analysis of the housing situation in Kenya, looking at the challenges of informal settlements as well as endemic lack of tenure security for many households in Kenya, with its attendant forced evictions and demolitions. It then develops the meaning and content of the right to housing and the scope of Kenya's obligations for the realisation of the right to housing. It then delves into an analysis of the mandate of the courts in the realisation of the right to housing, proposing that the courts adopt a transformative approach to adjudication that is capable of enhancing the realisation of the right to housing for the Kenyan people, especially with regard to the protection of Kenyans from forced evictions. The right to housing has been chosen as a case study due to the important role of housing in the preservation of the family, the basic unit of society, and in the realisation of other related rights such as the right to dignity, privacy, health, security as well as other CPRs and SERs. Kenya faces several challenges in the provision of housing to its citizens, which is evidenced by the dire housing situation that has forced the majority of Kenyans to live in inadequate shelters in informal settlements without access to necessary services such as water, electricity and proper sanitation. The challenge above is exacerbated by massive land grabbing, land holding for speculative purposes, as well as a lack of land security of tenure and its attendant forced evictions by both government and non-governmental entities. The entrenchment of a right to accessible and adequate housing in the Constitution can play a

prominent role in engendering a paradigm shift in housing, with the objective of responding to the challenges mentioned above. This chapter thus looks at the potential of the entrenched right to enhance the housing conditions of Kenyans.

Chapter eight, which contains the thesis conclusion and recommendations, sums up the main findings of the thesis and provides key recommendations to the relevant sectors of society charged with the implementation and enforcement of the entrenched SERs.



Chapter two: The general nature, scope and content of Kenya's socio-economic rights obligations in view of the direct incorporation of international law by the Constitution

2.1. Introduction

The primary responsibility of a State, and a major measure of its legitimacy, is the enhancement of the general welfare and the standards of living of its citizens.¹ This is achievable through the respect, protection and fulfilment of human rights, especially socio-economic rights (SERs).² Despite the close link between the realisation of SERs and the improvement of people's standards of living, there has traditionally been either a general reluctance to implement or the overall neglect of SERs at the national and international levels.³ This reluctance has mainly been due to the perceived vagueness, imprecision and lack of awareness of the real nature, scope, content as well as extent of States' SER obligations.⁴

¹ N Udombana 'Social rights are human rights: Actualising the right to work and social security in Africa'(2006) 39 *Cornell International Law Journal* 181 at 188. See also IP Stotzky 'Creating the conditions for democracy' in H Hongju-Koh & RC Slye (eds.) *Deliberative democracy and human rights* (1999) 157, at 180, who argues that the basic justification for a government is the realisation of human rights, and a government is simply illegitimate if its actions are not geared towards that goal.

² SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177, at 179.

³ P Alston, 'International law and the human right to food' in P Alston & K Tomasveski *The right to food* (1984) 54. See also The South African Human Rights Commission (SAHRC), '*7th Report on Economic and Social Rights: Millennium Development Goals and the progressive realisation of economic and social rights in South Africa - 2006-2009*' (2010) 9, who pinpoints the obtuse way in which SER obligation have been defined internationally as one of the main challenges on the monitoring and evaluation of the implementation of entrenched SERs.

⁴ J Waldron 'Socio-economic rights and theories of justice' New York University School of Law Public Law and Legal Theories Research Paper Series, No. 10-79 (November 2010) 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699898 (accessed on 23 April 2012), who argues that SERs are formulated at the wrong level of generality or abstraction; J Mchangama 'Commentary to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' September 2011, available at <http://www.globalgovernancewatch.org> (accessed on 25 January 2012), who argues

In response to this tradition of neglect of SERs, there have been developments in international human rights law, at the national and international levels, that have re-affirmed the justiciability of SERs and enhanced accountability for their violation. These include the adoption of individual and inter-state complaints mechanisms at the international and regional levels,⁵ as well as the entrenchment of justiciable SERs in the constitutions of several States.⁶ At the international level, the closest and most recent development is the adoption on 10 December 2008 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) which expands the mandate of the Committee on Economic, Social and Cultural Rights (CESCR) to receive and consider individual, group and inter-state communications,⁷ as well as to conduct inquiries into cases of grave or systematic violations of SERs by a State party.⁸ At the national level, the promulgation of the 2010 Kenyan Constitution which entrenched justiciable SERs and empowered courts to enforce them can also be

against the establishment of an international complaint mechanism to adjudicate SERs through the Optional Protocol to the International Covenant on Economic Social and Cultural Rights (OP-ICESCR) due to the vague nature of SERs and their undefined obligations which might result in subjective and preferential decision-making by the CESCR.

⁵ In Africa, see The African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, articles 47-56; and, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, article 3.

⁶ Some African countries with entrenched SERs include: The 1996 South African Constitution, the 1980 Egyptian Constitution, and the 1990 Constitution of Cape Verde. For a more elaborate discussion on the SER provisions in African constitutions, see DM Chirwa 'An overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa (2001) 7-10, available at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights>(accessed on 26 October 2011).

⁷ According to article 10 OP-ICESCR, this only applies to states that have, upon ratification of the Protocol, accepted the competence of the CESCR to receive and consider such communications. See L Chenwi '*Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court*' (2010) 5, available at <http://www.spil.org.za/agentfiles/434/file/Progressive%20realisation%20Research%20paper1.pdf> (accessed on 25 January 2012).

⁸ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, arts. 1, 2, 10, &11 available at <http://www.unhcr.org/refworld/docid/49c226dd0.html> (accessed 24 January 2012).

heralded as an important development in relation to the overall realisation of SERs.⁹ These developments are important as they dispel the notion of non-justiciability of SERs, enhance accountability for their violation at the international and national levels, as well as bridge the ideological divide between civil and political rights (CPRs) and SERs.¹⁰

This chapter aims to undertake a substantive analysis of the nature, scope and content of Kenya's SER obligations at the national and international level.¹¹ The Chapter is divided into seven interrelated sections. After this introduction, the chapter undertakes an exposition of the applicability and hierarchy of international law in the Kenyan domestic legal system taking into account articles 2(5) and (6) of the Kenyan Constitution which incorporate customs and ratified international treaty law into the Kenyan legal system, in section 2.2. It is submitted that due to the above constitutional provisions, Kenya's international SER obligations have been incorporated into the national domestic legal system and the State has a duty to realise them. Section 2.3 undertakes an analysis of Kenya's SERs obligations using the standard of progressive realisation, which has been applied at the international level and has been incorporated in the 2010 Kenyan Constitution in article 21(2) as read with article 20(5). Section 2.4 analyses Kenya's SER obligations as contained in African regional legal instruments, contending that these regional SER obligations are immediate as the African human rights treaties do not generally espouse the standard of progressive realisation to the maximum of available resources. Section 2.5 advocates the development of the scope and content of the entrenched SERs, especially the minimum core content, so as to enhance the realisation of the transformative constitutional objectives and aspirations of the 2010 Kenyan Constitution. Section 2.6 acknowledges the non-absolute nature of the entrenched SERs and discusses instances where limitations on SERs can be justified. The chapter then ends with a short conclusion in section 2.7.

⁹ The 2010 Kenyan Constitution, articles 22 & 23.

¹⁰ M Sseyonjo 'Economic, social and cultural rights: An examination of State obligations' in S Joseph & A McBeth (eds.), *Research handbook on international human rights law* (2010) 36, at 37.

¹¹ See K Iles 'Limiting socio-economic rights: Beyond the internal limitation clauses' (2004) 20 *South African Journal on Human Rights* 448, at 454, who argues that 'part of the difficulty in [the South African SER] jurisprudence has been the reluctance of the Constitutional Court to engage in the task of defining the scope and content of [SERs]' giving the State little guidance on how to implement SERs.

2.2 The place of international law in Kenya's domestic legal system

As a State party to several international and regional legal instruments that have entrenched SERs, Kenya has undertaken a continuum of both immediate and progressive obligations.¹² Some of these instruments include: the Universal Declaration of Human Rights (UDHR);¹³ the International Covenant on Economic, Social and Cultural Rights (ICESCR);¹⁴ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹⁵ the Convention on the Rights of the Child (CRC);¹⁶ the Convention on the Rights of Persons with Disabilities;¹⁷ the

¹² SI Skogly *Beyond national borders: States' human rights obligations in international cooperation* (2006) 59. She submits that States' SER obligations include both positive and negative obligations ranging from the obligation to refrain to the obligation to fulfil.

¹³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), preamble paras 2 & 5, as well as articles 1, 2, 17, 21(2), & 22-26, available at <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (accessed 25 January 2012). Debate on the binding nature of the SER provisions of the UDHR as part of customary international law is inconclusive. However, with the accelerated pace of incorporation of justiciable SERs into national constitutions and the adoption of these provisions into binding international legal instruments, there is a strong case for their attainment of customary international law status. This makes for their incorporation as part of Kenya's SER obligations in accordance with article 2(5) of the 2010 Constitution as general rules of international law. See N Orago 'A gender perspective of socio-economic rights under the 2010 Kenyan Constitution: A mirage or a path towards gender equality and women empowerment in Kenya' in J Biegon & G Musila (eds.) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 275, at, 282-283; International Council on Human Rights Policy (ICHRP) *Duties sans frontieres: Human rights and global social justice* (2003) 30, available at http://www.ichrp.org/files/reports/43/108_report_en.pdf (accessed on 22 February 2012).

¹⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, preamble paras 2 & 3; articles 1 & 6-13. Accented to by Kenya on the 1 May 1972, available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed on 26 January 2012). See, Orago (n 13 above) 283.

¹⁵ Adopted and opened for signature, ratification and accessions on 18 December 1979 and entered into force on 3 September 1981, preamble paras 2, 3, 8 & 13; articles 10-14. Accented to by Kenya on 9 March 1984, available at <http://www2.ohchr.org/english/law/cedaw.htm> (accessed on 26 January 2012). See, Orago (n 13 above) 286.

¹⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49. Ratified by Kenya

International Labour Organisation (ILO) Conventions;¹⁸ the African Charter on Human and Peoples' Rights¹⁹ and its Protocol on the Rights of Women in Africa;²⁰ and, the African Charter on the Rights and Welfare of the Child.²¹

Kenya's international SER obligations are based on the important international principle of *pacta sunt servanda* which provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'²² The good faith principle has been characterised by the International Court of Justice (ICJ) as one of the key principles governing the creation

on the 30 July 1990, articles 23-32, available at <http://www2.ohchr.org/english/law/crc.htm> (accessed on 26 January 2012). See, Orago (n 13 above) 288.

¹⁷ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, articles, 5-7, 12, 19, & 24-28, available at <http://www.unhcr.org/refworld/docid/45f973632.html> (accessed 31 January 2012). Signed by Kenya on 30 March 2007 and ratified on 19 May 2008.

¹⁸ Kenya has ratified 49 ILO Conventions, 43 of which are in force and 6 have been denounced. Some of the Conventions in force include: The Forced Labour Convention, 1930 (No. 29); The Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); and, Worst Forms of Child Labour Convention, 1999 (No. 182). For the full ratification information, see <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:1445709296871334::NO:11200:P11200> (accessed on 26 February 2012).

¹⁹ Adopted and opened for signature, ratification and accessions on 1 June 1981 and entered into force on 21 October 1986, articles 14-18, 22 & 24. Ratified by Kenya on 23 January 1992, available at <http://www.au.int/en/treaties> (accessed on 26 January 2012). See, Orago (n 13 above) 289.

²⁰ Adopted and opened for signature, ratification and accession on 1 July 2003 and entered into force on 25 November 2005, articles 12-21. Ratified by Kenya on 6 October 2010, available at <http://www.au.int/en/treaties> (accessed on 26 January 2012). See, Orago (n 13 above) 289.

²¹ Adopted and opened for signature, ratification and accession on 1 July 1990 and entered into force on 29 November 1999, articles 4, 11-15, & 19-20. Ratified by Kenya on 25 July 2000, available at <http://www.au.int/en/treaties> (accessed on 26 January 2012). See, Orago (n 13 above) 289.

²² Vienna Convention on the Law of Treaties, adopted May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), article 26. Good faith in the realisation of SERs is also emphasised by the Limburg Principles on the Implementation of Economic Social and Cultural Rights, para 7, UN doc. E/CN.4/1987/17, Annex; and (1987) 9 *Human Rights Quarterly* 122–135.

and performance of legal obligations.²³ With the adoption of the 2010 Constitution, these international obligations have been incorporated into the Kenyan domestic legal sphere by articles 2(5)²⁴ and (6)²⁵ of the Constitution.²⁶ The entrenchment of the primacy of international law into the Kenyan legal system, a system that has been plagued by almost four decades of totalitarian rule, is not a strangely Kenyan phenomenon, but has been witnessed world-wide,

²³ *Nuclear Tests Case (Australia v France)*, International Court of Justice (ICJ), 20 December 1974, 268, para. 47, available at <http://www.unhcr.org/refworld/docid/4023a57c7.html> (accessed 17 January 2012).

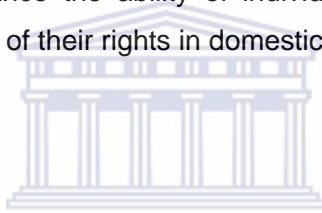
²⁴ Provides that “The general rules of international law shall form part of the law of Kenya”. This provision has similarities to article 25 of the German Basic Law which provides that ‘the general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory’. An analysis of the practice of the German Federal Constitutional Court indicates that customary international law plays an important role in the German legal system as domestic legislative acts must be interpreted in accordance with article 25, see G Slyz ‘International law in national courts’ (1995-1996) *New York Journal of International Law and Politics* 65, at 94-95.

²⁵ Provides that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

²⁶ The practice of directly incorporating international law into the domestic legal system in articles 2(6) of the Kenyan Constitution is comparatively similar to the 1991 Colombian Constitution, article 93, which provides that international human rights treaties ratified by Colombia take precedence over domestic law; and the international obligations entrenched in international SER treaties must be undertaken by Colombia, see M Sepulveda ‘The Constitutional Court’s role in addressing social injustice’ in M Langford (ed.) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 144, at 145-146. Similarly, the Russian Constitution of 12 December 1993, article 15(4) also incorporates international law into the Russian legal system by providing that ‘[c]ommonly recognised principles and norms of international law and international treaties of the Russian Federation are a competent part of its legal system. If an international treaty [...] stipulates other rules than those stipulated by the law, the rules of international treaty apply’. Similar provisions are also included in the new East European States’ Constitutions such as Estonia, Azerbaijan, Armenia, Kazakhstan, Tadjikistan, Turkmenistan, Moldova, and Belarus. See VS Vereshtin ‘New Constitutions and the old problem of the relationship between international law and national law’ (1996) 7 *European Journal of International Law* 29, at 34; A Peters ‘Supremacy lost: International law meets domestic constitutional law’ (2009) 3 *International Constitutional Law Journal* 170, at 171; GM Danilenko ‘Implementation of international law in CIS States: Theory and practice’ (1999) 10 *European Journal of International Law* 51, at 52-53.

and is based on the importance of a commitment to international values at the highest level possible with the hope of non-regression to totalitarian rule.²⁷

The change in the Kenyan legal system from dualism to monism was confirmed by Justice Martha Koome in the High Court case of *Re The Matter of Zipporah Wambui Mathara*,²⁸ concerning article 11 of the International Covenant on Civil and Political Rights (ICCPR). She held that article 2(6) imports the provisions of international treaties and conventions that Kenya has ratified into Kenyan law as part of the sources of Kenyan law.²⁹ Further affirmation of the changed situation in relation to the applicability of international law in Kenya after the promulgation of the 2010 Constitution was provided by the Kenyan Court of Appeal in the case of *David Njoroge Macharia v Republic*.³⁰ The above important constitutional provisions are in line with CESCR General Comment Number 9 which 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.³¹



²⁷ Vereshtin (n 26 above) 29-30; GL Neuman 'The use of international law in constitutional interpretation' (2004) 98 *American Journal of International Law* 82, at 85.

²⁸ *David Ndungu Maina v Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, available at http://kenyalaw.org/Downloads_FreeCases/77605.pdf (accessed on 8 October 2011).

²⁹ As above, at 4. See also *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition No. 15 of 2011, 6-7; and *Ibrahim Songor Osman v Attorney General & 3 Others*, High Court Constitutional Petition No. 2 of 2011, 8-10, where the High Court affirmed that since Kenya has ratified the ICESCR, it has become part of the Kenyan law by dint of article 2(6) of the Constitution.

³⁰ *David Njoroge Macharia v Republic*, Criminal Appeal No. 497 of 2007, 15, available at http://kenyalaw.org/Downloads_FreeCases/81236.pdf (accessed on 23 February 2012). See also CEDAW Committee Concluding Observation to Kenya's 7th Periodic Report, 5 April 2011, para. 4 where the Committee contends that the promulgation of the 2010 Constitution ensured the immediate domestication of the Convention.

³¹ CESCR, General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 4, available at: <http://www.unhcr.org/refworld/docid/47a7079d6.html> (accessed 2 November 2011).

However, progressive as it may seem, the change in the system of applicability of international law from a dualistic to a monistic system³² portends great challenges in the implementation of the 2010 Constitution, especially the entrenched SERs. The lack of clear constitutional safeguards in relation to the interpretation and operationalisation of article 2, coupled with the lack of a role for parliament in the treaty-adoption process,³³ raises concerns about the limitation of Kenya's sovereignty *vis-à-vis* international law.³⁴ These concerns are, however, too broad to be adequately and comprehensively discussed in this Chapter. The main concern of this section is the hierarchy or place of international law in relation to other sources of law in the Kenyan domestic jurisdiction. A secondary concern is to what extent the international SER obligations of the State, as entrenched in international and regional human rights treaties ratified by Kenya, form a part of the core justiciable SERs in the Kenyan domestic jurisdiction. To answer these questions, a brief analysis of a few of the jurisdictions with provisions incorporating international law into their domestic legal system is imperative.

³² Monism is a system of direct incorporation of international law, especially ratified treaties, into the domestic legal system without the requirement of enabling domesticating legislation; with the effect that international law is not only superior to municipal law, but also determines the content of municipal law. See WM Gibson 'International law and Colombian constitutionalism: A note on monism' (1942) 36(4) *The American Journal of International Law* 614; Slyz (n 24 above) 67.

³³ The 2010 Kenyan Constitution, in article 94(1) vests the legislative authority of the State in parliament, and further provides in sub-article 5 that no person or body has the power to make law in Kenya, except under authority conferred by the Constitution or legislation. The Kenyan Constitution and the prevailing practice, unlike in the United States and in Colombia, does not require the approval of parliament as a condition precedent before the executive ratifies a treaty, and thus direct application of treaties as law in the Kenyan domestic jurisdiction will be tantamount to legislation by the executive.

³⁴ Gibson (n 32 above) 614; Slyz (n 24 above) 67, who argues that in monist States, legislatures are circumscribed by international law requirements when making decisions, the executive is obliged to ensure that international law obligations are faithfully realised, and the courts must take into account and give effect to international law in their decisions. A further argument against direct incorporation of international law principles (customary international law) is that such incorporation interferes with democratic governance as no democratically elected institution evaluates their desirability and acts affirmatively to adopt them. See PR Dubinsky 'International law in the legal system of the United States' (2010) 58 *American Journal of Comparative Law* 455 at 464. This cautious approach towards the incorporation of recent international law customs, especially modern international human rights law, was affirmed in 2004 by the U.S. Supreme Court in *Sosa v Alvarez Machain*, 542 U.S. 692 (2004).

2.2.1 International law in the United States domestic legal system

The supremacy of international law in the domestic legal system of the United States (U.S.) was affirmed as early as 1804 when the then Chief Justice Marshall in his interpretation of article VI of the U.S. Constitution³⁵ held that ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains’.³⁶ This was affirmed by the U.S. Supreme Court in 1895 and 1900 when it held that ‘international law is part of our national law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of rights depending upon it are duly presented for their determination’.³⁷

However, international law jurisprudence in U.S. courts has progressively shifted towards a nationalist leaning.³⁸ Three reasons have been fashioned for this nationalist shift: first, the perceived different nature of international law from, and its potentially pervasive effects on, domestic law; second, the perception that fundamental tenets of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from a national societal body,³⁹ and, third, an understanding of constitutions as emerging from, espousing and responding to a nation’s particular history and traditions.⁴⁰ This

³⁵ Article VI of the U.S. Constitution provides that ‘...all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding’. See *The Constitution of the United States*, available at <http://constitutioncenter.org/633876696043236250.pdf> (accessed on 5 April 2012).

³⁶ *Murray v The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), quoted in H Hongju-Koh ‘International law as part of our law’ (2004) 98(1) *American Journal of International Law* 43, at 44.

³⁷ See *Hilton v Guyot* 159 U.S. 113 (1895); *The Paquete Habana* 175 U.S. 677 (1900) at, 700, quoted in Hongju-Koh (n 36 above) 43. See also XF Torrijo ‘International and domestic law: Definitely an odd couple’ (2008) 77 *Revista Juridica Universidad de Puerto Rico* 483, at 485, who affirms that the supremacy clause in the U.S. Constitution allows for the direct incorporation of ratified treaties, making them applicable, in principle, by national courts.

³⁸ A Bianchi ‘International law and U.S. Courts: The myth of Lohengrin revisited’ (2004) *European Journal of International Law* 751, at 754.

³⁹ As above.

⁴⁰ S Choudhry ‘Globalisation in search of justification: Towards a theory of comparative constitutional interpretation’ (1999) 74 *Indiana Law Journal* 819, at 822, who expounds on the doctrine of “legal particularism” and “legal hegemony” as some of the interpretive attitudes militating against the use of international law in the interpretation of constitutional provisions in the U.S., at 830-832.

shift has signified that for non-self-executing treaty provisions⁴¹ to provide concrete litigable rights to individuals, parliament must pass implementing legislation.⁴² The U.S. Supreme Court, faced with the question of the status of article 94 of the UN Charter and as a consequence the status of the International Court of Justice (ICJ)'s decision in the *Avena* case,⁴³ decided in *Medellin v Texas* (2008)⁴⁴ that the *Avena* decision was not self-executing within the U.S. legal system. The Court, in a six to three decision held as follows:⁴⁵

An ICJ judgment creates legal obligations for the United States under public international law and should be accorded "respectful consideration" within the U.S. domestic legal system, but is not to be accorded the status of binding law to be applied by U.S. courts in the absence of either implementing legislation or an intent, clearly expressed in the treaty text, for the provision at issue to be incorporated into U.S. law without action by Congress.

⁴¹ Application of the non-self-executing principle in the U.S. commenced with the decision of Chief Justice Marshall in *Foster & Elam v Neilson*, 27 U.S. (2 Pet.) 253 (1829), at 314 where he held that a treaty addresses itself to the political, and not the judicial institutions of the State, and the legislature must execute it before it becomes a binding rule for the Court. The Courts then developed criteria for the determination of the self-executing nature of a treaty which included: purpose of treaty and objective of its creators; circumstances surrounding its execution; the nature of obligations imposed by the agreement; the existence of domestic procedures and institutions appropriate for direct implementation; the availability and feasibility of alternative enforcement methods; and, the immediate and long term implications of self or non-self-execution (*People of Saipan v United States Department of the Interior*, 502 F.2d 90 (9th Cir. 1974) and *Frolova v U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985)). The above criteria were captured in the Third Restatement of the Foreign Relations Law of the U.S. which provided the following three conditions, any of which makes a treaty non-self-executing: if it manifests an intention not to be an effective domestic law without implementing legislation; if Congress or Senate requires implementing legislation; or if the Constitution requires implementing legislation. For a discussion of these, see Slyz (n 24 above) 78-80.

⁴² Slyz (n 24 above) 67-68 & 78. He gives the example of the U.S. Genocide Convention Implementation Act of 1987, sections 1091-1093 which proscribes the statute from creating any substantive or procedural right enforceable by law by any party in any proceedings, at 68, footnote 15.

⁴³ *Case concerning Avena and other Mexican Nationals (Mexico v United States of America)*, available at <http://www.icj-cij.org/docket/files/128/8190.pdf> (accessed on 12 April 2012).

⁴⁴ 552 U.S. 491 (2008).

⁴⁵ Dubinsky (n 34 above) 461.

George Slyz contends that this is a prudent way of avoiding the question of the supremacy of one system of law over the other, as they do not share a common field of application.⁴⁶ Andrea Bianchi, however, disagrees, contending that it detracts from, and waters down, the intended protection envisaged by international human rights and humanitarian law, as was exemplified by the lack of international law protection given to Guantanamo Bay detainees in the context of the war on terror.⁴⁷

On the place of international law in relation to the Constitution and domestic legislation, the U.S. Constitution is the supreme law of the land, and its primacy envisages that treaty or customary law provisions inconsistent with the Constitution will not have force of law in the U.S.⁴⁸ On the relationship between federal statutes and international law, the U.S. courts, on the basis of the supremacy of the Constitution, have held that federal statutes and self-executing treaty provisions have equal status as sources of domestic law.⁴⁹ Therefore, in case of conflict between them, the Courts have used the “last-in-time” doctrine to hold the validity of the subsequent instrument, be it the treaty or the statute.⁵⁰ A reading of articles 2(5) and (6) to infuse this type of interpretation in the Kenyan jurisdiction is possible taking into account article 21(4) of the 2010 Constitution which calls on the State, that is parliament and the executive

⁴⁶ Slyz (n 24 above) 68.

⁴⁷ Bianchi (n 38 above) 758. He cites the case of *Hamdi v Rumsfeld* where the 4th Circuit Court held that the Geneva Convention three on Prisoners of War was non-self-executing and could not create enforceable private rights of action in the U.S. domestic courts, at 764.

⁴⁸ Bianchi (n 38 above) 780. This position was espoused as early as 1957 in *Reid v Covert*, 354 US 1, 16-7 (1957), where the Supreme Court stated that ‘... no agreement with a foreign nation can confer power on Congress, or any other branch of Government, which is free from the restraints of the Constitution ... The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or the Executive and the Senate combined.’

⁴⁹ Slyz (n 24 above) 84; Dubinsky (n 34 above) 458.

⁵⁰ DL Sloss, MD Ramsey & WS Dodge (eds.) *International law in the U.S. Supreme Court: Continuity and change* (2011) 58. However, to minimise Congressional abuse of the ‘last-in-time doctrine’ U.S. courts have purposed to construe statutes so as not to conflict with international law and have strived to reconcile subsequent statutes with international law (the *Charming Betsy* rule of statutory construction). Thus, in *United States v Palestinian Liberation Organisation*, 695 F. Supp. 1456 (S.D.N.Y. 1988), the Court held that ‘in order for a subsequent statute to supersede a treaty, the explicit purpose of the statute must be to supersede the treaty,’ at 1459. See also, Bianchi (n 38 above) 761-763.

respectively, to enact and to implement legislation aimed at fulfilling its international human rights obligations.

2.2.2 International law in the Colombian domestic legal system

Colombia, a country with a similar constitutional provision incorporating international law directly into the domestic legal system, provides a contrary practice to the U.S. in relation to the applicability of international law in the domestic legal system. Monism has been entrenched in the Colombian constitutional jurisprudence as far back as 1914, with the Supreme Court of Colombia insisting that in instances of conflict between treaty provisions and provisions of municipal law, the treaty provisions prevailed.⁵¹ This is the prevailing situation after the adoption of the 1991 Constitution, and the supremacy of international law was affirmed in 2010 by the Constitutional Court of Colombia (CCC).⁵² In its analysis of *Decision C-376/10*, the International Network for Economic, Social and Cultural Rights (ESCR-Net) contends that it was significant as it 'restates that human rights treaties and general comments by [human rights treaty] bodies regarding [SERs] are part of the Colombian legal system and, within it, have a superior standing compared with the remaining regulations'.⁵³

A further elaboration of this expansive use of international law in Colombia is exemplified by *Decision C-355/2006* of the CCC which dealt with women's rights to reproductive health and especially the right to abortion. In her analysis of this case, Emilia Ordolis chronicles a broad use of international human rights law, and an affirmation by the Court that since women's sexual and reproductive rights had been recognised as human rights under international law, they as

⁵¹ Challenge on the Constitutionality of Law No. 14 of 1914, Decision of July 6, 1914, 23 *Gaceta Judicial* (1915), analysed in Gibson (n 32 above) 614-615.

⁵² Decision C-376/10, available (in Spanish) at http://www.escr-net.org/usr_doc/C-376_10_in_spanish.pdf (accessed on 6 April 2012). In arriving at its decision, the Court used a plethora of international legal instruments such as the Universal Declaration, art. 26; ICESCR, art. 13; the Protocol of San Salvador, art. 13; and CESCR General Comments Nos. 11 & 13, see ESCR – Justice, Monthly Case Law Update 'Colombian Constitutional Court issues a landmark decision on the right to education' (November 2010) available at <http://www.agirpourlesdesc.org/english/esc-rights-caselaw/article/colombian-constitutional-court> (accessed on 6 April 2012).

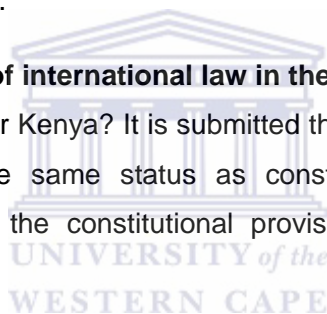
⁵³ ESR-Net 'Decision C-376/10 of the Colombian Constitutional Court' available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=1407210 (accessed on 6 April 2012).

such became part of Colombian constitutional rights.⁵⁴ She argues that the Court's reliance not only on international human rights law instruments,⁵⁵ but other soft law instruments⁵⁶ enabled it to espouse a progressive approach to reproductive rights. These instruments formed the basis for the recognition and protection of women's reproductive health by the Court.⁵⁷

Monica Olaya, in analysing the health rights jurisprudence of the CCC, contends that the Court has developed the notion of "constitutional blocks" which entails the incorporation of norms, standards and principles espoused in ratified international human rights instruments, and even interpretive documents issued by international human rights monitoring bodies, when reviewing the constitutionality of laws or when interpreting fundamental rights.⁵⁸ This has been affirmed by Joie Chowdhury who submits that international human rights treaties ratified by Colombia are at the same level as the Colombian Constitution with regard to the hierarchy of sources of law, and that the provisions of the ICESCR must be used when interpreting the relevant articles of the Constitution.⁵⁹

2.2.3 The proposed hierarchy of international law in the Kenyan legal system

The question then is, which way for Kenya? It is submitted that, as a source of legal obligations, international law is either of the same status as constitutional provisions (constitutional hierarchy) or slightly lower than the constitutional provisions, but is superior to domestic



⁵⁴ E Ordolis 'Lessons from Colombia: Abortion, equality and constitutional choices' (2008) 20 *Canadian Journal of Women and the Law* 263, at 267.

⁵⁵ Instruments relied on include: Universal Declaration, ICCPR, ICESCR, CEDAW, the American Convention on Human Rights, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention Belem do Para). See Ordolis (n 54 above) 267.

⁵⁶ The Court used the definition of reproductive health adopted in the 1994 UN International Conference on Population and Development (ICPD). See Ordolis (n 54 above) 268.

⁵⁷ Ordolis (n 54 above) 268.

⁵⁸ MA Olaya 'The right to health as a fundamental and judicially enforceable right in Colombia' (2009) 10 (4) *ESR Review* 16-17, available at [http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr review](http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr%20review) (accessed on 2 April 2012).

⁵⁹ J Chowdhury 'Judicial adherence to a minimum core approach to socio-economic rights – A comparative perspective' (2009) *Cornell Law School Inter-University Graduate Student Conference Papers. Paper 27*, at 8, available at http://scholarship.law.cornell.edu/lps_clacp/27 (accessed on 2 April 2012).

legislation (infraconstitutional but supralegal hierarchy), in the new constitutional dispensation.⁶⁰ This is due to the supremacy clause in the 2010 Constitution which not only provides in article 2(1) that it is the supreme law of the land binding on all persons and all State organs, but also provides that its validity is not subject to any challenge, and that any other law, custom, act or omission inconsistent with the Constitution is void to the extent of the inconsistency, as per articles 2(3) and (4). It is submitted here that taking into account a holistic reading of article 2 of the Constitution, in incorporating international law as part of Kenyan law in articles 2(5) and (6) within the supremacy clause, the drafters intended that international law, so long as it is consistent with the purport, spirit and the provisions of the Constitution,⁶¹ should have a

⁶⁰ Torrijo (n 37 above) 491. See also Danilenko (n 26 above) 64, who submits, taking into account the debate on the interpretation of article 17 of the Russian Constitution, that international law has the same status as constitutional provisions in Russia. This is the position in Argentina whose Constitution in article 75 also provides clearly that ratified international treaties are at the same level as the Constitution and should be considered as complimentary to the rights in the Constitution. Commenting on article 75 of the Argentinian Constitution, the UN Housing Rights Programme Report emphasises the importance of giving international law a prominent role at the national level, especially in the interpretation, implementation as well as enforcement of fundamental human rights, and encourages the inclusion of such clauses into the constitutional frameworks of other countries, see UN Housing Rights Programme Report No. 1 *'Housing rights legislation: Review of international and national legal instruments'* (2002) 39-40, available at <http://www.ohchr.org/Documents/Publications/HousingRightsen.pdf> (accessed on 19 September 2012). In Albania on the other hand, international law is subordinate to the Constitution, but is superior to other Albanian laws, see generally, F Korenika & D Doli 'The relationship between international treaties and domestic law: A view from Albanian constitutional law and practice' (2012) 24(1) *Pace International Law Review* 92, at 103ff.

⁶¹ Inapplicability of treaties contrary to the provisions, principles and purport of the 2010 Constitution can be drawn from the use of the word "under this Constitution" in article 2(6). This can be interpreted as a requirement that a proper constitutional analysis is undertaken before the ratification of a treaty to ensure that it is in compliance with the Constitution and that the processes leading to the ratification of a treaty must be accomplished in accordance with the Constitution. See for example JH Jackson 'Status of treaties in domestic legal systems: A policy analysis' (1992) 86(2) *American Journal of International Law* 310, at 317, who contends that there is a possibility that a treaty binding under international law may be invalid under the constitution of a State if it conflicts with the provisions of the domestic constitution. In such instances, the treaty cannot have a direct application and will be invalid to the extent of its inconsistency with the domestic constitution. He further argues that for the issue of hierarchy of norms to surface in relation to treaty law, it must first be determined that the treaty is valid both internationally and

prominent place in the Kenyan domestic legal system. This is to ensure that important democratic governance standards as well as human rights and fundamental freedoms contained in international law is sufficiently entrenched in the Kenyan domestic legal system, and are not left to the whims of the ruling majority of the day to change at their own convenience through legislative amendments. In this way, the drafters of the Constitution intended to safeguard the democratic and fundamental rights protection gains that were won in the struggle for constitutional change and to preclude a relapse to totalitarian rule.⁶²

This understanding of the place of international law in the Kenyan legal system finds resonance with the arguments of Ann Peters who fashions two reasons why international law must be placed at the same hierarchical level as national constitutions. First, she argues for the abandoning of a formal hierarchy between constitutional provisions and international law

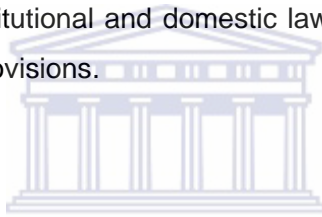
domestically (not inconsistent with the Constitution), must be directly applicable (reliance on the treaty provisions by the courts and other government institutions as a source of law) as well as invocable by parties in litigation, at 318. See also Korenika & Doli (n 60 above) 110-117, who similarly contend, in the context of Albania, that for treaties to have direct application, they must be constitutional, and that a *priori* process of analysis of the constitutionality of the treaty is undertaken by the Albanian Constitutional Court before the ratification of the treaty in question. Though the 2010 Kenyan Constitution has no express provision requiring *priori* review of treaties for constitutionality, a similar procedure must be developed in practice to ensure that treaties are consistent with the 2010 Constitution before their ratification.

⁶² Torrijo (n 37 above) 491, who avers that 'domestic legislation should not be allowed to untie what has been tied through the incorporation of international law into domestic law' and that to achieve this, international law should be placed beyond the reach of domestic law; Jackson (n 61 above) 322-323 & 331ff. He contends that:

[i]f citizens of a nation have a higher degree of trust in the international institutions and treaties than they do in their own governmental structures, they will prefer [directly applicable international norms with higher status than national legislative norms] as a conscious or implicit check on their government. Thus, it is entirely understandable that some persons in recently autocratic countries might favour an international regime to protect human rights, at 332.

This adequately summarises the Kenyan situation and supports the constitutionalisation as well as the prominent status given to international law in the 2010 Constitution. See also D Shelton 'Introduction' in D Shelton (ed.) *International law and domestic legal systems: Incorporation, transformation and persuasion* (2011) 2, who affirms that due to the post-war emphasis on human rights and democratic governance, international law has been given a prominent status in domestic legal jurisdictions as a form of "international safety net".

provisions by stating that due to the increasing permeability and convergence of State constitutions (constitutional cross-pollination) resulting in vertical and horizontal harmonisation (that is, with international law and with other State constitutions respectively), it matters little whether a court applies a domestic fundamental right or an international human rights provision, because both sets of norms tend to acquire the same content and scope.⁶³ She thus calls for the adoption of a “substance-oriented perspective” where norms are ranked in accordance with their substantive weight and significance, with less significant State constitutional provisions giving way to important international norms in instances of conflict.⁶⁴ Second, she argues that ‘[i]n a strictly legal positivist and schematic perspective, a hierarchically inferior norm cannot have an impact on the reading of a higher norm’.⁶⁵ She contends that in accordance with this understanding, the idea of the supremacy of domestic constitutional law over international law is irreconcilable with the requirement that national constitutions must be interpreted in conformity with international law.⁶⁶ Therefore, for international law to have the desired effect and impact on the development of national constitutional and domestic law, it must of necessity be ranked at the same level as constitutional provisions.



⁶³ Peters (n 26 above) 197. This is the doctrine espoused by the universalist model of constitutional interpretation through the use of comparative international and foreign law sources, which provides that constitutional guarantees are cut from a universal cloth and constitutional interpretation is an engagement in the identification, construction and application of the same set of principles, see Choudhry (n 40 above) 833; DM Beatty ‘Law and politics’ (1996) 44 *American Journal of Comparative Law* 131; C L’Heureux-Dubé ‘The importance of dialogue: Globalisation and the international impact of the Rehnquist Court’ (1998-1999) 34 *Tulsa Law Journal* 15, at 24ff, who avers that since human rights law, national and international, are cut from the same cloth and are drawn from similar earlier documents, it makes sense for judges to engage with the expertise, experience and reasoning of interpreters of similar documents from other jurisdictions.

⁶⁴ Peters (n 26 above) 197

⁶⁵ Peters (n 26 above) 181.

⁶⁶ Peters (n 26 above) 177-178. She gives the examples of the 1976 Portuguese Constitution, article 16(2); the 1978 Spanish Constitution, article 10(2); and the 1991 Romanian Constitution, article 20(1), as those constitutions which require that their provisions are interpreted in conformity with international law. See also K Young *Constituting economic and social rights* (2012) 23, who similarly contends that domestic constitutional rights must be interpreted compatibly with international human rights law.

Therefore, Kenya, in its implementation of SERs must not only take into account its constitutional obligations, but must also enforce its international SER obligations as entrenched in ratified international legal instruments and general principles of international law.⁶⁷ As such, in instances of conflict between national domestic legislation and international law, the Courts should resort to the use of the *Charming Betsy* doctrine of constitutional interpretation, discussed in section 2.2.1 above, and interpret the domestic legislation, as far as possible, to conform to international law, failing which international law should triumph.⁶⁸

This approach is envisaged by the 2010 Kenyan Constitution, especially article 20(2) which provides for the enjoyment of rights in the Constitution 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.⁶⁹ This is more in line with the approach to international law adopted in Colombia than that adopted in the U.S. It

⁶⁷ As Kenya already has an extensive constitutionally entrenched catalogue of human rights based on the generally recognised international human rights standards, the practice should be that cases on SER violations are premised on constitutional provisions, and international law provisions are used as additional arguments in support of the constitutional provisions. Only in instances of a real gap in the domestic constitutional provisions should international law be applied directly to cover the deficit. See Danilenko (n 26 above) 62.

⁶⁸ The Kenyan Courts can also benefit from the experience of the Russian Constitution Court in its use of international law in the interpretation of constitutional and other domestic laws such as: *Case Concerning Certain Normative Acts of the City of Moscow and Some Other Regions*, VKS 1996, No. 2 at 42, where the Court held that article 17 of the 1993 Russian Constitution recognises and guarantees human rights in accordance with the general principles and norms of international law, and emphasised that the right to freedom of movement is not only guaranteed by the Constitution, but also by the ICCPR, article 12, and other international human rights instruments including article 2 of Protocol No. 4 to the European Convention on Human Rights. For more such Russian cases, see Danilenko (n 26 above) 57-59 & 68; GM Danilenko 'The new Russian Constitution and international law' (1994) 88 *American Journal of International Law* 451; J Henderson 'Reference to international law in decided cases of the first Russian Constitutional Court' in R Mullerson *et al* (eds.) *Constitutional reforms and international law in Central and Eastern Europe* (1998) 59.

⁶⁹ See also, 2010 Kenyan Constitution, article 259(1) which calls for the construction of the provisions of the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law and the fundamental rights in the Bill of Rights; permits the development of law; and contributes to good governance.

espouses an acknowledgment of the transnational nature of international human rights law in a globalising world, and a recognition that this nature of human rights law has led to both vertical and horizontal constitutional cross-pollination.⁷⁰ This chapter, therefore, of necessity, adopts an expansive elaboration of Kenya's SER obligations encompassing both national (constitutional) and international (ratified human rights treaties and general principles) law, as they have a similar scope and content as discussed above.

2.3 The obligation of progressive realisation to the maximum of available resources

An understanding of Kenya's SER obligations must commence from the premises of the indivisibility, interdependence and interrelatedness of rights.⁷¹ This is to enhance coherence in rights implementation, and to ensure that similar mechanisms are used for the realisation of the entire corpus of human rights.⁷² Internationally, the general obligation for the realisation of SERs is premised on the standard of "progressive realisation" in accordance with the "maximum available resources" of the State. The standard is entrenched in the ICESCR, the foundational binding legal instrument entrenching SERs and generating State obligations for their realisation,⁷³ in article 2(1) which provides as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights

⁷⁰ Hongju-Koh (n 36 above) 53; E Benvenisti 'Reclaiming democracy: The strategic use of foreign and international law by national courts' (2008) 102 *American Journal of International Law* 241, at 242; Peters (n 26 above) 173-174. She argues that the reception of international standards such as human rights protection, good governance and democracy, into national constitutions leads to the vertical convergence of constitutional and international law; that is 'the globalization of State constitutions and the constitutionalisation of international law'.

⁷¹ Amartya Sen emphasizes the instrumental values of all rights contending that rights reinforce each other and that: political freedoms (free speech & elections) help promote economic activity; social opportunities (education & health) facilitate economic participation; and economic facilities (opportunities for participation in trade and production) generate personal as well as public resources for social facilities, see A Sen *Development as freedom* (1999) 11.

⁷² R Kunneman 'A coherent approach to human rights' (1995) 17 *Human Rights Quarterly* 323, at 323.

⁷³ See, United Nations High Commissioner for Human Rights (UNOHCHR) *Economic, social and cultural rights: A handbook for National Human Rights Institutions* (2005) 5.

recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This standard has over the years been incorporated into most of the international legal instruments entrenching SERs.⁷⁴ The Convention on the Rights of the Child (CRC), though containing the duty to ensure and respect rights without discrimination,⁷⁵ inserts, with regard to SER provisions, that they are to be realised to the maximum of a State's available resources, including reliance on international co-operation.⁷⁶ Article 4⁷⁷ has been interpreted by the Committee on the Rights of the Child (CRC Committee) to inculcate the standard of "progressive realisation" as entrenched in article 2(1) of the ICESCR with regard to the SERs of children.⁷⁸ Differentiation of obligations, as with regard to CPRs and SERs, is also apparent in the Convention on the Rights of Persons with Disability (CRPD) which, even though setting the

⁷⁴ M Sepulveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 256.

⁷⁵ CRC, article 2.

⁷⁶ CRC, article 4; S Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 101-102.

⁷⁷ Article 4 CRC provides that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation'.

⁷⁸ CRC Committee, *General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, paras. 5-8, available at: <http://www.unhcr.org/refworld/docid/4538834f11.html> (accessed 31 January 2012). Para. 5 incorporates the General Comments of the Human Rights Committee (ICCPR) and the CESCR as complimentary in the interpretation of the obligations of States under the CRC. Para. 7 acknowledges the constraint of resources in the implementation of SERs and introduces the concept of "progressive realisation to the maximum extent of available resources". See also CRC Committee, Working Group 3 'States parties' obligations: realizing economic, social and cultural rights – are child rights a luxury during an economic crisis?' available at www2.ohchr.org/english/bodies/crc/docs/20th/BackDocWG3.doc (accessed on 10 October 2011); Detrick (n 76 above) 103-109.

standard for States to ensure and promote the full realisation of human rights, still adopts the standard of progressive realisation for entrenched SERs.⁷⁹

The standard has also been entrenched into some of the national constitutions that have justiciable SERs such as the SAC.⁸⁰ The SACC adopted the same interpretation that was given to the standard by the CESCR in the *Grootboom* case where it held as follows:⁸¹

Although the Committee's analysis is intended to explain the scope of the states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of the Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was clearly derived.

The Kenyan Constitution, germane to this study, also entrenches the standard of progressive realisation with regard to entrenched SERs, and should thus adopt a similar interpretation.⁸²

The SER obligations as entrenched in article 2(1) of the ICESCR differ significantly from the undertaking to "respect" and "ensure" that is incorporated in article 2 of the ICCPR.⁸³ This was basically due to political, ideological and pragmatic reasons⁸⁴ at the time of drafting of the two covenants which engendered a perceived difference in nature between the two categories

⁷⁹ See CRPD, article 4 (1) & (2).

⁸⁰ The 1996 South African Constitution, sections 25(5), 26 & 27.

⁸¹ *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), para. 45. For an analysis of the jurisprudence of the SACC on the standard of "progressive realisation" see, Chenwi (n 7 above) 21-23.

⁸² The 2010 Kenyan Constitution, article 21(2) as read with article 20(5).

⁸³ Article 2 of the ICCPR entails the general obligation to respect and ensure entrenched rights.

⁸⁴ E Wiles 'Aspirational principles or enforceable rights: The future for socio-economic rights in national law' (2006-2007) 22 *American University International Law Review* 35, at 38-39. For an in-depth analysis of the reasons that were fashioned for the differing state obligations with regards to the two categories of rights in the two conventions see Sepulveda – Nature of SER obligations (n 74 above) 116-133. See also: Asbjorn Eide 'Economic, social and cultural rights as human rights' in A Eide, C Krause & A Rosas *Economic, social and cultural rights: A text book* (2001) 9, at 10; MA Baderin & R McCorquodale 'The International Covenant on Economic, Social and Cultural Rights: Forty years of development' in MA Baderin & R McCorquodale (eds.), *Economic, social and cultural rights in action* (2007) 3 at 6-12.

of rights, and which led to the erroneous conclusion that they required different methods of implementation.⁸⁵ The major prevailing reason, based on the perceived nature of SERs, was that SERs entailed highly resource-dependant positive obligations, and thus required only that States take steps to the maximum of their available resources to progressively realise these rights.⁸⁶ However, with the contemporary developments in international law, and an improved understanding of the nature of SERs, it has become clear that CPRs and SERs both contain positive and negative obligations, both require resources to implement, and both contain immediate⁸⁷ and progressive obligations.⁸⁸

The difficulty in implementing the “progressive realisation” standard, coupled with the monitoring and evaluation challenges it engenders, has led to a barrage of criticisms, with its opponents arguing that it is the major reason for the endemic neglect in the realisation of SERs nationally and internationally.⁸⁹ Robert Robertson argues that the use of the standard as a measuring tool for State compliance with their SER obligations is problematic as it has eluded adequate definition through the years, and that authoritative bodies and rights advocates have

⁸⁵ Sepulveda – Nature of SER obligations (n 74 above) 118-119. See also 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* 156, at 159-160; D Olowu ‘Human development challenges in Africa: A rights-based approach’ (2004) 5 *San Diego International Law Journal*, 179, at 188-189.

⁸⁶ Sepulveda – Nature of SER obligations (n 74 above) 133.

⁸⁷ The CESCR has for example elaborated immediate obligations generated by the ICESCR in several of its General Comments, for example General Comment No. 4 para. 10, General Comment No. 11 para.10, General Comment No. 12 para.16, General Comment No. 13 para.31, General Comment No. 14 para.30, General Comment No. 17, paras.25 & 39, General Comment No. 18, paras.19& 33, General Comment No. 19, paras.40 & 65, General Comment No. 20, paras.7 & 8.

⁸⁸ The Human Rights Committee (HRC) has stated, in its interpretation of article 2 of the ICCPR, that the “duty to respect” entails negative obligations of non-interference while the “duty to ensure” entails positive and progressive obligations of states in the realisation of CPR. See HRC General Comment No. 3 para. 1, General Comment No. 4 para.3, General Comment No. 17 paras.10 and 18, and General Comments No. 28 para. 3.

⁸⁹ M Dowell-Jones *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the economic deficit* (2004) 39. See also Young - Constituting SERs (n 66 above) 101-104, who views the standard as a limitation on SERs.

been unable to develop adequate indicators to usefully operationalise it.⁹⁰ He marks it as a 'difficult phrase' where 'two warring adjectives describe an undefined noun, where "maximum" stands for idealism, and "available" stands for reality; "maximum" is the sword of human rights rhetoric, and "available" is the wiggle room for the State.'⁹¹ He affirms the need for the development of content to the standard; and contends that if the content of the standard is not developed, the assessment of State performance in the realisation of SERs will lack vigour and SERs will be viewed as idealistic rhetoric, lacking in legal obligations.⁹²

Matthew Craven contends that article 2(1) of the ICESCR is 'a fairly unsatisfactory article, with its convoluted phraseology in which clauses and sub-clauses are combined together in an almost intractable manner, making it virtually impossible to determine the precise nature of the obligations'.⁹³ Audrey Chapman also contends that the standard is inexact and difficult to monitor, and thus making it difficult to hold States accountable for delay in the implementation, or liable for the violation, of SERs.⁹⁴ She further argues that the standard assumes differentiated content of rights and obligations for States depending on their relative level of development and availability of resources; and thus necessitating the development of a multiplicity of performance standards for substantive SERs in relation to the varied social, developmental and resource context of each of the member states of the Covenant.⁹⁵ David Harris has also argued that the language of article 2(1) is wide and full of caveats, making an assessment of compliance or infringement by States of their obligations under the Covenant a complex issue.⁹⁶ Finally, Scott Leckie has remarked that with the continued expansive interpretation and clarification of the

⁹⁰ RE Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* 693, at 694.

⁹¹ As above.

⁹² As above.

⁹³ M Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development*, revised edition (1998) 151.

⁹⁴ AR Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23.

⁹⁵ Chapman (n 94 above) 31.

⁹⁶ D Harris 'Comments' in F Coomans and F Van Hoof (eds.) *The right to complain about economic, social and cultural rights* (1995) 103-06.

content of substantive SERs, recalcitrant States will seek to rely on the convoluted nature of article 2(1) to escape from their SER obligations.⁹⁷

To help enhance the understanding of this standard, a systematic analysis of its components is imperative. Even though the components will be analysed separately, it is important to note that they are intertwined and mutually reinforcing and should thus be viewed as an organic whole.⁹⁸ The components to be analysed include: progressive realisation; obligation to take steps; maximum of the available resources; and, international cooperation and assistance.

2.3.1 Progressive realisation

The entrenchment of the “progressive realisation” standard in the ICESCR was due to the recognition that full realisation of all the substantive SERs could not be achieved over a short period of time.⁹⁹ It was thus intended as a flexibility device reflecting the realities of the world and the difficulties in achieving the full realisation of SERs, especially for the developing and the least developed countries.¹⁰⁰ However, due to its haziness, there were concerns that States will misuse the standard as an excuse for them to undertake measures to realise their Covenant SERs obligations. These concerns led the CESCR to stress that the standard should not be misinterpreted to leave States SER obligations bereft of content, but that it obliges States to move as expeditiously, and as effectively, as possible towards meeting their goal of the full

⁹⁷ S Leckie ‘Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights’ (1998) 20 *Human Rights Quarterly* 81, at 94.

⁹⁸ Sepulveda – Nature of SER obligations (n 74 above) 313.

⁹⁹ CESCR General Comment No. 3, paras.1 & 9; Chenwi (n 7 above) iii; Sepulveda – Nature of SER obligations (n 74 above) 312; Alston & Quinn (n 85 above) 172, who contend that the adoption of this standard ‘mirrors the inevitably contingent nature of State obligations’ on SERs.

¹⁰⁰ CESCR General Comment No. 3, para. 9. According to the words of Mr. Sorenson, the Danish representative during the drafting of the Covenant, the adoption of the standard of “progressive realisation” was ‘...necessary and valuable as it introduced a dynamic element, indicating that no fixed goal had been set in the implementation of [SERs], since the essence of progress was continuity.’ See Alston & Quinn (n 85 above) 174. The SACC has interpreted the “progressive realisation standard to be inherently limited by availability of resources, see *Sobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC), para. 11.

realisation of SERs, the *raison d'être* of the Covenant.¹⁰¹ The Maastricht Guidelines also acknowledges this requirement for expeditious realisation of Covenant obligations by providing the following:¹⁰²

The fact that the full realisation of most [SERs] can only be achieved progressively ...does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. [...] The State cannot use the “progressive realisation” provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognised in the Covenant because of different social, religious and cultural backgrounds.

The progressive realisation obligation goes further than the realisation of the minimum essential elements of the entrenched substantive rights, and encompasses an obligation for the State to ensure the widest possible enjoyment of the rights on a progressive basis.¹⁰³ This was recognised by the SACC in the *Grootboom* case when it interpreted “progressive realisation”, with regard to housing, to engender the obligation of the state to ‘progressively facilitate accessibility and examine legal, administrative, operational and financial hurdles with the aim of lowering them over time and making housing accessible to a larger number, and a wider range, of people as time progresses’.¹⁰⁴ *The Principles and Guidelines for Human Rights Approach to Poverty Reduction Strategies* (2006) acknowledge that progressive realisation due to resource

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¹⁰¹ CESCR General Comment No. 3, para. 9; Chenwi (n 7 above) iii & 20-21.

¹⁰² Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, guideline 8, available at http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425803 (accessed on 23 January 2012). See also the Limburg Principles, principle 21 which obliges states to expedite the realisation of the rights and not to use the “progressive realisation” standard to defer indefinitely efforts to ensure full realisation.

¹⁰³ Chenwi (n 7 above) iii & 20. See also, South African Human Rights Commission Working Paper ‘*Millennium Development Goals and the progressive realisation of economic and social rights in South Africa: A review*’ (December 2008) 6, available at <http://www.sahrc.org.za/home/21/files/1/ESR%20Working%20Paper%20for%20Public%20Hearings%20009.pdf> (accessed 28 March 2012), which defines “progressive realisation” as ‘a continuum where the rational is to start at the minimum socio-economic provision necessary to meet people’s basic needs (minimum obligation) to the full realisation of a significant improvement of the capabilities of people in the society to the extent that they can meaningfully participate and shape society’.

¹⁰⁴ *Grootboom*, para. 45.

constraints requires States to adopt strategies that are time bound, with properly set targets and benchmarks.¹⁰⁵ This is to ensure that SER policies and programmes are not unduly delayed, and that there is a careful prioritisation and balanced trade-offs in the implementation of these policies and programmes that conform to human rights norms and standards.¹⁰⁶ Progressive realisation thus requires the constant review and revision of SER policies and programmes over time to enhance the standards of life of the people within the jurisdiction of the State.¹⁰⁷

The use of the term “progressive” necessarily prohibits the adoption of retrogressive measures by the State in the full realisation of SERs. According to Sepulveda, progression entails two complimentary obligations: ‘the obligation to continuously improve conditions, and the obligation to abstain from taking deliberately retrogressive measures except under specific circumstances’.¹⁰⁸ The CESCR has been very assertive against retrogressive measures in its general comments, delineating very stringent conditions for such retrogressive steps to be acceptable. It has affirmed that deliberately retrogressive measures must be fully justified in relation to the totality of the Covenant rights and in the context of the maximum use of available resources.¹⁰⁹

The CESCR has further elaborated in General Comment Number 19, in relation to social security, measures that the Committee will consider when looking at the justifiability of retrogressive measures. They include reasonableness of the action; comprehensive

¹⁰⁵ UN Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, HR/PUB/06/12, para. 49, available at: <http://www.unhcr.org/refworld/docid/46ceaef92.html> (accessed 28 January 2012).

¹⁰⁶ OHCHR Principles and Guidelines on Poverty Reduction (n 105 above) para. 50. The human rights approach imposes some conditions during prioritisation and they include: the need for effective participation by all stakeholders, especially the poor; the establishment of just institutional mechanisms to reconcile conflicting worldviews in a fair and equitable manner; the requirement that prioritisation of rights meets the principles of equality and non-discrimination and that it does not exacerbate poverty, inequality and discriminatory outcomes; and that prioritisation must not interfere with the realisation of the minimum core obligations of the other entrenched rights. See, paras. 56-61.

¹⁰⁷ This aspect of the “progressive realisation” standard was expounded by the SACC in *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC), para. 40.

¹⁰⁸ Sepulveda – Nature of SER obligations (n 74 above) 319.

¹⁰⁹ CESCR General Comment No. 3, para. 9; General Comment No. 13, para.45; General Comment No. 14, para. 32.

examination and consideration of alternatives to the retrogressive action; genuine participation of the affected groups in decision-making; the long term adverse impact of the action and whether it deprives access to the minimum essential levels of rights; and, the presence or otherwise of independent national review.¹¹⁰ However, despite the flexibility allowing States to justify retrogressive measures, the CESCR in General Comment Number 14 has further stated that any such measures which affect the minimum core content of Covenant rights is a violation of the Covenant.¹¹¹ The Maastricht Guidelines also provide that the adoption of deliberately retrogressive measures by states is a violation of their obligation under the Covenant.¹¹²

Even though the Covenant adopts the “progressive realisation” standard, it also contains immediate obligations.¹¹³ They are as follows: non-discrimination;¹¹⁴ obligation to take steps (as discussed herein below); obligation to realise the minimum core content of substantive SERs;¹¹⁵

¹¹⁰ CESCR General Comment No. 19, para. 42. Retrogression must be justified by a reference to the totality of the rights in the Covenant taking into account the state’s full use of the maximum of its available resources.

¹¹¹ General Comment No. 14, para. 48.

¹¹² Maastricht Guidelines, Guideline 14(e).

¹¹³ See CESCR General Comment No. 3, para. 1; General Comment No. 4, para.8; General Comment No. 9, para.10; General Comment No. 13, paras.31 & 43; General Comment No. 14, para.30; General Comment No. 15, paras.17 & 37; General Comment No. 16, paras.16, 32 & 40; General Comment No. 17, paras.25 & 39; General Comment No. 18, paras.19 & 33; General Comment No. 19, para.40; General Comment No. 20, para.7; and, General Comment No. 21, paras.25, 44, 55, 66 & 67. See also Limburg Principles, principles 16 & 21.

¹¹⁴ CESCR General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (article 2(2) of the ICESCR) 2 July 2009E/C.12/GC/20, para. 7, available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed on 31 January 2012). It provides that ‘[n]on-discrimination is an immediate and cross-cutting obligation in the Covenant’. The CESCR has also stated, in General Comment No. 13, that State Parties have an immediate obligation in relation to the right to education, such as the guarantee that the right will be exercised without discrimination of any kind. See, CESCR *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para. 43, available at: <http://www.unhcr.org/refworld/docid/4538838c22.html> (accessed 28 January 2012).

¹¹⁵ Limburg Principles, principle 25, which provides that ‘State Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all’. The immediate nature of the realisation of the minimum core obligations was disputed by the SACC when it rejected the

trade union rights;¹¹⁶ obligation to ensure fair wages and equal remuneration for equal work;¹¹⁷ the obligation to take measures for the protection of children and young persons without discrimination; the obligation to penalise by law the employment of young children and young persons in dangerous or harmful work, and the duty to prohibit child labour;¹¹⁸ the duty to provide compulsory primary education free of charge;¹¹⁹ obligation to respect the freedom of parents to choose the school for their children;¹²⁰ the freedom to establish and direct educational institutions;¹²¹ the freedom essential for scientific research and creative activity;¹²² obligation to monitor implementation of the Covenant rights,¹²³ which include the duty to submit initial and progressive reports to treaty monitoring bodies,¹²⁴ among others.¹²⁵ The immediate nature of these duties is reflected by the wording of the rights which provides for an undertaking to “ensure” and “guarantee”.¹²⁶

The immediate nature of the non-discrimination and equality obligations of States with regard to SERs can be seen in the standard of compliance entrenched in CEDAW, a convention inspired by the principle of equality and non-discrimination.¹²⁷ CEDAW obliges States to take

minimum core content approach to SERs. The Court’s concerns were the difficulty of determining the minimum content of the substantive SERs, the fact that societal needs are diverse and people are differently situated and that the court was not institutionally competent to make such decisions without raising democratic concerns. For a more substantive analysis, see chapter five, section 5.3 of this thesis.

¹¹⁶ ICESCR, article 8.

¹¹⁷ ICESCR, article 7 (a) (i).

¹¹⁸ ICESCR, article 10(3).

¹¹⁹ ICESCR, article 13(2) (a); CESCR General Comment No. 13, para. 51.

¹²⁰ ICESCR, article 13(3).

¹²¹ ICESCR, article 13(4).

¹²² ICESCR, article 15(3).

¹²³ In relation to housing, see, CESCR General Comment No. 4, para. 13. Monitoring requires the development of relevant indicators and benchmarks for each of the substantive SER, see Sepulveda – Nature of SER obligations (n 74 above) 363. According to the Maastricht Guidelines, guideline 15(f), failure to monitor the realisation of SER is a violation of the Covenant.

¹²⁴ Chapman (n 94 above) 25.

¹²⁵ See Sepulveda – Nature of SER obligations (n 74 above) 175 & 345; Chenwi (n 7 above) 37ff.

¹²⁶ Alston & Quinn (n 85 above) 185-186; Chenwi (n 7 above) 27.

¹²⁷ CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19

appropriate measures, including the adoption of legislation, to ensure the full development and advancement of women in all fields of human rights, SERs inclusive.¹²⁸ The CEDAW Committee has interpreted the chapeau of article 2, which engenders the obligations of States to undertake measures “without delay”, to mean that States have an immediate and continuing obligation to condemn all forms of discrimination, especially those against women.¹²⁹ It has found that the immediacy of the non-discrimination obligation entails the duty of the State to undertake due diligence in the prevention, investigation, prosecution and punishment of violations.¹³⁰ The Committee further engenders the duty of the State to enhance substantive equality by adopting concrete and effective policies and programmes (including special measures in accordance with article 4 of CEDAW) to eliminate discrimination against women, especially taking into account the vulnerabilities of girl children.¹³¹

October 2010, CEDAW/C/2010/47/GC.2, paras. 3, 4 & 5, available at: <http://www.unhcr.org/refworld/docid/4d467ea72.html> (accessed 31 January 2012). See also UNIFEM South Asia & Partners for Law in Development ‘CEDAW: Restoring rights to women’ (2004) 23, available at <http://www.unifem.org.in/CEDAW.pdf> (accessed on 31 January 2012).

¹²⁸ CEDAW, articles 2, 3, 8 (right to represent their governments in international organisations), 10 (education), 11 (employment), 12 (health), and 13 (other areas of SERs); CEDAW Committee Recommendation 28, paras. 6 & 7.

¹²⁹ CEDAW Committee, General Recommendation 28, paras.14, 15& 29. Para. 29 provides that the language in CEDAW is unqualified and does not allow for delays or incremental implementation. It, therefore, means that delay in the implementation of the CEDAW provisions cannot be justified on any grounds, even socio-economic, and further obliges states that may be facing resource or expertise constraints to seek international assistance to overcome their difficulties.

¹³⁰ CEDAW Committee, General Recommendation 28, para. 19.

¹³¹ CEDAW Committee, General Recommendation 28, paras. 20-36. Para. 24 provides that the State has an obligation to immediately assess the *de jure* and *de facto* situation of women and take concrete steps towards the formulation and implementation of policy (constitutional and legislative guarantees) targeted at the elimination of discrimination and the enhancement of substantive equality of women. Para. 31 calls for an overriding constitutional provision eliminating discrimination against women; the incorporation of CEDAW provisions into domestic law; the immediate modification or abolition of discriminatory laws, regulations, customs and practices; and the enactment of legislation prohibiting discrimination against women in all fields of life, with a special attention to vulnerable women. Para. 32 calls for the provision of adequate remedies in instances of violations, especially reparations.

2.3.2 Obligation to take steps

This is an immediate obligation that the State must undertake shortly after the ratification of the Covenant to enhance the realisation of SERs.¹³² The obligation requires that the State undertakes deliberate, concrete and targeted steps aimed at, and capable of fully realising, SERs.¹³³ De Schutter avers that in order to fulfil this obligation as swiftly as possible, the State should adopt national strategies entrenched in legislative, policy and programmatic frameworks with quantified and time-based objectives reflected in sufficient benchmarks and monitoring indicators.¹³⁴ De Schutter's contentions are supported by *the Principles and Guidelines for Human Rights Approach to Poverty Reduction Strategies* developed by the OHCHR.¹³⁵ UN Food and Agriculture Organisation (FAO) in their *Voluntary Guidelines for the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* (2004) also reiterates that strategies for the progressive realisation of SERs must include: 'objectives, targets, benchmarks, time-frames; and actions to formulate policies, identify and mobilise resources, define institutional mechanisms, allocate responsibilities, coordinate the activities of different actors, and to provide for monitoring mechanisms'.¹³⁶ The CEDAW Committee has further provided a comprehensive framework that must be met by measures undertaken by States in the implementation of their obligations under CEDAW.¹³⁷

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¹³² Alston & Quinn (n 85 above) 165-166. They contend that the "obligation to take steps" was preferred by the drafters to the wording requiring States to "guarantee" the rights in the Covenant because the latter commitment would have been too onerous. See also D Olowu *An integrative rights-based approach to human development in Africa* (2009) 32.

¹³³ CESCR General Comment No. 3, paras. 2 & 4.

¹³⁴ O De Schutter *International human rights law: Cases, materials and commentaries* (2010) 462.

¹³⁵ OHCHR Principles and Guidelines on Poverty Reduction (n 105 above) paras. 51-55. It requires the State's commitment to poverty reduction, the development of a time-bound plan of action, establishment of benchmarks and indicators to enhance monitoring, and the involvement of the public in the design and development of the plan of action so that it is reflective of the concerns and the interests of all sectors of society.

¹³⁶ FAO *Voluntary Guidelines for the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* 23 September 2004, para. 3.3, available at <http://www.fao.org/docrep/meeting/008/J3345e/j3345e01.htm> (accessed on 29 January 2012).

¹³⁷ See CEDAW Committee, General Recommendation 28, para. 28.

In the domestic context, the SACC, in its reasonableness approach, has held that in order for measures aimed at the realisation of SERs to be reasonable, they must meet the following criteria:¹³⁸

- a) Be comprehensive, coherent and coordinated, and must also be properly conceived and implemented;
- b) Be inclusive, balanced, flexible and make appropriate short-, medium- and long-term provisions for people in desperate need or in crisis situations, whose ability to enjoy all human rights is most in peril;
- c) Clearly set out responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation;
- d) Be tailored to the particular context in which they are to apply and take account of the different economic levels in society;
- e) Be continuously reviewed because conditions change;
- f) Be transparent and have its contents made known appropriately and effectively to the public; and,
- g) Allow for meaningful or reasonable engagement with the public or affected people and communities.

The steps taken must, therefore, have a time scale of implementation, and must be rationally connected to the clear State objective of the full realisation of substantive SERs to the greatest majority of people, prioritising marginalised and vulnerable groups in society.¹³⁹ The CESCR has emphasised that even in situations of severe economic constraints, marginalised and vulnerable groups must be protected through the adoption of low-cost targeted programmes.¹⁴⁰ Therefore, a measure that does not prioritise the needs of the marginalised and vulnerable groups is less likely to meet the required threshold under this obligation. The *Grootboom* case hinged on this particular aspect and the reason why the Court found the housing programme in question to be unreasonable was because it failed to provide for, or to prioritise the needs of, people in desperate situations. Similarly, in the case of *Minister of Public Works v Kyalami Ridge Environmental Association*, the same Court held that the obligation to

¹³⁸ See Chenwi (n 7 above) 35-36 (footnotes omitted).

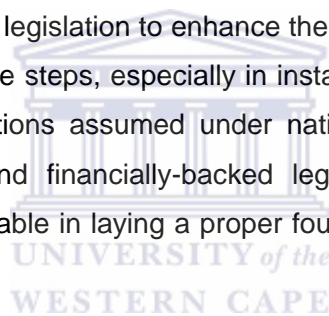
¹³⁹ Chenwi (n 7 above) 10.

¹⁴⁰ CESCR General Comment No. 3, para. 12; and General Comment No. 15, para. 13.

take steps includes the need to facilitate access to temporary relief for people living in intolerable conditions and for people who are in a crisis due to natural disasters.¹⁴¹

What measures must States adopt in order to fulfil their SER obligations? In answering this question it is important to note that States are afforded a margin of appreciation in relation to the measures to be implemented in the realisation of their obligations with regard to SERs.¹⁴² The CESCR, in its interpretation of this obligation, requires States to take all appropriate measures, depending on the nature of the substantive right in question,¹⁴³ and such measures include, but are not limited to, the adoption of legislation.¹⁴⁴ The 2010 Kenyan Constitution explicitly adopts this requirement - that the State is required to undertake legislative, policy and other measures for the progressive realisation of the entrenched SERs.¹⁴⁵ The Constitution further affirms, in article 21(4), the duty of the State to enact and implement legislation aimed at fulfilling its international human rights obligations.

The adoption, or reform, of legislation to enhance the realisation of SERs is an important component of the obligation to take steps, especially in instances where the existing legislation is in violation of the SER obligations assumed under national and international law.¹⁴⁶ The adoption of a comprehensive and financially-backed legislative, policy and programmatic framework is, therefore, indispensable in laying a proper foundation for the full and progressive



¹⁴¹ *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), paras. 38-40.

¹⁴² M Sseyonjo, *Economic, social and cultural rights in international law* (2009) 54.

¹⁴³ The Limburg principles, principle 17 stresses that the measures taken must be consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

¹⁴⁴ CESCR General Comment No. 3, para. 3.

¹⁴⁵ The 2010 Kenyan Constitution, article 21(2) & (4).

¹⁴⁶ Alston & Quinn (n 85 above) 167. The CESCR has consistently called on States to amend discriminatory laws as can be seen in its Comments such as General Comment No. 13, para. 15; General Comment No. 7, para. 9; and General Comment No. 14, para. 50. This is in line with the Limburg Principles which, in principle 37, calls on States to eliminate all *de jure* discrimination by abolishing discriminatory laws, regulations and practices; and with the Maastricht Guidelines, guideline 14(b), which consider the existence of discriminatory laws as a violation of the Covenant. See Sepulveda – Nature of SER obligations (n 74 above) 348-349.

realisation of SERs.¹⁴⁷ This is recognised by the CESCR, who further affirm the indispensability of legislation in combating discrimination,¹⁴⁸ in realising the right to health¹⁴⁹ and education, the protection of mothers and children, as well as the fulfilment of the rights captured under articles 6 to 9 of the ICESCR.¹⁵⁰

However, the adoption of a legislative framework on its own is not enough in enhancing the realisation of SERs at the national level.¹⁵¹ Affirming the inadequacy of legislation alone in the implementation of the Covenant obligations, Mr. Cassin, the representative of France at the drafting of the Covenant, argued that:¹⁵²

[L]egislative texts might prove inadequate when it came to reforms, or indeed, upheavals that [are] sometimes necessary to implement certain [SERs] which had not yet been recognised for the reason that a number of diverse measures had to be adopted involving changes in the country's economic and social equilibrium. It would be deceiving the peoples of the world to let them think

¹⁴⁷ Kenya has been known to enact legislation without the allocation of adequate resources to effectively implement them. This was pointed out by the CRC Committee in its consideration of Kenya's Initial Report to the body in 2001, and the Committee encouraged Kenya to allocate resources, human and financial, to the organs mandated to implement legislation protecting the SERs of children and to prioritise its budgetary allocation to children to the maximum extent of the available resources taking into account the principle of the best interests of the child. See CRC Committee, Concluding Comment – Kenya CRC/C/SR.725-726, paras. 11-13, 16-19 available at <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/fe005> (accessed on 19 February 2012).

¹⁴⁸ See CESCR General Comment No. 20, paras. 11, 37, 39 & 40, where the Committee emphasises that the adoption of specific legislation is an indispensable measure for eliminating and prohibiting both formal and informal discrimination, be it in public or private sphere. See also General Comment No. 16, para. 41, where the CESCR has reiterated that the failure by the State to implement and monitor effects of laws, policies and programmes aimed at the prohibition of discrimination in access to SERs is a violation of the Covenant.

¹⁴⁹ CESCR General Comment No. 14, para. 56, affirms the need for states to adopt a framework law to operationalise the right to health.

¹⁵⁰ Alston & Quinn (n 85 above) 167.

¹⁵¹ The Limburg Principles, principle 78 alludes to this by providing that States should not only report on the relevant legislative provisions that have been put in place to realise Covenant rights, but must also specify 'the judicial remedies, administrative procedures and other measures they have adopted for enforcing these rights and the practices under those remedies and procedures'.

¹⁵² U.N. Doc. E/CN.4/SR.232 (1951) Quoted in Alston & Quinn (n 85 above) 168.

that a legal provision was all that was required to implement certain promises, when in fact an entire social structure had to be transformed by a series of legislative and other measures.

Alston and Quinn also contend that the adoption of legislation on its own does not *ipso facto* discharge relevant State obligations, and that what is required is to make the Covenant provisions effective in law and in fact.¹⁵³

Thus, the other measures which are considered appropriate to compliment the adoption of legislation include the provision of adequate remedies,¹⁵⁴ which basically calls on states to entrench justiciable SERs in their constitutions and to allow for judicial or other effective administrative enforcement of SERs.¹⁵⁵ The enforcement measures adopted by the State must be practical, accessible, affordable, timely and effective in addressing the violations, or the perceived non-realisation, of SERs.¹⁵⁶ The 2010 Constitution, in article 22, avails judicial remedies to individuals, groups or public interest organisations in the instances of denials, infringements or violations of the entire corpus of human rights entrenched in the Bill of Rights, SERs included. The available remedies in this instance include: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of the infringing law; an order for compensation; and, an order of judicial review.¹⁵⁷ For Kenya to meet its obligations to provide adequate remedies, these constitutional provisions must be made effective to parties who seek judicial enforcement of their SERs. The adoption of administrative, financial, educational and social measures;¹⁵⁸ the creation of appropriate implementation and monitoring institutions,¹⁵⁹

¹⁵³ Alston & Quinn (n 85 above) 169.

¹⁵⁴ See CESCR General Comment No. 9, para, 2 which provides, among other things, that ‘appropriate means of redress, or remedies, must be available to an aggrieved individual or group, and appropriate means of ensuring government accountability must be put in place’.

¹⁵⁵ CESCR General Comment No. 3, para. 5. Some of the provisions in the ICESCR that are amenable to judicial enforcement include articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) & (4), and 15(3).

¹⁵⁶ CESCR General Comment No. 9, para. 9.

¹⁵⁷ 2010 Constitution of Kenya, article 23(3). The entrenchment of horizontally applicable justiciable SER into national constitutions and the empowerment of the judiciary to enforce those rights play an important role in meeting the states duty to protect the population from the violation of their rights by private entities, see Sepulveda – Nature of SER obligations (n 74 above) 314.

¹⁵⁸ CESCR General Comment No. 3, para. 7.

¹⁵⁹ Some of the institutions that may play a key role in the monitoring of SER implementation in Kenya are: The Kenya National Human Rights and Equality Commission and the Office of the Ombudsperson.

and the establishment of action programmes¹⁶⁰ also constitute steps toward the full realisation of SERs.

Dowell-Jones has decried the continued over-reliance on legal measures such as the enactment of legislation and the provision of legal remedies in the realisation of SERs.¹⁶¹ She argues that a realistic understanding of the obligations under article 2(1) of the Covenant must, as a necessity, involve a discussion of the macro-economic measures that the States must put in place to enhance the realisation of SERs, a task that has not been undertaken by either commentators or the CESCR due to a lack of technical, administrative or financial means.¹⁶² She mentions some of the macro-economic measures that must be put in place by States so as to create a sustainable, non-inflationary growth path capable of generating the requisite financial resources to implement SERs. They include the following:¹⁶³

[a]doption of deficit reduction and revenue raising programmes; the streamlining of government operations including the privatisation of public enterprises in areas efficiently managed in the private sector; removing barriers to entry in employment-generating industries; and the investment in power, transport and communications infrastructure.

Resources are critical in the realisation of SERs and unless measures are put in place to generate these resources, the full realisation of SERs will remain a pipe dream. It is therefore essential that an understanding of the measures to be taken to realise SERs must also include measures to enhance macro-economic stability which would lead to the generation of sufficient resources for the full realisation of SERs.

Even though the State has discretion as to the steps it can take with the objective of meeting its SER obligations, the final determination of the appropriateness of the steps to meet SER objectives lies with the Committee to be determined during the Committee's consideration

¹⁶⁰ Alston & Quinn (n 85 above) 169.

¹⁶¹ Dowell-Jones (n 89 above) 40-43.

¹⁶² As above.

¹⁶³ Dowell-Jones (n 89 above) 44. She quotes CESCR Concluding Observations to Mexico where the Committee praised Mexico's 'improved macro-economic performance, particularly the reduction of foreign debt, the decrease in inflation and the growth of export capacity, all of which create an environment conducive to a more effective implementation of the rights under the Covenant,' E/C.12/1/add.41, para. 3.

of the State's reports or through its expanded mandate as provided by the OP-ICESCR.¹⁶⁴ The obligation to take measures is however not absolute, as the measures to be taken will be determined by the availability of resources as discussed below.¹⁶⁵

2.3.3 Maximum of available resources

Even though substantive SERs are the same universally, the level at which these rights can be realised in any given State will depend vitally on the State's economy, and this determines the threshold a country must meet in discharging its obligations.¹⁶⁶ This component is at the core of article 2(1) as it ties compliance to quantitative economic factors and necessitates deference to the State on the quantum of resources that can be expended in the realisation of its SER obligations.¹⁶⁷ However, the discretion is not absolute as it would otherwise nullify the substance of the State's obligations.¹⁶⁸ The obligation calls for prioritisation in the allocation of State resources especially with regard to social spending, and also implies the duty on the State to effectively and efficiently use the allocated resources accountably in the realisation of Covenant-related objectives without diversion or misuse through corruption.¹⁶⁹ The need for the prioritisation of Kenya's resources in the realisation of its SER obligations is entrenched in the Kenyan Constitution which provides that:¹⁷⁰

[i]n 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 or individuals.

The Constitution further provides that in the instances where the State alleges the unavailability of resources to fulfil SERs, it is its responsibility to prove that such resources are lacking.¹⁷¹ The constitutional requirements with regard to the availability of resources is thus in line with the

¹⁶⁴ CESCR General Comment No. 3, para. 4.

¹⁶⁵ Chenwi (n 7 above) 10.

¹⁶⁶ Alston & Quinn (n 85 above) 177-181.

¹⁶⁷ Dowell-Jones (n 89 above) 44-45. For an example of the use of a State's discretion to balance needs in accordance with the available resources, see the *Soobramoney* case, paras. 24-25 & 29.

¹⁶⁸ Alston & Quinn (n 85 above) 177-181.

¹⁶⁹ Sepulveda – Nature of SER obligations (n 74 above) 315.

¹⁷⁰ The 2010 Kenyan Constitution, article 20(5)(b).

¹⁷¹ The 2010 Kenyan Constitution, article 20(5)(a).

Maastricht Guidelines which provide that the failure by a State to allocate the maximum of its available resources to the implementation of Covenant rights is a violation of the Covenant.¹⁷²

The maximum available resources do not refer only to the State's budgetary appropriations, but to all the real resources it can muster through the harnessing of public and private resources (creation of a conducive legal and social environment to encourage the voluntary use of private resources in the realisation of SERs),¹⁷³ and the resources available through international cooperation and assistance.¹⁷⁴ This has been affirmed by the CESCR, in its statement on the meaning of "maximum available resources" in the context of the OP-ICESCR, where it avers that this phrase refers to resources existing within the State as well as those available to the State from the international community through the facility of international cooperation and assistance, as discussed herein below.¹⁷⁵ Further, the CESCR has contended that in interpreting "the obligation to take steps to the maximum of its available resources" under OP-ICESCR, it will assess the adequacy and the reasonableness of the measures adopted by the State, taking into account the deliberate, targeted and concrete nature of measures taken; non-arbitrary and non-discriminatory use of the State's discretion; compliance with international human rights standards in the allocation or lack of allocation of available resources; adoption of options that least restrict SERs where several policy options are available; implementation time-frames for adopted steps; and, the prioritisation of the situation of vulnerable and marginalised groups.¹⁷⁶

¹⁷² Maastricht Guidelines, guideline 15(e).

¹⁷³ Robertson (n 90 above) 698-699. Government practices such as the enhancement of access to land and agrarian reforms are capable of enhanced individual, group or community realisation of SERs such as the right to food, housing, and improved standards of living. See also A Eide 'Economic and social rights' in J Symonides (ed.) *Human rights: Concepts and standards* (2000) 109, at 126-127; D Bilchitz 'Health' in S Woolman *et al* (eds.), *Constitutional law of South Africa* (2nd Edition) 2 (2009) 56A-1, at 42-46.

¹⁷⁴ CESCR General Comment No. 3, para. 13; Sseyonjo – SER in International law (n 142 above) 62.

¹⁷⁵ See CESCR Statement: An evaluation of the obligation to take steps to the maximum of available resources under the Optional Protocol to the Covenant, para. 5, available at <http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf> (accessed 31 January 2012).

¹⁷⁶ CESCR Statement on OP-ICESCR (n 175 above) para. 8.

The question then is, what are the resources that are at the disposal of a State? Robertson argues that resources mean more than just financial resources and includes natural/material resources such as land, water, seeds and animals; human resources; technological and informational resources; and, organisational resources.¹⁷⁷ Radhika Balakrishnan *et al* have advocated an expanded interpretation of maximum available resources which incorporates other determinants of availability of resources such as a State's monetary policy,¹⁷⁸ financial sector policy and deficit financing.¹⁷⁹ They affirm the concept of "fiscal space diamond" developed by some economists, with the four points of the diamond containing the following sources of resources for the realisation of SERs:¹⁸⁰

[e]xpenditure reprioritisation and efficiency; domestic resource mobilisation through taxation and other revenue raising measures; foreign aid grants (Official Development Assistance); and deficit financing.

In addition to the four points above, the authors incorporate a "monetary space" which refers to the central bank policies that influence interest rates, exchange rates,¹⁸¹ foreign exchange

¹⁷⁷ See Robertson (n 90 above) 695-697.

¹⁷⁸ These include the tax regime operating in any particular country. Olivier de Schutter, the Special Rapporteur on the Right to Food affirms the importance of a progressive tax regime in the generation of resources for the realisation of SERs. He argues, in relation to Brazil, that the skewed and regressive tax regime, which has high tax rates for goods and services and low tax rates for income and property, has exacerbated inequality in Brazil and thus hampered the redistribution efforts, limiting access to socio-economic goods and services. See O De Schutter, Report of the Special Rapporteur on the right to food, Mission to Brazil, 19 February 2009, para. 36, available at http://www.srfood.org/images/stories/pdf/officialreports/20100305_a-hrc-13-33-add6_country-mission-brazil_en.pdf (accessed on 7 February 2012).

¹⁷⁹ R Balakrishnan *et al* (Centre for Women's Global Leadership) 'Maximum available resources and human rights: Analytical report' (June 2011) 2, available at <http://www.cwgl.rutgers.edu/globalcenter/publications/marreport.pdf> (accessed on 7 February 2012).

¹⁸⁰ Balakrishnan *et al* (n 179 above) 4.

¹⁸¹ A case in point is the lack of adequate financial management policies at the Central Bank of Kenya that led to an exponential increase in the rate of exchange of the Kenyan shilling as compared to the other international currencies towards the end of 2011, leading to increased inflation, the skyrocketing of the prices of basic goods and services and thus generally reducing the amount of resources available for

reserves, reserves in the banking sector and the regulation of the financial sector.¹⁸² They thus call for a re-interpretation and further development of the concept of “maximum available resources” so as to enhance the redistribution of material resources and to re-imagine the role of the State, not only as the efficient administrator of available resources, but also as an institution with the role and potential capacity to mobilise resources for the realisation of SERs.¹⁸³

One of the criticisms that has been levelled against the “progressive realisation” standard is the difficulty in monitoring State compliance with the obligation to use maximum available resources in the realisation of SERs. Dowell-Jones indicates that no definite and effective criteria for assessing compliance with this obligation have been formulated.¹⁸⁴ The CESCR has, however, adopted a “social expenditure analysis” approach in which they have developed some indicators to assist in assessing State compliance with this obligation. The first indicator entails an analysis of the percentage of the national budget allocated to social expenditure such as education, health, housing, social security *vis-à-vis* the expenditure in other areas such as defence and debt-servicing.¹⁸⁵ Skewed allocation to the other areas indicates a lack of prioritisation of SERs and thus an indication that the State is not using the maximum of its available resources to fully realise SERs. The second indicator is the assessment of a State's social expenditure in comparison with the social expenditure of other States at the same level of development.¹⁸⁶ A huge disparity in such expenditure in relation to similarly situated States is also an indication of a lack of prioritisation of SERs by a State.

The Committee's approach above has been criticised by Balakrishnan *et al* who argue against the limitation of analyses of public expenditure on social spending, arguing that some areas of spending such as public investment in infrastructural development (building of roads,

the realisation of SERs, especially for the poor and marginalised who use the majority of their income on acquiring the basic commodities for survival.

¹⁸² Balakrishnan *et al* (n 179 above) 4. The authors argue that a country's central bank policies influence the availability of resources for the realisation of SERs as they impact on the level of employment and the utilisation of productive resources.

¹⁸³ As above.

¹⁸⁴ Dowell-Jones (n 89 above) 46.

¹⁸⁵ Sseyonjo – SER in international law (n 142 above) 63.

¹⁸⁶ Sseyonjo – SER in international law (n 142 above) 64.

schools and hospitals), agriculture, and industrial and employment policies also have a major impact on the realisation of SERs.¹⁸⁷ They further contend that in instances where the private sector is involved in the provision of socio-economic goods and services, the State must, as a necessity, put in place monitoring and regulatory mechanisms to ensure that its SER obligations are met.¹⁸⁸ For these mechanisms to be effective, public resources must be expended, expenditures that might not be captured by the social expenditure analysis.¹⁸⁹ They thus argue for an expansive analysis which is inclusive of expenditure on other economic sectors with a clear tilt towards the realisation of SERs. They are of the view that the analysis of expenditure should not be an end in itself which provides for specific targets such as a definite percentage of GDP that must go to each of the substantive SER areas, but should instead be used as a broad benchmark for assessing government policy and to detect regression.¹⁹⁰

Dowell-Jones has also criticised the CESCR assessment methods above, arguing that the traditional approach of assessing State spending fails to take into account the fact that the realisation of SERs is not the sole responsibility of the State¹⁹¹ and that resources for the realisation of SERs are not all necessarily intended to be generated by the State alone.¹⁹² This criticism is supported by Balakrishnan *et al* who contend that in jurisdictions where the private sector is actively involved in the realisation of SERs, social expenditure analysis does not provide a true reflection of the amount of resources being harnessed for the fulfilment of

¹⁸⁷ Balakrishnan *et al* (n 179 above) 6.

¹⁸⁸ Balakrishnan *et al* (n 179 above) 7.

¹⁸⁹ As above.

¹⁹⁰ Balakrishnan *et al* (n 179 above) 6.

¹⁹¹ See CRC Committee General Comment 5, para. 56 & CESCR General Comment No. 14, para. 42 which provides that the realisation of rights engenders not only the responsibility of the government in question, but also of other sectors of society such as individuals, professional associations, local communities, inter-governmental and non-governmental organisations, civil society organisations, and the private sector.

¹⁹² Dowell-Jones (n 89 above) 47-51. She argues that 'the approach fails to capture the wide variety of institutional arrangements amenable to realising the Covenant rights,' at 47. She further emphasises that the realisation of SERs involves the appropriation of socio-economic risks and costs across economic actors, at 49.

SERs.¹⁹³ Dowell-Jones further contends that the approach also conflicts with the principle of political and economic neutrality of the Covenant (CESCR General Comment Number 3, paragraph 8).¹⁹⁴

A further point of criticism of the social expenditure analysis is that it masks discrimination and inequality in the distribution of resources and may not indicate instances where the socio-economic needs of the vulnerable and marginalised groups are being ignored.¹⁹⁵ This is compounded by the general antipathy of States to presenting to the treaty monitoring bodies age and sex disaggregated data or data that identifies disadvantaged groups and minorities, and their practice of instead presenting national averages that cloak the specific needs and concerns of these groups.¹⁹⁶ This, as a consequence, limits the viability of the social expenditure analysis as it is unable to enhance the protection of the people who are in most need of SER protection, the poor, vulnerable and marginalised groups and communities.

As is indicated by the above criticisms, the lack of proper indicators and analytical benchmarks to monitor State use of the maximum of their available resources in the realisation of SERs is still a reality. To enhance the realisation of SERs at the national level, and to ensure the effectiveness of monitoring of State compliance with their international SER obligations at the international level, an expansive analytical mechanism with sufficient indicators and benchmarks need to be developed to augment the social expenditure analysis method that is currently being used by the CESCR and other treaty monitoring bodies. As Dowell-Jones argues, this expansive interpretation should encompass 'a systematic consideration of

¹⁹³ Balakrishnan *et al* (n 179 above) 7. They contend that the analysis of social spending can only be taken as a preliminary measurement of the resources allocated to the realisation of SERs and cannot be presumed as the definitive standard for the assessment of the State's fulfilment of its SER obligations.

¹⁹⁴ Dowell-Jones (n 89 above) 47-51. She argues that different political systems will choose different methods of realisation of SERs. She gives the example of liberal States which may shun broad-based socialisation of risk and instead choose market-driven solutions with strong individual choice and responsibility as the means for the realisation of entrenched SERs. This will thus reflect fewer quanta of State appropriations being directed to social spending.

¹⁹⁵ Balakrishnan *et al* (n 179 above) 7.

¹⁹⁶ Chapman (n 94 above) 28 & 33-34.

economic variables while also incorporating sufficient flexibilities to encapsulate the inevitable multiplicity of social and political choices as to how the rights are implemented'.¹⁹⁷

2.3.4 International cooperation and assistance

The requirement for international co-operation in the realisation of rights was first entrenched in the United Nations Charter (UN Charter) articles 1,¹⁹⁸ 55 and 56¹⁹⁹ and has been characterised as the “centre of gravity of the UN Charter”.²⁰⁰ It has been incorporated in the ICESCR in articles 2(1),²⁰¹ 11(1)-(2),²⁰² and 22.²⁰³ It has also been incorporated in the CRC,²⁰⁴ and its two

¹⁹⁷ Dowell-Jones (n 89 above) 51.

¹⁹⁸ UN Charter, article 1(3), it enumerates one of the purposes of the UN as the achievement of international cooperation in solving international problems of economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms.

¹⁹⁹ Article 56 encompasses the pledge of members of the UN to take joint and separate actions for the realisations of the aims of the UN as provided for in article 56 and which include:

- a) the promotion of higher standards of living, full employment, and conditions of economic and social progress and development;
- b) solutions of international economic, social, health, and related problems ...
- c) universal respect for, and observance of, human rights and fundamental freedoms for all...

²⁰⁰ Alston & Quinn (n 85 above) 187. Bruno Simma (B Simma (ed.) *The Charter of the United Nations – A commentary* (1994) 793-794) and Sigrun Skogly (SI Skogly ‘Extraterritoriality: Universal human rights without universal obligations?’ in S Joseph & A McBeth (eds.) *Research handbook on international human rights law* (2010) 71, at 77-78) both acknowledge the substantive legal obligations for international co-operation and assistance that are entailed in the above provisions of the UN Charter. Skogly further affirms the primacy of the obligations under the UN Charter in relation to article 103 of the Charter which provides for their primacy in cases of conflict with any other international law obligations, see Skogly-Beyond national borders (n 12 above) 74.

²⁰¹ For the drafting history of article 2(1) in relation to the “international cooperation and assistance”, see Skogly-Beyond national borders (n 12 above) 84-87. The drafting history shows that there was consensus as to the importance of international cooperation and assistance in the full realisation of the Covenant rights, and of the interpretation of available resources to include resources that could be accessed through international assistance, at 86.

²⁰² Article 11 provides for the right to adequate standards of living and the right to be free from hunger and it calls for international cooperation through the consent of States to enhance the progressive realisation of those substantive rights. For a substantive discussion, see Skogly-Beyond national borders (n 12 above) 89-93.

Optional Protocols,²⁰⁵ CEDAW,²⁰⁶ and CRPD.²⁰⁷ The provision of international assistance has raised several issues in the international legal arena on whether it entails a legal obligation on developed countries to provide assistance to developing countries.²⁰⁸ This debate has especially been premised on the legal nature of the right to development and the advocacy by developing States for the creation of a new international legal order.

²⁰³ Article 22 engenders the responsibility of ECOSOC to bring to the attention of other UN organs reports on the implementation of the Covenant so as to assist those organs in deciding, in accordance with their respective competencies, international measures that they can undertake to assist States fulfil their Covenant obligations. For an elaboration of the obligations arising from article 22, see CESCR General Comment No. 2 'International technical assistance measures (E/1990/23)' available at <http://www.unhcr.ch/tbs/doc>. (accessed on 27 January 2012).

²⁰⁴ CRC preamble para.12, articles 4, 17(b), 22(2), 23(4), 24(4), and 28(3). For an analysis of this provisions, see Skogly – Extraterritoriality (n 200 above) 81; BI Hamm 'A human rights approach to development' (2001) 23(4) *Human Rights Quarterly* 1005, at 1014-1015; W Vandenhole 'Economic, social and cultural rights in the CRC: Is there a legal obligation to cooperate internationally for development' (2009) 17 *International Journal of Children's Rights* 23, at 41ff.

²⁰⁵ CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, article 10(4) which entails the responsibility of developed States (who are able to do so) to provide financial, technical and other assistance multilaterally, regionally or bilaterally so as to address the root causes of exploitation of children such as poverty and underdevelopment; CRC Optional Protocol on the Involvement of Children in Armed Conflict, preamble and article 7 which refer to the requirement of international cooperation in the implementation of the Protocol and entails the responsibility of State parties (in a position to do so) to provide financial assistance through existing programmes or through a voluntary fund. For a more extensive discussion of the preparatory history and interpretation of international cooperation and assistance in the CRC and its two Optional Protocols, see generally Vandenhole (n 204 above).

²⁰⁶ CEDAW, preamble para. 10.

²⁰⁷ CRPD preamble para. I; articles 2, 32, 37 & 38. For an analysis of the preparatory works leading to the inclusion of international cooperation and assistance into the CRPD, see, Vandenhole (n 204 above) 55-61.

²⁰⁸ See for example Alston & Quinn who, basing their arguments on the preparatory works of the ICESCR, affirm the difficulty of sustaining an argument that the commitment to international cooperation is a legally binding obligation for developed States to provide development assistance to developing States, Alston & Quinn (n 85 above) 191.

The right to development in international law has two components, an internal component which deals with the duty of States (as primary duty bearers) to enhance development within their own borders for the benefit of their own people; and the external component aimed at dealing with the massively unequal international political economy, and which places an obligation on developed States to contribute to development in developing States through international assistance and co-operation.²⁰⁹ Despite objections to the legality of the right to development,²¹⁰ especially its external component,²¹¹ it has been argued that it takes

²⁰⁹ ME Salomon, 'Legal cosmopolitanism and the normative contribution of the right to development' in SP Marks (eds.) *Implementing the right to development: The role of international law* (2008) 17.

²¹⁰ The Declaration on the Right to Development was adopted by 146 yes votes, 1 no vote (United States of America) and 8 abstentions (Australia, Austria, Federal Republic of Germany, Belgium, Ireland, Japan, Norway and the United Kingdom). See J Donnelly, 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California West International Law Journal* 473 - 509 for arguments against the legal existence of the right to development in international law. Sepulveda also indicates that the obligation of international assistance and cooperation was one of the most contentious topics during the discussions leading to the elaboration of the Optional Protocol to the ICESCR, with questions asked about their legality or morality and whether the complaint procedures adopted under the Optional Protocol will be used to adjudicate on this obligation, see M Sepulveda 'Obligation of international assistance and cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 *Netherlands Quarterly of Human Rights* 271, at 273.

²¹¹ Proponents objecting to the legally binding nature of the external component of the right to development have proposed two non-legal justifications for international co-operation and assistance: enlightened self-interest and ethical considerations. The Organisation for Economic Cooperation and Development (OECD) Development Assistance Committee (*Shaping the 21st century: The contribution of development cooperation*) contend, in relation to the enlightened self-interest theory as follows:

Increased prosperity in the developing countries demonstrably expands markets for the goods and services of the industrialised countries. Increased human security reduces pressures for migration and accompanying social and environmental stresses. Political stability and social cohesion diminish the risk of war, terrorism and crime that inevitably spill over into other countries.

Proponents of the ethical approach argue that the obligation of international cooperation and assistance is based on: the moral grounds of humanity - ability of individuals in developed States to prevent death and human suffering in developing States through the transfer of resources; obligations for corrective justice; the rectification of past wrongs done to developing States through slave trade, colonisation and inequitable exploitation of natural resources in developing States; and obligations for distributive justice –

development assistance from the realms of charity to a more concrete obligation.²¹² The UN Declaration on the Right to Development affirms this by stating that States have a duty 'to cooperate with each other in ensuring development and eliminating obstacles to development' and should fulfil their duties in such a manner as to 'promote a new international economic order based on sovereign equality, interdependence and mutual interest'.²¹³ It calls for State cooperation with a view to fulfilling the realisation of human rights and fundamental freedoms.²¹⁴ The obligation of international co-operation has also expanded beyond the realm of States to incorporate international organisations and the international financial institutions, which must adopt a rights-based approach, especially the realisation of SERs, in their developmental policies.²¹⁵

the distribution of social goods within society, see KD Feyter, *World development law: Sharing responsibility for development* (2001) 24-25.

²¹² SR Chowdhury *et al* (eds.), *The right to development in international law* (1992) 13. Remarking on the philanthropic manner in which international assistance and cooperation has been interpreted, especially with regard to allocation of international resources for the realisation of children's rights in Africa, J Sloth-Nielsen *et al* argue that Africa has been viewed as the object of charitable and humanitarian relief rather than as a partner in a developmental programme sanctioned and defined by international legal obligations. They call for an expanded interpretation of international assistance and cooperation as an international legal obligation, see J Sloth-Nielsen *et al* 'Available resources: The African context; an African perspective' Submission to the UN Committee on the Rights of the Child for the Day of General Discussion, 21 September, 2007, at 2, para. 3, available at <http://www.communitylawcentre.org.za/clcprojects/childrensrights/submissions/CRCsubmissionAfrica> (accessed on 6 February 2012).

²¹³ United Nations General Assembly (UNGA), (1986) '*UN Declaration on the Right to Development*,' article 3(3), available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed on 6 February 2012).

²¹⁴ UN Declaration on the Right to Development (n 213 above) article 6.

²¹⁵ CESCR General Comment No. 14, para. 45; Hamm (204 above) 1016; Sepulveda – Obligation of international assistance (n 210 above) 277. See also R Hammonds & G Ooms 'World Bank policies and obligations of its member to respect, protect and fulfil the right to health' (2004) 8 (1) *Health and Human Rights* 26-60, who argue, using the right to health as an example, that World Bank (WB) policies, such as the Poverty Reduction Strategy Paper processes, makes it impossible for developing countries to undertake social spending that is sufficient to satisfy their core SER obligations due to restriction on social spending in national budgets of developing States. They submit that WB member States (developed),

Despite the recognised legal obligation of development assistance and cooperation at the international level, it has not been recognised in practice, and many international treaty monitoring mechanisms have not been assertive in its implementation.²¹⁶ Although it has argued that international cooperation for the realisation of SERs is an obligation of all States,²¹⁷ the CESCR has been very diplomatic in the debate on its legality or otherwise, insisting instead on the obligation of the developed countries to provide assistance depending on the availability of resources and based on their consent.²¹⁸ It has continued to urge developing States without sufficient resources to realise SERs to seek international assistance.²¹⁹ It has also emphasised

who have ratified international legal instruments providing for the realisation of SERs, are thus in violation of their SER obligations under the ICESCR. They contend that State parties to the ICESCR control 76.28% of the votes in the WB, giving them the power and opportunity to restructure WB policies to enhance the realisation of SERs, at 46.

²¹⁶ Hamm (204 above) 1015.

²¹⁷ CESCR General Comment No. 3, para. 14 which states as follows:

The Committee wishes to emphasise that in accordance with Articles 55 and 56 of the [UN] Charter, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realisation of [SER] is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.

²¹⁸ See for example CESCR General Comment No. 12 on the right to adequate food, at para. 38, which provides that 'States have a joint and individual responsibility, in accordance with the UN Charter, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its abilities'. CESCR General Comment No. 14 on the right to the highest attainable standard of health, at para. 39, also provides that '[d]epending on the availability of resources, States [in particular States in a position to assist developing countries in fulfilling their core and other obligations under the Covenant] should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required'. See also CESCR General Comment No. 14, para. 45; General Comment No. 15, para.38; General Comment No. 17, paras.36-38; General Comment No. 18, paras.29-30; General Comment No. 19, paras.41, 52-58 & 61; General Comment No. 20, para. 14.

²¹⁹ Skogly - Extraterritoriality (n 200 above) 95. In CRC Committee, General Comment No. 5, paras. 61 & 63, the Committee encourages State parties to seek international assistance within the framework of the CRC and prioritise the use of those resources for the realisation of children's rights. It further calls on

that developed States need to take into account their actions through international organisations, international financial institutions and other private actors under their control to ensure that such actions do not interfere with the realisation of SERs in other countries, especially the developing States.²²⁰

The CEDAW Committee has also emphasised this by stating that State Parties are responsible for their actions that violate human rights even if the affected persons are not within their territory.²²¹ The CRC Committee in its general comments has also been unwilling to affirm a legal obligation to development assistance, instead choosing to urge donor States and international agencies to “contribute systematically” or to mainstream child rights into their development strategies.²²² The obligation of developed countries in international cooperation

State parties to provide and use technical assistance and also to engage UN and UN related agencies in the provision of technical assistance in the implementation of the CRC.

²²⁰ Skogly - Extraterritoriality (n 200 above) 95. See also CESCR General Comment No. 18, para. 30 which provides the following:

State parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions.

See also General Comment No. 20, para. 14; and General Comment No. 19, para. 53, which provides that States in their action should not interfere directly or indirectly with the enjoyment of social security in other countries. Para. 54 further provides the following:

State parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where State parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

²²¹ CEDAW Committee, General Recommendation 28, para.12.

²²² CRC Committee General Comment No. 3 (HIV/AIDS and the rights of the child), para. 41; General Comment No. 1(Aims of education), para. 28; General Comment No. 9 (Rights of children with disability), para. 16. See also Vandenhoe (n 204 above) 44-47.

and assistance has also been discussed using the tripartite typology of obligations, which is the obligation to respect,²²³ protect²²⁴ and fulfil.²²⁵

Kenya, as a country, has an internal obligation to ensure the harnessing, and the effective use, of the resources available internally, both public and private, in the realisation of entrenched SERs and of its international obligations on SERs. After the effective and prioritised utilisation of internal resources for the realisation of SERs, the country should also look outwards to international cooperation and assistance to plug the deficit which is likely to hamper

²²³ The duty not to engage in activities, or to refrain from measures, that can directly or indirectly affect the enjoyment of SERs in other countries. For a more substantive discussion, see Sepulveda – Obligation of international assistance (n 210 above) 280-282; Skogly – Beyond national borders (n 12 above) 68-69. See also Vandenhole (n 204 above) 23-24 & 26, who avers that while it is not possible to establish the existence of the legal obligation to provide development assistance (extra-territorial obligation to fulfil), the extra-territorial obligations to respect and protect SERs have crystallised into hard law.

²²⁴ The duty to ensure that non-state actors within their jurisdiction or control (such as transnational corporations and international organisations) are prevented from interfering with enjoyment of SERs, or engaging in active violation of SERs of people in other countries. The duty also requires care in the adoption of bilateral and multi-lateral agreements. See Sepulveda – Obligation of international assistance (n 210 above) 282-284; Skogly – Beyond national borders (n 12 above) 70; Maastricht Guidelines, guideline 19.

²²⁵ The duty to fulfil is divided into three components: obligation to facilitate, provide and promote. The duty to facilitate entails the responsibility of the developed States to ensure that development assistance programmes create the requisite environment for an enhanced enjoyment of SERs in receiving States. It thus engenders a responsibility for the adoption of a human rights approach to development that takes into account the active participation and involvement of all the people to whom development projects are being designed, a bottom-up approach to development. The duty to provide entails the responsibility of developed States to provide development assistance to developing and least developed countries when they are incapable, from their own available resources and for reasons beyond their control, to realise SERs. The target of official development assistance for the developed States has been pegged by the UN at 0.7 per cent of their Gross National Product (GNP) for developing States and 0.15-0.20 per cent of the GNP for least developed States. The duty to promote entails the duty to empower the population of the developing States to be active participants in development, to know and be vigilant about their rights as well as to monitor and evaluate the effective use of resources acquired through development assistance. See Sepulveda – Obligation of international assistance (n 210 above) 285-289; Skogly – Beyond national borders (n 12 above) 71.

the realisation of SERs. International resources obtained for the realisation of SERs should be used effectively for the intended purposes and resources should not be diverted to other non-SER projects. The State should, as a matter of urgency, enhance effective participation of all people in the use of resources obtained internationally for the realisation of SERs and must also put in place effective transparency and accountability as well as monitoring and evaluation mechanisms to guard against mismanagement or the diversion of resources to other non-priority areas.²²⁶

2.4 Immediate obligations in the African human rights system

Kenya has also undertaken international obligations with regard to the realisation of SERs at the regional level. These commitments can be gleaned from the regional integration treaties such as the Constitutive Act of the African Union (AU Act) and its attendant treaties.²²⁷ Kenya's SER

²²⁶ See Sepulveda - Obligation of international assistance (n 210 above) 291, who summarises the duties of developing States in relation to the obligation of international assistance and cooperation as follows: to enhance assistance flow to the most marginalised and vulnerable in society; to utilise resources received so as to enhance the realisation of SERs, with the prioritisation of the realisation of the minimum core content of substantive SERs; to establish mechanisms for the effective utilisation of resources in a transparent and accountable manner and to ensure effective monitoring and evaluation; and, to design their own development and assistance programme with adequate participation from the affected people and establish proper benchmarks and timelines for implementation.

²²⁷ Constitutive Act of the African Union, 1 July 2000, available at: <http://www.unhcr.org/refworld/docid/4937e0142.html> (accessed 12 September 2011). Unlike the Charter of the OAU which was basically concerned with the rights of States such as self-determination, preservation of sovereignty and independence of African States, the integrity of national borders and the non-interference with the internal affairs of States (OAU Charter, article II), the Constitutive Act has incorporated the protection and promotion of individual rights at its core in its objectives (article 3) and in its guiding principles (article 4). See C Heyns 'The African regional human rights system: The African Charter' (2003-2004) 108 *Pennsylvania State Law Review* 679, at 681. See also K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97, at 98; and E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

obligations can further be found in other regional human rights treaties such as the African Charter,²²⁸ the African Women's Protocol;²²⁹ and, the African Children's Charter.²³⁰

2.4.1 SER obligations under the African Charter

States' SER obligations under the Charter can be gleaned from article 1 which provides as follows:

The Member States of the [AU] parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

The obligations in article 1 are buttressed by article 62 of the Charter which requires the submission of State reports on measures that have been taken by States to implement their Charter-based obligations.²³¹ States are further obliged to enhance the promotion of human rights, especially the rights under the Charter, in their jurisdiction through teaching, education and publications.²³² States are also obliged to guarantee the independence of the courts and to create institutional mechanisms for the promotion and protection of Charter-based rights.²³³ Dejo Olowu sums up these obligations as requiring African States to actively enforce the entire corpus of human rights, and not merely seeing them as idealistic goals.²³⁴

Unlike the international SERs treaties which encompass the standard of "progressive realisation to the maximum available resources,"²³⁵ the obligations contained in the African Charter are peremptory, requiring states to immediately realise SERs without resort to the excuse of lack of resources. Nsongurua Udombana affirms this immediacy by contending that

²²⁸ For an elaboration of its SER provisions, see CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23(2) *Human Rights Quarterly* 327 at 336-341.

²²⁹ For an elaboration of its SERs provisions, see Orago (n 13 above) 289.

²³⁰ For an elaboration of its SERs provisions, see Orago (n 13 above) 289.

²³¹ Olowu – Integrative rights based approach (n 132 above) 55.

²³² African Charter, article 25.

²³³ African Charter, article 26.

²³⁴ Olowu – Integrative rights based approach (n 132 above) 56.

²³⁵ For a discussion of this standard, see section 2.3 above. See also Chapman (n 94 above) 30 ff; Odinkalu (n 228 above) 332-333 & 335.

the Charter envisaged member States taking prompt and adequate steps to secure the protection of human rights without expressing any resource limitations.²³⁶ The immediacy of Charter-based SER obligations is affirmed by Dejo Olowu who contends that in the absence of any textual inference to the contrary, the spirit and the letter of the Charter connotes immediate implementation of SERs.²³⁷ Olowu cautions against the blind extrapolation of SER jurisprudence at the international level in Africa so as to prevent the adoption of a model of implementation that will provide leeway for African governments to evade their SER responsibilities, or which will affirm the protracted scepticism that has derailed the full realisation of SERs at the global level.²³⁸ He refers to the unified, all-inclusive and classification-neutral nature of the entire corpus of human rights in the Charter, and avers that any cynical or pessimistic stereotyping of SERs intended to lead to severance of their standard of implementation, *vis-à-vis* CPRs, would amount to a disservice to the drafters of the Charter.²³⁹

The immediacy of the implementation of SERs in the African Charter has raised debate within the African Human Rights System (AHRS), especially due to the poverty, under-development and scarcity of resources that bedevil the African Continent. The immediacy of SER obligations has for a long time been the official position of the African Commission having been affirmed by the then chairperson Oji Umozurike in his presentation of the Commission's Third Annual Activity Report to the 26th Assembly of the OAU Heads of State and Government on 9-11 July 1990. Some scholars have, however, differed from the above view, insisting that due to African realities, the immediacy of human rights obligations, especially SER obligations, cannot affirmatively be contended. Christopher Mbazira has argued that due to the prevailing economic situation of Africa, attended by corruption, poor planning, and insignificance in the global economy, immediate realisation of SERs is impossible and that we should instead adopt the progressive realisation standard in the AHRS.²⁴⁰ Danwood Chirwa is also of the opinion that

²³⁶ Udombana (n 1 above) 199; N Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105, at 125.

²³⁷ Olowu – Integrative rights based approach (n 132 above) 58.

²³⁸ Olowu – Integrative rights based approach (n 132 above) 190.

²³⁹ Olowu – Integrative rights based approach (n 132 above) 58.

²⁴⁰ C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 333, at 340.

it is unrealistic, considering the many SER problems and human, infrastructural and financial resource constraints that African States face, to expect them to be bound by unqualified positive obligations.²⁴¹ He supports his argument by relying on the findings of the African Commission in the case of *Purohit and another v The Gambia*, dealing with article 16 of the Charter, where the Commission found that '[the Charter] requires States to take concrete and targeted steps, while taking full advantage of available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind'.²⁴² His conclusion is, therefore, that resource constraints can be used by an African State as a possible defence in cases of violation of SERs.²⁴³

Frans Viljoen, reacting to the above debate and the Commission's findings in the *Purohit* case, acknowledges that the African Charter, in contrast to the ICESCR, does not make the fulfilment of SERs dependant on the availability of resources or to the standard of progressive realisation.²⁴⁴ He remarks that due to the consciousness of the Commission as to the resource realities in Africa, it read into the *Purohit* judgment a qualification of available resources and also imported from the CDESCR the concept of the core obligation of States to take concrete, targeted and non-discriminatory steps in the realisation of SERs.²⁴⁵ He, however, clarifies that the importation of the qualification of the "availability of resources" may have been influenced by the specific wording of article 16 of the Charter which provided for "best attainable state of health" and "necessary measures", and was not meant to be the standard of obligation for the fulfilment of other Charter-based SERs.²⁴⁶ He, therefore, concludes that the qualification of "available resources" referred to by the Commission in the *Purohit* judgment should not be applied to other unqualified SERs, such as the right to education.²⁴⁷

²⁴¹ DM Chirwa 'African Regional Human Rights System: The promise of recent jurisprudence on social rights' in M Langford (eds.) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 323, at 326-27.

²⁴² *Purohit and another v The Gambia* (2003) AHRLR 96 (ACHPR 2003), para. 84.

²⁴³ Chirwa - AHRS (n 241 above) 327.

²⁴⁴ F Viljoen, *International human rights law in Africa* (2007) 240.

²⁴⁵ As above.

²⁴⁶ As above.

²⁴⁷ As above.

It is my submission that from the express reading of the Charter and the analysis of the debate around the immediacy of Charter-based SER obligations, it can safely be stated that the Charter envisaged these obligations to be immediate. It is further submitted that the resource realities of African States and the structural difficulties that have been relied on to justify the introduction of the progressive realisation standard in the AHRS are surmountable with good and accountable governance which is responsive to the needs of the African people. In support of these arguments, reference can be made to the Commission's jurisprudence in *Commission Nationale des Droits de L'Homme et des Libertes v Chad*, where the Commission found, in relation to the lack of a derogation clause in the Charter, that it meant that States cannot derogate from their obligations under the Charter at any time, be it during war, emergency or any other situation.²⁴⁸ This is further supported by the Commission's holding in *Media Rights Agenda and Others v Nigeria*, where the Commission, in acknowledging the function of article 27(2) of the Charter as a general limitation clause, found that:²⁴⁹

[t]he reason for possible limitation must be founded in a legitimate State interest and the evils of limitation of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the rights become illusory.

It is therefore submitted that allowing States the leeway to use lack of availability of resources as a defence to ignore their obligations with regard to SERs will, in the long run, make the rights illusory, the very danger the Commission was referring to in the *Media Rights* case above.

SERs have suffered years of neglect in Africa, and the failure of African States to take them seriously is one of the major reasons for the endemic poverty and under-development afflicting the continent as well as the lack of availability of infrastructural, human and financial resources to implement them.²⁵⁰ Resources for the implementation of SERs do not come from

²⁴⁸ (2000) AHRLR 66 (ACHPR 1995) at para. 49.

²⁴⁹ (2000) AHRLR 200 (ACHPR 1998) at paras. 69 & 70. Though the above-mentioned cases did not expressly deal with SERs in the Charter, the jurisprudence emanating from them is indicative of the Commission's reasoning in relation to State's obligations under the Charter.

²⁵⁰ See Agbakwa (n 2 above) 188-191, who closely links the achievement of sustainable development to the realisation of SERs and quotes a UNESCO report which avers that 'national development hinges on the ability of working populations to handle complex technologies and to demonstrate inventiveness and adaptability, qualities that depend a great deal on the level of education'. He further contends that the

the State coffers only, but can be harnessed through the creation of a conducive framework by the government to enable individuals and communities to use their own resources to realise their own SERs, as has been discussed in section 2.3.3 above.²⁵¹ The harnessing of private resources (private-public partnership initiatives) and reliance on international assistance and cooperation are other avenues for enhancing the realisation of SERs.²⁵² The International Council for Human Rights Policy has emphasised the importance of developing States showing that they have made honest and commensurate efforts at meeting their SER obligations as a matter of priority, and to demonstrate a high level of commitment to the objectives of enhancing the realisation of SERs if they are to attract the reciprocal commitment of donors in international assistance and cooperation.²⁵³

African States have, however, in general not undertaken such initiatives, relying on the excuse of non-availability of resources to mask the lack of political will,²⁵⁴ lack of proper prioritisation of government expenditure,²⁵⁵ the misuse and misdirection of resources meant for

generation of wealth and the enhancement of the ability of the populace to realise full SERs depends a lot on the fulfilment of basic SERs such as education and health. He reacts to the lack of resources argument by stating that it should only affect the level of realisation of SERs, and does not justify outright non-enforcement, the situation presently prevailing in Africa.

²⁵¹ See ICHRP, *Duties sans frontieres* (n 13 above) 1 & 24, who affirm that even though the government is not expected to make all the interventions aimed the realisation of SERs, it is the one that is capable of focusing the resources and creating the necessary political and legal framework to deliver the core services either through public or private institutions.

²⁵² See Baderin & McCorquodale (n 84 above) 14, who state that developing States must make conscientious effort in meeting their SER obligations to the maximum of their own resources through careful balancing, prioritisation and effective use so as to encourage international assistance from developed States.

²⁵³ ICHRP, *Duties sans frontieres* (n 13 above) 22.

²⁵⁴ See Olowu – Integrative rights based approach (n 132 above) 70 who contends that what the realisation of SERs in Africa requires is the exertion of political will. He affirms the efficacy of putting in place effective, credible and equitable normative and institutional frameworks for the implementation of SERs, which has been lacking in Africa.

²⁵⁵ See Olowu – Human development challenges in Africa (n 85 above) 187, who remarks that many of the African States which occupy the lowest ranks of human development spend the most resources on the acquisition of military ware. He contrasts this with States with higher human development indices that

development, and the pilfering of State resources into private pockets and bank accounts through corruption.²⁵⁶ The adoption of the standard of progressive realisation in Africa will not make the scenario any better, in fact it will be doubly worsened as States will lack even the moral pressure to realise SERs. The adoption of the standard of progressive realisation will also hamper the work of the African Court on Human Rights which will have difficulties deciding cases related to SERs due to the difficulty in developing indicators for the standard of progressive realisation as discussed in section 2.3 above.

2.4.2 SER obligations under the African Children's Charter

Children are a special group deserving of special safeguards and care due to their immaturity and vulnerability.²⁵⁷ The need for their protection is entrenched in the Children's Charter which entails the obligation of member States to recognise the rights and duties contained in the Charter, and further enshrine the duty of member States to:²⁵⁸

[u]ndertake to take necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.

It is clear from the article that the Children's Charter neither distinguishes between the obligations of States with regard to CPRs and SERs nor contain the "progressive realisation"

have shown a marked improvement on resource allocation to social spending as compared to military expenditure.

²⁵⁶ See Agbakwa (n 2 above) 189-190, who avers that were it not for poor administration and kleptomaniacal tendencies, African states would have by now reached the level of realising at least the basic survival needs (minimum core content of SER) for their people. He quotes Richard Falk who argues that most third world countries possess sufficient resources to eliminate poverty and satisfy basic essential needs if the policy makers were so inclined. See also Olowu – Human development challenges in Africa (n 85 above) 198; ICHRP, *Duties sans frontieres* (n 13 above) 25.

²⁵⁷ African Children's Charter, preamble, paras. 3 & 5. See also T Bankole 'Africa's Charter on children's rights: A normative break with cultural traditionalism' (1992) 41(2) *International and Comparative Law Quarterly* 432, at 434; D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157, at 157.

²⁵⁸ African Children's Charter, article 1.

standard for SERs as contained in the CRC.²⁵⁹ It therefore follows that, like the African Charter discussed above, the African Children's Charter contains immediate obligations of States with regard to entrenched SERs.²⁶⁰ Further, the Children's Charter does not refer to States, an indication that the obligations in the Charter are not only vertical, but are also horizontal in nature, thus binding parents, and other non-state actors who have not traditionally had international human rights obligations such as MNCs.²⁶¹ The Children's Charter also places the best interest of the child as the primary consideration for States in their undertaking of obligations under the Charter, further entrenching the protection accruing to children.²⁶²

The immediate obligations of States *vis-à-vis* SERs are also contained within the Charter provisions such as in articles 11 on education, article 14 on health and health services, article 15 on child labour, and 16 on protection against abuse; all of which entail the obligation of the State to undertake all appropriate measures with a view to achieving the full realisation of these rights.²⁶³

However, despite the general immediacy of SER obligations under the Children's Charter, some provisions dealing with specific SERs within the Charter have adopted the standard of "progressive realisation". They include articles 11(3)(b) dealing with the obligation of States to progressively make secondary education free and accessible to all; and article 13(2) which obliges States to ensure the protection, and access of children with disability to training, preparation for employment, and recreation opportunities subject to the available resources. Article 13(3) further obliges States to use their available resources with a view to progressively

²⁵⁹ CRC, article 4.

²⁶⁰ See D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127, at 130; S Rosa & M Dutschke (Children's Institute, University of Cape Town) '*Child rights at the core: A commentary on the use of international law in South African court cases on children's socio-economic rights*'. A Project 28 Working Paper, May 2006, at 11.

²⁶¹ Chirwa – Merits and demerits (n 257 above) 159; Rosa & Dutschke (n 260 above) 10.

²⁶² African Children's Charter, article 4. See also A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 11, at 18.

²⁶³ For further analysis, see Chirwa – Merits and demerits (n 257 above) 162-169; Bankole (n 257 above) 436.

achieving access to public facilities for the children with mental and physical disability. Article 20(2) also underscores the importance of resources by obliging States to provide material assistance to parents and other persons who are responsible for children, with regard to basic socio-economic goods and services such as nutrition, health, education, clothing and housing, in accordance with the State's means and national conditions.²⁶⁴ These provisions seem out of place taking into account the vulnerability and developmental needs of children, especially children with disability, but they may have been the result of compromise, a necessity that visits any process of treaty making to enhance ratification and accession.

Despite the immediate nature of State obligations with regard to the realisation of the SERs of children in Africa, several children's rights experts have acknowledged the inability of most African States to realise these rights due to the inadequacy of resources.²⁶⁵ In the Kenyan context, the CRC Committee, considering the Initial Report submitted by Kenya in September 2001, acknowledged the economic and social constraints in the realisation of children's rights, but also stated that these are exacerbated by rampant corruption.²⁶⁶ Resources are key to the fulfilment of rights, especially SERs, but the duty of States contain a continuum of obligations, some that do not require colossal amounts of resources to implement. Resources should, therefore, not be the pretext for the lack of political will to implement children's SERs.

2.5 The place of the “minimum core obligations” in Kenya

The major objective of the entrenchment of SERs in a constitution is to facilitate the reduction of poverty and inequality, improve the overall standards of living, and ensure social justice.²⁶⁷ To achieve these objectives, a strong normative approach, with sufficient foundational standards and tests for the translation of the abstract SER norms into tangible realities for the rights-

²⁶⁴ Rosa & Dutschke (n 260 above) 8.

²⁶⁵ Sloth-Nielsen *et al* (n 212 above) para. 5. They refer to the stark reality that over 80 per cent of the highly indebted poor countries are in Sub-Saharan Africa

²⁶⁶ CRC Committee, Concluding Comment – Kenya (2001), para. 9. The socio-economic challenges identified by the Committee included high external debt payments, pressures exerted by structural adjustment, increased levels of unemployment, and deteriorating economic conditions.

²⁶⁷ Z Yacoob 'The entrenchment and enforcement of socio-economic rights' a paper presented by the Justice of the SACC at a conference to mark the inauguration of the new building for the SACC 18-20 March 2004, at 3, available at <http://housingjustice.ca/wp-content/uploads/2012/03/the-entrenchment-and-enforcement-of-socio-economic-rights.pdf> (accessed on 27 January 2013).

holders, is crucial.²⁶⁸ This, in essence necessitates that, apart from the duty to realise SERs progressively, there exists an implicit minimum core obligation which requires the State to, at the very least, provide the most vulnerable of its citizens with the minimum essential levels of the entrenched SERs.²⁶⁹

2.5.1 Foundational origins of the minimum core obligations

The existence of the minimum core as an intrinsic component of the standard of progressive realisation was averred by the CESCR as follows:²⁷⁰

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which a significant number of individuals are deprived of essential foodstuffs, of essential primary healthcare, of 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 states that a reading of the Covenant obligations devoid of the minimum core is tantamount to depriving it of its *raison d'être*.²⁷¹ The Committee has thus been at the forefront in developing a comprehensive minimum core jurisprudence detailing the content of the SERs in the Covenant.²⁷² The importance of developing the minimum core content of SERs

²⁶⁸ Chowdhury (n 59 above) 2, who contends that without identifying the tangible content of SERs, and linking that content to the actual satisfaction of material needs, SERs are reduced to meaningless rhetoric, at 5-6.

²⁶⁹ Rosa & Dutschke (n 260 above) 12; Robertson (n 90 above) 701. See also M Craven 'Assessment of the progress on adjudication of economic, social and cultural rights' in J Squires, M Langford & B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 27, at 39, who defines the minimum core content of rights as representing a quantitative or qualitative threshold of enjoyment; SACHR – 7th Report on economic and social rights (n 3 above) 14, who affirm that the minimum core obligations are an inherent component of the progressive realisation test and that the two cannot be divorced from one another.

²⁷⁰ General Comment No. 3, para. 10.

²⁷¹ As above.

²⁷² See for example: General Comment No. 12 on the right to adequate food, paras. 6, 8, & 33; General Comment No. 13 on the right to education, para.57; General Comment No. 14 on the right to the highest attainable standard of health, paras. 43 & 47; General Comment No. 15 on the right to water, para. 37; General Comment No. 17 on the right of everyone to benefit from the moral and material interests resulting from any scientific, literary or artistic production of which he is the author, para. 39; General

has been affirmed By Phillip Alston who argues that the logical implication of terming SERs as rights is that SERs must give rise to some minimum entitlements, the absence of which must be considered a violation of the SER obligations of States.²⁷³

The development of the minimum core relates closely to the “basic needs” paradigm developed under the 1976 World Employment Conference which espoused the commitment of all International Labour Organisation (ILO) Member States to provide:²⁷⁴

(i) the minimal consumption requirements needed for a physically healthy population (food, shelter, clothing); (ii) access to essential services and amenities (safe drinking water, sanitation, health and education); (iii) access of all to adequately remunerated employment opportunities; and, (iv) the satisfaction of the needs of a more qualitative nature (a healthy humane environment, and popular participation in making decisions that affect the lives and livelihoods of the people and their individual freedoms).

This basic needs paradigm, like the minimum core content approach, is based on human dignity and it finds expression in the understanding that human dignity is entrenched in the material and non-material conditions of life required for human survival and happiness.²⁷⁵ As an ILO Member State, Kenya is under an obligation to enforce the above-mentioned standards in accordance with its ILO commitments, a process of realisation which will go a long way in fulfilling the minimum core of the entrenched SERs.

The imperative for States to realise their minimum SER obligations can be gleaned from the development in international human rights law, as is evidenced in the General Comments of the CESCR, to the point that resource constraints are no longer a justification for a State to fail

Comment No. 18 on the right to work, para. 31; General Comment No. 19 on the right to social security, paras.59-61; and, General Comment No. 21 on the right of everyone to take part in cultural life, paras.55, 59 & 67.

²⁷³ P Alston, ‘Out of the abyss: The challenges confronting the new United Nations Committee on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 352-353.

²⁷⁴ *Employment, growth and basic needs: A one- world problem*, Report of the Director-General of the International Labour Office 7 (1976), quoted in Olowu – Human development challenges in Africa (n 85 above) 200.

²⁷⁵ Olowu – Human development challenges in Africa (n 85 above) 201.

to meet its minimum core obligations.²⁷⁶ The Committee's stance has been reiterated by the UN Special Rapporteur on SERs, Danilo Turk, who contends that 'States with specific legal obligations to fulfil [SERs] are obliged, regardless of the level of economic development, to

²⁷⁶ General Comment No. 3, para. 10 allows States to use the justification of resource constraints if they fail to realise their minimum core obligations, though it requires a high threshold which is fulfilled if a State is able to show that it has used all the resources at its disposal to satisfy its minimum core obligations as a matter of priority. However, the Committee has contended in the later General Comments such as General Comment No. 14 (The Right to the Highest Attainable Standards of Health (2000) para 47) and General Comment No. 15 (The Right to Water (2003) para 40) that the realisation of the minimum core was non-derogable and failure could not be justified by reliance on the lack of availability of resources. Para. 47 of General Comment No 14 provides that:

[i]f resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, *that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable* (emphasis added).

Para. 40 of General Comment 15 provides as follows:

To demonstrate compliance with their general and specific obligations, States must establish that they have taken the necessary and feasible steps towards the realisation of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. *It should be stressed that a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable* (emphasis added).

The Draft Principles and Guidelines on the SERs in the African Charter (available at <http://www.communitylawcentre.org.za/achpr/files-for-achpr/draft-pcpl-guidelines.pdf> (accessed 25 January 2012)) also acknowledges this progressive shift in the minimum core approach by stating that they form a part of the immediate obligations of the State with regard to the implementation of SERs (para. 16). It goes further to state that the obligation exists regardless of the availability of resources and that no matter the resource constraints, 'the State should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritising them in all interventions'(para. 17).

The above jurisprudence shows the shift in international obligations with regards to the realisation of the minimum essential elements of SERs, and it is thus imperative that Kenya must take this into account when developing the framework for the implementation of entrenched SERs and in SER adjudication.

ensure respect for minimum subsistence rights for all'.²⁷⁷ The minimum core calls for the prioritisation 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 SERs²⁷⁸ as is discussed in chapter five, section 5.3 below.

2.5.2 The minimum core obligations in the Kenyan context

The most important question at this juncture is whether there is any obligation on Kenya to adopt the minimum core approach, and how the adoption of the approach can spur on the implementation of SERs. This question raises the following three pertinent issues for discussion:

- Where do the treaty monitoring mechanisms, especially the CESCR, get their legitimacy from to interpret the relevant international legal instruments in question and how does this warrant States' voluntary compliance with the monitoring bodies' interpretations?
- Do the monitoring bodies, in their interpretation of the Covenant and in the development of the minimum core obligations employ interpretive approaches that are consistent with the rules of interpretation accepted under international law?
- What has been the practice of States in relation to the general recommendations that have been adopted by treaty monitoring bodies, especially the CESCR?

These issues are broadly dealt with below with the objective of making a case for the adoption of the minimum core approach in Kenya.

i) Interpretive legitimacy and authority of treaty monitoring bodies

The treaties detailing SERs have reporting mechanisms created by State parties to monitor State implementation of the treaties, be it through State reporting, consideration of individual, group or State communications, or by conducting inquiries. The mandates of these treaty bodies give them the authorisation to interpret the provisions of relevant treaties in line with the

²⁷⁷ Second Progress Report Prepared by Danilo Turk, Special Rapporteur, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1991/17, para. 52(d), available at <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.1991.17.En?Opendocument> (accessed on 2 February 2012). See also Limburg Principles, principle 25; Maastricht Guidelines, guideline 9.

²⁷⁸ S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 436-472.

experiences through the formulation of General Comments. The ICESCR, in part IV, mandates the Economic and Social Council (ECOSOC) to receive State reports²⁷⁹ and to produce General Comments to assist States and UN specialised agencies in the implementation of their obligations under the Covenant.²⁸⁰

In order to enhance the implementation of its mandate, ECOSOC created the CESCR in May 1986,²⁸¹ taking over from the ECOSOC Sessional Working Group of Government Experts that had been monitoring implementation on behalf of ECOSOC from 1976.²⁸² The Committee is composed of experts with recognised competence in SERs and they act in their personal capacity, enhancing their impartiality and independence.²⁸³ They also represent different geographical, legal and social systems of the world, enhancing the consideration of the different world-views in its interpretation of Covenant provisions.²⁸⁴ The CESCR is mandated to submit to ECOSOC a report of its activities, including a summary of its consideration of State reports and general recommendations, so as to facilitate ECOSOC's responsibilities under articles 22-22 of the Covenant.²⁸⁵ Alston simplifies the above mandate into the following responsibilities:²⁸⁶

(1) the clarification of the normative content of each of the relevant rights; (2) the encouragement of more meaningful reporting by State parties; (3) the improved cooperation with relevant UN bodies, including the specialised agencies; (4) the facilitation of greater input from non-governmental organisations; and (5) the effective follow-up to the examination of States' reports.

Though the CESCR was not specifically established in the ICESCR, as is the norm with the other treaty monitoring bodies, its establishment was authorised and done in accordance with the Covenant. The fact that its work is mainly aimed at assisting ECOSOC, the body that was conventionally mandated to monitor the implementation of Covenant, does not detract from

²⁷⁹ ICESCR, articles 16-20.

²⁸⁰ ICESCR, articles 21-22.

²⁸¹ It was established under ECOSOC Resolution 1985/17 of 28 May 1985, E.S.C. Res. 1985/17, 1985 U.N. ESCOR Supp. (No. 1) at 15, U.N. Doc. E/1985/85 (1985).

²⁸² See, Alston – Out of the Abyss (n 273 above) 333. He details the failures of the Working Group which led to the establishment of the CESCR, at 335-349

²⁸³ Resolution 1985/17 (n 281 above), para. b.

²⁸⁴ As above.

²⁸⁵ Resolution 1985/17 (n 281 above), para. f.

²⁸⁶ Alston – Out of the Abyss (n 273 above) 349-379.

the authenticity of its mandate and the legitimacy of its interpretation of the Covenant as is encompassed in its Concluding Observations and General Comments.

The legitimacy of the other treaty monitoring bodies such as the CEDAW Committee, CRC Committee and the CRPD Committee have not generated much debate as their mandate is provided for within the text of the relevant treaties. The CEDAW Committee is established under part V of the Convention²⁸⁷ and article 21 provides for its mandate to make suggestions and adopt General Recommendations based on the consideration of State reports and information received from State parties. The acceptability of its General Recommendations can be gleaned from the fact that even though the Convention provides for a system of dispute resolution in instances of a difference in interpretation or application, the system has so far not been used to challenge any of the interpretations of the Convention as has been provided by the CEDAW Committee.²⁸⁸

The CRC Committee is established in part II of the CRC²⁸⁹ and it is mandated to receive and consider State reports,²⁹⁰ and to make General Recommendations based on information received from State parties and other specialised agencies in accordance with articles 44 and 45.²⁹¹ Lastly, the CRPD Committee is established under article 34 of the Convention with the tasks of considering State reports,²⁹² and can also make suggestions and General Recommendations based on the examination of State reports and on the information received from State parties.²⁹³

Since States have ratified these relevant treaties knowing the mandates of the monitoring bodies, they have, in good faith, undertaken to be bound to accept the authenticity and legitimacy of the General Recommendations emanating from them, and should thus be expected to be bound, or at least to be authoritatively persuaded, by the General Recommendations in good faith. This conclusion is supported by Alston and Quinn, in relation to

²⁸⁷ CEDAW, article 17.

²⁸⁸ CEDAW, article 29(1).

²⁸⁹ CRC, article 43.

²⁹⁰ CRC, article 44.

²⁹¹ CRC, article 45(d).

²⁹² CRPD, articles 35-36.

²⁹³ CRPD, article 39.

the CESCR, where they contend that if State parties had ratified the Covenant in good faith, and given the CESCR genuine authority as the body charged with the interpretation of the Covenant provisions, then they must, as a necessity, be bound by the interpretation that has been accorded to the treaty by the CESCR, including the incorporation of the minimum core content into State parties SERs obligations.²⁹⁴

ii) Compliance of the treaty monitoring bodies with rules of interpretation under international law
On this second question, SERs are part of human rights law, which are part of the larger body of international law. So the customary rules of treaty interpretation, albeit with a little adjustment due to the *sui generis* nature of human rights instruments, also apply to SERs.²⁹⁵ The customary rules of interpretation are encapsulated in the Vienna Convention on the Law of Treaties, articles 31-33. Article 31(1) is especially informative as it calls for treaty provisions to be interpreted in good faith taking into account not only their ordinary meaning (literal interpretation), but also the objects and purpose of the relevant treaty (teleological interpretation), and the context in which the treaty is applied (systematic interpretation). To further support article 31, the Vienna Convention provides other aids of interpretation which include the preparatory works of the treaty and the circumstances of its conclusion.²⁹⁶

In using the above rules to interpret human rights treaties, the monitoring bodies are expected to take into account the objects and purposes of the relevant treaty, and to undertake an expansive interpretation aimed at providing the greatest and most effective protection to individuals and groups.²⁹⁷ This should be done in accordance with the principle of good faith

²⁹⁴ Alston & Quinn (n 85 above) 160-161.

²⁹⁵ Sepulveda – Nature of SER obligations (n 74 above) 74, 77-87. She undertakes an extensive discussion, quoting several authors and decisions of the International Court of Justice, especially the Advisory Opinion on the Reservation of to the Convention on the Prevention and Punishment of the Crime of Genocide, which indicate the special nature of human rights treaties as treaties granting protection to individuals and groups who are not parties to the treaty but who need protection all the same.

²⁹⁶ Vienna Convention on the Law of Treaties, article 32.

²⁹⁷ Sepulveda – Nature of SER obligations (n 74 above) 79. She quotes the European Court in *Soering v United Kingdom* where the Court stated the following:

In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms [...] thus the object and

which requires that positive rules of law contained in treaties are interpreted and applied honestly, fairly and reasonably.²⁹⁸ The customary norms of treaty interpretation as well as the principle of good faith have been effectively employed in practice by the treaty monitoring bodies in the interpretation of the contents of the relevant legal instruments. A case in point is the CESCR which has undertaken an expansive interpretation to make the entrenched SER provisions effective and practical in the protection of the relevant groups and individuals. This can be seen in the development of the minimum core obligations of States, which is aimed at giving content to SERs to make them practical in the protection of marginalised and vulnerable groups.²⁹⁹

iii) State practice in relation to the general comments of treaty monitoring bodies

On this third issue, and as has been discussed above, the treaty monitoring bodies are authoritatively mandated to monitor the implementation of the relevant treaties, and as such have the authority to interpret the scope of their (the treaties') provisions through the General Comments. Through their General Comments the monitoring bodies have developed the minimum core obligations as being implicit in the obligations of States in accordance with the relevant treaties.³⁰⁰ Even though under traditional international law these General Comments are not legally binding on member States, it is beyond doubt that they carry considerable legal clout.³⁰¹ This is reflected in the wide acceptance of the monitoring bodies' General Comments

purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. She further discusses the need for an evolutive interpretation of human rights treaties taking into account the developments in international human rights law and in the context of the present day conditions, basically adopting the 'living instrument principle'. She refers to the European Court case of *Airey v Ireland* where the court stated in relation to the European Convention on Human Rights that 'the Convention must be interpreted in the light of present day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals', at 80.

²⁹⁸ Sepulveda – Nature of SER obligations (n 74 above) 76.

²⁹⁹ CESCR General Comment No. 9, para. 11 & 15; General Comment No. 12, para.6; and General Comment No. 14, para.11.

³⁰⁰ CESCR General Comment No. 3, para. 10.

³⁰¹ Sepulveda – Nature of SER obligations (n 74 above) 88; Craven (n 93 above) 91.

by State parties to those relevant treaties.³⁰² Kenya, as a State party to the relevant treaties is, therefore, under an obligation to fulfil its obligations under these treaties in good faith, including the realisation of its minimum core obligations on SERs. Failure to do so will be indicative of bad faith.³⁰³

2.5.3 An analysis of the viability for the adoption of the minimum core obligations in the development of Kenya's SER jurisprudence

It is generally accepted that where there is doubt with regard to the meaning or import of domestic law, that law should be interpreted in a way that gives credence to the relevant international obligations accruing to the State due to its ratification of international legal instruments.³⁰⁴ Kenya has undertaken international SER obligations by ratifying the international and regional legal instruments as has been discussed above.³⁰⁵ The Kenyan Constitution acknowledges that all these international human rights instruments and all the general rules of international law accruing from them form part of Kenyan law.³⁰⁶ The provisions of the ratified international legal instruments have been interpreted, by the authoritative mechanisms responsible for the monitoring of the implementation of those instruments, to include the minimum core obligations envisaged by the entrenched rights. Kenya, taking into account the doctrine of good faith, must thus be bound to adopt the interpretation of the monitoring bodies on the minimum core obligations and thus implement the same in its legislative, policy and

³⁰² Chenwi (n 7 above) 4-5; Craven (n 93 above) 92, who contends that the endorsement of the General Comments of the CESCR by ECOSOC and the UN General Assembly where a number of State parties participate in the consideration of the Committee's report as a clear indication of acceptance of the interpretation given to the ICESCR provisions by the Committee. See also Chowdhury (n 59 above) 5, who states that national courts have been known to draw from the CESCR's General Comments when they adopt the minimum core approach.

³⁰³ Sepulveda – Nature of SER obligations (n 74 above) 88.

³⁰⁴ Alston & Quinn (n 85 above) 171. An expansive interpretation of constitutional rights to accord with international law has been adopted by the High Court of Kenya in the case of *John Kabui Mwai* (n 29 above) 7, where the Court relies heavily on the education provisions of the ICESCR as well as the elaboration of the right to education in General Comment No. 13 of the CESCR in interpreting the right to education in article 43(1)(f) of the 2010 Constitution.

³⁰⁵ It has been indicated in section 2.3 above that the implementation of the minimum core is an immediate obligation of each and every State party to the Covenant.

³⁰⁶ For this discussion, see section 2.2 above.

programmatic framework aimed at the realisation of the entrenched SERs, and also by the courts during the adjudication of SER cases as is discussed more elaborately in chapter five, section 5.3 below.³⁰⁷

A wholehearted espousal of the minimum core approach in understanding, implementing, and enforcing SER obligations can be seen in national practice in domestic jurisdictions, as has been espoused in Colombia by the Colombian Constitutional Court (CCC), a country with a similar constitutional clause incorporating international human rights law in ratified treaties into the national jurisdiction as part of national law.³⁰⁸ The commitment of the Court to the minimum core approach has been exemplified by its development of the concept of “the minimum conditions for dignified life” a concept constructed from the right to life, human dignity, health, work and social security.³⁰⁹ This approach has been used in individual cases such as in a case on the right to health, in a situation of 22 *Tutela*³¹⁰ actions dealing with a systematic violation of the right to health in Colombia.³¹¹ The Court, adopting the right to health framework expounded by the CESCR in General Comment Number 14, restructured the entire

³⁰⁷ For the importance of adopting the minimum core obligations, see Limburg Principles, principle 5; Maastricht Guidelines, guideline 8. See also CESCR General Comment No. 9, paras. 3 & 15, which requires States to interpret domestic legal provisions in a manner that gives credence to their international law obligations and discourages reliance on national laws to defeat international legal obligations.

³⁰⁸ Chowdhury (n 59 above) 7-8. He affirms that the CCC has adopted and uses the minimum core approach as expounded by the CESCR. He cites some of the cases dealing with housing and health where the Court has categorically applied the minimum core content approach and they include: ‘CCC decision, T-859, 2003; CCC decision, T-025, 2004; CCC decision, T-585, 2006’.

³⁰⁹ Sepulveda – The Constitutional Court’s Role (n 26 above) 148.

³¹⁰ A *tutela* is an innovative writ of protection of fundamental rights enshrined in article 86 of the Colombian Constitution and which can be filed by any person whose fundamental rights are threatened or violated, and requires immediate protection. It entails a summary proceeding with the judge obliged to provide a resolution within ten days of a writ being filed. See Sepulveda – The Constitutional Court’s Role (n 26 above) 146.

³¹¹ CCC Decision T-760 of 2008, discussed in Olaya (n 58 above) 16-17; AE Yamin & OP Vera ‘*The role of courts in defining health policy: The case of the Colombian Constitutional Court*’ (2008) 1-4, available at http://www.law.harvard.edu/programs/hrp/documents/Yamin_Parra_working_paper.pdf (accessed on 2 April 2012).

Colombian health system by giving content to the right to health.³¹² It distinguished essential minimum core aspects of the right to health which were immediately enforceable, from those aspects which were subject to progressive realisation taking into account the available resources.³¹³ The Court thus ordered the provision of specific health goods and services such as the provision of viral load tests and anti-retroviral treatment for HIV/AIDS, costly cancer treatment, the implementation of which were resource intensive.³¹⁴

The espousal of the minimum core content approach by the Court can also be seen in an earlier case on the situation of internally displaced persons (IDPs).³¹⁵ One of the three main orders of the Court was for the government to guarantee the protection of survival-level content (essential core) of the most basic rights such as the right to food, education, healthcare, housing, and land within a stringent period of six months from the date of the decision.³¹⁶ The adoption of the minimum core in this case has led to the improvement in access to education and healthcare for the IDPs with nearly 80 per cent of them benefitting.³¹⁷ In its 2010 decision C-

³¹² Yamin & Vera (n 311 above) 3. They argue that in adopting the health jurisprudence of the CESCR, the Court: (i) elaborated on the multiple dimensions of State obligations on the right to health, and the importance of monitoring and oversight to enhance protection and accountability; (ii) reiterated the responsibility of the State to adopt deliberate measures to achieve progressive realisation, and the impermissibility of retrogression; and the importance of transparency, access to information, public participation in the realisation of the right to health.

³¹³ Yamin & Vera (n 311 above) 3-4; Chowdhury (n 59 above) 8; Olaya (n 58 above) 16-17. Her analysis of the Court's minimum core reasoning indicates that the Court acknowledged that the right to health has both positive (which require resources to implement) and negative obligations (which require State abstention); enforceability of positive obligations (as the vital minimum) depended on their urgency and the impact of their non-implementation on human dignity; and that non-implementation of positive obligations which did not have adverse impact on human dignity were subject to progressive realisation.

³¹⁴ Yamin & Vera (n 311 above) 2.

³¹⁵ Sentence T-025/04, this judgment was the outcome of the aggregation of 1,150 constitutional complaints (*tutelas*) by IDPs. This case is discussed in more detail in chapter four, section 4.5 below.

³¹⁶ 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, at 1682 &1693.

³¹⁷ Rodriguez-Garavito (n 316 above) 1686. He however remarks that due to the high number of IDPs, with over 5 million IDPs in the last 25 years and 280, 000 IDPs in 2010 alone, access to the other SERs has been unsatisfactory, with 98 per cent of them living in poverty, and only 5.5 per cent having adequate housing, at 1687.

376/10, a case concerning the validity of article 183 of Law 115 of 1994 which authorised public education institutions to implement charges for education, the Court, taking into account international human rights law as incorporated in the Colombian domestic jurisdiction through articles 44, 67 and 93 of the Constitution,³¹⁸ held that a right to free primary education was immediately enforceable.³¹⁹

The Colombian system of protection of rights has been defined as “biting substantive progressiveness” by Manuel Cepeda-Espinoza, a former judge of the CCC.³²⁰ *Progressiveness* recognises that: rights are not absolute, and must be developed and expanded within certain limitations; implementation of rights must show advancement accompanied by proof of progress; and, that advancement should show progressiveness towards an outcome, which is the effective enjoyment of rights.³²¹ The *substantiveness* of the approach is indicated by two phenomena: the adoption of a fixed standard that substantively defines the scope and content of rights (including the minimum core); and, the ability of the Court to give a remedy to the individual petitioners while at the same time ordering structural remedies to cover similarly situated people, a contrast to the South African situation exemplified by the *Grootboom* case.³²² The *biting* nature of the approach is indicated by the extensive nature of the decisions as they impose government expenditure on implementation, order administrative and policy changes, and prompt regulatory action.³²³

³¹⁸ See Amicus brief to case C-376/10 prepared by The Cornell International Human Rights Clinic, Robert F. Kennedy Centre for Justice and Human Rights, and Association NOMADESC (November 2009) 1, available at http://www.escr-net.org/usr_doc/Amicus-Brief-w-Annexes-Report-ENG-FINAL.pdf (accessed on 6 April 2012).

³¹⁹ See, ESR-Net ‘Decision C-376/10 of the Colombian Constitutional Court’ available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=1407210 (accessed on 6 April 2012).

³²⁰ MJ Cepeda-Espinoza ‘Transcript: Social and economic rights and the Colombian Constitutional Court’ (2010-2011) 89 *Texas Law Review* 1699, at 1702-1703.

³²¹ Cepeda-Espinoza (n 320 above) 1702-1703. Transparent rights-based rationality, which requires the State to define objectives, rationalise means to objectives, develop policies and regulations aimed at the fulfilment of objectives, and to build institutional capacity to enhance the achievement of objectives, can also be said to form part of the substantive aspect of the approach.

³²² Cepeda-Espinoza (n 320 above) 1703.

³²³ As above.

It is therefore imperative, following the Colombian example, that Kenya adopts the minimum core approach and entrenches it in the legislative, policy and programmatic framework aimed at the implementation of SERs. An expansive reading of the entrenched SERs to incorporate the minimum core approach is envisaged by the Kenyan Constitution, especially article 20(2) which provides for the enjoyment of rights in the Constitution 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.³²⁴ The CESCR has been categorical that an understanding or a reading of substantive SERs which does not incorporate the minimum core deprives SERs of their *raison d'être*. It has emphasised an extensive and inclusive interpretation of SER obligations, and has categorically called on States not to interpret SER provisions in a way that deprives them of their meaningful content, and thus rendering them ineffective and illusory.³²⁵ It follows, therefore, that for the entrenched SERs to achieve the purpose for which they were intended, in accordance with article 19(2) of the Constitution, the minimum core obligations envisaged by the entrenched SERs must be upheld.

The adoption of the minimum core approach necessitates the development of the substantive content of SERs. This, however, raises another set of questions, which are, how to pragmatically determine the substantive content of the rights, and how a determination of the substantive content of SERs will be beneficial to Kenyans, especially the poor, vulnerable and marginalised. This question has been one of the major concerns that led to the SACC declining to adopt the minimum core approach to the interpretation of SERs.³²⁶ It raises the dilemma of how, in a diverse society with different understandings of minimum essential needs for human survival and well-being, there can be an imposition of a detailed and comprehensive theory of value to determine what the minimum core content of each of the SERs entail.

However, to respond to the above concerns, the very entrenchment of justiciable SERs in the Constitution can be said to be an acknowledgment of the very diversity of society and a

³²⁴ See also, 2010 Kenyan Constitution, article 259(1) which calls for the construction of the provisions of the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law and the fundamental rights in the Bill of Rights; permits the development of law; and contributes to good governance.

³²⁵ CESCR General Comment No. 14, para. 31; General Comment No. 13, para.44; General Comment No. 9, para.11; and General Comment No. 3, para. 9.

³²⁶ *Grootboom*, paras. 32-33.

realisation that different individuals and groups have different needs that must be provided for. These needs can be met either through the adoption of relevant legislative, policy and programmatic framework by the State to provide an enabling environment to allow people to meet their basic socio-economic needs using their own resources; or through the actual provision of basic socio-economic goods and services to individuals and groups who are unable to provide for themselves. This acknowledgment resonates perfectly with the international obligations of the State to respect, protect, promote and fulfill SERs as discussed in the case studies in chapter six and seven below. This, in essence, therefore places the responsibility for the development of the content of SERs squarely on the doorstep of the government, especially the political institutions.³²⁷

How then will the political institutions determine the contents of SERs? My submission here is that there is no need to reinvent the wheel. A lot of work has already been done in the international arena, especially by the CESCR and other international experts,³²⁸ to develop the minimum essential elements for most of the SERs entrenched in the Constitution. All that is required of the State, therefore, and this can be done almost immediately without raising arguments about the availability of resources, is to use the available international material to develop the minimum essentials to the entrenched SERs taking into account Kenya's peculiar historical context, priorities and long-term objectives. If this is done in an inclusive process allowing for participation of all the Kenyan people in accordance with article 10 of the Constitution, the State will be able to develop a detailed and comprehensive standard detailing the minimum core content of the SERs that is inclusive and that is acceptable to all Kenyans. As part of the process of developing the minimum core content of SERs, the State must incorporate the requisite achievable targets, indicators, benchmarks and specific timelines to provide guidance in the implementation, monitoring and evaluation of the plan of action as well as enabling the public and other watchdog institutions to also monitor progress.³²⁹ The minimum

³²⁷ For a more elaborate discussion, see chapter four, section 4.2 below.

³²⁸ See generally, S Chapman & S Russell (eds.) *Core obligations: Building a framework for economic, social and cultural rights* (2002); P Hunt, *Reclaiming social rights: International and comparative perspectives* (1996).

³²⁹ S Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al Constitutional law of South Africa* (2nd Edition) 2 (2009) 33-42.

core contents, as developed by the political institutions, will then be polished by the courts over time as and when cases dealing with specific SERs come to the courts for interpretation.

The adoption of the minimum core approach will be beneficial to the poor, vulnerable and marginalised 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 programmes aimed at implementing the entrenched SERs. Such criteria will involve the development of the content of the 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 a clear understanding of the duties imposed on State institutions by the provisions. Such criteria are also important for the donor community, international agencies, and, national and international NGOs as they can then choose specific aspects within the criteria to fund and also have clear indicators for monitoring the State's policies and programmes for the implementation of SERs.

2.6 Limitations on SER obligations

An understanding of the scope and extent of Kenya's SER obligations is incomplete without undertaking a limitations analysis, as limitations impact directly on the extent of the obligations that accrue to the State. The importance of this analysis is affirmed by Roza Pati who contends that the ascertainment of the legal effect of a right by only defining its substantive scope is incomplete until a limitations analysis is undertaken due to the need to balance societal needs *vis-à-vis* individual interests.³³⁰ The International Council of Human Rights Policy has also affirmed the importance of a limitations analysis, especially in instances where resources are constrained and capacities are inadequate.³³¹ This section will, therefore, briefly undertake a limitations analysis with regard to the SERs in the Kenyan Constitution.

The incorporation of a limitations clause in legal instruments, national or international, is a recognition of the non-absolute nature of rights. Limitation is thus a legitimate way in which

³³⁰ R Pati 'Rights and their limits: The constitution for Europe in international and comparative legal perspective' (2005) 23 *Berkeley Journal of International Law* 323, at 324-325. See also J Mutakha-Kangu 'The theory and design of limitation of fundamental rights and freedoms' (2008) *The Law Society of Kenya Journal* 1, who argues that effective protection of human rights at the national sphere is dependent on the design of the limitation clause.

³³¹ ICHRP Duties sans frontieres (n 13 above) 15.

legal instruments accommodate the democratic conflict between entrenched rights and competing social interests.³³² The non-absolute nature of human rights, and the legitimacy of a limitations clause in a constitutional system, was affirmed by the SACC in the case of *De Reuck v Director of Public Prosecution (Witwatersrand Local Division) and others*.³³³ The Court acknowledged the importance of harmonious co-existence in society and noted the need for a balancing process should individual rights conflict.³³⁴ However, it is important to emphasise that SER obligations can only be limited by the State in particular instances, and the following criteria must be met for the restrictions to be legal: the objectives justifying such limitation must be legitimate; the limitation must be prescribed by law; and the limitation must not be disproportionate, meaning that it must not exceed the aim envisioned by the particular limitation.³³⁵ The restriction on limitation is based on the principle that the exercise of public power derives its force from the relevant legal instrument, be it a treaty or a constitution, and must therefore be justified with reference to that particular legal instrument.³³⁶

In the Kenyan context, limitation of rights is envisioned by article 24 of the Constitution, which provides clear grounds that must be met before limitation on rights can be legitimate. A discussion of these grounds of limitation is the main thrust of this section. However, as has been discussed in section 2.2 above, Kenya has also incorporated ratified international law into its

³³² H Cheadle 'Limitation of rights' in H Cheadle, DM Davis, & N Haysom (eds.) *South African constitutional law: The Bill of Rights* (2002) 30-1. The first national constitution to engender limitation of rights was the German Basic Law (German Constitution of 23 May 1949). For a comprehensive analysis of limitation under the German Basic Law, see Pati (n 330 above) 234-342.

³³³ *De Reuck v Director of Public Prosecution (Witwatersrand Local Division) and others* 2002 (12) BCLR 1285 (CC), para. 89.

³³⁴ As above. See also *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 930 (CC), para. 57; *S v Mamela & Another* 2000 (3) SA 1 (CC), para. 32. In *Mamela*, the Court affirmed the need for a balancing exercise based on the proportionality principle, holding that the more serious the impact of limitation, the stringent the criteria for its justification and the more onerous the requirements for its justification (justifications must be persuasive and compelling).

³³⁵ *De Schutter* (n 134 above) 241. See also *S v Makwanyane & Another* 1995 (3) SA 391 (CC), at para. 104.

³³⁶ S Woolman & H Botha 'Limitations' in Woolman *et al Constitutional law of South Africa* (2nd Edition) 2 (2009) 34-7.

domestic jurisdiction in accordance with article 2(5) and (6) of the Constitution, and so has incorporated international human rights obligations arising from international human rights treaties and customs. In that context, it is thus important that a brief analysis of the use of limitation at the international and regional sphere be undertaken so as to inform the interpretation of article 24 of the Constitution. Therefore, before we commence an analysis of article 24, it is imperative that an analysis of limitations at the international and regional levels be undertaken.

2.6.1 Limitations in the international sphere

At the international level, the ICESCR acknowledges the possibility of the limitation of the SERs entrenched therein. The limitation clause is contained in article 4 which provides that SERs can be limited as provided by law, and that such limitation must be compatible with the nature of the rights, and must be done only for the purpose of promoting the general welfare in a democratic society.³³⁷ Article 5 further prohibits the destruction of SERs or the imposition of limitations exceeding the extent envisioned by the Covenant.³³⁸ The Covenant goes further to espouse the principle of permeability and interdependence of rights by foreclosing the use of its provisions as a pretext to limit or lower the level of protection of any other rights provided for in other treaties or national law.³³⁹ Article 5(2) is thus a saving provision aimed at preserving the sanctity of laws providing higher SER protection than those envisaged in the Covenant.³⁴⁰

The Limburg Principles also provide that these articles were meant to protect rights rather than to permit imposition of limitations, and calls for their strict interpretation.³⁴¹ It interprets the provision “determined by law” to refer to a national law of general application which must be clear and accessible to everybody, consistent with the Covenant, and must not

³³⁷ See CESCR General Comment No. 14, para. 28 & 29 where the Committee affirmed that article 4 was meant to protect rights and not to impose limitation on rights by States. It thus calls for a restricted interpretation of article 4 in accordance with the elements enumerated in the article, and further clarifies that international standards must be adhered to in the imposition of limitations. It states that limitation measures must be of a limited duration and subject to review.

³³⁸ ICESCR, article 5 (1).

³³⁹ ICESCR, article 5 (2).

³⁴⁰ Sseyonjo – SER in international law (n 142 above) 102.

³⁴¹ Limburg Principles, principles 46-47.

be arbitrary, unreasonable or discriminatory.³⁴² It further requires the adoption of adequate safeguards and the provision of effective remedies should the limiting law be abused or used illegally.³⁴³ For the limitation to be compatible with the nature of the rights, it should not render the rights ineffective or illusory.³⁴⁴

The phrase “general welfare” has been interpreted to ensure that limitations should only be aimed at furthering the economic, social and cultural well-being of the people as a whole, meaning that a proper proportionality test must be undertaken if the limitation is to be justified.³⁴⁵ The proportionality test must be undertaken within the context of a democratic society characterised by pluralism, tolerance and broad-mindedness taking into account the views of minority groups and preventing the arbitrary totalitarian imposition of limitations on minority groups by the majority.³⁴⁶

The interpretation of article 4 of the ICESCR in the Limburg Principles is informed by the work of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, especially the *Siracusa Principles on the Limitation and Derogation of the Provisions in the ICCPR*.³⁴⁷ Though based on the ICCPR, Siracusa Principles provide general interpretive principles relating to the justification of limitations that have application across all the international treaties allowing for limitation of rights. Some of the principles include the prohibition of limitations that jeopardise the essence of the rights; strict interpretation of limitation clauses in favour of rights, and in accordance with the nature of the right; compatibility of limitations with the objects and purpose of the Covenant; non-arbitrary application of limitations; provision of safeguards and remedies against abusive use of limitations; non-discriminatory application of limitations; necessity and the basis of limitations on justifiable

³⁴² Limburg Principles, principles 48-50. See also Sseyonjo – SER in international law (n 142 above) 100-101.

³⁴³ Limburg Principles, principle 51.

³⁴⁴ Limburg Principles, principle 56.

³⁴⁵ Sseyonjo – SER in international law (n 142 above) 101.

³⁴⁶ As above.

³⁴⁷ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984), available at <http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf> (accessed on 9 February 2012).

Covenant grounds; and, the proportionate pursuit of legitimate aims responsive to public needs in accordance to the Covenant.³⁴⁸

The CESCR has not substantively expounded on the interpretation of article 4 in a General Comment.³⁴⁹ However, guidance on understanding it can be sought from the work of the Human Rights Committee, especially its General Comment Number 27 where it provides that permissible limitation must be provided by law and the law must establish all the conditions under which the right may be limited.³⁵⁰ It further provides that the limitation must be necessary in a democratic society for the protection of the Covenant acknowledged purposes, must not impair the essence of the right, must not confer unfettered discretion on the authority charged with their execution, must conform to the principles of proportionality, must be appropriate to achieve their intended purpose, and must be the least intrusive among the available options.³⁵¹

The conditions under which limitation of rights are permissible in the international sphere have been affirmed by several judicial and quasi-judicial bodies. The Inter-American Court in an *Advisory Opinion on the Interpretation of the Word "Law" in Article 30 of the American Convention on Human Rights* has affirmed the importance of guarantees and safeguards to fetter the discretion of governments in the application of limitations so that the inviolable attributes of the individual are not impaired.³⁵² The European Court on Human Rights has also held that even though States could legitimately limit rights, they must do so in a manner which is compatible with their international law obligations, and such limitations must be subject to

³⁴⁸ Siracusa Principles, principles 1-14.

³⁴⁹ A reference was made to article 4 by the CESCR in General Comment No. 14, paras. 28 & 29.

³⁵⁰ UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, paras. 11-12, available at: <http://www.unhcr.org/refworld/docid/45139c394.html> (accessed 9 February 2012).

³⁵¹ As above, paras. 13-16.

³⁵² Inter-American Court '*The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, May 9, 1986, Inter-Am. Ct. H.R. (Ser. A) No. 6 (1986), paras.22-24, available at http://www1.umn.edu/humanrts/iachr/b_11_4f.htm (accessed on 9 February 2012). The Court held that the legitimacy of a limitation is guaranteed in it passing through the national legislative process and the opportunity being given to the people, through their representatives to express their disagreements or to propose different optional initiatives.

review by the treaty monitoring mechanisms.³⁵³ It further held that in undertaking these review functions, the Court must ascertain the necessity of the limitation, especially with regard to an existing pressing social need, and the proportionality of the limitation in relation to the purpose sought to be achieved.³⁵⁴ Similarly in the *Observer and Guardian v United Kingdom*, the European Court held that rights, freedom of expression in this instance, are subject to a number of exceptions, which must be narrowly interpreted, and the necessity for limitation convincingly established.³⁵⁵ It stated that “necessary” must imply the existence of pressing social need, and that even though States have discretion in the imposition of limitations; the same is subject to the overall supervision of the treaty monitoring bodies.³⁵⁶ The Court further held, in relation to proportionality, that it has to look at the limitation in question in light of the entire national context as a whole. In doing this, the Court has to determine whether the limitation is proportionate to the legitimate aims being pursued, and whether the State’s justifications are relevant and sufficient.³⁵⁷

2.6.2 Limitations in the regional sphere

The question of limitation of rights in the African Human Rights System (AHRs) has raised some debate due to the lack of a general limitations clause in the African Charter and its Protocol on the Rights of Women in Africa, as well as the African Children’s Charter, unlike other regional human rights instruments.³⁵⁸ Concerns on limitations are specifically greater in relation to the SERs in these instruments, as they do not contain internal limitations or claw-back clauses as is the case with the CPR. In response to this debate, the African Commission

³⁵³ *Open Door and Dublin Well Woman v Ireland*, 64/1991/316/387-388, Council of Europe: European Court of Human Rights, 23 September 1992, para. 69, available at: <http://www.unhcr.org/refworld/docid/3ae6b7020.html> (accessed 9 February 2012).

³⁵⁴ As above, para. 70.

³⁵⁵ *The Observer and the Guardian v The United Kingdom*, Application No. 13585/88, Judgement of 26 November 1991, Para.59 (a) & 60, available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/681> (accessed on 9 February 2012).

³⁵⁶ As above, para.59 (c).

³⁵⁷ As above, para.59 (d).

³⁵⁸ Viljoen (n 244 above) 348-352; F Ouguergouz, *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 425.

has delineated article 27(2)³⁵⁹ as the general limitations clause and has developed limitations jurisprudence around the article.³⁶⁰ The Commission has affirmed that a law limiting rights must be a law of general application,³⁶¹ and must be in conformity with the provisions of the African Charter.³⁶² It has then propounded a proportionality test which balances the nature and extent of the limitation imposed *vis-à-vis* the legitimate State interest aimed to be protected by the limitation. In the *Media Rights* case the Commission stated as follows:³⁶³

The reasons for possible limitation must be founded in a legitimate State interest and the evils of limitation of rights must be strictly proportionate with, and absolutely necessary for, the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.

The Commission is thus basically contending that any use of the limitations clause must meet the basic requirements of legality, necessity and the prohibition of arbitrariness.³⁶⁴ It has further found, when undertaking the proportionality analysis, that if there is more than one way of achieving the legitimate State objective, the measure that least limit rights must be adopted.³⁶⁵ The Commission thus contends that the onus of proving the legitimacy of the limitations of rights is on the State, and that once the limitation of a right has been proven, it is up to the government in question to justify the reasonableness of that limitation.³⁶⁶

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³⁵⁹ It provides that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

³⁶⁰ See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para. 68; *Prince v South Africa*, Communication 255/2002, para. 43 reprinted in C Heyns & M Killander, *Compendium of key human rights documents of the African Union* 3rd edition (2007) 239;

³⁶¹ *Media Rights* case, para. 71; *Prince* case, para. 44.

³⁶² *Media Rights* case, para. 66.

³⁶³ *Media Rights* case, paras. 69-70; *Prince* case, para. 43;

³⁶⁴ Ouguergouz (n 358 above) 430.

³⁶⁵ Communication 242/2001 *Interights & Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), para. 82-85.

³⁶⁶ *Media Rights* case, para. 73. The Commission states that the Nigerian government had not provided any evidence to justify its limitation of the freedom of expression. See also Communication 212/98 *Amnesty International v Zambia*, para. 50, available at <http://www1.umn.edu/humanrts/africa/comcases/212-98.html> (accessed on 17 February 2012), where the

The object and purpose of the legal instruments in the AHRS are to confer protection on individuals, and the limitations clause must be interpreted with this in mind. Ouguergouz argues that having the object and purpose of the African Charter in mind, article 27(2) should be given the most restrictive interpretation possible so as to enhance the protection of rights entrenched in the Charter.³⁶⁷

2.6.3 Limitations in the domestic sphere

Limitation of rights is not a new concept in the Kenyan constitutional jurisprudence, with the 1963 Constitution having contained a limitations clause.³⁶⁸ A reading of the limitation clause however indicates that it was not meant to be a general limitations clause, but was only a reference to the internal limitations within the provisions in the Bill of Rights. The construction of the internal limitations envisaged restricted use, as they were meant to only operate to curtail enjoyment of rights in instances where the exercise of rights prejudiced the rights and freedoms of others or the public interest.³⁶⁹ In *Changanlal v Kericho Urban District Council*, a case dealing with compulsory acquisition of private property, the Court held that such an acquisition was subject to payment of compensation and no legislation would pass constitutional muster if it took private property without compensation.³⁷⁰ The Kenyan courts have generally been state-centric in their proportionality test where rights have been limited by the State. This was apparent in

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Commission not only cautioned against a too easy resort to the use of limitation, but also found that the onus is on the State to prove that it is justified to resort to the use of the limitation clause

³⁶⁷ Ouguergouz (n 358 above) 432-433.

³⁶⁸ See 1963 Constitution of Kenya, section 70 which provides that:

[t]he provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

³⁶⁹ Internal limitations included that related to the compulsory acquisition of private property, section 75; arbitrary search or entry, section 76(2). See generally Mutakha-Kangu (n 330 above) who contends that due to the pervasive nature of the internal limitations in the Bill of Rights, it has been described as a bill of exceptions, at 1.

³⁷⁰ (1965) EA 370.

Pattni v The Republic where it was held that public interest triumphed individual interests.³⁷¹ Under the old Constitution, the onus of proof of limitations generally lay on the Applicant and the justification for limitations was borne by the Respondent.³⁷²

A more comprehensive provision for the limitation of rights has been entrenched in the 2010 Constitution, in article 24, and it provides clear grounds for when the State can legitimately limit rights. Article 24(1) provides that rights can only be limited in accordance with the law, and only to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Further safeguards are provided to ensure that limitations of rights are legitimate, and they include:³⁷³

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

Article 24(2) further provides safeguards where a limitation is contained in legislation and it provides that such limitation is not valid unless it specifically expresses the intention to limit a particular right in a clear and specific manner, as well as the nature and extent of that limitation.³⁷⁴ It not only calls for the strict construction of legislative provisions limiting rights, but also prohibits any limitations that have the effect of derogating from the core or essential content

³⁷¹ High Court Criminal Application 481 of 1995 (unreported). See also *Riungu v Republic* High Court Criminal Application No 232 of 1994 (unreported) and *Mazrui v Republic* High Court Criminal Application No 91 of 1985 (unreported).

³⁷² AW Munene 'The Bill of Rights and constitutional order: A Kenyan perspective' (2002) 2 *African Human Rights Law Journal* 154.

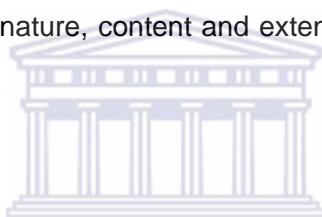
³⁷³ 2010 Kenyan Constitution, article 24(1).

³⁷⁴ 2010 Kenyan Constitution, article 24(2)(a)-(b).

of rights leading to the rights being ineffective or illusory.³⁷⁵ It places the burden of proof as to the legitimacy of a limitation on the authority or organ imposing the limitation in question.

The article 24(1) limitations clause is very similar to that in section 36 of the 1996 SAC.³⁷⁶ The section 36 clause 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 limitations in the Kenyan context. The SACC has utilised the limitations clause in a two-stage constitutional analysis which looks, first, at whether there has been a contravention of the guaranteed right, and secondly, whether the contravention is justified under the limitations clause.³⁷⁷ The first part of the test entails the responsibility of the Applicant³⁷⁸ while the second part of the test burdens the person or authority who seeks to limit rights to justify the limitations.³⁷⁹

In undertaking the first stage of the analysis, which basically involves the interpretation and development of the meaning, nature, content and extent of the right in question³⁸⁰ and the



³⁷⁵ 2010 Kenyan Constitution, article 24(2)(b)-(c).

³⁷⁶ These grounds of limitation and the requirement that the court undertakes a proportionality test taking into account the necessity, suitability and appropriateness of limitations was first entrenched in the German Basic Law, article 19, see Pati (n 330 above) 238.

³⁷⁷ *S v Zuma & Others* 1995 (2) SA 642 (CC), at 414; *Makwanyane*, at para. 100. See also Woolman & Botha (n 334 above) 34-3 – 34-4; Iles (n 12 above) 453-455.

³⁷⁸ During this first stage of the two-stage limitations 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). This is to prevent a situation where the law can be held invalid for one litigant and valid for another litigant. The theory also espouses a generous interpretation of *locus standi* rules to allow Applicants who have not been directly affected by a limitation on rights to bring cases to court, see Woolman & Botha (n 336 above) 34-42 – 34-43, footnote 5.

³⁷⁹ See *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 CC, para. 19, which confirms that once a limitation is proven, the burden of justification rests on the party seeking to rely on the limitation, and the analysis of the justification will depend on the balancing of competing interests.

³⁸⁰ Ackermann J in *Ferreira v Levin NO & Others, and Vryenhoek & Others v Powell NO & Others* 1996 (1) BCLR 1 (CC), at para. 252.

assessment of whether the offending legislation³⁸¹ impairs or limits the defined content of the rights, the SACC has used an approach based on the text, the context and the foundational values.³⁸² It involves the analysis of the text of the right in its context which entails the historical background of both the constitution and the right; the reasons for its inclusion as a constitutional right; the concepts enshrined in the right, and their legal elaboration both under national, international and comparative law; the other constitutional provisions, particularly the other rights entrenched in the Bill of Rights; and, the foundational values.³⁸³ This stage entails the analysis of the internal demarcations/qualification of rights and their circumscription of the scope of rights.³⁸⁴

The second stage, which encompasses the proportionality test, entails the analysis of the reasonableness and the justification of the limitation, in the context of a democratic society based on human dignity, equality and freedom and using the factors listed in section 36(1) (similar to article 24(1) of the Kenyan Constitution).³⁸⁵ Cheadle, relying on Canadian jurisprudence in relation to section 1 of the Canadian Charter of Rights and Freedoms, contends that this analysis should not be a balance between the importance of the right as against the purpose of the limitation, but an analysis of the propriety and viability of the means used to limit the right.³⁸⁶ He quotes the Canadian case of *R v Oakes* 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:³⁸⁷

³⁸¹ For it to be legitimate, a limitation clause must be entrenched in a law of general application and not on a policy or executive act. This is to guarantee rights by only giving the legislature the power to limit rights. See Cheadle (n 332 above) 30-8 – 30-9.

³⁸² *Ferreira v Levin*, para. 46.

³⁸³ Cheadle (n 332 above) 30-5; Woolman & Botha (n 336 above) 34-19 - 34-32.

³⁸⁴ I Currie & J de Waal, *The Bill of Rights handbook* 5th Edition (2005) 187.

³⁸⁵ Cheadle (n 332 above) 30-9 – 30-11; Woolman & Botha (n 336 above) 34-26 – 34-27, they contend that for the respondent to succeed at the limitation stage, they must satisfy all the limitation clause's requirements as provided in section 36(1). For an extensive analysis of the jurisprudence of the SACC in relation to the understanding of the factors involved in the proportionality analysis, see Woolman & Botha (n 336 above) 34-47 – 34-103.

³⁸⁶ Cheadle (n 332 above) 30-11 – 30-12.

³⁸⁷ *R v Oakes* (1986) 26 DLR (4th) 200, at 227, quoted in Cheadle (n 332 above) 30-11.

First, measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations...they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question. Third, there must be proportionality between the effects of the limiting measures and the objective which has been identified as of sufficient importance.

It is thus important that in determining the justifiability of a legislation limiting rights, the Kenyan courts must take the above factors into consideration and ensure that the *raison d'être* of the entrenched rights in the Bill of rights are achieved.

Interestingly, the limitation clause has not been used in the SACC jurisprudence on SERs as evidenced by the *Grootboom* and the *Treatment Action Campaign*³⁸⁸ cases.³⁸⁹ This is due to the requirement that for a limitation on rights to be legitimate, it must be contained in a law of general application, which was not the case with the two decisions.³⁹⁰ However, a limitation analysis was also not undertaken in the *Khosa* case, which dealt with the Social Assistance Act 59 of 1992, the Court deciding the case on the criterion of reasonableness.³⁹¹ The Court categorically acknowledged the difficulty of applying section 36 in SER cases due to the internal limitation requiring the State 'to go no further than to take "reasonable legislative and other measures within its available resources to achieve the progressive realisation" of the rights'.³⁹² The Court further stated as follows:³⁹³

If a legislative measure taken by the State to meet this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is "reasonable" for the purposes of that section, is different to what is "reasonable" for the purposes of sections 26 and 27.

³⁸⁸ *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 70 (5 July 2002).

³⁸⁹ Currie & de Waal (n 384 above) 594.

³⁹⁰ As above.

³⁹¹ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) (4 March 2004).

³⁹² *Khosa*, para. 82. For an in-depth analysis, see generally, Iles (n 12 above) 448 ff.

³⁹³ *Khosa*, para. 82.

Justice Ngcobo, in the same judgment, questions whether the standard of determining reasonableness under section 27(2) is a similar standard to that of determining reasonableness and justifiability under section 36(1), but did not give any concrete way forward on how the two sections can be used in the context of SER adjudication, preferring to state that an analysis using any of the sections will have the same conclusion.³⁹⁴

Currie and de Waal argue that even though a law of general application can only feasibly limit the negative aspects of SER obligations,³⁹⁵ such a law would be held to be unreasonable in the first stage of the interpretation analysis as the principle of reasonableness has been included in the demarcation of SERs, and that the courts would not have to proceed to undertake a limitation analysis.³⁹⁶ However, Marius Pieterse, relying on the judgment of Budlender AJ in the *Residents of Bon Vista Mansion* case, contends that the application of section 36 is necessary in relation to the duty to respect SERs if limitations of such duties are to assail constitutional muster.³⁹⁷ He argues that violations of SERs should not only be analysed using the principle of reasonableness, but must also be justified with reference to an open and democratic society based on human dignity, equality and freedom, and that a proportionality test taking into account all the relevant factors should be undertaken.³⁹⁸

Pieterse's approach was seemingly taken up by the SACC in the *Jaftha* case.³⁹⁹ In this case, the court not only acknowledged the existence of negative SER obligations in sections

³⁹⁴ *Khosa*, paras. 105-107. See Woolman & Botha (n 336 above) 34-37 footnote 2, who conclude that Ngcobo J's analysis leads us nowhere.

³⁹⁵ See Currie & de Waal (n 384 above) 594, who argue that since most SER litigation concerned with positive obligations are likely to be due to omissions, section 36 analysis will be irrelevant due to the requirement of a law of general application.

³⁹⁶ Currie & de Waal (n 384 above) 594-595.

³⁹⁷ M Pieterse 'Towards a useful role for section 36 of the Constitution in social rights cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2003) 20 *South African Law Journal* 41, at 45-46. The Court in *Bon Vista* did not engage in a section 36 analysis despite the presence of a law of general application, Water Services Act 108 of 1997, because the Respondents had not fashioned any arguments justifying the use of the limitation.

³⁹⁸ Pieterse (n 397 above) 47.

³⁹⁹ *Jaftha v Schoeman & Others* 2005 (2) SA 140 (CC). The case involved the validity of the Magistrates' Court Act which permitted the sale of a person's home in execution of a civil debt.

26(1) and 27(1) of the SAC,⁴⁰⁰ but also held that where the State limits those obligations, such a limitation must be justified under section 36.⁴⁰¹ The Court proceeded to undertake a limitations analysis under section 36 and held that the breach of section 26(1) was not reasonable and justifiable in terms of section 36 because of the importance of access to housing and its link to dignity, the seriousness of the infringement, and the existence of less restrictive means.⁴⁰²

Sandra Liebenberg, affirming the importance of section 36 analysis in relation to SERs contends that:⁴⁰³

[t]he State's purpose in limiting a right should not be solely for reasons of administrative convenience, cost-saving or a re-prioritisation of resources. Allowing these reasons to constitute sufficient grounds of limitation will strip the rights of all effect. In order to justify a limitation on these rights under section 36, the State will have to argue that the restriction based on resource constraints is reasonably required in the interests of the general welfare in a democratic society based on human dignity, equality and freedom. In addition, the nature and degree of the restriction must be carefully tailored to fit these purposes (the proportionality test).

The existence of this debate on the use of section 36 in SER cases was acknowledged by the Court in the *Khosa* case, but it did not provide any guidance on the same as this was unnecessary for the determination of the case.⁴⁰⁴

This whole debate strangely rests squarely on the approach to interpretation and implementation of SERs that has been adopted by the courts in a particular domestic jurisdiction. In the South African context, the adoption of the reasonableness approach in the interpretation of SERs, of necessity, undermines the value of a section 36 analysis in instances where the State has failed to take adequate measures to realise progressively the right in question. However, if the SACC had adopted the minimum core approach, more stringent justifications would have been required in the instances where the State had failed to meet its minimum core obligations of providing the minimum essential goods and services, especially for

⁴⁰⁰ *Jaftha*, paras.32 & 33.

⁴⁰¹ *Jaftha*, para. 34.

⁴⁰² *Jaftha*, paras. 35-49; Woolman & Botha (n 336 above) 33-35 – 33-46.

⁴⁰³ S Liebenberg 'Violations of socio-economic rights: The role of the South African Human Rights Commission' in P Andrews & S Ellman (eds.), *The post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) 424.

⁴⁰⁴ *Khosa*, para. 84.

the most marginalised and vulnerable groups.⁴⁰⁵ This is due to the immediate nature of the minimum core obligations, and the developments in international human rights law to the effect that a lack of resources is no longer a justification for the non-fulfilment of these obligations as discussed in section 2.5 above. If Kenya adopts the integrated approach to the interpretation of SERs, as is proposed in chapter five of this thesis, with its minimum core component, it will thus follow that a limitations analysis which engenders a proportionality test using all the factors provided for in article 24(1) of the Kenyan Constitution will be necessary.

Despite its progressive nature in the protection of rights, article 24 of the Kenyan Constitution has retrogressive aspects, especially in relation to Muslims and members of the disciplined forces. With regards to people who profess the Islamic faith, it qualifies the provisions of equality that runs throughout the Bill of Rights, and which forms the backbone of the entire corpus of SERs, by providing that the equality provision does not apply to Muslims on matters relating to personal status, marriage, divorce and inheritance.⁴⁰⁶ With regard to members of the disciplined forces (persons serving in the Kenyan Defence Forces and the National Police Service), the article allows some of their fundamental rights to be limited, such as the right to association (article 36); assembly, demonstration, picketing and petition (article 37); labour relations (article 41); and, SERs (article 43).⁴⁰⁷ An extensive discussion of these retrogressive aspects is beyond the scope of this chapter. However, it is briefly submitted herein that these provisions are incompatible with the objectives and purposes of the Bill of Rights in particular, and of the entire Constitution in general.

In conclusion, and in line with the arguments of former Chief Justice Earl Warren of the United States made in 1962, the courts must be vigilant in the protection of fundamental rights entrenched in the Bill of Rights for all persons at all times, and any legislative or executive action limiting the fundamental rights of any group of citizens must be given the strictest

⁴⁰⁵ Iles (n 12 above) 458, who argues that if the SACC had adopted the minimum core approach, section 36 would have had a more meaningful role in justifying failures to realise the minimum core, while the internal limitation would serve to justify failure to expand the realisation of SERs beyond the minimum core.

⁴⁰⁶ 2010 Kenyan Constitution, article 24(4).

⁴⁰⁷ 2010 Kenyan Constitution, article 24(5).

interpretation possible.⁴⁰⁸ The strict interpretation should apply even for constitutional provisions limiting the rights of members of disciplined forces such as article 24 (4) and (5) of the 2010 Kenyan Constitution.

2.7 Conclusion

In entrenching justiciable SERs in the 2010 Constitution, and incorporating international law into its domestic legal system, Kenya has undertaken an extensive transformative project aimed at the enhancement of equality, social justice and sustainable development, the eradication of poverty and inequality, as well as the uplifting of standards of living of all Kenyans. This chapter sought to undertake an analysis of this transformative project, by determining the nature, content and extent of the SER obligations that Kenya has undertaken. This analysis commenced with the determination of the place of international law in the Kenyan domestic legal system taking into account article 2(5) and (6) of the Constitution which subsumes customs and ratified international treaties into the domestic arena. The chapter found that these constitutional provisions have changed the Kenyan legal system from pure dualism towards monism, with ratified international law forming a part of the domestic legal system without the requirement of domesticating legislation. This has, however, led to sovereignty concerns, especially due to the unclear role of the legislature in the treaty-adoption process. Related to this concern has been the hierarchy of incorporated international law *vis-à-vis* the constitutional provisions as well as national legislation. After a comparative analysis of the place of international law in the United States and in Colombia, two countries with similar constitutional provisions incorporating international law into the domestic legal system, it is submitted that in order to achieve the transformative potential of the Constitution, international law should have the same status as constitutional provisions and should have a higher status than legislation. This is due to the vertical and horizontal cross-fertilisation of constitutional provisions by international law to the point that both sets of norms have acquired the same scope and content. This reading is supported by the Kenyan Constitution in article 20(2) which requires rights to be enjoyed to the greatest extent consistent with their nature, and article 20(3)(b) which calls for the adoption of an interpretation that most favours the enforcement of rights. In this regard, therefore, the chapter proceeds to jointly discuss the SER obligations of the State at the

⁴⁰⁸ E Warren 'The Bill of Rights and the military' (1962) 4(3) *United States Air Force Judge Advocate General Bulletin* 6, at 19.

national and international levels on the understanding that they are of the same nature and espouse the same scope and content.

After laying this basis, the chapter then proceeds to discuss the “progressive realisation standard”, a standard that has been adopted both at the international level and in the Kenyan Constitution as the standard for the monitoring of the implementation of SERs by States. The discussion divides the standard into four related components: progressive realisation; obligation to take steps; the maximum of available resources; and, international cooperation and assistance. It is submitted that the progressive-realisation component encompasses the reality that States cannot meet all their SER obligations immediately due to scarcity of resources, but still contains some immediate aspects that the States must undertake as soon as they assume SERs obligations, such as the prohibition of non-discrimination, the requirement that the State puts in place effective and comprehensive measures to enhance the realisation of SERs over time, the obligation to provide the minimum essential levels of goods and services for the vulnerable groups in society (minimum core). The obligation-to-take-steps component requires the State to put in place a comprehensive national strategic plan based on a legislative, policy and programmatic framework to enhance the realisation of SERs. It further requires non-legislative steps such as putting in place remedial institutions such as courts to enhance accountability in the realisation of SERs and to enable victims of violations to vindicate their rights. This component is entrenched in articles 21(2)-(4), 22 and 23 of the Constitution.

The third component of maximum available resources is a recognition that the full realisation of the entire continuum of SERs requires resources, which are almost always scarce for a developing country like Kenya. It, however, requires the prioritisation of resources to meet the immediate needs of the most vulnerable and further entrenches the obligation of the State to use resources efficiently as well as accountably to enhance the full realisation of SERs. This component is entrenched in the Constitution in articles 20(5)(a) and (b). This component acknowledges that resources for the realisation of SERs need not come only from the State, but that the State has the primary obligation to put in place measures to ensure that people are able to use their own resources to realise their SERs, or to harness resources from the private sector to enhance the realisation of SERs, and in instances where resources within the State are insufficient, for the State to look to the international community through the facility of international cooperation and assistance, which is the fourth component of the standard of progressive realisation.

At the regional level, the African human rights treaties have not adopted the standard of progressive realisation for SERs, instead adopting a universal obligation requiring member States to realise the entire corpus of human rights catalogued therein, including SERs. The chapter undertakes an analysis of the debate on the SER obligations under the AHRS, concluding that the SER obligations therein are immediate, and thus States do not have the defence of lack of resources when it comes to the realisation of their SER obligations.

As has been stated above, the elaboration of the substantive content of SERs can go a long way in achieving the transformative potential of the Constitution. This is because such elaboration ensures that the State has in place proper guiding and review standards for the development of an SER implementation framework, as well as their monitoring and evaluation. The chapter thus undertakes a discussion of the place of the minimum core obligations approach, submitting that due to its ratification of international legal instruments on SERs which have been authoritatively interpreted to imply the existence of the minimum core obligations, Kenya has the responsibility to adopt this approach in good faith and to ensure its entrenchment in the legislative, policy and programmatic framework for the implementation of SERs. It is further submitted in this chapter that the Kenyan courts should also adopt the same approach when enhancing the accountability of the political institutions for the realisation of entrenched SERs through adjudication. The chapter, in this section, relies on the jurisprudence of the Colombian Constitutional Court, a court that has extensively adopted the minimum core obligations approach with the aim of enhancing the protection of right-holders against the recalcitrance of the State. In concluding that analysis, it is submitted that the development of the content of SERs, especially the minimum core content, is beneficial to the poor, marginalised and vulnerable people as it ensures that their basic survival needs are catered for, giving them the opportunity to enjoy the maximal level of SERs in future.

Lastly, the chapter acknowledges that SERs are not absolute and can legitimately be limited by the State. It undertakes an analysis of the factors that the State must take into account if limitation of rights is to be legitimate, as is provided for both under international and regional law as well as in constitutional provisions, especially article 24 of the Constitution. To enhance the substance of this analysis, the chapter borrows heavily from the limitations jurisprudence of South Africa courts, a national jurisdiction with a similar limitation clause as that included in the Kenyan Constitution.

Chapter three – Theory of dialogical constitutionalism: Philosophical foundations and comparative analysis

3.1 Introduction

In the previous chapter we discussed the importance of developing a clear understanding of the nature, scope, content and extent of socio-economic rights (SERs) with the objective of their effective and scrupulous implementation so as to enhance the realisation of the constitutional project of improving the living standards of the Kenyan people. However, to develop this clear understanding, it is imperative that Kenya adopts a progressive theoretical framework for the interpretation, implementation and enforcement of the entrenched SERs, an approach that recognises the important relative competences of all the institutions of the State as well as all other societal actors. This chapter and the subsequent chapter four propose and develop a theory of dialogical constitutionalism, which encompasses both a theory of law and a theory of politics, aimed at enhancing the interpretation, implementation and enforcement of the entrenched SERs.

The phrase “law is politics” coined by members of the Critical Legal Studies Movement has divided legal and political scholars into different groups.¹ Anel Boshoff, analysing this phrase, classifies its objectors into two groups. On the one hand are the traditionalists who see law as a pure, objective and value-neutral system capable of finding the correct interpretation of legal norms and applying them impartially to specific facts.² On the other hand are the radicals

¹ A Boshoff ‘Law as dialogical politics’ in H Botha *et al* (Eds.) *Rights and democracy in a transformative constitution* (2003) 1.

² Boshoff (n 1 above) 1. The traditionalists argue that the capacity of law to yield right answers depends on it being kept separate from politics, guaranteeing its protection from the despotism of men. See also P Goodrich *et al* ‘Introduction: Politics, ethics and the legality of the contingent’ in P Goodrich *et al* (eds.) *Politics, post-modernity and critical legal studies: The legality of the contingent* (1994) 17 who contend that ‘any contamination of law by value will compromise its ability to turn social and political conflict into manageable disputes about the meaning and applicability of pre-existing public rules’; O Fiss ‘The death of the law’ (1986) 72 *Cornell Law Review* 1, at 2 & 9-10, who contends that the phrase “law is politics” denies law its special hierarchical place in society above politics; and also denies law its objectivity, espoused by the judicial determination of legal meaning, thus leading to the death of the law.

who view law as having a pervasive and restrictive influence on politics and democratic self-government, and thus also want law to be kept separate from politics.³ A third group of scholars, such as Jeremy Waldron and Frank Michelman, whose approach will be of great relevance in the development of the theory of dialogical constitutionalism here, however, acknowledge the obvious connection between law and politics, contending that the development of a theory of justice must involve two interlinked and mutually supporting tasks, that is, theorising about justice, rights and the common good as well as theorising about politics.⁴

The interplay between law and politics is specifically relevant with regard to constitutional law, as the development, promulgation, interpretation, implementation and enforcement of a constitution engender debate on the connection between politics and law, and how the two interact in the sphere of democratic governance.⁵ Constitution-making is a contextual and value-laden process intended to inculcate the societal history, values, principles, hopes and aspirations of a people into their main governing document. This was acknowledged by Justice Kriegler of the Constitutional Court of South Africa (SACC) in the *Makwanyane* case where he stated that 'it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large'.⁶ Justice Kriegler's contentions were further buttressed by those of Justice Mokgoro, in the same *Makwanyane* case, where she argued as follows:⁷

³ Boshoff (n 1 above) 1. This group has argued against the courts exercising the power of judicial review of executive and legislative acts, terming such exercise of judicial power as denigrating democratic deliberation. See A Petter 'Taking dialogue theory much too seriously (Or perhaps Charter dialogue isn't such a good thing after all)' (2007) 45(1) *Osgoode Hall Law Journal* 147, at 156; JM Pickerill, *Constitutional deliberations in Congress: Impact of judicial review in a separated system* (2004) 3-4 & 38-54.

⁴ J Waldron, *Law and disagreement* (1999) 3-4; J Waldron, *The dignity of legislation* (1999) 36, who states that law is the offspring of politics; F Michelman 'Bringing the law to life: A plea for disenchantment' (1988-1989) 74 *Cornell Law Review* 256, at 256-257, who contends that for law to espouse public values and be consonant with the ideas of self-government as well as the rule of law, it must, of necessity, be created through democratic political processes. He further states that a constitution, as an authoritative expression of public values and ideals, is an embodiment of public morality harnessed through dialogue, at 258-259.

⁵ Michelman – Bringing law to life (n 4 above) 261, where he affirms the political nature of popular constitution-making.

⁶ *S v Makwanyane and another* (CCT3/94) 1995 (3) SA 391, para. 207.

The interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself.... To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.

The 2010 Kenyan Constitution is not any different, having gone through an elaborate process of dialogue and deliberation almost transcending a generation so as to be reflective of the hopes and aspirations of the Kenyan people as contained in articles 4(2), 10 and 24(1). A theory on its interpretation must thus espouse an understanding of constitutional interpretation as a value-laden and dialogical exercise that inculcates societal values and principles into the normative content of constitutional provisions.⁸

The question then is, should the interpretation of the Constitution be left to a select few (the Courts) or should the development of constitutional meaning be the responsibility of all societal actors in a process of democratic dialogue and deliberation? In responding to this question in the context of the United States (U.S.), Waldron states the following:⁹

⁷ *Makwanyane* case, paras.302-04. For an extensive and illuminating discussion of the importance of values in constitutional interpretation, see K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 156-166.

⁸ S Woolman & H Botha 'Limitations: Shared constitutional interpretation, an appropriate normative framework and hard choices' in S Woolman & M Bishop (Eds.) *Constitutional conversations* (2008) 149, at 153; DE Johnsen 'Functional departmentalism and non-judicial interpretation: Who determines constitutional meaning' (2004) 67(3) *Law and Contemporary Problems* 105, at 116; R Dworkin 'The moral reading and the majoritarian premise' in H Hongju-Koh & RC Slye (eds.) *Deliberative democracy and human rights* (1999) 81, at 82ff. He contends that a proper understanding of democracy entails a finding that the moral value-laden reading of a political constitution is not antidemocratic, but is actually and practically indispensable to democracy, at 86.

⁹ Waldron – Law and disagreement (n 4 above) 15-16. See D Bilchitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 102-104, who argues in answer to this question that decision-making on fundamental rights should ultimately be left to highly experienced judges in constitutional courts, who are better able to ensure that all people in the society are treated as being equally important. He thus views judicial review as 'shifting the focus of final decision-making from majoritarian institutions to judicial ones'. The theory of dialogical constitutionalism differs from Bichitz's view. Although it assigns decision-making and watchdog responsibilities to courts with regards to fundamental rights, it contends that legitimate disagreements about rights, which are inherently

Men and women who struggled and died to establish [the new constitutional dispensation] were looking for far more than a voice on interstitial issues of policy... They fought for [the Constitution] because they believed that controversies over the fundamental ordering of the society ...were controversies for them to sort out...because they were the people who would be affected by the outcome. Moreover, they did not fight for [the Constitution] on the assumption that they would then all agree about [the meaning of Constitutional provisions] ... But they fought for the [Constitution] anyway on the ground that the existence of such principled disagreements was the essence of politics, not that it should be regarded as a signal to transfer the important issues they disagreed about to some other forum altogether, which will privilege the opinions and purses of a few.

The above quote envisions an intrinsic interplay between law and politics in the development of constitutional meaning. This interplay foresees the role of all societal actors engaging in a collaborative and cooperative project on the development of constitutional meaning through a process of deliberative dialogue.¹⁰

Jürgen Habermas affirms the importance of popular participation in the elaboration of constitutional meaning by contending that even though constitutional provisions are expressed in relatively uncontroversial abstract principles, they are only made clear in an on-going translation into laws in response to social problems.¹¹ He argues that for laws so translated to be legitimate and to effectively protect individual rights, citizens must have a say in the process

indeterminate, should be made by the people themselves in carefully structured deliberative institutions that enhance public participation based on equality and mutual respect, and thus engender a sense of collective self-governance.

¹⁰ See Michelman – Bringing law to life (n 4 above) 256, who contends that politics is the only avenue through which public values are determinable and accessible, and by deliberating on these values, citizens are able to transform themselves as well as their society; C Young *Constituting economic and social rights* (2012) 6, who ascertains the viability of a value-based and deliberative problem solving process in which the institutions of the State as well as other societal actors work collectively in a collaborative fashion to provide a contextualised, participatory and localised understanding of SERs. See also L Du Plessis 'Constitutional dialogue and the dialogic constitution (or: Constitutionalism as culture of dialogue)' (2010) 25 *South African Public Law* 683, at 686ff.

¹¹ See J Habermas, *Between facts and norms: Contribution to the discourse theory of law and democracy*, translated by William Rehg (1996) chapter three. For a discussion of this aspect of Habermas, see also C Cronin 'On the possibility of democratic constitutional founding: Habermas and Michelman in Dialogue' (2006) 19(3) *Ratio Juris* 343, at 346-49.

of translation, especially on how their needs and interest are to be captured within the translated laws.¹² He concludes that the process of legislation and policy-making can inspire public confidence only if it is based on public dialogue and deliberation which fosters informed and balanced decision-making on matters of public interest.¹³

The interplay between law and politics is specifically pronounced in the interpretation and enforcement of constitutionally entrenched SERs due to their perceived policy and programmatic nature.¹⁴ The above can be seen in the myriad concerns that have been raised against the judicial enforcement of SERs: the separation-of-powers concerns and the lack of democratic legitimacy of non-elected judges to make decisions on policy choices, traditionally a domain of the political institutions of the State;¹⁵ the polycentric nature of SERs and the

¹² As above.

¹³ As above.

¹⁴ C Bateup 'The dialogical promise: Assessing the normative potential of theories of constitutional dialogue' (2006) 73(3) *Brooklyn Law review* 1115, at 1109, who states that due to the indeterminate nature of SERs, the pervasive disagreements as to their perceptions and application in specific contexts, and their implementation in the context of restrictive resources, dialogue has become an important tool in their interpretation, implementation and enforcement. See also KG Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8(3) *International Journal of Constitutional Law* 385, who acknowledges that tension between democracy and constitutionalism is especially pronounced with regard to entrenched SERs.

¹⁵ Young – Typology of SERs adjudication (n 14 above) 386; M Tushnet, *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2008) xi; S Liebenberg 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in S Woolman & M Bishop (eds.), *Constitutional conversations* (2008) 303, at 311; C Mbazira, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 27-29; V Gauri & D Brinks 'Introduction: The elements of legalisation and the triangular shape of social and economic rights' in V Gauri & D Brinks (eds.), *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 1, at 3; A Sachs 'The judicial enforcement of socio-economic rights: The Grootboom case' in P Jones & K Stokke (eds.), *Democratising development: The politics of socio-economic rights in South Africa* (2005) 131, at 140, where he argues that '...there can be little doubt that it is inappropriate for judges who in general know very little about the practicalities of housing, land and other social realities, to pronounce on these issues. That is what parliament is there for'.

perceived lack of competence of the courts to balance societal needs against individual rights;¹⁶ and the concern that judicial determination of SERs leads to the re-writing of government budgets, traditionally a preserve of the political institutions of the State,¹⁷ among many others.

The development of a theory of constitutional interpretation of the entrenched SERs in the 2010 Constitution must address these concerns. The broad theoretical objective of this chapter and of chapter four below is to design an inclusive and collaborative normative interpretative approach aimed at developing an understanding of SERs that is societally agreeable, practical, and capable of implementation so as to achieve the constitutional objectives of reducing poverty as well as inequality, and thereby enhancing social justice in Kenya.¹⁸

¹⁶ Mbazira (n 15 above) 30-32; E Wiles 'Aspirational principles or enforceable rights: The future for socio-economic rights in national law' (2006-2007) 22 *American University International Law Review* 35, at 53-54. See also *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) 2002 (5) SA 703 (5 July 2002) where the South African Constitutional Court held that in dealing with SERs: 'courts are not institutionally equipped to make wide-ranging factual and political inquiries...nor deciding how public revenue should most effectively be spent'; and that the 1996 SA Constitution envisages a restrained and focused role for the Court, thus making the court 'ill-equipped to adjudicate upon issues where court orders could have multiple social and economic consequences for the community', at 722 & 740. Mark Tushnet criticises this as a language of non-justiciability yet the 1996 Constitution provides for justiciable SERs, see M Tushnet 'Social welfare rights and the forms of judicial review' (2003-2004) 82 *Texas Law Review* 1895, at 1903-1904.

¹⁷ Tushnet - Social welfare rights (n 16 above) 1896-1897; K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 163, at 194, who avers that the remit of the Court, in SER adjudication, is limited to testing the constitutionality of specific State policies and programmes, and neither involves scrutiny of how the public resources are spent, nor the power to order the government to change its macro-economic policies.

¹⁸ The 2010 Constitution of Kenya, article 19(2) which provides that the purpose of the recognition of human rights in the Constitution is the preservation of the dignity of individuals and communities, the promotion of social justice and the realisation of the potential of all human beings. Sandra Liebenberg acknowledges the transformative capacity of a substantive theory of SERs which enhances the participatory capabilities of people living in poverty and inequality, see S Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2006) 17 *Stellenbosch Law review* 5, at 36. Liebenberg thus endorses a "relational and dialogic approach" to SER interpretation, implementation and enforcement,

The current chapter is divided into six sections. After the introduction, the chapter undertakes an analysis of the historical and philosophical foundations of the theory of dialogue, looking at Jürgen Habermas's discourse theory and Frank Michelman's theory of discursive politics in section 3.2. Section 3.3 is an analysis of the practical application of the theory of dialogue, as expounded by Peter Hogg and Allison Bushell, in Canadian constitutional law. This section further examines the critique that has been levelled against the use of the "dialogue metaphor" in Canada, taking into account this critique in the elaboration of the second level of dialogue in chapter four, section 4.3 below. Section 3.4 entails a brief exposition of coordinate construction theory in the constitutional context of the United States, identifying important dialogical elements in that theory that complements the theory of dialogical constitutionalism that is further expansively elaborated in chapter four below. Section 3.5 then analyses the dialogic jurisprudence of the SACC, especially in relation to the concept of 'meaningful engagement.' The section looks at the dialogical credentials of the concept and the possibilities it provides in the realisation of SERs in Kenya in the context of the theory of dialogical constitutionalism elaborated on more comprehensively in chapter four below. The chapter then ends with a short conclusion in section 3.6.

3.2 Historical and philosophical foundations of the theory of dialogical constitutionalism

The dialogical approach is broadly rooted in the Hegelian tradition of philosophy, with a focus on processes and relationships, with the aim of a mutual constitutional understanding rather than a one way cause-effect determinism.¹⁹ The term dialogic, as it is used in the dialogical constitutionalism model, originates from the works of Mikhail Bakhtin (1895–1975),²⁰ a Russian

see Liebenberg – Revisiting the reasonableness review (n 15 above) 321; M Pieterse 'On dialogue, translation and voice: A reply to Sandra Liebenberg' in S Woolman & M Bishop (Eds.) *Constitutional conversations* (2008) 331, at 332ff, where he discusses the potential of dialogical constitutionalism in facilitating the translation of SERs from conceptual abstract principles into more concrete, claimable legal entitlements with the aim of achieving egalitarian redistribution, basic service provision, or the satisfaction of individual needs.

¹⁹ F Cornish 'Making "context" concrete: A dialogical approach to the society-health relations' (2004) *Journal of Health Psychology* 284.

²⁰ See M Bakhtin, *The dialogic imagination* translated by C Emerson & M Holquist (1981); M Bakhtin, *Rabelais and his world* translated by H Iswolsky (1984); M Bakhtin, *Problems of Dostoevsky's poetics* translated by C Emerson (1984).

philosopher and literary scholar, and was originally used to refer to literature that was capable of creating a counter-active dialogue between the writer and the reader.²¹ In the Bakhtinian view of dialogue, the meaning of a word is not absolute or abstract, but arises within a web of contextual relations.²² The dialogic term is also reflected in the teaching methods of Brazilian pedagogue and educational theorist Paulo Freire (1921-1997) who expounded a philosophy of social science and a theory of society based on the concept of conscientisation (critical consciousness).²³ According to Bebbington *et al*, conscientisation is 'the process of becoming dialogically aware of social reality where those who seek knowledge are active participants in a reflexive process of education that teaches those who are supposed to know as well as those who seek to learn'.²⁴ Freire's pedagogy was aimed at those who were traditionally denied education and was thus intended to initiate emancipator change through conscientisation and reflexive dialogue.²⁵ Cornish provides a wider understanding of Freire's conscientisation as a process where 'communities of social actors interact to "name the world" and the social factors which disadvantage the community can be brought into collective debate, alternatives can be envisioned, and individual and collective action can be taken, aiming to reformulate social structures in the interest of the actors'.²⁶

²¹ J Bebbington *et al* 'Theorizing engagement: The potential of a critical dialogic approach' (2007) 20(3) *Accounting, Auditing and Accountability Journal* 357.

²² Cornish (n 19 above) 284.

²³ See P Freire, *Pedagogy of the oppressed*, translated by M Ramos, 30th Anniversary edition (1970) chapters 3-4. See also RA Morrow and CA Torress, *Reading Freire and Habermas: Critical pedagogy and transformative social change* (2002) 6. For similarities in the dialogical conceptions of education by Bakhtin and Freire, see generally, Stewart J *et al* 'Relationships among philosophies of dialogue' in R Anderson *et al* (eds.), *Dialogue: Theorising differences in communication studies* (2004) 21-38; A Aubert & M Soler 'Dialogism: The dialogic turn in the social sciences' in JL Kincheloe & RA Horn (eds.), *The Preager handbook of education and psychology* (2007) 520-529; R Bowers 'Freire (with Bakhtin) and the dialogic classroom seminar' (2005) 51(4) *The Alberta Journal of Educational Research* 368-378.

²⁴ Bebbington *et al* (n 21 above) 364. See also E Mustakova-Possardt, *Critical consciousness: A study of morality in global, historical context* (2003) 15, who avers that critical consciousness focuses on achieving an in-depth understanding of the world and taking action to address the social and political contradictions exposed by such understanding.

²⁵ Bebbington *et al* (n 21 above) 364.

²⁶ Cornish (n 19 above) 286.

In the context of contemporary discourse, the dialogical approach to the development of constitutional meaning has been expounded extensively by two renowned scholars, Jürgen Habermas from Germany and Frank Michelman from the United States of America.

3.2.1 Jürgen Habermas

The place of dialogue in resolving communal problems is the cornerstone of Habermas's writings. His reconstructive theory of communicative action seeks to articulate an expanded conception of rationality, with the aim of rethinking the foundations of the theory-practice problematic.²⁷ He draws a related distinction between two different forms of communication, communicative action (interaction) and discourse.²⁸ He terms discourse as that “peculiarly unreal” form of communication in which the participants subject themselves to the unforced force of the better argument, with the aim of coming to a rational agreement about the validity or invalidity of problematic claims.²⁹ The discourse theory is thus based on the capacity of societal actors to reach common understanding and to coordinate their actions through reasoned argument, consensus as well as cooperation rather than through strategic action strictly in pursuit of their own individual interests.³⁰ The resultant consensual agreement, due to its foundation in rational argument and evidence, is thus considered not only subjectively valid for the participants in the dialogical process, but also objectively valid for all rational subjects.³¹

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²⁷ T McCarthy, *The critical theory of Jürgen Habermas* (1984) 272-273. The theory is reconstructive as it does not espouse ‘enormous revelatory power’ but seeks an exposition of what already occurs in normal life, see W Outhwaite, *Habermas: A critical introduction* (1994) 109.

²⁸ J Habermas, *Theory and practice*, translated by John Viertel (1971) 19-21; McCarthy (n 26 above) 291.

²⁹ McCarthy (n 27 above) 292. McCarthy further notes that the guiding idea of a rationally achieved consensual agreement is the cogency of the argument employed, a fact that can be ascertained through the analysis of the level and intensity of the discourse, at 304-305.

³⁰ J Habermas *The theory of communicative action– Volume One: Reason and the rationalization of society*, translated by T McCarthy (1984) x, 85-101 & 284-288; R Bolton ‘Habermas’s theory of communicative action and the theory of social capital’ (2005) available at <http://web.williams.edu/Economics/papers/Habermas.pdf> (accessed on 1 August 2012). Strategic forms of communication include lying, misleading, deceiving, manipulating and other like strategies, see McCarthy (n 26 above) 287.

³¹ McCarthy (n 27 above) 192. See also W Rehg ‘Introduction’ in Habermas - Between facts and norms (n 11 above) xiii-xiv, where he states that Habermas’s view of validity claims is that they contain an unconditionality that takes them beyond the context in which they are raised. Rehg points out that this has

Habermas contends that for discourse to achieve rational consensus, both internal and external distortions such as open domination, conscious strategic behaviour, the use or threat of use of force, deception and lies, must be eliminated, and that there must be a symmetrical distribution of chances for all participants to present their views on the subject in issue in an environment of effective equality, trust as well as respect.³² Habermas's discourse theory therefore presupposes three validity claims, that is, sincerity, truth and normative legitimacy, which make it possible to achieve rational consensus in an ideal speech situation.³³ Simone Chambers, in her analysis of Habermas's discourse theory, also contends that for dialogue to achieve transformation in the context of mutual understanding, participants must be guaranteed discursive equality, freedom, impartiality as well as fairness in the dialogical process, with the assumption that each participant has the capacity to make a worthwhile contribution to the dialogical process.³⁴

been one of the points of criticism of Habermas's theory of discourse; Habermas 'Postscript' in *Between facts and norms* (n 11 above) at 458 where he contends that the only deliberative agreements that can claim legitimacy are those to which all who are possibly affected could assent as participants in rational discourses. For a succinct elaboration of Habermas's discourse theory, see M Rosenfield 'Law as a discourse: Bridging the gap between democracy and rights – A book review of Habermas's *Between facts and norms*' (1995) 108(5) *Harvard Law Review* 1163, at 1165-70; N Luhmann '*Quod omnes tangit*. Remarks on Jurgen Habermas's legal theory' (1995-1996) 17 *Cardozo Law Review* 883, at 890-91.

³² McCarthy (n 27 above) 306-309, who contends that this is what Habermas calls "the ideal speech situation". McCarthy is of the view that discourse rarely happens in conditions of "the ideal speech situation", and that due to space-time as well as psychological and other limitations, actual speech precludes the realisation of conditions of ideal speech. He, however, states that this does not render the concept of "the ideal speech situation" illegitimate, and that it can serve as an important guide in the institutionalisation of discourse and as a critical standard against which every actually achieved consensus can be measured, at 309-310.

³³ Habermas – *Theory of communicative action* (n 30 above) 137 & 307-308.

³⁴ S Chambers, *Reasonable democracy: Jurgen Habermas and the politics of discourse* (1996) 99-100 & 187. See also J Habermas, *Moral consciousness and communicative action*, translated by C Lenhardt & SW Nicholsen (1990) 89; S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 1, at 7-13, where, in acknowledging the potential of deliberative democracy to reconcile the tension between broadly-formulated, universal human rights norms and the values of democratic participation aimed at resolving particular disputes, she argues that deliberative democracy

Habermas contends that for participants to reach consensus in decision-making, four different types of validity claims must be met, that is, first, participants must use comprehensible language to enhance understanding, secondly, participants must have the intention of communicating true propositional content to enhance learning and knowledge sharing on the subject in question, thirdly, participants must express their intentions truthfully and in good faith so as to enhance mutual trust in the dialogical process, and lastly, participants must employ appropriate language in light of the existing societal norms and values so as to enhance collegiality as well as respect, and thus create a conducive environment for discourse.³⁵ The above validity claims are affirmed by Simone Chambers who contends that for transformative dialogue to occur, the participants must share the same natural language to be able to understand each other, share objective worlds, normative worlds and commensurable subjective worlds, in the absence of which communication becomes difficult, if not impossible.³⁶

In his analysis of Habermas, Roger Bolton states that Habermas's view of the legitimacy of democracy depends 'not only on the constitutional process of enacting laws, but on the discursive quality of the full process of deliberation leading up to such result'.³⁷ This is elaborated by Habermas through the expansion of his discourse theory into the legal and democratic field in his book – *Between facts and norms: Contribution to the discourse theory of law and democracy* in which he expounds on his conception of the proceduralist paradigm of

must espouse the principles of 'universal moral respect' and 'egalitarian reciprocity', two principles which entail respect for human dignity, autonomy and equality.

³⁵ J Habermas, *Communication and evolution of society – What is universal pragmatics*, translated by T McCarthy (1979) 2-3; McCarthy (n 27 above) 288-291; Rehg – 'introduction' in Habermas – *Between facts and norms* (n 11 above) xv.

³⁶ Chambers - *Reasonable democracy* (n 34 above) 95.

³⁷ Bolton (n 30 above) 2. See also Outhwaite (n 27 above) 112.

law.³⁸ He develops his proceduralist paradigm in contradistinction to the liberal-bourgeois paradigm on the one hand,³⁹ and the social welfare paradigm on the other.⁴⁰

In developing his proceduralist paradigm of law, Habermas stresses the critical interdependence between private and public autonomy,⁴¹ contending that total legal autonomy

³⁸ Habermas - Between facts and norms (n 11 above) x, where the translator in his introduction states that Habermas's current work is a drawing out of the legal, political and institutional implications of his theory of discourse as is expounded in his two-volume treatise, *Theory of communicative action*. See also J Habermas 'Three normative models of democracy' (1994) 1(1) *Constellations* 1; J Habermas 'Paradigms of law' (1995-1996) 17 *Cardozo Law Review* 771, at 776ff.

³⁹ This paradigm promotes a formal conception of law and reduces justice to the equal distribution of rights. For a discussion, see Habermas – Paradigms of law (n 38 above) 772-75; Rosenfield – Law as a discourse (n 31 above) 1174. Habermas links this paradigm to liberal democracy, in which the political process is determined by the competition of strategically acting collectives trying to maintain or acquire positions of power, and decisions are made through personal preferences, see Habermas – Three models of democracy (n 38 above) 1-3; Habermas – Paradigms of law (n 38 above) 772-773; Rehg – 'Introduction' in Habermas – Between facts and norms (n 11 above) xxiv.

⁴⁰ This paradigm is geared towards achieving factual equality in relation to the material conditions of citizens, thus over-relying on State bureaucracy and creating clientelism which detracts from individual autonomy, see Habermas – Paradigms of law (n 38 above) 775; Rosenfield – Law as a discourse (n 31 above) 1174. See also G Frankenberg 'Why care? The trouble with social security' (1995-1996) 17 *Cardozo Law Review* 1365, at 1382-83, who contends that 'the economism, individualism and clientelism of the welfarist paradigm lend themselves to paternalism, including the authoritarian-authoritative definition of needs and their bureaucratic testing...which does not solve the problem of social security'. Habermas links this paradigm with the civic republican conception of democracy where the political process is based on dialogue, oriented towards mutual understanding, self-government and the achievement of the common good, see Habermas – Three models of democracy (n 38 above) 1-3; Rehg – 'Introduction' in Habermas – Between facts and norms (n 11 above) xxv.

⁴¹ See Rosenfield – Law as discourse (n 31 above) 1175, where he states that what Habermas aims to achieve with his paradigm of law is to 'explore how to restore personal autonomy and dignity without abandoning the quest for factual equality under the material conditions characteristic of the modern welfare State'.

can only be achieved when citizens understand themselves as authors of the law to which they are subject as addressees.⁴² He states the following in this respect:⁴³

No regulation, however sensitive to context, can adequately concretise the equal right to an autonomous private life, unless it simultaneously strengthens the effectiveness of the equal right to exercise political autonomy, that is, the right to participate in forms of political communication that provide the sole arenas in which citizens can clarify the relevant aspects that define equal status.

Thus according to his proceduralist paradigm, basic rights can only be effectively realised in a process that secures and activates both the private and the public autonomy of equally entitled citizens.⁴⁴ It is this duality that guarantees the legitimacy of enacted laws.⁴⁵ Habermas further argues that the achievement of the mutuality of the private-public autonomy requires the recognition and institutionalisation, in positive law, of a system of basic rights that delineates the general conditions of democratic participation in law and politics.⁴⁶ The system of rights he

⁴² Habermas – Between facts and norms (n 11 above) 104; Habermas – Paradigms of law (n 38 above) 776-777. He contends that a legal order is legitimate to the extent that it equally secures the co-original private as well as public autonomy of its citizens. He further contends that this can only be done within a conscious, deliberate public discourse in which affected parties articulate their viewpoints on the basis of concrete experiences of violated integrity, discrimination and oppression, at 783-784.

⁴³ Habermas – Paradigms of law (n 38 above) 784.

⁴⁴ As above. For an elaboration of Habermas's paradigm, see Rosenfield – Law as discourse (n 31 above) 1175-76.

⁴⁵ Rehg – 'Introduction' in Habermas – Between facts and norms (n 11 above) xxv. In Rehg's analysis, Habermas's proceduralist paradigm is aimed at ensuring that both human rights and popular sovereignty play distinct, irreducible roles in the legitimation of laws. See also Habermas – Postscript in, Between facts and norms (n 11 above) 447, at 448-450 where he avers that the democratic procedure of law formation is the only post-metaphysical source of legal legitimacy, due to its reliance on discursive rationality and democratic self-determination.

⁴⁶ Habermas – Between facts and norms (n 11 above) 122ff; Rehg – 'Introduction' in Habermas – Between facts and norms (n 11 above) xxvii. See also Habermas – Three models of democracy (n 38 above) 7 & 8, where he avers that the success of political deliberations lies not 'on collectively acting citizenry, but on the institutionalisation of the corresponding procedures and conditions' of discourse and decision-making within parliamentary bodies as well as in the informal networks of civil society; J Bohman 'The coming of age of deliberative democracy' (1998) 6(4) *Journal of Political Philosophy* 400, at 414, where he acknowledges Habermas's argument that the legitimacy of the State depends on a

envisages can be divided into five categories. The first three categories, aimed at guaranteeing private autonomy, include basic negative liberties, membership rights as well as due process rights.⁴⁷ The fourth category, rights of political participation, and fifth, socio-economic rights, are aimed at ensuring public autonomy, as the exercise of civil and political rights depends on certain social and material conditions.⁴⁸ He contends that the five categories of rights are mutually interdependent and none can be subordinated to the others.⁴⁹

The analysis of the mutuality of private-public autonomy and its place in the legitimisation of law leads to Habermas's central thesis, the internal relationship between deliberative democracy and the rule of law or the constitutional State.⁵⁰ In conceptually explaining this link, he argues that individual private liberties (human rights) and the public autonomy of enfranchised citizens (popular sovereignty and democratic self-governance) are

constitutional framework of rights which supply the necessary and sufficient conditions for freedom & equality; R Alexy 'Jurgen Habermas's theory of legal discourse' (1995-1996) 17 *Cardozo Law Review*, 1027, where he also acknowledges Habermas's objective of entrenching the dialogue principle within the institutional frame of a State's legal system.

⁴⁷ Rehg – 'Introduction' in Habermas – Between facts and norms (n 11 above) xxvii.

⁴⁸ As above.

⁴⁹ As above. See also Habermas – Postscript in, Between facts and norms (n 11 above) 455; AR Oquendo 'Deliberative democracy in Habermas and Nino' (2002) 22(2) *Oxford Journal of Legal Studies* 189, at 190-191 & 194-196, where he acknowledges Habermas's contention that human rights form one of the main ingredients of a true democracy, not a constraint on popular sovereignty, and therefore, that the concept of the "tyranny of the majority" in relation to the rights of minorities does not arise.

⁵⁰ Rehg – 'Introduction' in Habermas – Between facts and norms (n 11 above) xxiv; Habermas – Between facts and norms (n 11 above) 100-104, where he analyses the writings of Rousseau and Kant on the mutual connection between human rights and popular sovereignty, and concludes that the co-originality or the internal connection between the two concepts 'lies in the normative content of the very mode of exercising public autonomy...a mode that is secured through the communicative form of discursive processes of opinion and will-formation', at 103. See also J Habermas 'On the internal relation between the rule of law and democracy' (1995) 3 *European Journal of Philosophy* 12-20; Oquendo (n 49 above) 195-196, where he reads Habermas as contending that democracy and human rights are co-equal as well as co-originating, that private and public autonomy are non-hierarchical and mutually implied, and that neither human rights nor popular sovereignty can claim primacy over each other, as each is a necessary precondition of the other (footnote omitted).

co-originate and make each other possible.⁵¹ He further avers that the constitutional State represents crucial legal institutions and mechanisms that govern political deliberation, and which transforms citizens' communicative power into efficacious administrative power, through the medium of law.⁵² This legal institutionalisation of discourse, in his view, transforms the discourse principle into a principle of democracy,⁵³ which then becomes the basis for legitimate self-legislation as well as the basis for the protection of public and private autonomy as encapsulated in the corpus of entrenched human rights and fundamental freedoms.⁵⁴ Thus, even though the law-making power properly resides with State institutions such as parliament, the exercise of that power is only legitimate if the formal decision-making procedures have a discursive character that preserves the democratic source of legitimacy in the public at large.⁵⁵

Habermas's discourse theory and his proceduralist paradigm of law are especially relevant in elaborating the meaning of contested constitutional principles such as SERs in the context of democratic self-government. The realisation of rights, of which SERs form a crucial part, is a functional prerequisite for the achievement of both public and private autonomy.⁵⁶ Genuine legal autonomy, which is a prerequisite for active participation in deliberative processes aimed at public decision-making, can only be achieved if public and private autonomy of all citizens are met. According to Gunther Frankenberg, the discourse theory shifts the understanding of SERs from rights to fair, minimal or maximal material benefits aimed at uplifting the social situation of the rights-holder; towards a vision of SERs as 'potentially empowering all citizens to be able to fully participate in the cultural, social, economic and

⁵¹ Habermas – Postscript in, *Between facts and norms* (n 11 above) 454ff. See also Cronin (n 11 above) 346-49 for an elaboration of Habermas's argument.

⁵² Habermas – *Between facts and norms* (n 11 above) 169ff.

⁵³ Habermas – Postscript in, *Between facts and norms* (n 11 above) 455.

⁵⁴ Habermas – *Between facts and norms* (n 11 above) 121-122; Habermas – Postscript in, *Between facts and norms* (n 11 above) 458. See also Oquendo (n 48 above) 196, where he contends that for Habermas, the exercise of public autonomy in discursive democratic processes requires the respect of private autonomy as encapsulated in the corpus of human rights.

⁵⁵ Rehg – 'Introduction' in Habermas – *Between facts and norms* (n 11 above) xxxi; Habermas – Postscript in, *Between facts and norms* (n 11 above) 461-462, where he places the burden of the normative democratic genesis of law on the structures of a vibrant civil society and an unsubverted political public sphere.

⁵⁶ Frankenberg (n 40 above) 1384.

political life of their society,' as well as being active equal partners in societal discursive decision-making.⁵⁷ To engender democratic societal participation, the theory emphasises wide institutionalised public participation, access to public information to bolster rational decision-making, public decision-making through societal dialogue rather than through the exercise of raw power, as well as the equal consideration of the reflective views and lived experiences⁵⁸ of each person in society rather than the privileging of experts and bureaucrats.⁵⁹ Thus, the endpoint of discursive discourse is the emancipation or empowerment of the populace, leading to socio-economic transformation and the enhancement of social justice, the very objective of the entrenchment of justiciable SERs in the 2010 Kenyan Constitution.

3.2.2 Frank Michelman

Michelman's conception of dialogical politics is based on a reading of civic republicanism that rejects the transferring of responsibilities for the resolution of public controversies to non-accountable authorities, such as the courts.⁶⁰ This conception of politics demands the

⁵⁷ Frankenberg (n 40 above) 1386.

⁵⁸ Habermas uses the term "lifeworld" to refer to the lived experiences of participants in discursive dialogue, and states that these lifeworlds must be rationalised through discussion so as to achieve social evolution which is necessary for an emancipated society, See Habermas – Theory of communicative action (n 30 above) 70-74 & 337-340. See also Chambers - *Reasonable democracy* (n 34 above) 126-130, who contends that the "lifeworld" is the background against which all social interactions take place; H Schnadelbach 'The transformation of critical theory' in A Honneth & H Joas (eds.) *Communicative action: Essays on Jürgen Habermas's theory of communicative action* (1991) 8.

⁵⁹ Bolton (n 30 above) 2; Habermas – Paradigms of law (n 38 above) 776, and especially 784 where he contends that contest over the interpretation of needs cannot be delegated to judges, government officials, or political legislators. See also C Nino, *The Constitution of deliberative democracy* (1996) 137, where he argues that 'the value of a democratic process arises from its capacity to determine moral issues such as the content, scope and hierarchy of rights'.

⁶⁰ F Michelman 'The Supreme Court 1985 Term, Foreword: Traces of self-government' (1986-1987) 100 *Harvard Law Review* 4, at 17-19. Civic republicanism is based on two ideas, civic virtue, which is the willingness of citizens to subordinate their private interests to the general good; and the concept of the general good. He ties the two ideas to positive freedom, which he equates with self-government in the following manner:

We are free only in so far as we are self-governing, directing our actions in accordance with law-like reasons that we adopt for ourselves, upon conscious, critical reflection on our identities and social situations, at 26.

unmediated responsibility of the people, through on-going transformative dialogue, to undertake public decision-making about the governance of the polity.⁶¹ He develops his idea of dialogical and jurisgenerative politics, a subset of deliberative democracy, in contradistinction to instrumentalist/pluralist politics.⁶² Dialogical politics envisions politics as a normative activity entailing a contestation over concerns of public value, carried out in a deliberative process where reason and persuasion are aimed at achieving the common good in the ordering of societal life.⁶³ It further envisions politics as being pragmatic, that is, based on political reasoning that is conscious of, and is informed by, the historical as well as cultural situation of a particular society.⁶⁴ It is thus context respecting, with the ability to utilise context-specific normative historical resources for critical re-examination with the objective of achieving transformation through interpretation (critical self-revision), internal development and re-collective imagination.⁶⁵

In characteristically Habermasian style, Michelman acknowledges people's capacity to reach consensual agreement through mutual dialogue in procedural conditions of open, critical

He further affirms that self-government equates to citizenship, which is 'the direct participation, as an equal, in the determination of common affairs,' at 27. See also S Feldman 'The persistence of power and struggle for dialogic standards in post-modern constitutional jurisprudence: Michelman, Habermas and civic republicanism' (1992-1993) *Georgetown Law Journal* 2243, at 2243-2244; S Feldman 'Republican revival/interpretive turn' (1992) *Wisconsin Law Review* 679, at 689-690.

⁶¹ Michelman – Traces of self-government (n 60 above) 17-19.

⁶² Michelman – Bringing law to life (n 4 above) 257; Traces of self-government (n 60 above) 21; F Michelman 'Conception of democracy in American constitutional argument: Voting rights' (1989) 41 *Florida Law Review* 443, at 450-451; F Michelman 'Law's republic' (1988) 97 *Yale Law Journal* 1493, at 1507-1508. He envisions jurisgenerative politics as the crux of political freedom, at 1524.

⁶³ Michelman – Bringing law to life (n 4 above) 257; Traces of self-government (n 60 above) 23 & 40; Voting rights (n 62 above) 447 & 450; The normative character of politics as expounded by Michelman has three bases: the independence of mind and judgment; the authenticity of voice; and the diversity or plurality of views that enrich societal discourse, see Law's republic (n 62 above) 1504. See also Boshoff (n 1 above) 3.

⁶⁴ Michelman – Bringing law to life (n 4 above) 258. See also Feldman – Struggle for dialogic standards (n 60 above) 2248-2250; Boshoff (n 1 above) 3, where she terms Michelman's conception of dialogue as "good-faith, normative, pragmatic dialogue".

⁶⁵ Michelman – Bringing law to life (n 4 above) 258 (footnotes omitted).

and un-dominated normative conversation.⁶⁶ He further states that it is only through this inclusive normative dialogue that total freedom and political liberty – the achievement of both a government of the people by the people (democracy and self-rule), and a government of laws and not of men (rule of law and the judicial protection of human rights) can be realised.⁶⁷ He thus envisions both legislative politics as well as constitutional adjudication as integral parts of his conception of normative dialogue,⁶⁸ and requires that they should not only be conducted rationally and objectively, but also creatively and critically.⁶⁹

3.2.3 Summary of Interlinks between Habermas and Michelman

The theories of Habermas and Michelman have similarities in that they espouse a deliberative conception of democracy, require rationality as well as discursive justification in the legitimation of law, and also lay emphasis on procedure.⁷⁰ The theories further acknowledge the requirement of a minimum level of socio-economic empowerment of the citizenry to enable political dialogue to occur in an environment of equality and fairness, thus espousing a recognition of the entanglement of the symbolic and material worlds, or public and private autonomy in the creation of an active citizenry.⁷¹

⁶⁶ Michelman – Traces of self-government (n 60 above) 31; Feldman – Struggle for dialogical standards (n 60 above) 2245.

⁶⁷ Michelman – Law's republic (n 62 above) 1493-1494. He states that political freedom in American constitutionalism is based on two premises: collective self-rule and the rule of law, at 1500.

⁶⁸ Michelman – Bringing law to life (n 4 above) 266; Michelman – Law's republic (n 62 above) 1494.

⁶⁹ Michelman – Bringing law to life (n 4 above) 261.

⁷⁰ F Michelman 'Family quarrel' (1995-1996) 17 *Cardozo Law Review* 1163, at 1163-64. See also J Habermas 'Reply to symposium participants, Benjamin N Cardozo School of Law' (1995-1996) 17 *Cardozo Law Review* 1477, at 1485-87, where he acknowledges the similarities between his theory and Michelman's and further states that his theory of law has been influenced by Michelman's work, terming Michelman as one of his three most frequently cited contemporary authors. The theories of Habermas and Michelman contain two important elements, rationality and consensualism, elements important to the interpretation of SERs as is discussed by Young – Constituting SERs (n 10 above) chapter two, at 33ff.

⁷¹ The importance of the realisation of SERs in enhancing deliberation and dialogue in societal decision making is acknowledged by Ian Stotzky, see IP Stotzky 'Creating the conditions for democracy' in H Hongju-Koh & RC Slye (eds.) *Deliberative democracy and human rights* (1999) 157, at 162 & 168-169. See also S Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010) 32-34 where she affirms the importance of equality in participation in deliberative democratic processes,

Even though there is a perceived difference between the two theorists as to the requirement of a concrete community with a shared ethical culture for dialogical deliberation to occur,⁷² it is not a substantive difference, as in modern societies, for dialogue about rights to occur in a polity, there must be at least a shared culture of democracy, equality, dignity and, at a very general level, respect for the fundamental rights and freedoms of each citizen.⁷³ It is this general understanding among the citizenry that enables citizens to actively engage in dialogue as equal co-participants tied together in a common bond, that of being members of a specific State, and the desire to engage in effective collective self-governance through the enactment of valid laws aimed at enhancing the common good.⁷⁴

3.3 Dialogical constitutionalism in the Canadian constitutional jurisprudence

The dialogical metaphor has been adopted and used extensively in the analysis and evaluation of judicial review in Canada, especially in relation to the interpretation and enforcement of the Canadian Charter of Rights and Freedoms. This resulted from an exposition of the theory of dialogue by Peter Hogg and Allison Bushell who described the interaction between the judiciary and the legislature in instances of constitutional review,⁷⁵ specifically in view of the Charter-

calling for disadvantaged groups to be provided with substantive means to participate effectively; Klare (n 7 above) 153, where he acknowledges the intricate intertwinement between political freedom and socio-economic justice, emphasizing that people must have actual basic resources if there are to meaningfully exercise their democratic rights; and KS Czapanskiy & R Manjoo 'The right of public participation in the law-making process and the role of the legislature in the promotion of the right' (2008-2009) 19 *Duke Journal of Comparative and International Law* 1, at 22-25, who contend that democratic deliberation and socio-economic emancipation are mutually interdependent and complimentary as deliberation requires adequate education and economic security, and a lack of fulfilment of basic SERs denies the poor the requisite social agency to participate in public deliberations.

⁷² Michelman – Family quarrel (n 70 above) 1164.

⁷³ Michelman – Family quarrel (n 70 above) 1169-74. He further terms this a 'consciousness of inter-subjectivity and a consciously shared awareness of "symmetrical relations of mutual recognition" ...as subjects "both free and equal"', at 1172.

⁷⁴ Michelman – Family quarrel (n 70 above) 1170-71.

⁷⁵ PW Hogg & A Bushell 'The Charter dialogue between the Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all' (1997) 35(1) *Osgoode Hall Law Journal* 75, at 79-80. James Kelly questions the viability of parliament as a participant in this dialogue stating that even though some kind of dialogue exists, it is basically between the Cabinet (Executive) and the judiciary due to the

based possibility⁷⁶ of the political institutions of the State reversing, modifying or avoiding the courts' review decisions invalidating legislative or executive action,⁷⁷ as a dialogue.⁷⁸ They argued that this interaction between the courts and the political institutions entails a dialogue because judicial review by the courts is not the final word on constitutional interpretation, and the political institutions, especially parliament and the executive, have the capacity and the power to override court decisions.⁷⁹ They thus contend that the Canadian courts espouse a weak form of judicial review which does not have denigrating effects on the democratic aspirations of the majority as espoused by the political institutions of the State.⁸⁰

3.3.1 The espousal of the “dialogic metaphor” by the Canadian Supreme Court

The theory of dialogue was first adopted by the Canadian Supreme Court in 1998 as a response to criticisms of the Court's usurpation of the legislative role of parliament, with Judge Frank Iacobucci holding that the Charter entrenched dialogue as well as accountability of each of the branches of government, and judicial review thus had the effect of enhancing, not denying, the democratic process.⁸¹ This opened the floodgates for judicial reliance on the concept of Charter dialogue, and by 2006, a total of 27 judicial decisions, 10 of which were made by the Supreme Court, had adopted the concept.⁸²

prominent role played by the executive both in the development of the policies prior to introduction in parliament. See JB Kelly 'Legislative activism and Parliamentary Bills of Rights: Institutional lessons from Canada' in JB Kelly & CP Manfredi (eds.) *Contested constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (2009) 86 & 89-94.

⁷⁶ The Charter-based dialogue facilitators relied on by Hogg and Bushell include: The dialogue thesis is premised on four Charter-based dialogue facilitators: the section 33 override provision; the section 1 limitation provision; the internal rights qualifiers in sections 7, 8, 9 and 12; and the guarantee of equality rights under section 15(1). See Hogg & Bushell – Charter dialogue (n 75 above) 82-91.

⁷⁷ Hogg & Bushell – Charter dialogue (n 75 above) 79-80.

⁷⁸ They base their thesis on an analysis of constitutional review cases which showed that of the 88 invalidation cases analysed, 58 resulted in a legislative modification by parliament, see P Hogg, A Bushell-Thornton & WK Wright 'Charter dialogue revisited – or “much ado about metaphors”' (2007) 45(1) *Osgoode Hall Law Journal* 1, at 51 & Appendix 1 at 55-65.

⁷⁹ Hogg, Bushell & Wright – Charter dialogue revisited (n 78 above) 4 & 26.

⁸⁰ Hogg, Bushell & Wright – Charter dialogue revisited (n 78 above) 4, 26 & 29-30.

⁸¹ *Vriend v Alberta* (1998) 1 S.C.R. 493, at 563 (para 130).

⁸² Hogg, Bushell & Wright – Charter dialogue revisited (n 78 above) 5 & 7-25

Judicial use of the dialogue theory is underscored by an analysis of two interrelated cases dealing with access to private medical records of sexual assault survivors. In the first case, *R v O'Connor*,⁸³ the Supreme Court held unanimously that access to private medical and counselling records of a complainant by the accused in a sexual assault case that are held by a third party was necessary, but under a procedure that adequately balanced the accused's fair trial rights in section 7 of the Charter and the complainant's right to privacy under section 8.⁸⁴ However, the court was divided 5-4 on how to achieve the balance, with the majority holding that the threshold to be satisfied by the accused person was the "likely relevance" of the private record to the accused's defence.⁸⁵ The majority further said that once the accused has proved the likely relevance of the requested private records to his defence, the trial judge must then examine and weigh the salutary and deleterious effects of a production order to determine whether non-production would limit the ability of the accused to prepare his defence. In undertaking this balancing the trial judge must take into account: the extent to which the record is necessary to the accused's defence; the probative value of the record; the nature and extent of the reasonable expectation of privacy vested in the records; whether production requested is based on any discriminatory belief or bias; and the potential prejudice on the complainant's dignity, privacy or security.⁸⁶

The minority on the other hand held that an application for production can only be made to the trial judge after the commencement of the trial, and they also held that the determination of an application for production must be a restrictive procedure, requiring a more robust balancing of interests by the courts.⁸⁷ The minority stated that orders for disclosure must be respectful of Charter values and the fundamental justice that the right to privacy entails, and that the violation of complainants' privacy must be justified in a free and democratic society.⁸⁸ They thus enumerated more stringent grounds that must be met before an order of disclosure is

⁸³ *R v O'Connor* (1995) 4 S.C.R. 411.

⁸⁴ *R v O'Connor*, at 10-11. Two requirements were to be met before the disclosure could be granted: the applicant had to establish the relevance of the records in the resolution of the case; the court must view the records and decide whether their disclosure is necessary, taking into account the rights of both parties to the case.

⁸⁵ *R v O'Connor*, at 9.

⁸⁶ *R v O'Connor*, at 10-11.

⁸⁷ *R v O'Connor*, at 11-16.

⁸⁸ As above.

made, which included: the inability of the accused to obtain the information sought by other means; disclosure must be as limited as possible to only the information necessary for the accused to make their defence; applications for disclosure must be made on reasonable grounds, not on discriminatory assumptions and stereotypes; and the need for proportionality between salutary and deleterious effects of production.⁸⁹

The case led to legislative amendment with the Legislature adopting the restrictive procedure developed by the minority in the *O'Connor* case.⁹⁰ The Legislature set out its reasons for doing so in the preamble to the legislation, which was the need to deal with the high prevalence of sexual violence against women and children, and a desire not to deter the reporting of those cases, a likely scenario if disclosure of private medical records of survivors could be compelled.⁹¹ In the subsequent case of *R v Mills* which was challenging the new legislation on disclosure, the Court upheld the legislation.⁹² The reasoning of the Court was that the *O'Connor* case was not the last word on the subject of disclosure; that the development of the law followed a dialogue between the Legislature and the Courts; and that there had been a long process of consultation after *O'Connor*, leading to the adoption of the new legislation.⁹³

3.3.2 Critique of the use of the dialogical metaphor in the Canadian context

Although heralded as constituting a powerful account of judicial review as an instrument of democratic governance,⁹⁴ the dialogue theory, as used in the Canadian context has, however,

⁸⁹ As above.

⁹⁰ Hogg, Bushell & Wright – Charter dialogue revisited (n 78 above) 19-21.

⁹¹ As above

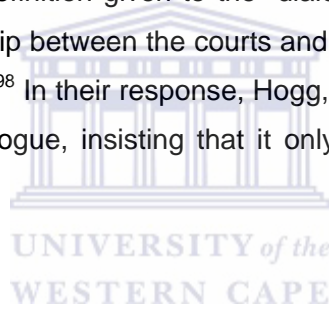
⁹² *R v Mills* (1999) 3 S.C.R. 668, at 689.

⁹³ *Mills*, at 745. For a discussion of similar Canadian cases that have resulted in legislative sequels that have been deferred to by the Canadian Supreme Court in subsequent (second look) cases, see R Dixon 'Weak form judicial review and American exceptionalism' Chicago Public Law and Legal Theory Working Paper No. 348 (May 2011) 13-17 & 20-25, available at <http://www.law.uchicago.edu/files/file/348-rd-weak-form.pdf> (accessed on 23 January 2013).

⁹⁴ CP Manfredi & JB Kelly 'Six degrees of dialogue: A response to Hogg and Bushell' (1999) 37(3) *Osgoode Hall Law Journal* 513, at 515; A Petter 'Twenty years of Charter justification: From liberal legalism to dubious dialogue' (2003) 52 *University of New Brunswick Law Journal* 185-186, who contends that the dialogue metaphor has enabled the Courts to transcend the constrictive theory of liberal legalism and has thus allowed them greater scope to justify judicial policy-making such as the imposition of

not received universal acclaim. Even though a thorough exposition of all the critique and responses to the critique is beyond the scope of this study, some of the most important and relevant criticisms are discussed below.

Carissima Mathen contends that the use of the dialogue metaphor characterises a complex, unpredictable inter-institutional relationship as a straight-forward exchange between equally matched institutions, an unrealistic scenario taking into account the common sense understanding of dialogue.⁹⁵ She argues that a common sense understanding of dialogue envisions a relationship of cooperation, exchange and the possibility of mutual moderation.⁹⁶ She, therefore, surmises that the understanding of dialogue envisioned by Hogg and Bushell, and subsequently adopted by the Canadian Supreme Court, has limited utility in the debate over judicial review as it does not entail a common sense understanding of dialogue.⁹⁷ Matthew Hennigar acknowledges these concerns, contending that the empirical validity of whether or not dialogue exists depends on the definition given to the “dialogue metaphor” as the accuracy of the reference to the interrelationship between the courts and the political institutions as dialogue will depend on the definition used.⁹⁸ In their response, Hogg, Bushell and Wright argue that they envisioned a modest view of dialogue, insisting that it only refers to legislative responses to



positive obligations on the State, the protection of collective interests, and the fashioning of creative remedies.

⁹⁵ C Mathen ‘Dialogue theory, judicial review and judicial supremacy: A comment on “Charter dialogue revisited”’ (2007) 45(1) *Osgoode Hall Law Journal* 125, at 128-129.

⁹⁶ As above (footnotes omitted). See also J Goldsworthy ‘Judicial review, legislative override and democracy’ (2003) 38 *Wake Forest Law Review* 451, 460; J Waldron ‘Some models of dialogue between judges and legislators’ (2004) 23 *Supreme Court Law Review* (2d) 7, 36.

⁹⁷ Mathen (n 95 above) 131.

⁹⁸ M Hennigar ‘Expanding the “dialogue” debate: Canadian Federal Government responses to lower court Charter decisions’ (2004) 37(1) *Canadian Journal of Political Science* 3, at 4. In his view, the “dialogic metaphor”, as used by Hogg and Bushell and adopted by the Supreme Court, is a discreet inter-institutional dialogue with the Courts speaking through their judgments and the Legislature doing so through legislation. He adds a further angle to the dialogue which involves litigational dialogue that goes on in court settings with the government fashioning its interpretation of constitutional provisions culminating in government appeals to higher courts from the decisions of lower courts, at 5.

judicial decisions, not actual literal inter-branch dialogue on Charter interpretation and enforcement.⁹⁹

On a more substantive level, the dialogue theory has been criticised as being merely a means of rationalising judicial interpretive supremacy and not a structured system of coordinate interpretation of Charter provisions.¹⁰⁰ Grant Huscroft contends that the version of dialogue espoused in the Canadian context does not offer a normative justification for judicial review, a theory of constitutional interpretation, or in any way assist the courts in interpreting the Charter.¹⁰¹ This criticism has been echoed by Andrew Petter who avers that the dialogue theory 'lacks normative content, and exerts no moral claim to support judges' involvement in Charter decision-making'.¹⁰² Huscroft states that the theory does not adequately respond to the counter-majoritarian dilemma,¹⁰³ and that it is not concerned with qualitative outcomes, any legislative response to judicial decisions being sufficient to satisfy it.¹⁰⁴ He further contends that judicial review in Canada does not in any way portray a weak form of review, stating that the difference between judicial review in Canada and the USA is purely a matter of form and not substance.¹⁰⁵

⁹⁹ See Hogg, Bushell & Wright – Charter dialogue revisited (n 78 above) 4, 26 & 45-46. See also P Hogg & A Bushell-Thornton 'A reply to "six degrees of dialogue"' (1999) 37 *Osgoode Hall Law Journal* 529.

¹⁰⁰ G Huscroft 'Rationalising judicial power: The mischief of dialogue theory' in JB Kelly & CP Manfredi (eds.) *Contested constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (2009) 50, at 50-57; Mathen (n 95 above) 127, 130-131, who contends that due to the simplicity and the elegance of the dialogue metaphor, the courts have used it as it presents the court in 'a more benign light than the power-mad institution invoked by opponents of judicial review'.

¹⁰¹ Huscroft (n 100 above) 52 (footnotes omitted). The above critique has been conceded by the authors who contend that dialogue metaphor, as used by them, was meant to be descriptive rather than normative, see Hogg, Bushell & Wright – Charter dialogue revisited (n 78 above) 26 & 47.

¹⁰² Petter - Twenty years of Charter justification (n 94 above) 187; Petter - Taking dialogue theory much too seriously (n 3 above) 149, he argues that the dialogue theory can properly be understood as a mitigation of judicial policy-making through judicial review and not as a legitimisation of judicial review, at 150.

¹⁰³ Huscroft (n 100 above) 62. See also Manfredi & Kelly – Six degrees of dialogue (n 94 above) 522, who affirm that the dialogue theory does not address anti-majoritarian objections.

¹⁰⁴ Huscroft (n 100 above) 52.

¹⁰⁵ Huscroft (n 100 above) 57-58. A strong-form judicial review is a form of judicial supremacy 'in which the courts have the final and unrevisable word on what the Constitution means, with legislatures and

Similar sentiments are echoed by Christopher Manfredi who argues that the Court has used judicial review to propagate its preferred immediate substantive policy choices, leaving the political institutions with very limited options of response, the very hallmark of a strong-form judicial review.¹⁰⁶ He further scrutinises the section 33 override,¹⁰⁷ and the historical difficulty of its use that has rendered it a redundant tool for the Legislature to rely on to override judicial interpretation of rights or to engage in any meaningful dialogue.¹⁰⁸ He thus contends that basing the dialogic theory on section 33 is 'an overly simplistic, ahistorical and apolitical type of legal formalism'.¹⁰⁹ His summations are thus that rather than encourage democratic dialogue between two equal institutions, sections 1 and 33 elevate judicial preferences to the status of

executive officials having no substantial role in informing the courts' constitutional interpretations'. On the other hand, a weak-form judicial review is a 'form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the short and medium term'. It has thus been argued that judicial review in the Canadian context is a weak form of judicial review as it allows the legislature to override the judicial interpretation of constitutional rights, and thus enhancing the position of the people to govern themselves within the bounds of the Constitution. For an elaboration of this argument, see M Tushnet 'Weak form judicial review and "core" civil liberties' (2006) 41 *Harvard Civil Rights-Civil Liberties Law Review* 1, at 1-11; Dixon (n 93 above) 2 where she chronicles authors arguing that the weak-form judicial review:

[h]elps transform constitutional rights discourse from a judicial monologue into a richer and more balanced inter-institutional dialogue thereby reducing, if not eliminating, the tension between judicial protection of fundamental rights and democratic decision-making, at 2.

¹⁰⁶ CP Manfredi 'The unfulfilled promise of dialogic constitutionalism: Judicial-Legislative relationship under the Canadian Charter of Rights and Freedoms' in T Campbell *et al* (eds), *Protecting rights without a Bill of Rights: Institutional performance and reform in Australia* (2006) 239, at 244-248. For an account of the adverse effects judicial review to political decision making in Canada, see generally, A Petter 'Legalise this: The Chartering of Canadian politics' in JB Kelly & CP Manfredi (eds.) *Contested constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (2009) 33, at 33-49.

¹⁰⁷ Section 33(1) provides that 'Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter'.

¹⁰⁸ Manfredi – The unfulfilled promise (n 106 above) 249-252.

¹⁰⁹ Manfredi – The unfulfilled promise (n 106 above) 252.

constitutional principles, foreclosing dialogue in any real sense and leading to overall policy distortion.¹¹⁰

Despite the criticisms, most of the critics agree that an expansive understanding of dialogue can have a positive impact on the interpretation of rights, and thus engender a deeper understanding of their relationship to competing constitutional visions.¹¹¹ Canada thus provides an important case study of the theory of dialogue in constitutional interpretation. The dialogical constitutionalism model further developed in chapter four below, therefore, does not espouse a restrictive understanding or oversimplification of the dialogical metaphor, but aims to develop a more expansive understanding of dialogue with normative interpretational content, infused with the theory of deliberative democracy as well as the theory of coordinate construction.

3.4 Dialogical constitutionalism and coordinate construction in the United States

The challenges of judicial review in the United States (U.S.) has led to an extensive debate on whether the Supreme Court is the main State organ entrusted with the power of constitutional interpretation¹¹² or whether the political institutions also have equal coordinate power to interpret

¹¹⁰ Manfredi – The unfulfilled promise (n 106 above) 249. See also Manfredi & Kelly - Six degrees of dialogue (n 94 above) 522, where they explain that ‘policy distortion occurs whenever a legislature must subordinate its understanding of constitutionally permissible policy to that articulated by the Court, even when legislative objectives are not at issue’. The criticism on the policy distortion even in weak form judicial review is conceded by Hogg, Bushell & Wright in their later article, see Hogg, Bushell & Wright – Charter dialogue revisited (n 78 above) 39-40; M Tushnet ‘Policy distortion and democratic debilitation: Comparative illumination of the counter-majoritarian difficulty’ (1995) 94 *Michigan Law Review* 245.

¹¹¹ Huscroft (n 100 above) 51; Manfredi – The unfulfilled promise (n 106 above) 240, footnote 5; CP Manfredi, *Judicial power and the charter: Canada and the paradox of liberal constitutionalism*, 2nd edition (2001) 207-208. For a more critical and elaborate account of dialogue as used in Canada and the United Kingdom, see generally, C Bateup ‘Reassessing the dialogic possibilities of weak-form Bills of Rights’ (2009) 32 *Hastings International and Comparative Law Review* 529.

¹¹² This is an aspect of judicial supremacy, which entrenches the supremacy of the court as the ultimate interpreter of the constitution, and requires that political branches conform to or defer to the constitutional meaning as fashioned by the courts, even when they think that the courts are substantially wrong about the meaning of the Constitution, see Johnsen - Functional departmentalism (n 8 above) 106; KE Whittington ‘Extrajudicial constitutional interpretation: Three objections and responses (2002) 80 *North Carolina Law Review* 773, at 784.

constitutional provisions.¹¹³ The debate has been occasioned by the courts,¹¹⁴ specifically the activist Rehnquist Court which asserted an extreme version of judicial supremacy, declaring that it was the sole and exclusive responsibility of the court to define the substance of constitutional guarantees, and that any foray into the fashioning of constitutional meaning by the political institutions was contrary to the principle of separation of powers.¹¹⁵

The debate led to the development of alternative theories of constitutional interpretation to enhance the role of the political institutions in the fashioning of constitutional meaning, such

¹¹³ J Meernik & J Ignagni 'Judicial review and coordinate construction of the constitution' (1997) 41(2) *American Journal of Political Science* 447; Johnsen – Functional departmentalism (n 8 above) 105 & 118, who states that even though the authority of the court to review the constitutionality of the acts of congress and the president are an integral part of the American constitutional system since *Marbury v Madison*, this does not equate with the concept of judicial supremacy, as the *Marbury* court only claimed a limited interpretative authority for the courts, that is, only the authority to interpret and apply the constitution in the course of resolving justiciable cases and controversies. See also LD Kramer 'The Supreme Court, 2000 term: Foreword: We, the Court' (2001) 115 *Harvard Law Review* 5-6; P Brest 'The conscientious legislator's guide to constitutional interpretation' (1975) 27 *Stanford Law Review* 585, at 587-588.

¹¹⁴ See *Marbury v Madison* 5 U.S. 137 (1803) at 177 where Chief Justice Marshall stated that 'it is emphatically the province and duty of the judicial department to say what the law is'; *Cooper v Aaron* 358 U.S. 1 (1958) at 18, where a unanimous Supreme Court also held that the principle of judicial supremacy in the exposition of constitutional law is a permanent and indispensable feature of the American constitutional system. For further discussion, see Pickerill (n 3 above) 14-15.

¹¹⁵ Johnsen – Functional departmentalism (n 8 above) 107 & 118-119. He quotes cases such as *United States v Morrison* 529 U.S. 598, 616 (2000) where the court held that '[e]ver since *Marbury*, this court has remained the ultimate expositor of the constitutional text'; *Nevada Department of Human Resources v Hibbs* 538 U.S. 721, 728 (2003) where the court held that '[i]t falls to this Court, not Congress, to define the substance of constitutional guarantees...The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the judicial branch'; and *Board of Trustees of the University of Alabama v Garret* 531 U.S. 356, 365 (2001) where the Court held that '[i]t is the responsibility of this Court, not Congress, to define the substantive constitutional guarantees'. For an exposition of this and other cases where the Court affirms its primary jurisdiction on constitutional interpretation, see Whittington – Extra-judicial constitutional interpretation (n 112 above) 775-776; C Zurn *Deliberative democracy and the institution of judicial review* (2007) 21-23.

as the theory of departmentalism or coordinate construction.¹¹⁶ Coordinate construction is defined by James Meernik and Joseph Ignagni as ‘a process whereby governmental and non-governmental actors seek to realise their interpretation of the Constitution as equals of the Supreme Court’.¹¹⁷ It is the same as departmentalism, which entails the independent and coordinate authority of all the branches of government in the fashioning of constitutional meaning.¹¹⁸

Despite contrasting opinions on constitutional interpretation, there is consensus that the constitutional text and structure engenders the responsibility of all the three branches of government to uphold the Constitution.¹¹⁹ The Supreme Court itself has acknowledged this in the case of *Boerne v Flores* where it remarked, in relation to Congress, as follows:¹²⁰

When Congress acts within its sphere of power and responsibility, it has not just the right but the duty to make its own informed judgment on the meaning and force of the constitution... Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.

This is in line with the theory of dialogical constitutionalism further expanded in chapter four below which proposes that courts, taking into account the concept of coordinate construction,

¹¹⁶ See Johnsen – Functional departmentalism (n 8 above) 105 & 112-113. For a list of authors who have ascertained the existence of coordinate construction in the U.S. see Pickerill (n 3 above) 16.

¹¹⁷ Meernik & Ignagni (n 113 above) 448. See also Whittington – Extra-judicial constitutional interpretation (n 112 above) 782-783.

¹¹⁸ R Post & R Siegel ‘Popular constitutionalism, departmentalism and judicial supremacy’ (2004) 92(4) *California Law Review* 1027, at 1031. See also Johansen – Functional departmentalism (n 8 above) 117, who advocates functional departmentalism that engenders cooperation and collaboration in the design of constitutional meaning between the three branches of government based on their interconnections and the practical realities of how they govern. He contends that the hallmark of his approach to departmentalism is respect and deference between the branches in the fashioning of constitutional meaning, at 120; Whittington – Extra-judicial constitutional interpretation (n 112 above) 778 concurs with Johansen, stating that the proper degree of deference to the other branches in constitutional interpretation is key to enhance collaboration in the design of constitutional meaning.

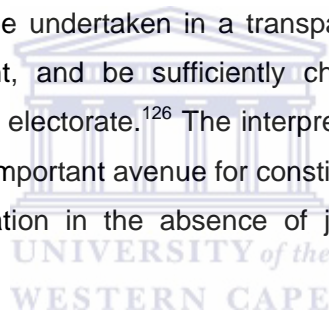
¹¹⁹ Johnsen – Functional departmentalism (n 8 above) 113. See also D Landau & JD Lopez-Murcia ‘Political institutions and judicial role: An approach in context, the case of the Colombian Constitutional Court’ (2009) 55, at 59-60 available at http://works.bepress.com/julian_lopez_murcia/26 (accessed on 4 September 2012).

¹²⁰ *Boerne v Flores* 521 U.S. 507, at 535.

should defer to the institutional and constitutional competence of the political institutions to make public decisions on the design, development and implementation of SER's implementation framework unless there is a clear error or unconstitutionality.¹²¹

In practice, coordinate construction has been used by Congress and Presidents¹²² over the years in the U.S. to effect substantial constitutional changes, especially in court dominated areas of the protection of fundamental rights and the rights of minorities. Examples here are as follows:¹²³ Thomas Jefferson's assertion of independent presidential powers to evaluate the constitutionality of the Sedition Act; Andrew Jackson's veto of the National Bank; Abraham Lincoln's rejection of the Supreme Court decision in the slavery case of *Dred Scott v Sandford* (1857) and his exposition of an antislavery constitutionalism leading to the New Deal,¹²⁴ among others.¹²⁵

Johansen argues that to enhance Constitutional fidelity, the use of interpretive powers by the political institutions must be undertaken in a transparent and accountable manner, be subject to principled self-restraint, and be sufficiently checked by the other branches of government, and ultimately by the electorate.¹²⁶ The interpretation of constitutional meaning by the political institutions is thus an important avenue for constitutional development as it 'provides a necessary source of interpretation in the absence of judicial resolution, and a valuable



¹²¹ Johansen – Functional departmentalism (n 8 above) 114.

¹²² Some of the presidents that have advocated coordinate construction and advanced popular interpretation in support of their preferred constitutional understanding include: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan, see KE Whittington 'Presidential challenges to judicial supremacy and the politics of constitutional meaning' (2001) 33 *Polity* 365.

¹²³ Whittington – Extra-judicial constitutional interpretation (n 112 above) 819-820.

¹²⁴ In rejecting the notion of judicial supremacy, Lincoln stated in his First Inaugural Speech that: 'if the policy of government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, then the people would have ceased to be their own rulers' quoted in Whittington – Extra-judicial constitutional interpretation (n 112 above) 843.

¹²⁵ See Johansen – Functional departmentalism (n 8 above) 115; D Johansen 'Ronald Reagan and the Rehnquist court on congressional power: Presidential influence on constitutional change' (2003) 78 *Indiana Law Journal* 363; Pickerill (n 3 above) 32-33.

¹²⁶ Johansen – Functional departmentalism (n 8 above) 115.

alternative or supplemental voice when the courts have spoken'.¹²⁷ Johansen thus acknowledges the importance of dialogue in constitutional interpretation, contending that coordinate construction envisions 'a collaborative enterprise in which each branch should recognise its own limitations and the relative strengths and functions of the other coordinate branches'.¹²⁸ Coordinate construction forms an important building block of the dialogical constitutionalism theory further developed in chapter four below.

3.5 Dialogical constitutionalism and meaningful engagement in the South African context

In the enforcement of SERs in the context of evictions, the South African courts have on several occasions issued mandatory orders requiring the political institutions of the State to substantively and meaningfully engage¹²⁹ with the affected communities and their representatives with the view of reaching a dialogical and mutually satisfactory outcome.¹³⁰ This

¹²⁷ As above.

¹²⁸ Johansen – Functional departmentalism (n 8 above) 109. See also Pickerill (n 3 above) 3, where he details a number of American constitutional scholars who have argued that judicial review and coordinate construct can exist in an environment of mutual respect and deference.

¹²⁹ See L Chenwi 'Meaningful engagement in the realisation of socio-economic rights: The South African experience' (2011) 26 *South African Public Law* 128, at 129-30, who argues that 'meaningful engagement' is an expression of 'bottom-up' participatory democracy. She contends that even though participation is an important component of engagement, the concept of 'meaningful engagement' goes beyond mere participation to envisage a process of constant interchange between government and citizens in the design, planning, implementation and evaluation of SER legislative and policy frameworks. It further requires accountability, transparency and the inclusion of the poor, vulnerable and marginalised individuals as well as groups in the development and implementation of effective as well as sustainable SERs implementation frameworks that benefit poor communities and that is capable of promoting social change. See also L Chenwi & K Tissington, *Engaging meaningfully with government on socio-economic rights: A focus on the right to housing* (2010) 9 & 21-24, where they aver that the process of meaningful engagement must be structured, coordinated, consistent and comprehensive; be sensitive to language preferences; be sensitive to and balance individual and group interests and needs; treat all participants as equal partners in the decision-making process; as well as involve other stakeholders and third parties such as NGOs and other civil society organisations.

¹³⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality case*); *Occupiers of 51 Olivia Road v City of Johannesburg* Case CCT 24/07; [2008] ZACC 1 (*Olivia Road case*); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2011]

approach has been termed 'a tangible expression of a deliberative version of judicial review [with the potential for the enforcement of SERs] while preserving the democratic legitimacy of legislative bodies'.¹³¹ The orders are the product of what the SACC has termed "active judicial management,"¹³² and in issuing these orders, the courts have on several instances retained supervisory jurisdiction to ensure that the State does not ride rough shod over the poor, vulnerable and marginalised claimants, but engage in a respectful dialogue with clear guidelines and review standards/benchmarks that must be met by any resultant negotiated agreement.¹³³

Even though the need for government engagement with people affected by its action was present in the *Grootboom*, *Kyalami Ridge* and *Modderklip* cases,¹³⁴ the use of the term 'meaningful engagement' was first expressly employed in the *Port Elizabeth Municipality* case. The case concerned an application for the eviction of around 68 people who had illegally occupied private land within the municipality for a period ranging from two to eight years.¹³⁵ In emphasising the importance of dialogue and deliberation in the realisation of SERs, the Court affirmed the inherent link between the substantive and procedural aspects of justice, which required that courts devise innovative ways to undertake their managerial role in the context of constitutional adjudication of competing rights.¹³⁶ To this end the Court stated that:¹³⁷

ZACC 8 (*Joe Slovo* case); *Mamba and Others v Minister of Social Development* (36573/08) [2008] ZAGPHC 255 (12 August 2008) (*Mamba* case); *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* (CCT12/09) [2009] ZACC 31 (*Abahlali* case), paras. 69, 79 & 113-114.

¹³¹ A Pillay 'Towards effective social and economic rights adjudication: The role of meaningful engagement' (2012) 10(3) *International Journal of Constitutional Law* 732, at 732.

¹³² *PE Municipality* case, para. 36. Justice Albie Sachs stresses that this function goes beyond the normal judicial function and has major implications for the manner in which the Court approaches and deals with SER adjudication, especially in making remedial choices for the vindication of SER violations.

¹³³ Liebenberg - Adjudication under transformative constitution (n 71 above) 418-19.

¹³⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), para. 87; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (CCT 55/00) 2001 (3) SA 1151 (CC), para. 111; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) 2005 (5) SA 3 (CC) (13 May 2005), para. 31. See Pillay (n 131 above) 739.

¹³⁵ *PE Municipality* case, paras. 1-2.

¹³⁶ *PE Municipality* case, para. 39.

¹³⁷ As above.

[o]ne potentially dignified and effective mode of achieving sustainable reconciliation of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.

The Court held that the most important aspect of the engagement was the active participation of the affected people, in line with the requirements of justice and equity that people are treated with dignity, equal care and concern as bearers of fundamental rights.¹³⁸ In the Court's view, engagement was advantageous as it reduced the expenses of litigation, reduced the tension resulting from litigation, promotes good neighbourliness and social cohesion, and encourages respect for human rights and fundamental freedoms.¹³⁹ The Court thus held that 'absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted'.¹⁴⁰

A more elaborate and successful use of the order is evidenced by the *Olivia Road* case, which concerned an application by the city to evict the claimants on account of concerns about the health and safety implications of the buildings in which the claimants were staying.¹⁴¹ The Court made a mandatory order for engagement on the basis that it was advantageous to resolve conflicts amicably in line with the values, principles and purposes of the Constitution and also that it was a constitutional duty for the City to engage vulnerable groups before making decisions that adversely affect them.¹⁴² In doing this, the Court drew a clear link between

¹³⁸ *PE Municipality* case, paras. 40-41. The Court further contended that justice and equity also requires that poor people undertake some efforts, using their own agency and resourcefulness, to seek possible solutions to their situation.

¹³⁹ *PE Municipality* case, paras. 42-43.

¹⁴⁰ *PE Municipality* case, para. 43. See also paras. 54-56, 59-60 where the Court undertakes its analysis of the facts of the case and the circumstances of the families in question and decides that it is not just and equitable to order the eviction of the families.

¹⁴¹ *Olivia Road* case, paras. 1-3.

¹⁴² *Olivia Road* case, paras. 5 & 16-23. The Court held that a Municipality that evicts people without meaningfully engaging with them was acting contrary to the values, principles and purpose of the Constitution, at para. 16. It thus emphasised that the Constitution obliges every Municipality to engage meaningfully, openly (secrecy is counterproductive to proper engagement) and in good faith (without intransigent attitudes evidenced by the making of non-negotiable demands) with people who would

meaningful engagement and the requirement for active public participation in government decision-making, especially by those expressly affected by the government's actions in question, noting that people in need of housing should not be seen as a "disempowered mass" but as active participants in the process of finding housing solutions.¹⁴³ The Court further provided normative guidance to the parties as to the standards that had to be met before their agreement could be accepted;¹⁴⁴ with the Court further retaining jurisdiction to review, and either endorse or reject, the resulting agreement between the parties as contained in the parties' affidavits to be presented to the Court on or before 3 October 2007.¹⁴⁵ The agreement between the parties was endorsed by the Court on 5 November 2007 as, in view of the Court, it represented a reasonable response to the engagement process.¹⁴⁶

In its elaboration of the concept of meaningful engagement, the *Olivia road* Court contended that it involves a two-way process of deliberation and dialogue, entailing the active participation of all the affected parties with the objectives of deciding, in the context of evictions,

become homeless because it evicts them, and that the occurrence of meaningful engagement was thus one of the factors that a court must consider when determining whether it is just and equitable to grant an order of eviction, at paras. 17 & 20-23. It further held that the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement which must be undertaken by skilled and compassionate government officials, at para. 19.

¹⁴³ *Olivia Road* case, para. 20.

¹⁴⁴ See S Wilson 'Planning for inclusion in South Africa: The State's duty to prevent homelessness and the potential of "meaningful engagement"' (2011) 22 *Urban Forum* 265, at 276, who states that negotiations were guided by the indication of the Court that it was unwilling to issue an eviction order unless there was alternative accommodation for the occupiers; and also that the major aim of the negotiation was to ensure the re-accommodation of the occupiers in safe, decent accommodation.

¹⁴⁵ *Olivia Road* case, para. 5, especially paras. 3-4 of the interim order. See S Wilson (n 144 above) 276, who contends that the retention of jurisdiction and report-back order of the Court was key in facilitating negotiations and engagement between the parties, as it ensured that they were focussed and negotiated in good faith.

¹⁴⁶ *Olivia Road* case, paras. 27-30. It was the first time for the Court to approve an out of court agreement by the parties which required court approval before major aspects of it could be operational, and reasons for the approval included: the fact of respectful engagement between the parties, compliance by the parties with the interim court order requiring engagement, resource implications for the city on the implementation of the agreement, and the dire consequences to the parties if the agreement was not endorsed by the Court, at para. 29.

the following issues: What the consequences of eviction might be, the role of the city in alleviating those consequences, the possibility of rendering the buildings in issue safe and secure, and the alternatives available to the city to fulfil its obligations to the occupiers.¹⁴⁷ The Court noted the potential of engagement to contribute towards amicable and compassionate resolution of conflicts, and called for sensitivity as well as care in the conduct of engagement.¹⁴⁸ Engagement thus represents the opportunities available to the political institutions, together with all societal stakeholders, to explore the vast range of possibilities with the object of full realisation of entrenched SERs.¹⁴⁹

The resultant agreement between the parties was a comprehensive plan which extensively dealt with most of the concerns that had been raised by the claimants, and it included: a plan to renovate the buildings in issue to make them safer and more habitable in the interim;¹⁵⁰ the provision of alternative accommodation in other, better buildings within the inner city and the setting of agreeable dates for the occupiers to relocate to these new accommodation;¹⁵¹ the nature and standard of the alternative accommodation and its affordability for the claimants;¹⁵² as well as an undertaking by the City to provide more permanent housing solutions for the claimants.¹⁵³

In her analysis of the case, Sandra Liebenberg express the view that the agreement resulting from the dialogue in the *Olivia Road* case not only led to an amicable resolution of the conflict between the parties, but was also more comprehensive than any court would have been able to order.¹⁵⁴ She further contends that the judgment is an affirmation by the Court of the principle of participatory, deliberative democracy and its importance in the realisation of

¹⁴⁷ *Olivia Road* case, para. 14.

¹⁴⁸ *Olivia Road* case, para. 15.

¹⁴⁹ G Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22 *Stellenbosch Law Review* 742, at 744.

¹⁵⁰ This included the installation of chemical toilets, the cleaning and sanitation of the buildings, delivery of refuse bags, closure of a lift shaft, and the installation of fire extinguishers, an undertaking which was to be completed 21 days after the completion of the agreement, see *Olivia Road* case, para. 25.

¹⁵¹ *Olivia Road* case, para. 26.

¹⁵² As above.

¹⁵³ As above.

¹⁵⁴ Liebenberg - Adjudication under transformative constitution (n 71 above) 420.

entrenched SERs.¹⁵⁵ According to her, the hallmarks of deliberative democracy in the judgment include: the requirement for openness, respect for human dignity and equal worth of all stakeholders in the engagement process; persuasion and the force of the better argument as the basis of decision-making; inclusion of all societal stakeholders in the decision-making process, especially indigent, marginalised and vulnerable groups; and the availability and consideration of all relevant information.¹⁵⁶ Anashri Pillay concurs, arguing that by ordering the parties to substantively engage in dialogue, the SACC was able to respond to the institutional and constitutional competency concerns that have been raised against judicial adjudication and enforcement of SERs, justiciability concerns in relation to SERs as well as concerns about democracy and separation of powers.¹⁵⁷

Despite its dialogical and deliberative credentials, the *Olivia Road* Court failed to further spur on societal dialogue by failing to engage with the occupiers with regard to permanent housing solutions.¹⁵⁸ It is submitted that, even though it was proper for the Court to show deference to the City to develop its plan aimed at the realisation of the provision of permanent housing for the people living in the inner city, it should have retained jurisdiction to allow either the occupiers in question, or any other occupiers who would have faced similar threats of eviction to approach it to enhance engagement as to the suitability and ability of the developed plan to meet the City's housing obligations.¹⁵⁹ Similar sentiments are shared by Kirsty McLean who labels the failure of the Court to engage with outstanding issues as the negative aspect of

¹⁵⁵ Liebenberg - Adjudication under transformative constitution (n 71 above) 301; Liebenberg – Engaging the paradoxes (n 34 above) 14ff.

¹⁵⁶ As above.

¹⁵⁷ Pillay (n 131 above) 733-34.

¹⁵⁸ *Olivia Road* case, para. 34-36. The reasoning of the Court was that the City had made an undertaking to develop the plan in consultation with the people and that there was no indication that the City would fail to continue negotiations with all affected occupiers in good faith; its consideration of the city's plan would amount to abstract review and that it was not proper for it to be the Court of first and last instance in scrutinising the new plan. See also Liebenberg - Adjudication under transformative constitution (n 71 above) 300-301.

¹⁵⁹ See Wilson (n 144 above) 279-280, who chronicles the difficulties that have been experienced by the occupiers who have basically been “parked” into the temporary accommodation they were moved to for over four years now, and have had to commence fresh litigation at the High Court so as to force the City to implement the agreement in its entirety.

the judgment.¹⁶⁰ She contends that this failure cannot be termed judicial “minimalism” or “avoidance” but an express and extensive unwillingness of the Court to adjudicate on the issues, a situation that can effectively be termed as abdication of judicial responsibility.¹⁶¹

Questions as to the adequacy and substantive requirements of the concept of meaningful engagement arose in the *Joe Slovo* case, a case concerning efforts by the government to move over 20, 000 residents of the Joe Slovo informal settlement to a temporary relocation site to pave way for the N2 Gateway pilot project which was aimed at the slum upgrading.¹⁶² Unlike its dicta in the *Port Elizabeth Municipality* and the *Olivia Road* decisions discussed above, the Court proceeded to issue an order of eviction despite there being no meaningful engagement between the parties, only requiring engagement as to how the eviction was to be carried out.¹⁶³ The Court further retained jurisdiction requiring the engagement to be conducted and its results to be placed before the court by 7 July 2009 for its scrutiny and possible endorsement.¹⁶⁴



¹⁶⁰ K McLean, *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 150-51.

¹⁶¹ McLean (n 160 above) 151.

¹⁶² *Joe Slovo* case, para. 1

¹⁶³ *Joe Slovo* case, paras. 2-4, which sets out the order that was made by the Court in the previous case (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) at para 7.), especially paras. 4-22 of the order. Points of engagement included: date of relocation, timetable for relocation, and any other matter which the parties decided to engage on. For an extensive and informative discussion of the first SACC *Joe Slovo* Judgement, see McLean (n 160 above) 152-159; Chenwi - The South African experience (n 129 above) 146-149; Liebenberg - Adjudication under transformative constitution (n 71 above) 303-311. Dismay at the Court's order has been expressed by several authors such as Chenwi - The South African experience (n 129 above) 146; Pillay (n 131 above) 744-745, who contends that the order of eviction watered down the requirements of meaningful engagement as developed in the earlier cases, leaving the meaningful engagement concept devoid of substantive dialogical safeguards; Liebenberg - Adjudication under transformative constitution (n 71 above) 308-310, who contends that 'if engagement is to be meaningful and entrenched [in the courts' SER jurisprudence] consequences must attach to the State's failure to adhere to the deliberative requirements [of the concept of meaningful engagement], at 314.

¹⁶⁴ *Joe Slovo* case, paras. 2-4.

Even though the court-induced dialogue did not occur in accordance with the Court order, the Court's retention of jurisdiction was a crucial factor as it ensured that parties were still able to approach the Court, either for the postponement of the order of eviction as was done by the Respondents, or for discharging the order of eviction, as was done by the Applicants, without commencing a fresh suit.¹⁶⁵ Due to the application by the Applicants, the Court annulled the eviction order as the government had failed to undertake adequate measures to carry it out as well as due to the shift in government plan from relocation to in-situ upgrading of the settlement.¹⁶⁶

Several commentators have acknowledged the potential of the concept of meaningful engagement to spur on dialogue and deliberation due to its espousal of tenets of participatory democracy as well as its delineation of a neutral space where societal actors can engage equally and respectfully to seek social solutions in the design of SER legislative, policy and programmatic frameworks.¹⁶⁷ Lilian Chenwi argues that it responds to traditional concerns that have been raised against the judicial adjudication of SERs such as separation of powers and polycentricity, as it enables the political institutions of the State, with the participation of all affected societal actors, to develop alternative policy choices aimed at the remedying of SER violations.¹⁶⁸



¹⁶⁵ *Joe Slovo* case, paras. 5-20.

¹⁶⁶ *Joe Slovo* case, paras. 29-39.

¹⁶⁷ See Chenwi - The South African experience (n 129 above) 129 & 144, who contends that it is more democratic, flexible and responsive to the practical concerns raised by SERs; Chenwi & Tissington (n 129 above) 8-9; Pillay (n 131 above) 732; Liebenberg - Adjudication under transformative constitution (n 71 above) 301 & 308; Liebenberg – Engaging the paradoxes (n 34 above) 26-28; Muller (n 149 above) 745 & 753-756; and B Ray 'Proceduralisation triumph and engagement's promise in socio-economic rights litigation' (2011) 27 *South African Journal on Human Rights* 107, at 114, who contends that the flexibility of engagement ensures adequate interaction between the courts, the government, citizens and other interested parties on the values espoused by the entrenched SERs, and thus overall leads to the enhancement of constitutional democracy. He states that this form of engagement 'results in a collaborative model of constitutional development in which courts, citizens and the political branches each participate in negotiating the meaning of the Constitution'.

¹⁶⁸ Chenwi - The South African experience (n 129 above) 146. See also Liebenberg – Engaging the paradoxes (n 34 above) 27, who contends that for meaningful engagement to effectively serve its dialogical purposes, there must be a substantive normative interpretation and understanding of SERs, an

Due to its dialogical and deliberative credentials, meaningful engagement can play an important role in the realisation of SERs in Kenya as an integral part of the theory of dialogical constitutionalism. The Kenyan Constitution contains similar provisions on which the SACC has based its meaningful-engagement jurisprudence.¹⁶⁹ The provisions are as follows. First, the preamble which espouses the commitment of the State to nurture and protect the well-being of all people, the inalienable right of the people to determine the structures of government as well as the requirement that the formation of government be based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.¹⁷⁰ Secondly, article 1 encompasses the sovereignty of the people and provides that this sovereignty can either be exercised directly (participatory democracy) or through democratically elected representatives (representative democracy).¹⁷¹ The article further requires that the delegated authority to all the institutions and levels of the State be exercised in accordance with the Constitution, which requires that the participatory democracy aspects of the Constitution must be respected in public decision-making at all levels of the State.¹⁷² This, coupled with the supremacy of the

understanding which encapsulates the development of the purposes and values underpinning the various SERs. She avers that this is important as it guides the setting of the engagement agenda as well as provides an evaluative framework for assessing the outcomes of the engagement exercise. She concludes that this normative framework provides safeguards against the imposition of the will of the more powerful party in the engagement process.

¹⁶⁹ For an elaborate discussion of the constitutional basis of meaningful engagement, see Chenwi & Tissington (n 129 above) 11-12; Chenwi - The South African experience (n 129 above) 134-135; Liebenberg - Adjudication under transformative constitution (n 71 above) 297-298. Some of those provisions include: the preamble which requires the State to improve the quality of life of all citizens and free the potential of each person; section 152 requiring local governments to involve communities in local government governance; section 7(2) which entails the obligations of the State to respect, protect and fulfil rights; SERs sections (26(2), 27(2), 25, among others) which requires the State to act reasonably to realise SERs such as healthcare, food, water, education, social security, housing, land ; section 26(3) which prohibits arbitrary evictions; section 33 which requires procedural fairness in administrative action; section 195 which contains basic values of governance, and which requires public participation in policy-making and access to information; as well as the right to human dignity and the right to life (sections 10 & 11).

¹⁷⁰ The 2010 Constitution of Kenya, preamble paras. 5-7.

¹⁷¹ The 2010 Constitution of Kenya, article 1(2).

¹⁷² The 2010 Constitution of Kenya, article 1(3).

Constitution entrenched in article 2 requires that all State organs at all levels engage democratically with the citizenry in decision-making in the design, development, implementation as well as evaluation of legislative, policy and programmatic frameworks for the realisation of the entrenched SERs. Third, articles 2(5) and (6) of the Constitution which provides for the applicability of international law in the Kenyan domestic jurisdiction also encompasses the requirement of active and genuine participation in public decision-making as is entrenched in international law.¹⁷³ This, taken together with article 21(4) which requires the State to enact and implement legislation to fulfil its international law obligations, thus firmly entrenches the duty of the State to undertake genuine dialogue when undertaking public decision-making in accordance with the international law guidelines and standards.¹⁷⁴

Fourth, meaningful engagement requirements are entrenched within the national values and principles of governance provided for in article 10 of the Constitution, which are binding on all State organs at all levels of government. Fifth, engagement-enhancing provisions populate the Bill of Rights such as article 19 which espouses the objective of rights as being to preserve the dignity of all people, to promote social justice and enhance the realisation of the well-being of all; article 20(4) which requires that interpretation promotes the spirit, purport and objects of the Bill of Rights as well as values underlying an open, democratic society based on human dignity, equality, equity and freedom; article 21 which contains the obligations of the State to respect, protect, promote and fulfil human rights, and especially taking legislative policy and other measures to enhance the progressive realisation of SERs contained in article 43 of the Constitution; articles 26 and 28 on the right to life and human dignity respectively; article 47 on the right to fair administrative action, among many others. Last, and most importantly, meaningful engagement is entrenched in Constitutional provisions calling for the active and direct participation of the people in legislative and executive policy and programmatic decision making such as articles 188 and 119 on public participation in parliament, article 196 on public

¹⁷³ In developing the concept of meaningful engagement, the SACC did not delve into an analysis of the concept as understood in international law or in comparative national jurisdictions. For an analysis of the concept of meaningful engagement in international and regional law, see Chenwi - The South African experience (n 129 above) 131-34; Chenwi & Tissington (n 129 above) 15-17.

¹⁷⁴ For an extensive discussion of the place of international law in the Kenyan legal system, see chapter two, section 2.2 above.

participation in county assemblies, articles 129 and 232(1)(d) on public participation in executive policy-making, and article 201 requiring public participation in public finance.¹⁷⁵

The above discussion shows that there are numerous constitutional provisions that can be used to entrench constructive dialogue and meaningful engagement between the State institutions at all levels of government and the people both at the level of the development of SER implementation frameworks and at the remedial level when SER matters are filed for adjudication in the courts. Therefore, the concept of meaningful engagement, as has been used in the South African context,¹⁷⁶ has application at two levels in the theory of dialogical constitutionalism: at the level of design, planning, development and implementation of legislative, policy and programmatic frameworks by the political institutions of the State as is discussed more broadly in relation to the first level of dialogue in chapter four below,¹⁷⁷ and at the remedial stage as discussed in relation to the third level of dialogue in chapter four below.¹⁷⁸

¹⁷⁵ The above provisions are more extensively discussed in chapters four and five below.

¹⁷⁶ Chenwi - The South African experience (n 129 above) 131, where she affirms the use by the South African courts of the meaningful engagement concept both as a tool in the conceptualisation as well as realisation of SERs, but also as a remedial model in instances of infringement or threatened infringement of SERs.

¹⁷⁷ Chenwi & Tissington (n 129 above) 21, where they contend that meaningful engagement should take place before policies, strategies and development projects are planned, and must continue during their implementation and evaluation. This reflects the SACC's contentions that meaningful engagement must occur before litigation is countenanced, see *Olivia Road* case, para. 30 and *Abahlali* case, paras. 119-120. See also Muller (n 149 above) 753.

¹⁷⁸ Chenwi - The South African experience (n 129 above) 145-146, where she avers that the involvement of stakeholders in the remedial process, as was the case in the *Olivia Road* case and the *Joe Slovo* case, entails the adoption of innovative remedies that are respectful of the separation of powers doctrine and responds to polycentricity concerns of judicial adjudication of SERs. She further discusses at which point engagement should be ordered, whether it should be before the judgment of the court, as in *Olivia Road*, or after the judgment, as in *Joe Slovo*. She contends that ordering engagement after the judgment ensures that the normative parameters and party legitimate entitlements are clearly set out by the court, and thus curbing power imbalances during engagement as parties know what they are entitled to. She further contends that ordering engagement after the judgment also enhances the inclusion of CSOs in the process, at 151-154.

3.6 Conclusion

This chapter lays the basis for the elaboration of the theory of dialogical constitutionalism in chapter four below. It espouses the interconnectedness of law and politics, acknowledging that constitutional interpretation of entrenched rights, especially SERs, is a value-laden and dialogic exercise which requires the equal participation of all citizens in public decision-making. It briefly traces the history of dialogical constitutionalism from Bhaktin's literary theory of dialogism through to Freire's conscientisation, both of which espoused the idea of collective societal dialogue aimed at the emancipation of marginalised and vulnerable communities as well as facilitating social transformation. The theory is philosophically grounded in the works of two prominent theorists, Habermas and Michelman, who contend that dialogue and citizen participation is imperative in the elaboration of the meaning of abstract constitutional provisions in the design, planning, development, implementation and enforcement of the State's legislative, policy and programmatic framework for the realisation of entrenched constitutional rights. They argue that the very legitimacy of the legal system is dependent on citizen's active participation in public decision-making through open, transparent and equally accessible deliberative structures, in the absence of which the legitimacy of the resultant legal framework is wanting. In this way, they contend that democracy and fundamental rights are interconnected and mutually supporting, and that the fulfilment of rights, especially the basic material necessities of life are imperative for the proper functioning of democracy.

The chapter also undertakes a comparative study of the use of the dialogical metaphor in three different national jurisdictions, in Canada where it has been used in the context of the interpretation and enforcement of the Canadian Charter of Fundamental Rights and Freedoms; in the United States where it has been developed in the context of the theory of coordinate construction; as well as in South Africa where it has been used in the context of the concept of 'meaningful engagement' especially in the implementation and enforcement of entrenched SERs. The comparative study lays the basis and provides the building blocks for further elaboration of the theory of dialogical constitutionalism in the Kenyan context, especially with regard to the interpretation, implementation and enforcement of SERs in the Kenyan Constitution, as is discussed in chapter four below.

Chapter four – Theory of dialogical constitutionalism: Fashioning a model of dialogical constitutionalism for Kenya

4.1 Introduction

The previous chapter encompassed a general analysis of the theory of dialogical constitutionalism, looking at its development in the writings of two prominent theorists, Jürgen Habermas and Frank Michelman, as well as the application of the theory in practice in the Canadian, American and South African jurisdictions. This chapter builds on the theory of dialogical constitutionalism developed in the last chapter, providing an exposition of the theory as should be adopted in the Kenyan context. The theory is based on an acknowledgement of the inherence of reasonable disagreement in relation human rights, especially socio-economic rights (SERs) due to their perceived indeterminate nature.

Reasonable disagreement is inherent in the entire human rights structure, but more so regarding SERs,¹ which, it is argued, are only statements of aspiration and not concrete fundamental rights.² Questions abound as to the extent to which the deprivation of nutrition, sanitation or health is sufficient to trigger legal redress, and whose duty it is to ensure that the rights are fulfilled, taking into account the sometimes dire resource constraints of countries in which the fulfilment of SERs is most urgent.³ Further, as the fulfilment of these SERs demand the redistribution of societal power and resources between as well as within countries, concerns

¹ J Rawls *A theory of justice* (1999) 198-199; KS Czapanskiy & R Manjoo 'The right of public participation in the law-making process and the role of the legislature in the promotion of the right' (2008-2009) 19 *Duke Journal of Comparative and International Law* 1, at 3, who contend that rights are contestable and debate about them are an inescapable part of politics, and that judicial rulings cannot resolve the multi-faceted disagreements at the heart of the rights discourse.

² See D Beetham, *Democracy and human rights* (1999) 116, who avers that for a claim to be a right, it must be fundamental and universal, be definable in a justiciable form, have clear duty-bearers with the capacity to fulfil the resultant obligations; criteria that most critics contend that SERs do not satisfy.

³ As above. Beetham states, at 117, that the capacity of poor States to fulfil the SERs of their citizens has been further eroded by globalisation and the skewed international market forces which have limited the capacity of governments to control their own economic destinies as 'collective choices have been replaced by market forces'.

then arise as to the entity to make societal decisions as to their (SER) interpretation and implementation.⁴ The question is, should these decisions be made by the people themselves, as they have the highest stakes in their (SER) enforcement; or by the legislature, the people's representative; or by the courts? These are the questions that abound in the Kenyan context at the moment, questions that the theory of dialogical constitutionalism seeks to address.

This chapter develops for Kenya a theory of dialogical constitutionalism, a form of cooperative constitutionalism which acknowledges the full potential as well as limits of the responsiveness of the judicial and political institutions of the State in the process of constitutional rights interpretation and enforcement.⁵ It is based on the reasoning that the judiciary should not have a monopoly on the interpretation of the Constitution, but must engage in an interactive, interconnected and collaborative conversation with all the other constitutional actors in order to come up with practical, workable and inclusive interpretations of the constitution.⁶ Its main focus is on the institutional and societal processes through which constitutional interpretation is undertaken, and it recognises that other non-judicial organs of the State, and society at large, play an important role in the interpretation, elaboration and development of constitutional meaning.⁷ It is based on an understanding of democracy not as a simple aggregation of a majority's private preferences, but as a way of structuring wide cooperative participation by citizens in the process of principled opinion formation and decision-making to achieve the common good of society.⁸

⁴ Beetham (n 2 above) 117.

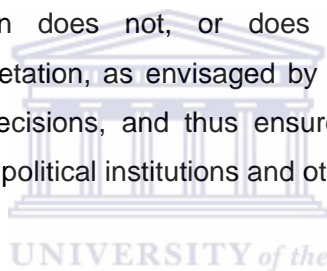
⁵ R Dixon 'Creating dialogue about socio-economic rights: Strong v weak form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391, at 393. See also D Landau & JD Lopez-Murcia 'Political institutions and judicial role: An approach in context, the case of the Colombian Constitutional Court' (2009) 55, at 64 available at http://works.bepress.com/julian_lopez_murcia/26 (accessed on 4 September 2012), who acknowledge that comparative constitutional law has shown that the "dialogical model" is the most plausible way to enforce SERs.

⁶ C Bateup 'The dialogical promise: Assessing the normative potential of theories of constitutional dialogue' (2006) 73(3) *Brooklyn Law review* 1115, at 1109; JM Pickerill, *Constitutional deliberations in Congress: Impact of judicial review in a separated system* (2004) 11, who affirms the substantial value that constitutional deliberation at multiple decision-making points has in the law-making process.

⁷ Bateup – Dialogical promise (n 6 above) 1118.

⁸ C Zurn *Deliberative democracy and the institution of judicial review* (2007) 7; J Waldron, *Law and disagreement* (1999) 283; A Gutman & DF Thompson *Why deliberative democracy?* (2004) 13–21.

Two important factors justify the choice of the theory of dialogical constitutionalism in this context. Firstly, it engenders diversity and participation in the interpretation and implementation of SER provisions.⁹ Incorporation of a diversity of disciplinary expertise and diversity of social experiences is critical if constitutional interpretation is to be reflective of the entire societal stratum. Constitutional interpretation, especially when dealing with such sensitive rights as SERs, therefore requires a cross-section of expertise in their interpretation, and an injection of deeper insight into the lived experiences of the different sections of society, a duty that might be too much for the judges who are almost always lawyers.¹⁰ The importance of the involvement of the entire social spectrum in constitutional interpretation is acknowledged by Craig Scott who argues that 'whatever necessary skills they bring to the interpretive enterprise, lawyers cannot claim a monopoly of knowledge of the interpretive content to be given to human rights'.¹¹ Scott further contends that there is a risk of a systematic alienation of certain sections of society, especially the voiceless poor and vulnerable who need the implementation of SERs the most, when constitutional interpretation does not, or does not adequately, represent their perspectives.¹² Diversity in interpretation, as envisaged by the dialogical approach, enhances the legitimacy of constitutional decisions, and thus ensures the implementation as well as enforcement of those decisions by political institutions and other sectors of society.¹³



⁹ This diversity is in line with the definition of rights expounded by Kartharine Young, who views rights as 'a focal point of interpretive disagreements and agreements, of agitation and contestation, and of monitoring and enforcement, of the fundamental material interests that are reasonably argued to be universal and compelling,' see KG Young, *Constituting economic and social rights* (2012) 2

¹⁰ See C Scott 'Bodies of knowledge: A diversity promotion role for the UN High Commissioner for Human Rights' in P Alston and J Crawford (eds.) *The future of UN human rights monitoring* (2000) 403, at 404-422. He argues for a system of dialogical interactive diversity in the interpretation of legal instruments premised on the idea that 'superior collective judgment is exercised when multiple perspectives are encouraged to interact with each other,....thus facilitating universalism', at 406.

¹¹ Scott (n 10 above) 421.

¹² Scott (n 10 above) 406, who avers that the implicit and explicit exclusion of the voices of marginalised sections of society demonstrates the pervasive partiality of the law.

¹³ See S Chambers, *Reasonable democracy: Jürgen Habermas and the politics of discourse* (1996) 190, who submits that decisions resulting from deliberative processes are more likely to be implemented and viewed as legitimate as they are embedded in the convictions of the participants, for they will have been convinced that there are good reasons for the choice of the particular decision.

Secondly, dialogical constitutionalism also encompasses the “living tree” constitutional doctrine which views the Constitution not as a normative positive law document that creates government institutions and defines rules for the conduct of State functions, but as an expression of the deepest values as well as beliefs of the people, constituting their character and sensibilities, and allowing for the possibilities of self-revision and transformation over time as the nation develops.¹⁴ This doctrine is especially crucial in the interpretation of the entrenched SERs in the 2010 Kenyan Constitution as it allows for their evolutive interpretation taking into account developments in law at both the national and international level.¹⁵

The theory of dialogical constitutionalism thus engenders the responsibilities of all the institutions of the State and the people to work together towards the development of constitutional meanings that reflect the deeper values and beliefs of that society. Hanna Pitkin contends that in this way, the Constitution reflects the people, activating and empowering them as responsible co-founders of the nation.¹⁶ In so far as the Bill of Rights is concerned, a dialogical approach, which entrenches the centrality of the people in constitutional discourse, enhances the creation and entrenchment of a deep societal culture of respect for and protection of human rights, as it ensures widespread participation in the development of the meaning, scope and content of rights.¹⁷ Waldron affirms the importance of this societal culture by noting that constitutional history shows that ‘paper declarations are worth little if not accompanied by the appropriate political culture of liberty’.¹⁸

The theory of dialogical constitutionalism developed in this chapter envisages the development of the meaning of the entrenched SERs at three levels, firstly, at the political level in the development of the legislative, policy and programmatic framework for the implementation of the entrenched SERs; secondly, at the level of constitutional litigation in the courts; and thirdly, in the fashioning of judicial remedies subsequent to constitutional litigation. The development of the theory on these three levels is inspired by the constitutional review jurisprudence of the Colombian Constitutional Court (CCC), the Indian Supreme Court as well

¹⁴ M Tushnet ‘The possibilities of comparative constitutional law’ (1999) 108 *Yale Law Journal* 1269-85.

¹⁵ M Sepulveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 81-84.

¹⁶ HF Pitkin ‘The idea of a constitution’ (1987) 37 *Journal of Legal Education* 167-68.

¹⁷ Bateup – Dialogical promise (n 6 above) 1166.

¹⁸ J Waldron, *The dignity of legislation* (1999) 84

as the South African Constitutional Court (SACC), which have all developed a progressive jurisprudence in the interpretation and enforcement of constitutionally entrenched SERs.

The chapter is divided into seven sections. After this introductory section, the chapter delves into an exposition of the first level of dialogue in the political institutions of the State in section 4.2. This level of dialogue envisages the involvement of all the levels and institutions of the State in the development of constitutional meaning (aspects of coordinate construction),¹⁹ and the involvement of the public in civic constitutional fora in an on-going societal project of democratic deliberation and decision-making (aspects of popular constitutionalism). Sections 4.3 and 4.4 delve into the development of dialogue in the courts in the context of constitutional litigation (the second level of dialogue) and the design of constitutional remedies (the third level of dialogue) respectively. Section 4.5 undertakes an analysis of the transformative potential of the dialogical constitutionalism developed in the second and third levels of dialogue. Section 4.6 looks at the viability of the model of dialogical constitutionalism developed in sections 4.2 – 4.4 in dealing with the concerns that have been raised against the justiciability of SERs, and especially the judicial interpretation and enforcement of entrenched SERs. It undertakes an analysis of the viability of the dialogical constitutionalism approach in dealing with issues of polycentricity and judicial encroachment into the policy and budget spheres as well as the democratic challenges of the judicial review of SERs. The chapter ends with a conclusion in section 4.7.

4.2 First level of dialogue: the development of the implementation framework for the entrenched socio-economic rights

If the entrenched SERs are to achieve their objectives of reducing poverty and inequality, enhancing human dignity, and improving the standards of living of the Kenyan people, then the design and implementation of the government's legislative, policy and programmatic framework must be right. In the design of the implementation framework, the political institutions must, of necessity and in accordance with their coordinate interpretative responsibility,²⁰ infuse their interpretation of the nature, content, and extent of the SERs; determine whether or not to design

¹⁹ See K McLean, *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 117-18, where she affirms the coordinate responsibilities of all arms of the State to undertake constitutional interpretation in the implementation of their constitutional functions.

²⁰ See Chapter three, section 3.4 for a discussion of the theory of coordinate construction.

a minimum core content into the understanding and implementation of the SERs; design the requisite structures for the implementation and monitoring of the SERs; determine the prioritisation on the implementation of the different SERs taking into account available resources and other societal needs; and also apportion the available resources depending on the levels of need and vulnerability of the different societal groups.

Constitutional dialogue must take root at this juncture and must bring together all societal stakeholders such as political institutions, civil society, academics and the public at large.²¹ Political institutions play an important constitutional role at this level of dialogue, as they are the ones constitutionally mandated to ensure that SERs are implemented.²² The Constitution only provides structures of government and enumerates a list of rights, but the fleshing out of those rights to respond to the day to day requirements of society is the duty of the political institutions to be undertaken through a framework of legislation, policy and programmes. This is where the bulk of constitutional interpretation happens, and the political institutions must, of necessity, give meaning to the provisions of the constitution when designing the implementation framework. It is mostly when constitutional considerations are not properly incorporated in the formation of this framework that constitutional litigation occurs in the courts. The political institutions thus have an important coordinate role in constitutional interpretation, an interpretation that must be done properly, taking into account the threat of the judicial review of resultant legislation.²³

The Constitution vests the Legislature with the national legislative authority, and requires of it to protect the Constitution as well as to promote democratic governance.²⁴ This legislative authority derives from the people, and must thus be exercised in a legitimate way, with the outright participation of the people in legislative decision-making on the enactment or

²¹ See Dixon (n 5 above) 401-02, who states that rights controversies are better resolved in deliberative processes that give effect to broader constitutional understandings.

²² M Pieterse 'On dialogue, translation and voice: A reply to Sandra Liebenberg' in S Woolman & M Bishop (Eds.) *Constitutional conversations* (2008) 331, at 334, who contends that the political institutions have the democratic mandate, expertise and resources to define the scope of SER entitlements and to establish and operate a structural mechanism for their enforcement.

²³ Pickerill (n 6 above) chapters 3-5.

²⁴ The 2010 Kenyan Constitution, article 94 as read with article 109.

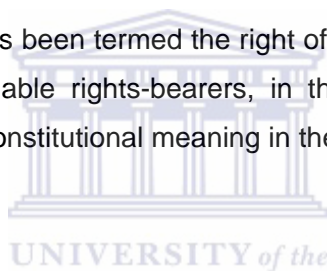
amendment of legislation.²⁵ The Constitution further expressly provides for democratic deliberation in the conduct of legislative business and in the resolution of the issues of concern to the people.²⁶

4.2.1 Public participation as a driver of dialogue in the 2010 Kenyan Constitution

Public participation is an important component of popular constitutionalism.²⁷ It espouses the concept of active citizenship, which entails equal participation in public affairs in the pursuit of the common good, a fundamental human good and the cornerstone of democracy.²⁸ This was affirmed by Justice Albie Sachs in the South African Case of *Minister of Health NO v New Clicks South Africa*, where he stated as follows:²⁹

The right to speak and to be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy, dialogue and the right to have a voice on public affairs is constitutive of dignity.

The right to participation, which has been termed the right of rights,³⁰ is thus crucial in dialogical deliberation as it enables reasonable rights-bearers, in the exercise of their citizenship, to contribute to the development of constitutional meaning in the context of rights disagreements.³¹



²⁵ The 2010 Kenyan Constitution, article 94 (1) as read with articles 118-119.

²⁶ The 2010 Kenyan Constitution, article 95 (2). See also Chambers - Reasonable democracy (n 13 above) 185, who avers that the requirement for public participative in the business of the legislature is based on its responsibility as the guardian of the general interest.

²⁷ See LD Kramer 'Popular constitutionalism, circa 2004' (2004) 92(4) *California Law Review* 959, who defines popular constitutionalism as 'a constitutional system where the role of the people is not confined to occasional acts of constitution-making, but includes active and on-going control over the interpretation and enforcement of constitutional law'.

²⁸ F Michelman 'Law's republic' (1988) 97 *Yale Law Journal* 1493, at 1503-1504.

²⁹ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) 2006 (8) BCLR 872 (CC) (30 September 2005), para. 627.

³⁰ Waldron – Law and disagreement (n 8 above) 232.

³¹ Waldron – Law and disagreement (n 8 above) 232 & 244. See Pieterse (n 22 above) 335-336, who also acknowledges the importance of beneficiary participation in constitutional dialogue as to the meaning and implementation of SERs. He however notes the reality that the voices of the poor and marginalised are always muted by their inability to access the legal system, their lack of rights-awareness, and their

Public participation is premised on the philosophical foundations of human rights, which are, the human capacity for self-conscious and reasoned choice, as well as purposeful reflection on the collective common good.³² The possession of this capacity is also the primary basis for democratic competence, indicating the close convergence between democracy and rights.³³ Participation entails respect for the political capacity and moral sense of justice of people to deliberate in, and determine, substantive and procedural questions of constitutional design, interpretation and implementation.³⁴ Waldron emphasises the importance of societal participation in all decision-making by linking the right to participation to the values of autonomy, dignity and responsibility, values that augment the entire rights framework.³⁵ He avers that the right to participation does not only mean the existence of popular elements at all levels and institutions of government, but that the popular elements must be decisive in the collective decision-making process.³⁶ He further contends that ‘decisions about rights are best taken by those who have a sufficient stake in the matter to decide responsibly’.³⁷

The right to participation ingrains the principle of indivisibility, interdependence and interrelatedness of rights, as even though it is a civil and political right, it has the capacity to enhance the realisation of SERs and other group rights. In international law, the right to

scepticism of the political and judicial processes. This can be mitigated through massive social mobilisation and rights education.

³² Beetham (n 2 above) 93. See also Waldron – Law and disagreement (n 8 above) 14.

³³ Waldron – Law and disagreement (n 8 above) 282.

³⁴ Waldron – Law and disagreement (n 8 above) 295-296.

³⁵ Waldron – Law and disagreement (n 8 above) 213. He contends that this right to participation involves participation on matters of high principle, such as the design of constitutional meaning, and not just participation in interstitial matters of social and economic policy. He thus criticizes the shifting of decision-making involving important societal issues, such as the design of constitutional meaning, to the courts. For more on his arguments on rights, respect and distrust, see 221-223.

³⁶ Waldron – Law and disagreement (n 8 above) 235. See also Waldron – Dignity of legislation (n 18 above) chapter 5 where he chronicles Aristotle and develops the “doctrine of the wisdom of the multitude” which contends that ‘the people acting as a body are capable of making better decisions by pooling their knowledge, experience and insight than a few of them’ and thus advocating the participation of citizens in deliberation and decision-making in a State, at 93-97. He further notes that the people’s ability to participate in deliberation led Aristotle to regard the capacity for reasoned speech as the mark of man’s political nature, at 98.

³⁷ Waldron – Law and disagreement (n 8 above) 250 & 253.

participation is enshrined in the International Covenant on Civil and Political Rights (ICCPR), especially in the provisions on the right to association, expression and the right to take part in the conduct of public affairs.³⁸ The ICCPR article 25 not only guarantees the right to participation, but also entails the obligation of states to provide opportunities for public participation in government.³⁹

In the Kenyan context, popular participation in the interpretation and enforcement of the entrenched SERs is crucial if the rights are going to achieve their intended purpose of social emancipation, empowerment, and socio-economic transformation.⁴⁰ The Constitution enshrines this right to participation in several provisions. In the preamble, the Constitution espouses the inalienable right of the people to determine how they want to be governed, and further contains the aspirations of the people to a government based on the values of human rights, equality, freedom, social justice, democracy and the rule of law.⁴¹ The Constitution states categorically that all public power derives from the people and must be exercised on behalf of, and for the benefit of the people.⁴² The very foundation of the State is based on values and principles which espouse deliberation and public participation in decision-making, and these values include: the rule of law, democracy and participation; good governance, integrity, transparency and accountability; human dignity, equity, social justice, equality, inclusiveness, non-discrimination, human rights, and the protection of the marginalised.⁴³ The Constitution further provides that these values bind all persons and institutions that exercise public power, especially in instances of the interpretation and application of the Constitution; in the enactment, application and interpretation of any law; as well as in the making and implementation of public policy decisions.⁴⁴ It is clear from the above provisions that public participation in the design of the

³⁸ ICCPR, articles 19, 21, 22 & 25. See also the African Charter on Human and Peoples Rights, articles 9, 13, and 25. For more discussion, see Czapanskiy & Manjoo (n 1 above) 6-7.

³⁹ See *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) 2006 (6) SA 416 (CC), paras. 91-94.

⁴⁰ See Czapanskiy & Manjoo (n 1 above) 15, who contend that where citizens, through deliberations, are engaged more in self-government, they gain self-respect, autonomy and empathy for others, values that lead them to better envision the common good.

⁴¹ The 2010 Kenyan Constitution, preamble, paras.6 & 7.

⁴² The 2010 Kenyan Constitution, article 1,

⁴³ The 2010 Kenyan Constitution, article 10.

⁴⁴ As above.

legislative, policy and programmatic framework is a prerequisite if the SER implementation framework is to be legitimate.⁴⁵

The requirement for public participation in decision-making is further buttressed by article 118 of the Constitution which requires parliament to conduct its affairs in an open manner and be open to the media as well as the public, except in exceptional circumstances.⁴⁶ It further requires parliament to facilitate public participation and involvement in the legislative as well as other businesses of parliament and its committees,⁴⁷ and enshrines a right of the people to petition parliament on matters within parliament's authority such as the enactment, amendment or repeal of legislation.⁴⁸ This is aimed at enhancing accountability, responsiveness and openness in parliamentary processes.⁴⁹

The Constitution also envisages public participation in the design of the policy and programmatic frameworks for the implementation of the entrenched SERs, the mandate of the executive.⁵⁰ Further the constitution requires public participation in public finance and allocation of resources to the various governmental projects. Article 201 contains the principles of public finance which require openness and accountability, including public participation in financial matters.⁵¹ Availability and allocation of resources play a major role in the fulfilment of SERs, and one of the reasons why there has been a failure in the realisation of SERs is due to misallocation of large portions of State resources to areas such as defence while allocation to social programmes has continued to dwindle. The above provision is thus key in enhancing deliberations and public participation in the budgeting process, and can be used as a tool to

⁴⁵ The importance of public participation in the creation of legitimate laws is one of the cornerstones of Habermas's theory of discourse as discussed in chapter three, section 3.2.1 above.

⁴⁶ The 2010 Kenyan Constitution, article 118 (1) (a) & (2).

⁴⁷ The 2010 Kenyan Constitution, article 118 (1) (b); see also article 196 on County Assemblies.

⁴⁸ The 2010 Kenyan Constitution, article 119 (1), article 119 (2) requires parliament to devise a procedure for the exercise of this right.

⁴⁹ See *Doctors for life*, paras. 111 & 121; *New Clicks and Others*, paras. 111-113.

⁵⁰ The 2010 Kenyan Constitution, article 129 which provides that executive authority derives from the people of Kenya, must be exercised in accordance with the Constitution, and for the well-being and benefit of the Kenyan people. See also, article 232 (1) (d) which calls for the involvement of the people in policy making.

⁵¹ The 2010 Kenyan Constitution, article 201 (a).

advocate for the prioritisation of social spending with the objective of enhancing the implementation of the entrenched SERs, especially for marginalised and vulnerable communities.

An expansive understanding of the right to participation, as discussed above, entails the possibility of individuals or groups of persons accessing the courts to vindicate their right to participation in instances of failure of the political institutions to provide opportunities for participation. The justiciability of the right to participation can be extracted from the Constitutional requirement that public power, legislative or executive, be exercised in accordance with the Constitution.⁵² This, taken together with the mandate of the High Court to adjudicate rights infringement and to determine constitutional questions relating to the exercise of constitutional power by other organs of the State,⁵³ thus makes it possible for the Court to enforce public participation in legislative and executive decision-making.

The requirement for public participation as discussed above fits neatly into the requirement of meaningful engagement as has been developed in the SACC SER jurisprudence as discussed in chapter three, section 3.5 above. The justiciability of the right to participation in public decision-making has been further affirmed by the SACC in a series of cases dealing with public participation in legislative activities, the leading case being, *Doctors for Life International v Speaker of the National Assembly and Others (Doctors for life)*.⁵⁴ The case dealt with the failure of the National Council of Provinces and some provincial legislatures to facilitate public

⁵² The 2010 Kenyan Constitution, articles 93 (2) & 129 (1). See S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 1, at 11, who affirms the role of courts in preserving the conditions for fair and equitable participation in decision-making processes through the adjudication of the constitutional right to participation, freedom of association and expression, access to information as well as the right to just administrative action.

⁵³ The 2010 Kenyan Constitution, articles 165 (3) (b) and (d) as read with articles 22 and 23.

⁵⁴ Other cases dealing with public participation in parliamentary processes include: *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister II*); *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC); and *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC).

participation in the development of four health statutes.⁵⁵ The SACC held that there was insufficient public participation on two of the four statutes and ordered a suspended invalidation to allow relevant legislative bodies to consult the public and amend the statutes accordingly.⁵⁶ The Court affirmed that the duty to facilitate public participation requires parliament to provide citizens with meaningful opportunities to be heard in the making of laws that govern them, contending that the Constitution demanded no less.⁵⁷ The Court further affirmed that even though the enforcement of public participation in the legislative process by the courts interferes with the autonomy of parliament, and might be an affront to the principle of separation of powers, it is a crucial component of, and is integral to the concept of democracy as enshrined in the SA Constitution.⁵⁸ This, the Court said, is due to the supremacy of the Constitution and the role of the courts as guardians of the rule of law.⁵⁹

To achieve the requisite level of participation in deliberation and decision-making, massive social mobilisation as well as empowerment through political and human rights education of the citizenry is mandatory, both for the government⁶⁰ and NGOs working in the

⁵⁵ *Doctors for life*, at paras. 36-37.

⁵⁶ *Doctors for life*, at paras. 198-214.

⁵⁷ *Doctors for life*, para. 145. See also *Glenister II*, paras. 31 & 32, where the Court held that parliamentary obligation does not just entail the holding of hearings, but must also provide citizens with an opportunity to influence the decisions of the law-maker. It thus stated that meaningful engagement entailed the legislature listening to the concerns, values and preferences of the people, and considering this in the shaping of decisions and policies, without which the right to public participation has no meaning.

⁵⁸ *Doctors for life*, at para. 32. See further the concurring judgment of Sachs J where he affirms that active and on-going public participation is a constitutional obligation in the legal sense, and not just legislative etiquette or good governmental manners, at para. 231.

⁵⁹ The Court, however, stated that in determining the level of scrutiny of parliamentary obligation to involve the public in parliamentary processes, the court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs, *Doctors for life*, at para. 146. See also *Glenister II*, at para. 31.

⁶⁰ This is supported by the findings of the SACC in *Doctors for life*, paras. 129-134, where they affirm a second aspect of the duty to facilitate participation as requiring the State to take measures to ensure that people have the ability to take advantage of the participation opportunities provided.

area of SERs.⁶¹ This requirement dovetails with Habermas's requirement, in his discourse theory, for an engaged citizenry which finds its basis in the associations of a civil society.⁶² William Forbath contends that for these associations of civil society to achieve their purpose, they must be democratic and efficacious, that is, their deliberation must have tangible effects in government decision-making.⁶³ Deliberative democracy, thus, requires an active and a well-informed citizenry who espouse deliberative competence and aptitude, and who are able to think critically about their own conception of the good.⁶⁴

Some of the benefits of citizen participation in political decision-making include: ensuring an active citizenry as well as empowering voiceless, marginalised and vulnerable groups; enabling citizens to identify themselves with government institutions, legislation and policy; enhancing civic dignity as well as fostering the spirit of democratic and pluralistic accommodation; enhancing legislative legitimacy; and acting as a counterweight to secret lobbying and influence-peddling.⁶⁵



⁶¹ Czapanskiy & Manjoo (n 1 above) 19, who contend that to respond to the viability and temporal concerns of the engagement of the masses in deliberation, mobilization of people into groups that form authentic positions through dialogue and negotiate solutions is key in achieving successful decision-making through deliberation.

⁶² J Habermas, *Between facts and norms: Contribution to the discourse theory of law and democracy*, translated by William Rehg (1996) 301. See also W Forbath 'Short-circuit: A critique of Habermas's understanding of law, politics and economic life' (1995-1996) 17 *Cardozo Law Review* 1441, at 1446-47, who contends that the role of such engaged association of civil society is to counter the power of privileged elites as well as concentrated interests through enabling broad-based citizen deliberation and action.

⁶³ Forbath – Short-circuit (n 62 above) 1447. He further submits that to enhance efficacy, the associations must have a legal mandate and institutional role to engage in deliberation in law and policy formulation as well as in the on-going interpretation and implementation of laws and policies.

⁶⁴ D Weinstock & D Kahane 'Introduction' in D Kahane *et al* (eds.), *Deliberative democracy in practice* (2010) 1, at 6-7; Czapanskiy & Manjoo (n 1 above) 15, who aver that dialogic deliberation requires a connection and engagement of the people with one another to develop view-points and positions, and to decide public issues through public debate.

⁶⁵ *Doctors for life*, at paras. 115 & 234-235.

4.2.2 Structures for public deliberation

Deliberation does not occur in the abstract, but within a concrete institutional context. The responsibility to engender participative deliberation in the design and implementation of the SER legislative, policy and programmatic frameworks is the responsibility of political institutions, as has been discussed above. However, in Kenya, the right to public participation in these institutions is always honoured more in breach than in compliance. This is because the Kenyan legislative and executive structures lack the requisite capacity and resources to meaningfully engage with societal actors.⁶⁶ This is further exacerbated by the fact that these institutions have historically been used to serve elitist interests, and are thus horribly unrepresentative of the interests of, and lack accountability towards, the ordinary citizens whom they are supposed to serve.⁶⁷ The question then is how to design an efficient deliberative structure to complement the role of parliament and the executive in enhancing public participation in societal decision-making.

One of the major challenges of theories of deliberative democracy is the design of deliberative structures.⁶⁸ This is especially due to the large number of people in modern

⁶⁶ See Landau & Lopez-Murcia (n 5 above) 61, who affirm that the problem of lack of capacity, contested legitimacy, minimal resources and a poor party system are some of the challenges bedeviling legislatures in nominal democracies, limiting their effectiveness as policy-makers and as checks on the executive. They further contend that these legislatures suffer from weak committee systems, have no or weak links with civil society or policy think-tanks and thus have no ability to formulate important policy initiatives, at 62.

⁶⁷ See M Kiai 'The crisis in Kenya' (2008) 19(3) *Journal of Democracy* 162, at 164.

⁶⁸ See Chambers – Reasonable democracy (n 13 above) 195-197, who contends that even though deliberation depends on institutionalising the necessary procedures and conditions for dialogue, citizen willingness as well as ability to participate actively in dialogue both informally and within the designed formal structures of deliberation is the key to dialogic decision-making. She enumerates some ways of enhancing dialogue by including the excluded voices through: democratising the media, setting up deliberative public opinion polls, empowering the powerless, decentralising decision-making, and establishing public commissions to canvass public opinion. See also J Bohman 'The coming of age of deliberative democracy' (1998) 6(4) *Journal of Political Philosophy* 400, at 415ff who calls for the exercise of institutional imagination in figuring out which decentralised process of decision-making are possible within constitutional political structures and which are thus capable of enhancing opportunities for deliberation and participation within on-going collective enterprises, at 416.

societies, and the time constraints within which decisions have to be made.⁶⁹ Another concern is the need for the requisite connection between the deliberative structures proposed and the existing governmental decision-making structures such as parliament and the executive. This connection is important as it will ensure that the deliberation that occurs in the proposed deliberative structure has an impact on, and guides, legislative as well as policy decision-making in the political institutions of the State. It is proposed, therefore, that to meet the above challenges, a governmental commission should be designated to compliment the deliberative roles of the political institutions of the State. The responsibility of the commission will be to receive draft bills and policy documents from the relevant political institutions of the State, meaningfully engage the public on those documents through public hearings and submissions, prepare a report with proposed amendments to the draft bills or policy documents in accordance with the views resulting from the societal dialogue, and then submit the report to the relevant political institution for action.

The proposal to establish a commission raises the next challenge about how it is to be designed. Should it be an *ad hoc* commission created for the specific purpose, or can the responsibility be undertaken by one of the more permanent commissions that is either constitutionally entrenched or that has legislative backing? Due to challenges of the multiplicity of institutions and the problems of coordination that this engenders, it is proposed that the task of enhancing public participation and deliberation should be undertaken by a commission that has already been established, has constitutional or legislative backing, and already has the capacity, mandate, ability and the experience to undertake the same.⁷⁰ These criteria lead us to two already functional commissions, the Commission for the Implementation of the Constitution (CIC), and the Kenya National Human Rights and Equality Commission (KNHREC).

⁶⁹ Weinstock & Kahane (n 64 above) 7.

⁷⁰ The choice of an already existing institution and not a new institution is to avoid further institutional disintegration with regard to human rights and to enhance the economies of scale on the efficient use of human and financial resources.

i) Commission for the Implementation of the Constitution

The CIC was established under the 2010 Constitution⁷¹ and it has a direct mandate to enhance the implementation of the Constitution. Its mandate includes the following: monitoring, facilitating and overseeing the development of a legislative and administrative framework requisite to the implementation of the Constitution; the coordination of, and collaboration with, other relevant actors in the achievement of its functions, especially liaising with the Attorney General as well as the Kenya Law Reform Commission in the preparation and tabling of bills in parliament;⁷² engaging with parliament, through the Constitutional Implementation Oversight Committee – a Select Committee of Parliament on the progress made in the implementation of the Constitution; and undertaking any other duties provided for by the Constitution or other written law.⁷³

The viability or otherwise of the CIC undertaking the role of enhancing participative deliberation in the development of the constitutional implementation framework was raised by the former adviser of the Prime Minister, Miguna-Miguna, when he stated that the mandate of the CIC did not include that responsibility.⁷⁴ In his response, the Chairperson of the CIC, Charles Nyachae, elaborated on the constitutional mandate of the CIC, and argued that the involvement of the public in the constitutional implementation process through nation-wide consultations, hearings, workshops and other relevant fora was a major role of the CIC.⁷⁵ He argued that the CIC, as a public organ, must espouse the national values and principles of the Constitution, which includes public participation, and that attempts to oversee the

⁷¹ The 2010 Kenyan Constitution, sixth schedule, section 5; and The Commission for the Implementation of the Constitution Act, No. 9 of 2010 (CIC Act), available at <http://cickenya.org/sites/default/files/downloads/CIC%20Act.pdf> (accessed on 8 June 2012).

⁷² The CIC Act, section 27 engenders a duty for all public officers, State organs and State officers to cooperate with the CIC in the implementation of its mandate.

⁷³ The 2010 Kenyan Constitution, sixth schedule, section 5(6) as read with section 4; The CIC Act, section 4.

⁷⁴ Miguna-Miguna 'The Commission on the Implementation of the Constitution is failing in its core mandate' published in the Star Newspaper on 3rd May 2011, available at <http://jukwaa.proboards.com/index.cgi?board=general&action=print&thread=5389> (accessed on 8 June 2012).

⁷⁵ C Nyachae 'Fact or myth: The role of CIC under the Constitution' available at <http://www.cickenya.org/opeds/fact-or-myth-role-cic-under-constitution> (accessed on 8 June 2012).

implementation of the Constitution without espousing those values would be a violation of the Constitution.⁷⁶ He further contended that the oversight role requires interaction between the CIC, other constitutional actors, and the public in general as all parties must be engaged in a collaborative process of implementation.⁷⁷ To further elaborate on its mandate in enhancing public participation in the law making process, the CIC has developed an informational flyer “understanding the journey of the Bills” which outlines its role at each of the stages of the legislative process.⁷⁸ This indicates that the CIC is already undertaking this role with regard to other legislation aimed at implementing the Constitution. It would thus not be beyond them to undertake the same function in relation to the implementation framework of the entrenched SERs.

Despite its competencies and the efforts it is already making to enhance public deliberation in the Constitutional implementation process, especially the holding of nation-wide public hearings on important constitutional implementation bills, it is a temporary body whose mandate is set to expire five years after its establishment, though there is a possibility of parliament passing a resolution to extend its life.⁷⁹ The above challenge, coupled with the fact that the CIC has no branches in other parts of the country and has also not developed an extensive collaborative network with other societal organisations such as civil society organisations, militates against it taking up the daunting participative deliberation role that is envisioned by the theory of dialogical constitutionalism.

ii) Kenya National Human Rights and Equality Commission

KNHREC is a permanent, constitutionally entrenched body which has an extensive human rights mandate,⁸⁰ and the requisite independence, capacity, expertise and practical experience necessary to undertake the deliberative function. Its mandate, relevant to this role, includes the

⁷⁶ As above, para. 5.

⁷⁷ As above.

⁷⁸ CIC, ‘Law making process: Understanding the journey of the Bills’ available at <http://www.cickenya.org/law-making-process> (accessed on 8 June 2012).

⁷⁹ The 2010 Constitution of Kenya, sixth schedule, section 5(7); CIC Act, section 29(1). This five-year period can even be shorter if it is perceived that the CIC has already exhausted its mandate, at which time it is constitutionally expected to be wound up.

⁸⁰ The 2010 Kenyan Constitution, part 5, article 59; Kenya National Commission on Human Rights Act, 2011 (KNCHR Act), sections 3 & 4.

following: promotion of the protection and observance of human rights in public and private institutions; monitoring and reporting on the observance of human rights; undertaking research on human rights and making recommendations aimed at improving the function of State institutions; ensuring State compliance with treaty obligations; and, performing any other function prescribed by legislation.⁸¹

The human rights mandate of KNHREC is further enhanced in chapter fifteen of the Constitution with added responsibilities to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles, and promote constitutionalism.⁸² To enable it to undertake these responsibilities, the Constitution further entrenches KNHREC's independence by stating that it is subject only to the Constitution and the law, and should not be subjected to any direction or control by any person or authority; and also ensures its financial independence.⁸³

Further to their mandate, the KNHREC also has other competencies that make it an ideal commission to undertake the task of complementing the deliberative efforts of the political institutions of the State. Firstly, it has built expertise on SERs through its Economic, Social and Cultural Rights Department (ECOSOC), which has undertaken extensive research on, and has continuously engaged both government institutions and civil society actors, on the realisation of SERs in Kenya prior to the enactment of the 2010 Constitution.⁸⁴ Secondly, it already undertakes a human rights audit of all parliamentary bills before they are passed into law through its Research and Compliance Department, and this role can be extended to include public participation in the auditing process on SER draft bills and policy documents.⁸⁵ Thirdly, KNHREC has held numerous nation-wide consultative fora on specific human rights challenges, and especially in the development of the Kenyan Human Rights Policy.⁸⁶ This, coupled with its extensive and continuous human rights advocacy and education, has expanded its outreach to all parts of the country. Lastly, KNHREC already has three established and functioning branch

⁸¹ The 2010 Kenyan Constitution, article 59 (2); KNCHR Act, sections 8& 28-44.

⁸² The 2010 Kenyan Constitution, articles 248 (2)(a) and 249(1).

⁸³ The 2010 Kenyan Constitution, articles 249(2) & (3).

⁸⁴ See Kenya National Commission on Human Rights website, <http://www.knchr.org/Departments/Economicsocialandculturalrights.aspx> (accessed on 3 June 2012).

⁸⁵ As above.

⁸⁶ As above.

offices in different parts of the country, giving it a wide coverage and reach of the majority of citizens.⁸⁷

The above competencies place the KNHREC in good stead to complement the participatory role of the political institutions of the State. However, facilitation of participation in societal decision-making is a massive task and if the Commission is to be successful at it, there is need for further enhancement of their resource base, especially human and financial, so as to enable them to establish more offices in the different devolved county units, to hire more staff, and to finance the costly and time consuming deliberative process. The expansion of the KNHREC capacity as indicated above is not only beneficial to participative deliberation, but is also beneficial to the entire human rights project as the proposed KNHREC county offices would be involved in the monitoring, protection and promotion of human rights at those levels, hence ensuring better rights implementation.

The choice of the Commission in enhancing deliberation is supported by the role that has been played by comparative Chapter Nine institutions in the South African context.⁸⁸ In assessing the comparative advantage of these SA institutions, Czapanskiy and Manjoo contend that they 'have the means to provide a forum for public education, are able to facilitate public participation, and can mediate easier access to the relevant legislative structures for civil society actors'.⁸⁹ They document the facilitation of discussion and consultations around the Older Persons Bill 2003 by the South African Human Rights Commission (SAHRC) which commenced in 2001 and lasted until 2006.⁹⁰

⁸⁷ This information was gained from my experience having worked at the two bodies that were merged to form this monolithic Commission, being the Kenya National Commission on Human Rights and the Kenya National Commission on Gender and Development.

⁸⁸ These are the institutions that were created under chapter 9 of the 1996 South African Constitution with the objective of supporting constitutional democracy and they include, The Public Protector, The Auditor-General, The Electoral Commission, The South African Human Rights Commission, The Commission for Gender Equality, and The Commission for the Protection of the Rights of Cultural, Religious and Linguistic Minorities.

⁸⁹ Czapanskiy & Manjoo (n 1 above) 26.

⁹⁰ Czapanskiy & Manjoo (n 1 above) 26-29. The results included: reception of over 300 submissions from individuals and organizations; development of cooperation and coordination between institutions and organizations working in specified areas; establishment of civil society forums to advocate for the relevant

The importance of a complimentary body to facilitate public deliberations is further evidenced by the illustration provided by Gutmann and Thompson on publicly funded medical aid in the state of Oregon, United States.⁹¹ In determining medical conditions covered by the funded medical aid, the Oregon Health Services Commission developed a list of conditions ranked mainly on the basis of utilitarian cost-benefit calculations, with treatment lower on the list regarded as less cost-beneficial and thus less likely to receive funding.⁹² Even though the ranking was a good faith attempt to maximise the welfare of the majority of citizens within the context of limited resources, it caused a massive outcry as most citizens were of the opinion that the list was unreasonable, unjust and unfair.⁹³ The Commission then employed a wide and dynamic process of deliberation through community meetings, presentation of submissions and proposals, the incorporation of public proposals into the medical aid policy, followed by more deliberations and revisions, leading to a final list that was more acceptable across the board.⁹⁴

Contrast the above process with the lack of dialogue and public participation in the adoption of the renal dialysis policy guidelines by the Kwa-Zulu Natal hospital leading to the filing of the *Soobramoney* case.⁹⁵ The above example shows that if the dialysis policy had been subjected to public deliberation in a wide consultative process, either a better policy would have been designed based on the different principled reasoned arguments and proposals that would have been made by the participants, or the policy would have been more legitimate. The case may thus not have been filed, and even if it were to have been filed, the judgment would not have led to the vilification of the SACC as being anti-people.⁹⁶

issues; emancipation and empowerment of the citizenry leading to increased direct interaction with parliamentary legislative procedures; amendment of the Bill to reflect societal concerns and prioritizations; and the building of coalitions and community solidarity in rights protection.

⁹¹ Gutmann & Thompson (n 8 above) 17-18.

⁹² As above.

⁹³ As above.

⁹⁴ As above.

⁹⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁹⁶ See KG Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8(3) *International Journal of Constitutional Law* 385, at 395; A Sachs 'Social and economic rights: Can they be made justiciable?' (2000) 53 *Southern Methodist University Law Review* 1381, at 1386, who contends that the public were angry with the Court as they felt that the Court could have done much more to save lives; C Scott & P Alston 'Adjudicating constitutional priorities in a

A commission can thus play an important role as a structure of deliberation supportive of the other decision-making institutions of the State such as the legislature, the executive and even the courts. Where issues arise as to the content of proposed legislative or policy frameworks aimed at the implementation of the entrenched SERs, the political institution involved should either, on their own (parliament through its committees or the executive through its relevant ministries or institutions), engage the public directly in deliberations or seek the assistance of the Commission in undertaking public deliberation on the proposed bill or policy document. In this way, the capacity of the people for self-government and civic responsibility is enhanced in tandem with the increased legitimacy and chances of implementation of the resultant law or policy.

4.2.3 Decision-making in deliberative structures

The next major challenge after the design of a deliberative structure is how decisions are to be made in the structure. Traditional deliberative democrats have always argued that deliberation should be aimed at the achievement of consensus.⁹⁷ However, due to the presence of genuine and good faith disagreements engrained into the very nature of rights, coupled with the constraint of time within which decisions have to be made, consensus may not always be achievable. The question then is, how does society break the deadlock or bottlenecks created during deliberation so as to reach a societally agreeable decision? Voting has been suggested by some deliberative scholars as one way in which such deliberative bottlenecks can be overcome.⁹⁸ Jane Mansbridge *et al* for example contend that deliberation should be complementary rather than antagonistic towards other democratic decision-making mechanisms that are not themselves deliberative, such as voting, fair-bargaining and negotiation.⁹⁹

transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* 206, 250.

⁹⁷ For an elaboration of this, see Waldron – Law and disagreement (n 8 above) 11-14.

⁹⁸ See J Habermas 'Three normative models of democracy' (1994) 1(1) *Constellations* 1, at 5, who acknowledges that there are political values and interests that stand in conflict with each other without prospects of consensus and which cannot effectively be balanced by discourse. He contends that such conflicts should be subjected to empirical references (voting) after effective practical deliberations so as to achieve the common good in a manner compatible with universalistic principles of justice.

⁹⁹ J Mansbridge *et al* 'The place of self-interest and the role of power in deliberative democracy' (2010) 18(1) *The Journal of Political Philosophy* 64, at 64-65. See also Weinstock & Kahane (n 64 above) 6, who

In discussing the link between deliberation and voting, Waldron outlines the classical divergence between the two concepts, elaborating the characteristic of deliberation as aimed towards consensus, while voting only takes place when there is a dissensus.¹⁰⁰ In analysing the writings of deliberative scholars, Waldron discerns an aversion to voting;¹⁰¹ noting their concern that this entails accepting that reasoned merit-based discussion has failed to resolve a problem.¹⁰² These deliberative scholars, he argues, view voting as a shift from the qualitative consideration of substance that is the hallmark of deliberation, to the quantitative counting of numbers, which is an arbitrary process of decision-making on a statistical basis.¹⁰³ He injects a sense of reality into the whole debate by stating that voting is a natural culmination of deliberation.¹⁰⁴ He thus contends that there may be no other available option but to vote in a deliberative decision-making process where there is an unredeemed plurality of reasoned opinions where a single cause of action is requisite.¹⁰⁵

Waldron further contends that voting in the context of deliberation is not only an effective decision-making procedure, but a respectful one as it respects individuals by taking seriously

aver that for deliberative democracy to attain maturity, deliberation should take pluralism seriously, and be much more inclined to morally acceptable compromises rather than to always insist on consensus; Bohman (n 68 above) 412ff, who states that deliberation must come to terms with other existing democratic practices such as voting and representation.

¹⁰⁰ J Waldron 'Deliberation, disagreement and voting' in H Hongju-Koh & RC Slye (eds.) *Deliberative democracy and human rights* (1999) 210, at 211-212.

¹⁰¹ See however, Deliberative democrats such as Habermas – Between facts and norms (n 62 above) ix; JS Fishkin, *Democracy and deliberation: New directions for democratic reform* (1991) 4; J Cohen 'Deliberation and democratic legitimacy' in A Hamlin & P Pettit (eds.) *The good polity: Normative Analysis of the State* (1989) 17-34, who, even though recognising the place of voting in public decision-making, argue that voting should not be aimed mainly at the aggregation of personal preferences, but must be preceded by public discourse in a democratic process in which citizens become informed through reasoned arguments and espouse more general interests.

¹⁰² Waldron - Deliberation and voting (n 100 above) 211-212.

¹⁰³ Waldron - Deliberation and voting (n 100 above) 211-212. See also Waldron – Dignity of legislation (n 18 above) 125-126 & 151-156, who contends that voting, a majority principle, is inherent, and has endured and prevailed, in all deliberative institutions consisting of more than one individual who regard each other as equals.

¹⁰⁴ Waldron – Deliberation and voting (n 100 above) 211-212.

¹⁰⁵ As above.

the reality of their principled disagreement about justice and the common good, while at the same time also treating them as equals in the authorisation of political action.¹⁰⁶ He avers that even in the supposedly principled deliberative organ of the State such as the courts, decisions are made by voting.¹⁰⁷

Amy Gutmann agrees with Waldron that voting is an essential and important component of deliberative democracy because it acknowledges that reasonable disagreements may result from a deliberative process.¹⁰⁸ She argues that the importance of voting is to focus the minds of the participants on the need to decide, and that deliberation without voting does not make much sense.¹⁰⁹ Carlos Rosenkrantz further agrees that voting may be a necessary part of deliberation, but avers that voting must be preceded by a well-informed process of deliberation, and that without this, the resultant majoritarian vote would have no epistemic value.¹¹⁰ Rosenkrantz's

¹⁰⁶ Waldron – Dignity of legislation (n 8 above) 158-162. See also CJ Nemeth 'Differential contributions of majority and minority influence' (1986) 93 *Psychology Review* 23, who argues that:

[m]ajorities foster convergence of attention, thought, and the number of alternatives considered. Minority viewpoints are important, not because they tend to prevail but because they stimulate divergent attention and thought. As a result, even when they are wrong they contribute to the detection of novel solutions and decisions that, on balance, are qualitatively better. The implications of this are considerable for creativity, problem solving, and decision making, both at the individual and group levels.

¹⁰⁷ Waldron – Deliberation and voting (n 100 above) 215-16. See also Waldron – Dignity of legislation (n 18 above) 128-129, where he contends that the only difference in the shift of decision-making on constitutional issues from the legislature to the courts is a shift of constituency, as the decision-making method, by voting, remains the same.

¹⁰⁸ A Gutmann 'Deliberative democracy and majority rule: Reply to Waldron' in H Hongju-Koh & RC Slye (eds.) *Deliberative democracy and human rights* (1999) 227, at 228-229.

¹⁰⁹ As above.

¹¹⁰ CF Rosenkrantz 'The epistemic theory of democracy revisited' in H Hongju-Koh & RC Slye (eds.) *Deliberative democracy and human rights* (1999) 235, at 239. A decision with epistemic value is that which is informed by proper knowledge, reason, understanding and access to all relevant information by the decision-making body with the aim of achieving the best possible outcome, see generally D Fallis 'Epistemic value theory and social epistemology' (2006) 2(3) *Episteme* 177-188.

arguments are buttressed by Bernard Manin who similarly contends that majority rule can only be justified when preceded by sincere and fair deliberation.¹¹¹

Though the building of consensus is the major aim of deliberation, the controversies associated with SERs make it likely that there will be principled disagreements as to their nature, scope, content, prioritisation and even the design of their implementation framework. The aim of deliberation in this context is thus to filter out instances of raw interests and preferences, engender learning and compromise and come out with proposals that better espouse the common good. It is these proposals that will thus be subjected to voting, with the proposal with the biggest support becoming the decision of the participants, and by extension, the decision of society.

4.3 Second level of dialogue: Deliberation in the context of constitutional litigation

4.3.1 Constitutional litigation as a dialogue

The second and third levels of dialogue envisage the court as an important facilitator of constitutional dialogue and deliberation.¹¹² This dialogical function of the court is acknowledged by William Eskridge and John Ferejohn who contend that judges, in undertaking constitutional review, must be deliberation respecting, meaning that they should listen to, dialogue with, and at times defer to the democratic process composed of the executive, legislators, officials and the

¹¹¹ B Manin 'On legitimacy and political deliberations' (1987) 15 *Political Theory* 357-362. See also Bohman (n 68 above) 416-417.

¹¹² See Young – Typology of SERs adjudication (n 96 above) 387ff, who terms this function of the court as catalytic, as it opens up inter-branch and societal dialogue between the courts, political institutions and society at large, making the achievement of a rights-protective outcome more likely. See also Pieterse (n 22 above) 336-337 & Liebenberg – Engaging the paradoxes (n 52 above) 11-13, who both acknowledge the twin role of the courts as participants in rights dialogue and also as a venue where the voices of all societal actors can be heard simultaneously on equal footing with regard to the meaning and implementation of SERs; C Bateup 'Reassessing the dialogic possibilities of weak-form Bills of Rights' (2009) 32 *Hastings International and Comparative Law Review* 529, at 587ff, who contends that the courts, through judicial review, play an important role in a constitutional system as judicial decision spark or continue broader societal discussions about constitutional meaning as well as the particular rights and values at stake in specific cases.

public, as these are the most legitimate ways in which constitutions evolve.¹¹³ They submit that the work of the judges in such a system is to facilitate, and occasionally guide, the political institutions, and the people, in the development of constitutional meaning.¹¹⁴ Their summation is that 'judicial review should avoid closing off democratic deliberation, should respect the products of such deliberation, and should create constitutional floors only when supported by deliberation among a wide array of represented interests'.¹¹⁵

Robert Post and Reva Siegel also affirm the importance of the courts and constitutional review in a constitutional democracy, contending that 'some form of judicial finality is essential to the rule of law, which is necessary for a functional democracy'.¹¹⁶ They argue that judicial review and popular constitutionalism are interconnected, interdependent and mutually supportive in an overallly beneficial way in the development of constitutional meaning.¹¹⁷ The concern for Post and Siegel is, therefore, how to strike a 'viable balance between the rule of law and the people's authority to speak to issues of constitutional meaning'.¹¹⁸ They propose constitutional dialogue as the practice that can viably create the requisite balance between these competing claims.¹¹⁹

Even though courts have not traditionally been dominant actors in the sphere of socio-economic policy, judicial rule-making, and to a certain extent judicial policy formulation, has always been a part of the courts' role, especially in the formation of the common law.¹²⁰ Judicial

¹¹³ WN Eskridge & J Ferejohn 'Constitutional horticulture: Deliberation-respecting judicial review' (2009) 87 *Texas Law Review* 1273, at 1275.

¹¹⁴ As above.

¹¹⁵ As above.

¹¹⁶ R Post & R Siegel 'Popular constitutionalism, departmentalism and judicial supremacy' (2004) 92(4) *California Law Review* 1027, at 1029.

¹¹⁷ As above. They further affirm the important role played by judicially enforceable rights in guaranteeing conditions for popular constitutionalism, and also affirm the important vital role popular constitutionalism plays in the articulation of fundamental values entrenched in judicially enforceable rights, at 1036-1037.

¹¹⁸ Post & Siegel (n 116 above) 1029.

¹¹⁹ Post & Siegel (n 116 above) 1041. They contend that dialogue, in this sense, is achieved through 'a complex negotiation between deference and disagreement, between the comity necessary to instantiate a legal constitutional order and the autonomy necessary to give that order life and vibrancy', at 1041-1042.

¹²⁰ V Gauri 'Fundamental rights and public interest litigation in India: Overreaching or underachieving?' (2010) 1 *Indian Journal of Law and Economics* 71, at 76. See also K Klare 'Legal culture and

engagement with SERs thus spurs on inter-branch and societal dialogue by introducing the language of rights, elaborating the guidelines within which the legislative, policy and programmatic framework should be developed, and providing a forum for debate.¹²¹ This is acknowledged by Varun Gauri and Daniel Brinks who contend that in adjudicating on SERs, the courts do not make final all-or-nothing decisions that usurp the functions of the political institutions, but design open-ended and interactive decisions that enable these institutions to respond in the adoption or reformulation of policy.¹²²

Sandra Liebenberg contends that SER adjudication has the potential to enrich democracy due to the following reasons. First, it creates a forum where the voices of poor, vulnerable and marginalised groups can be heard and the impact of legislation as well as policies in their lives receive serious and reasoned consideration in accordance with constitutional norms, values and principles. Secondly, it facilitates meaningful societal participation in the formulation, implementation and monitoring of government's social programmes through the vindication of the right of public participation in decision-making as well as enhancing transparency and accountability in public decision-making processes. Thirdly, it enhances the development of common and customary law through their infusion with constitutional values and principles to augment the protection of the poor, marginalised and vulnerable in the private sphere. Lastly, it ensures that the State is more responsive to systemic

transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146 at 146-47, who acknowledges that adjudication is an important part of the law-making process in democratic societies, as a site of law-making activity.

¹²¹ Gauri (n 120 above) 76. See also S Fredman, *Human rights transformed: Positive rights and positive duties* (2008) 149, where she avers that adjudication in courts creates a space for democratic deliberation among equal citizens; Landau & Lopez-Murcia (n 5 above) 81-82, who contend that the CCC has been able to espouse these requirements in its work, creating a detailed guideline for the other branches of government on how to implement rights as well as having a constant engagement with governmental, NGO and other civil society actors, on rights protection.

¹²² V Gauri & D Brinks 'Introduction: The elements of legalisation and the triangular shape of social and economic rights' in V Gauri & D Brinks (eds.), *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 1, at 3-4. They divide the public interest litigation life-cycle into four stages: filing of cases in court (legal mobilisation); judicial decision; bureaucratic, political or private-party response; and follow-up litigation. They contend that these four stages are interdependent and mutually self-supporting, engendering societal dialogue in the litigation process.

socio-economic deprivations and subordinations.¹²³ Despite the above progressive potential of SER adjudication, Liebenberg acknowledges that SER adjudication can have debilitating effects on participatory and deliberative democracy due to the following reasons. First, the courts may adopt a narrow interpretation of SERs, excluding the most important needs of the most poor and vulnerable in society thus leaving them bereft of the protection that was envisaged in the entrenchment of justiciable SERs in the Constitution. Secondly, a formalistic adjudicative culture and practices which entrench the private-public dichotomy may impose weak accountability on private institutions, detracting from the protection against socio-economic deprivation in the private sphere. Thirdly, the appearance of normality and inevitability associated with judicial pronouncements can inhibit societal dialogue as to the broad understanding and alternative societal interpretations of the entrenched SERs, thus limiting the transformative potential of a constitution. Lastly, a purely court-facilitated process of SER realisation has the potential to induce lethargy in the political institutions and thus lead to the abdication of their responsibility as the primary implementers of SERs as discussed in the first level of dialogue above.¹²⁴ Despite the above challenges, Liebenberg insists that judicial adjudication of SERs has the potential to achieve social transformation, and suggests that courts must seek to stimulate participatory strategies without abdicating their responsibility to critically assess government compliance with its SER obligations.¹²⁵

Therefore, the second level of dialogue occurs in the adjudication of SER cases in which the interpretation of the SER provisions are in issue.¹²⁶ The courts take the institutional role of facilitators of dialogue as they depend on individuals, groups or organisations to initiate constitutional litigation by filing cases in the courts.¹²⁷ Dialogue at this level reflects the

¹²³ S Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010) 37-38.

¹²⁴ Liebenberg - Adjudication under transformative constitution (n 123 above) 39-42. For an incisive and elaborate analysis of the limitations of adjudication in the context of the realisation of SERs, see M Craven 'Assessment of the progress on adjudication of economic, social and cultural rights' in J Squires, M Langford & B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 27-42.

¹²⁵ As above.

¹²⁶ This is the aspect of dialogue as is envisaged by the use of the "dialogical metaphor in Canada as discussed in chapter three, section 3.3 above.

¹²⁷ See S Gloppen 'Public interest litigation, social rights and social policy' in AA Dani & AD Haan (eds.) *Inclusive states: Social policy and structural inequalities* (2008) 343, at 345-354, who contend that for

argument by Peter Häberle that ‘he who has the power of pleading, has the power of interpretation’, which basically means that pleadings in constitutional litigation are based on particular competing understandings or interpretations of the constitutional provision in issue.¹²⁸

This level of dialogue is envisioned by the 2010 Kenyan Constitution which provides for the role of the Court as the guardian of the Constitution.¹²⁹ The Constitution entitles a wide range of parties to initiate the judicial review process in the Courts, especially in relation to the infringement of the Constitution.¹³⁰ In addition to individuals whose rights have been contravened or whose rights are threatened with contravention, the Constitution expands its standing jurisdiction to also entertain class actions and public interest litigation (PIL), as well as grant *amici curiae* status.¹³¹ The wide array of persons capable of instituting or participating in constitutional litigation enhances the level of dialogue in the development of constitutional meaning on the entrenched SERs, making it possible for the courts to be persuaded to adopt an

litigation to be a successful tool in social transformation, the following aspects must be present: identification and articulation of SER cases in the courts; responsiveness and acceptance by the courts of the mandate to adjudicate SER claims; the fashioning of effective remedies to tackle the root causes of SER deprivations; and, the acceptance, implementation and enforcement of court judgments to achieve structural changes through social policy and political practices.

¹²⁸ See A Sajo ‘Constitutional adjudication in light of discourse theory’ (1995-1996) 17 *Cardozo Law Review* 1193, at 1201; GG de la Vega ‘Two different approaches in constitutional interpretation with special focus in religious freedom: A comparative study between Germany and the United States’ (2008) 122 *Boletín Mexicano de Derecho Comparado* 795-833.

¹²⁹ The 2010 Constitution of Kenya, articles 23 & 165.

¹³⁰ The 2010 Constitution of Kenya, articles 22 & 258.

¹³¹ As above. The Kenyan Courts have undertaken a lenient stand in relation to the awarding of costs in constitutional litigation dealing with matters of public interest. In the case of *John Harun Mwau & 3 Others v Attorney General & 2 Others*, High Court Petition No. 123 of 2011, the Court held as follows:

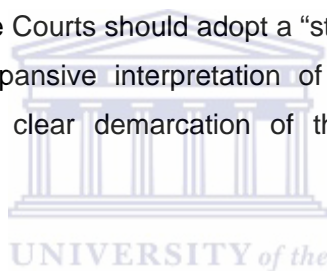
The intent of articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.

This above stand on costs was further affirmed by the High Court in the case of *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others*, High Court Petition No. 88 of 2011, at paras. 43-46.

interpretation that is reflective of the hopes and aspirations of the people as entrenched in the Constitution.¹³²

Dialogue at this level does not only involve the courts and the people (litigants); it is a tripartite dialogue that also entails the participation of the executive, as the defender and implementer of government policy. In constitutional litigation on SERs in Kenya, the government defender will almost always be the Attorney-General (AG),¹³³ and in the few cases where SER issues arise in the context of criminal litigation, the Office of the Director of Public Prosecutions.¹³⁴ The Constitution confers on the AG the duty to promote, protect and uphold the rule of law, and defend the public interest,¹³⁵ a role which, taken together with the fact that he/she is a public servant exercising delegated authority from the people, requires that she/he uses the conferred powers to enhance the public good, and not merely to espouse the views of the executive.

At this level of dialogue, the Courts should adopt a “strong rights approach” which entails a principled, substantive and expansive interpretation of entrenched SERs.¹³⁶ This would involve the court undertaking a clear demarcation of the content, scope and extent of



¹³² See *Gloppen - Public interest litigation* (n 127 above) 347 who affirms that lenient standing criteria is a feature of all the jurisdictions in which social rights litigation has been able to achieve social transformation such as in Colombia and India. See also Gauri (n 120 above) 71; S Shankar & PB Mehta ‘Courts and socio-economic rights in India’ in V Gauri & D Brinks (eds.) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 146, at 149-150; E Ordolis ‘Lessons from Colombia: Abortion, equality and constitutional choices’ (2008) 20 *Canadian Journal of Women and the Law* 263, at 266.

¹³³ The 2010 Constitution of Kenya, article 156, which empowers the AG, as the principal legal advisor of the government, to represent the State in legal matters in court; and, to appear, with the leave of the court as a friend of the court in cases in which the State is not a party.

¹³⁴ The 2010 Constitution of Kenya, article 157.

¹³⁵ The 2010 Constitution of Kenya, article 156 (6).

¹³⁶ See M Tushnet ‘Social welfare rights and the forms of judicial review’ (2003-2004) 82 *Texas Law Review* 1895, at 1903, where he argues that the SACC rejected a strong version of substantive SERs and that most of its decisions have been weak substantively and remedially as they lacked breadth, coerciveness as well as remedial timing.

entrenched SERs, including the delineation of the minimum core content of the rights.¹³⁷ It would further involve the court undertaking a strict use of the limitation clause, be they internal limitations on the availability of resources or external limitations to rights as is espoused in section 24 of the 2010 Constitution.¹³⁸ Dialogue here will entail the court adopting a two-stage approach to litigation, with the parties to the case adducing evidence in court to make an affirmative case of a violation of an entrenched SER, and the government adducing evidence to rebut the allegation of violation of that SER at the first stage. This stage must entail a principled focus on the nature, scope and content of the right in question and whether the impugned legislation or conduct infringes the right in question.¹³⁹ Should the court decide that a violation has occurred, the dialogue will then shift to the second stage where the political institutions will be required to adduce evidence indicating that the limitation of the right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in accordance with article 24 of the Constitution.¹⁴⁰ If the court holds that the justification does not cure the violation of the right, it must then, of necessity, make orders as to remedies, leading us to the third level of dialogue.

In undertaking their duties at this level of dialogue, especially in reviewing the SER implementation framework designed by the political institutions, the courts must have in mind the doctrine of coordinate construction, and the competence as well as the responsibility of the other branches of government in the development of constitutional meaning.¹⁴¹ The courts must thus, where reasonable, defer to and respect the meaning of entrenched SERs developed by the political institutions unless there are clear failures of foresight, perspective, accommodation or responsiveness; at which point the courts must intervene so as to generate new ideas and perspectives or to instil equilibrium into the political process.¹⁴² This follows from the democratic

¹³⁷ For a detailed discussion of why Kenya should adopt the minimum core approach to SERs, see chapter two, section 2.5 above and chapter five, section 5.3.

¹³⁸ For an elaborate discussion of limitations in the Kenyan context, see chapter two, section 2.6.

¹³⁹ Liebenberg - Adjudication under transformative constitution (n 123 above) 141.

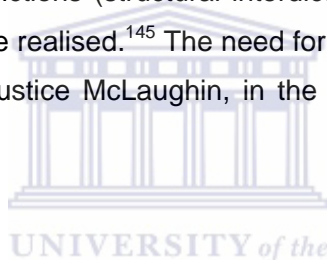
¹⁴⁰ This is the aspect of dialogue espoused in the Canadian context as discussed in chapter three, section 3.3 above. See also Young – Typology of SER adjudication (n 96 above) 396.

¹⁴¹ For an exposition of the doctrine of coordinate construction, see chapter three, section 3.4 above.

¹⁴² Dixon (n 5 above) 407; Young – Typology of SER adjudication (n 96 above) 392- 398. In the Kenyan case of *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition No. 15 of 2011, 6, available at

authority and epistemic superiority of the political institutions, coupled with the involvement of the public in a cooperative and deliberative undertaking to design the implementation framework as discussed in the first level of dialogue above. Deference to the political institutions will enhance the legitimacy of the courts' involvement in SER adjudication as it effectively responds to concerns of democratic legitimacy of policy making by the courts, separation of powers concerns, and the concerns of judicial competency to adjudicate polycentric matters.¹⁴³ The Constitution requires this deference in the adjudication of SERs, especially on the allocation of resources.¹⁴⁴

The court should, however, not abdicate its responsibility as the ultimate protector of rights and the guardian of the Constitution, on the basis of respect and deference where the political institutions are intransigent, incompetent or inattentive to their responsibility to realise SERs. It must retain sufficient latitude to undertake more drastic constitutionally availed remedies such as mandatory injunctions (structural interdicts) and the exercise of supervisory jurisdiction to ensure that SERs are realised.¹⁴⁵ The need for the courts not to abdicate their role in adjudication was affirmed by Justice McLaughlin, in the Canadian context, in the following terms:¹⁴⁶



http://kenyalaw.org/Downloads_FreeCases/83548.pdf (accessed on 2 April 2013), the High Court acknowledged the SERs entails the prioritisation of government expenditure, and that in instances of resource limitations, the political institutions of the State must be accorded the appropriate deference to determine the best way of meeting their constitutional obligations.

¹⁴³ Young – Typology of SER adjudication (n 96 above) 392. She avers that deference enables governmental institutions to fulfil their appropriate constitutional roles and responsibilities without impinging on each other, at 393.

¹⁴⁴ The 2010 Kenyan Constitution, article 20(5)(c).

¹⁴⁵ For an extensive discussion on the use of structural interdicts in the realisation of SERs, see C Mbazira, *Litigating socio-economic rights in South Africa* (2009) chapter six.

¹⁴⁶ *RJR MacDonald v Canada* [1995] 3 SCR 199 para. 136, also quoted in McLean – Constitutional deference (n 19 above) 175-76. See also Dixon (n 5 above) 406, who contends that courts have a direct responsibility, using their communicative and coercive powers, to counter blind spots and burdens of inertia in the political processes, and failure to do so has two consequences for the courts: first, they will be implicated directly in illegitimate State coercion due to their constitutional mandate to undertake authoritative judicial decision-making in instances of rights violations; and secondly, courts' failure actively

Care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is parliament. To carry judicial deference to the point of accepting parliament's view simply on the basis that the problem is serious and the solutions difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our Constitution and nation is founded.

The above quote, which is basically self-explanatory, stresses the important role which the courts play in the entire constitutional structure, a role that must not be sacrificed on the altar of blanket deference.

4.3.2 Which way for Kenya - Individualised or structural litigation?

The viability and effectiveness of dialogue at this level in achieving socio-economic transformation will depend a lot on the litigation strategy to be adopted by the prospective litigants. A choice of litigation strategy must aim at the overall achievement of the transformative agenda, which is, shielding the poor, marginalised and vulnerable individuals and groups from the uncertainties and harshness of a pure market model, and extending to them the benefits of public goods and services.¹⁴⁷ A distinction can be drawn between two strategies - the individualised strategy as has been used in access to health in Brazil, and the class action/public interest litigation which is the hallmark of SER litigation in Colombia and India.¹⁴⁸

entrenches the unequal status quo and makes it harder for individuals and social movements to contest the legitimacy of the status quo.

¹⁴⁷ DM Brinks & W Forbath 'Commentary: Social and economic rights in Latin America: Constitutional Courts and the prospects for pro-poor interventions' (2010-2011) 89 *Texas Law Review* 1943, at 1949. See also A Nolan 'Litigating housing rights' Conference on Economic, Social and Cultural Rights, 9-10 December 2005, at 11-12, available at <http://www.ihr.org/publications/list/aoife-nolan-litigating-housing-rights-conference-o/> (accessed on 26 September 2012), who emphasises the importance of proper case selection in SER litigation, as poorly chosen litigation strategies may lead to adverse precedents that may take years to reverse.

¹⁴⁸ See 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, at 1671, who calls public interest

Concerns have been raised about the viability of individualised interest litigation in achieving social transformation. Critics argue that the strategy makes it harder for indigent, voiceless and marginalised individuals and groups to benefit from SER programmes at the expense of middle class litigants.¹⁴⁹ Daniel Brinks and William Forbath contend that private individual litigation has the potential of producing beneficiary inequality and may operate as a rationing device in which access to social goods and services is a preserve of those with sufficient resources and the ability to access courts and retain private advocates.¹⁵⁰ Paola Bergello also concurs, contending that continued individual litigation exacerbate intra-policy

litigation (PIL) cases “structural cases” and demarcates their features as: involving the violation of the rights of a large number of people; implicating multiple State institutions and agencies whose failure in policy development and implementation contribute to the rights violation; and, engendering the adoption of structural injunctive remedies requiring government’s coordinated action to protect the entire affected population, and not only of the litigants. On India, see S Muralidhar ‘The expectations and challenges of judicial enforcement of social rights: India’ in M Langford (ed.), *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 102, at 106 & 108-109, who indicates that the development of PIL in India was entirely a judge-led and judge-dominated movement.

¹⁴⁹ Gloppen - Public interest litigation (n 127 above) 359-360, who argues that PIL in India has seen stronger middle class groups upstage the concerns of the most vulnerable and marginalized groups in accessing the courts. DP Chong ‘Five challenges to legalising economic and social rights’ (2009) 10 *Human Rights Review* 183, at 190, similarly argues that SER litigation amplifies the reproduction of social inequalities as judgment in favour of one group necessarily leads to deterioration of the conditions of other groups who may not have access to the justice system or a leverage on the State’s scarce resources. For an affirmation of this claim, see B Rajagopal ‘Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective’ (2007) *Human Rights Review* 157ff; F Hoffman & FR Bentes ‘Accountability for social and economic rights in Brazil’ in V Gauri & DM Brinks (eds.) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008)100, at 119-132; OM Ferraz ‘Harming the poor through social rights litigation: Lessons from Brazil’ (2010-2011) 89 *Texas Law Review* 1643.

¹⁵⁰ Brinks & Forbath (n 147 above) 1946-1950. See also DM Brinks & V Gauri ‘A new policy landscape: Legalising social and economic rights in the developing world’ in V Gauri & DM Brinks (eds.) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 303, at 336-342, who undertake an extensive analysis of this issue and submit that even though the middle class are always the direct beneficiaries of SER litigation, class action litigation always leads to massive structural adjustments in policy and implementation procedures, indirectly benefiting even the poor non-litigating majorities

inequalities.¹⁵¹ The unviability of providing individualised benefits in the context of SER adjudication was also affirmed by the SACC in the *Soobramoney* case where the Court held as follows:¹⁵²

The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

Even though individualised litigation has denigrating effects on the potential for transformative litigation, the other extreme - where the courts are absolutely oblivious to the individualised concerns of litigants - also has adverse effects on the fulfilment of SERs. This is exemplified by the reasonableness approach to SER litigation through which the SACC has consistently shown chariness and a lack of concern to individual litigants,¹⁵³ and has instead laid

¹⁵¹ P Bergallo 'Courts and social change: Lessons from the struggle to universalise access to HIV treatment in Argentina' (2010-2011) 89 *Texas Law Review* 1611, at 1640-1641.

¹⁵² *Soobramoney* case, para. 31. See also *Grootboom* case, para. 95, & *TAC* case, paras. 34-36. The unviability of providing purely individualised remedies in the context of SER litigation has also been affirmed in the High Court of Kenya in the case of *John Kabui Mwai* (n 142 above) 6, where the Court stated as follows:

One of the obstacles to the realisation of [SER] is the limited financial resources on the part of the government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.

The holistic approach advocated here can be interpreted to entail a mix of individual and structural remedies in accordance with the specific context of particular cases, the approach proposed below.

¹⁵³ See Pieterse (n 22 above) 341 and D Brand 'Proceduralisation of South Africa's socio-economic rights jurisprudence, or "what are socio-economic rights for?"' in H Botha *et al* (eds.) *Rights and democracy in a transformative constitution* (2003) 33, at 46, who both contend that the failure of the SACC to adopt the minimum core approach, and its consequent adoption of the reasonableness approach, was partly motivated by its aversion to the notion of individual entitlements. Pieterse further argues that this approach stifles dialogue as individuals and organisations find it worthless to participate in the identification and elaboration of rights claims as the courts will not award to them any immediate and tangible relief, at 343-344. See also J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214, at 215ff who contends that the South African judiciary has remained relatively untransformed due to its

emphasis on assessing whether government policies and programmes aimed at the realisation of rights have taken into account the needs and circumstances of the most vulnerable groups.¹⁵⁴ Frank Michelman terms the adoption and application of supposedly “objective legal standards” such as “the reasonableness standard” as flights from responsibility, aimed at absolving judges from responsibility for the fate of individual parties, as well as the absolution of the responsibility of judges for their contribution to socially unequal or conflictual outcomes.¹⁵⁵ In her analysis of the jurisprudence of the SACC, Katherine Young terms this a “weak court approach” which is basically aimed at the court’s self-protection.¹⁵⁶ Sandra Liebenberg also affirms the inability of the reasonableness approach adopted by the SACC to be used to elicit benefits for an individual or a class of individuals.¹⁵⁷

The strategy being advocated here is a mix of the two extremes, that is, where litigants mostly concentrate on structural litigation through the preparation of test cases on SER issues of most concern to the people.¹⁵⁸ To enhance the viability of this approach, the courts must

institutional unresponsiveness to the problems of the poor and its failure to advance transformative justice, and thus its general failure to collectively act as an institutional voice of the poor.

¹⁵⁴ Brinks & Forbath (n 147 above) 1952; Dugard - Courts and the poor in South Africa (n 153 above) 236ff. See also Young – Typology of SER adjudication (n 96 above) 395; Scott & Alston (n 96 above) 254-55, who contends that chariness toward the needs of individual litigants has a chilling effect on SER litigation by individual claimants.

¹⁵⁵ F Michelman ‘The Supreme Court 1985 Term, Foreword: Traces of self-government’ (1986-1987) 100 *Harvard Law Review* 4, at 15.

¹⁵⁶ Young – Typology of SER adjudication (n 96 above) 391. See also T Roux ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7(1) *International Journal of Constitutional Law* 106, who similarly states that the reasonableness approach was basically a pragmatic approach adopted by the SACC for institutional protection.

¹⁵⁷ S Liebenberg ‘Socio-economic rights: Revisiting the reasonableness review/minimum core debate’ in S Woolman & M Bishop (eds.), *Constitutional conversations* (2008) 303, at 304. See also Tushnet – Social Welfare Rights (n 136 above) 1905.

¹⁵⁸ Brinks & Gauri – A new policy landscape (n 150 above) 340; Gauri & Brinks - Introduction (n 122 above) 15, who contend that in order to produce a “rights revolution” repetitive and coordinated litigation is a requirement, a feat that cannot be achieved by individuals litigating on their own, and which, therefore, requires a PIL organisation that can undertake a prolonged and strategically planned litigation campaign; Gloppen - Public interest litigation (n 127 above) 348, who avers that the key to success here is the “associative capacity” that is, the capacity to join forces and resources both human and financial,

establish proper guidelines and outline correct parameters for the acceptance and adjudication of PIL cases so as to curtail the filing of frivolous and vexatious petitions.¹⁵⁹ Furthermore, in adjudicating these test cases, the courts should issue remedies that balance individualised concerns of litigants and all other similarly placed individuals, while at the same time responding to the structural concerns that militate against the realisation of SERs for the masses.¹⁶⁰ In support of this remedial approach, Iain Currie and Johan de Waal contend that constitutional violations do not only cause harm to individuals, but causes harm to the entire social spectrum as they impede the realisation of the constitutional project aimed at the creation of a just and democratic society.¹⁶¹ This is further affirmed by Sandra Liebenberg who similarly states that constitutional remedies should not only be aimed retrospectively at the vindication of the right-violations that have already occurred, but must also be aimed at deterring future violations of the right in respect of all people.¹⁶² The aim of the test cases, especially the initial ones, should,

undertake societal mobilisation around the issues of concern, and engage in media campaigns to enhance knowledge and awareness of the test cases and their intended social impact. Gloppen emphasises the importance of social mobilisation at all the levels of litigation, contending that it is easier for judges to adopt progressive judgments if a case has already been “won in the streets, at 355. See also Dugard - Courts and the poor in South Africa (n 153 above) 216-226, who calls for a comprehensive system of legal representation for poor people to enable their issues to be adequately, equally and effectively articulated so as to promote parity in the legal process; Roux (n 156 above) 123-125; Nolan (n 147 above) 14; and S Leckie ‘The UN Committee on Economic, Social and Cultural Rights and the right to adequate housing: Towards an appropriate approach’ (1989) 11 *Human Rights Quarterly* 522 at 528-31.

¹⁵⁹ See Gauri (n 120 above) 75-76 who argues that the lack of such a guideline has led to the Indian Supreme Court entertaining frivolous PIL petitions, to the detriment of the real administration of justice. He documents calls by the bench for the establishment of PIL parameters and also indicates that a Parliamentary Bill was tabled in 1996 to regulate PIL in the Indian Courts. See also Dugard - Courts and the poor in South Africa (n 153 above) 226ff, who calls for the judiciary in South Africa to promote PIL and limit systemic barriers to its use.

¹⁶⁰ See Gloppen - Public interest litigation (n 127 above) 344 who affirms that PIL is aimed at the transformation of not only the individual litigant, but also similarly situated individuals through the alterations of structured inequalities and power relations. It is thus aimed at the transformation of social policy, public discourse on social rights, and the development of progressive jurisprudence.

¹⁶¹ I Currie & J de Waal *The Bill of Rights handbook* (2005) 196.

¹⁶² Liebenberg - Adjudication under transformative constitution (n 123 above) 378.

therefore, be to tackle government's structural and institutional deficiencies that result in the non-realisation of SERs, with the consequential objective of ensuring policy changes, shattering the bureaucratic bottlenecks, and enhancing inter-branch and societal dialogue in the design of SER implementation frameworks.¹⁶³

The need for a mixed litigation strategy to enhance the achievement of the transformative aspirations of a transformative constitution is also acknowledged by David Bilchitz who identifies both the positive and negative consequences of each of the specific litigational strategies mentioned above.¹⁶⁴ He advocates a flexible approach in which the courts make orders that are just and equitable in light of the facts and context of each particular case.¹⁶⁵ He proposes that in litigation challenging an existing SER implementation framework, the court should proceed and grant individual remedies requiring the inclusion of the litigants and similarly placed individuals into the existing programmes, so as to enhance the equality of treatment and to respect the principle of equal importance of all people.¹⁶⁶ He further proposes that in litigation where there is no existing SER framework, the court should order the State to adopt a policy and develop a programme aimed at the provision of the right in question to all similarly situated individuals.¹⁶⁷ He contends that this ensures that all individuals benefit from the State's programmes in an orderly and systematic manner.¹⁶⁸

The viability of the litigation and remedial approach discussed above is evidenced by the Indian right to food (PUCL) case, which concerned the failure of the government to put in place measures to ameliorate extreme hunger and malnutrition caused by drought and famine.¹⁶⁹ In

¹⁶³ See Bergallo (n 151 above) 1614-1615 & 1631-1638 who, writing in the context of SER litigation in Argentina, contends that while the earlier collective PIL on the right to health were able to inspire policy changes and fostered inter-branch dialogue in the formulation solutions, later litigation did not have this effect.

¹⁶⁴ D Bichitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 203-206.

¹⁶⁵ Bichitz - Poverty and fundamental rights (n 164 above) 204.

¹⁶⁶ As above. The case that best illustrates this point is the *Khosa* case.

¹⁶⁷ As above.

¹⁶⁸ Bichitz - Poverty and fundamental rights (n 164 above) 205.

¹⁶⁹ *People's Union for Civil Liberties v Union of India*, (Writ Petition [Civil] No. 196 of 2001) available at <http://www.righttofoodindia.org/case/case.html> (accessed on 3 September 2012). For a more elaborate discussion of this case, see chapter six below.

reacting to this situation, the Indian Supreme Court made extensive preliminary orders requiring the government to introduce midday meals in all government assisted primary schools; provide food security benefits through a card system and nationwide food security schemes to the most vulnerable groups; and to increase its budgetary allocations to schemes aimed at enhancing employment.¹⁷⁰ To ensure that these orders were fulfilled, the Supreme Court proceeded to appoint two commissioners to monitor their implementation, and to work with both the government and non-governmental organisations to enhance the realisation of the right to food.¹⁷¹ Through this monitoring mechanism, the court was further able to make follow-up orders in instances where implementation was either slow or had not taken off.¹⁷² David Bilchitz contends that the PUCL case portrays the positive benefits that properly balanced SER litigation can have in enhancing the realisation of SERs, by shattering bureaucratic bottlenecks as well as placing SER issues on the political agenda.¹⁷³

Within this litigation framework, the entire societal context and circumstances should be brought to bear in a deliberative system of decision-making where even individuals, groups and organisations not party to the specific litigation have an opportunity to contribute freely and equally to the elaboration and design of remedies to address the violation of, or non-realisation of SERs, as discussed below in relation to the third level of dialogue.¹⁷⁴ This dialogic system has the potential to represent the million faceless poor who are too indigent to undertake litigation of their own, and to ensure that their situation is brought to bear in national decision-making, as is illustrated by the PUCL case above.¹⁷⁵ This is exemplified by the structural decision-making

¹⁷⁰ Bichitz - Poverty and fundamental rights (n 164 above) 241-242; Chong (n 149 above) 187.

¹⁷¹ Bichitz - Poverty and fundamental rights (n 164 above) 241-242.

¹⁷² Bichitz - Poverty and fundamental rights (n 164 above) 245.

¹⁷³ Bichitz - Poverty and fundamental rights (n 164 above) 242-243.

¹⁷⁴ Young – Typology of SER adjudication (n 96 above) 391, who also envisions review dialogue in a web involving the courts, political institutions, litigants, similarly placed individuals and groups, other parties who may be harmed or helped by the prospective remedies, and the general public.

¹⁷⁵ Dugard - Courts and the poor in South Africa (n 153 above) 226ff. See also J Easterday 'Litigation or legislation: Protecting the rights of internally displaced persons in Colombia (2008) 36-38, available at http://works.bepress.com/jennifer_easterday/1 (accessed on 3 September 2012), where she affirms the decision by the CCC in the Internally Displaced Persons (IDPs) case did not only apply to the specific applicants in the case, but was directed at the amelioration of the conditions of all IDPs in Colombia.

approach that entails strong rights, moderate remedies and a strong monitoring system as exemplified by the practice of the CCC whose jurisprudence is discussed below.

4.4 Third level of dialogue: the designing of constitutional remedies

The third level of dialogue deals with the type of remedy the courts adopt and the kind of monitoring mechanisms that the courts will establish to ensure the implementation of the adopted remedies.¹⁷⁶ It entails courts adopting “moderate remedies” which are in line with the concept of separation of powers, and which only outline the broad goals and procedures to be implemented by the political institutions.¹⁷⁷ In adopting this form of remedy, the Court acknowledges and defers to the constitutional responsibility and institutional competence of the political institutions in designing, planning and implementing SER policies.

4.4.1 Remedies

Some of the remedial approaches that allow the court to undertake its facilitative role, and which are expressly provided for in the Constitution include a declaration of rights; injunctions, including mandatory injunction/structural interdicts; and declarations of invalidity, which include suspended declarations of invalidity.¹⁷⁸ The courts must of necessity exercise judicial discretion as to the remedy to apply in any particular case. In exercising that discretion the courts will be guided not only by the particular facts of the case and the contextual as well as historical circumstances of the litigants, but also on the need to ensure that remedies issued in any particular case are effective, just, equitable and appropriate.¹⁷⁹ An appropriate remedy, according to Justice Ackermann of the SACC, is that relief which is required to protect and

¹⁷⁶ See *Gloppen - Public interest litigation* (n 127 above) 354 who states the importance of creativity of courts in designing remedies and developing innovative follow-up monitoring mechanisms to enhance implementation of rights, pointing at the creativity of the Indian Supreme Court, the Colombian and the Costa Rican Constitution Courts in this area.

¹⁷⁷ *Tushnet – Social welfare rights* (n 136 above) 1910 ff; *Rodriguez-Garavito* (n 148 above) 1676. See also *McLean – Constitutional deference* (n 19 above) 187-88.

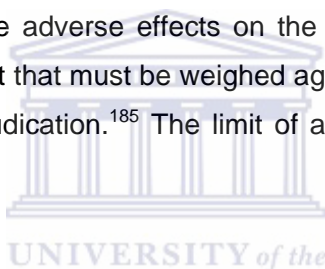
¹⁷⁸ The 2010 Kenyan Constitution, article 23(3).

¹⁷⁹ See K Roach & G Budlender ‘Mandatory relief and supervisory jurisdiction: When is it appropriate, just, equitable’ (2005) 122(2) *South African Law Journal* 325, at 345-51.

enforce the Constitution.¹⁸⁰ Even though an expansive elaboration of these remedies is beyond the scope of this chapter, a brief analysis of their dialogical character is necessary.¹⁸¹

First, a declaration of rights is an optional order which the court can make to determine rights in particular circumstances, even in instances of mootness of a legal question with regard to the litigating parties, but which does not entitle the claimants to any enforceable relief.¹⁸² According to the SACC, it 'is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of [constitutional values]'.¹⁸³ In making this order, the court allows the political institutions of the State to put in place measures to either realise the right in question or to fulfil the obligation so declared, taking into account their institutional comparative advantages as well as the many legitimate options available for the realisation of the right in question.¹⁸⁴

However, Liebenberg acknowledges that purely declaratory orders, without any other complementary remedy, may have adverse effects on the immediate needs of the claimants and similarly situated people, a fact that must be weighed against the benefits of the order when the court is undertaking SER adjudication.¹⁸⁵ The limit of a purely declaratory order was also



¹⁸⁰ See *Fose v Minister of Safety and Security* (1997) 3 SA 786 (CC), paras. 19 & 69.

¹⁸¹ For an extensive discussion of these remedies in the context of South Africa, see Liebenberg - Adjudication under transformative constitution (n 123 above) 377-462.

¹⁸² Liebenberg - Adjudication under transformative constitution (n 123 above) 397-399. She argues that some of the reasons for the making of declaratory orders are, to provide an authoritative confirmation of the violation of the relevant constitutional rights and to deter future violations of rights.

¹⁸³ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), para. 107.

¹⁸⁴ Liebenberg - Adjudication under transformative constitution (n 123 above) 398ff. see also K Roach 'Crafting remedies for violations of economic, social and cultural rights' in J Squires, M Langford & B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 111, at 113-116, who analyses the preferred use of declaratory remedies by the courts in Canada, especially the Canadian Supreme Court, in the context of cases dealing with rights entrenched in the Canadian Charter of Rights and Freedoms.

¹⁸⁵ Liebenberg - Adjudication under transformative constitution (n 123 above) 408-09. For a comprehensive analysis of the effects of the declaratory orders made on the Grootboom judgment, see 399-407.

emphasised by Justice Iacobucci of the Canadian Supreme Court, who, in his dissenting opinion in a Canadian case held as follows:¹⁸⁶

Declarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government. [However, they] can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance. [They are thus] inadequate and place an unfair burden on successful litigants in cases of grave systemic problems and when administrators have proven themselves unworthy of trust.

Secondly, the suspended declaration of invalidity acknowledges the institutional and constitutional competency of the political institutions to deal effectively with a violation of a right by pointing out the violation and allowing these institutions to put in place measures to rectify the violation in the first instance.¹⁸⁷ This declaration envisages the continuation of an unconstitutional state of affairs for the period specified in the order, and thus allowing the political institutions to rectify the situation through a legislative sequel or executive action, failing which the declaration takes effect invalidating the previous unconstitutional state of affairs.¹⁸⁸ In analysing this remedy, Liebenberg avers that it is appropriate in two instances, the first being when an order of immediate invalidation will result in an unacceptable legal situation, such as the creation of a lacuna in the legal system, and the second instance being when it is appropriate to afford the political institutions, due to their institutional and constitutional competence and comparative advantage, the opportunity to adopt the requisite comprehensive and balanced scheme to cure the unconstitutional state of affairs.¹⁸⁹ She contends that this order, especially its application in the second instance, has the effect of enhancing dialogue as it allows policy choices for the realisation of SERs to be made in democratic and collaborative deliberative structures where all societal concerns and interests are brought to bear on collective societal decision-making.¹⁹⁰ She, however, calls for an appropriate balance to be struck between the benefits to be achieved by the suspension of the order *vis-à-vis* the burden

¹⁸⁶ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* (2000)2 SCR 1120, paras. 258-61, as quoted in Roach & Budlender (n 179 above) 339.

¹⁸⁷ Roach & Budlender (n 179 above) 339-40; Roach – Crafting remedies for SERs (n 184 above) 123ff.

¹⁸⁸ Liebenberg - Adjudication under transformative constitution (n 123 above) 389-90.

¹⁸⁹ Liebenberg - Adjudication under transformative constitution (n 123 above) 390.

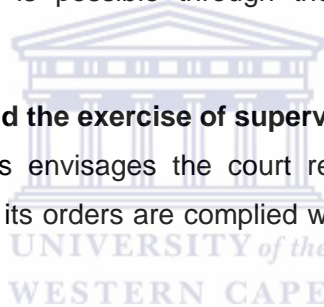
¹⁹⁰ Liebenberg - Adjudication under transformative constitution (n 123 above) 390-91.

placed on the claimants and similarly situated individuals in allowing the unconstitutional state of affairs to subsist for the suspension period.¹⁹¹ She thus suggests that interim measures should be put in place to cushion the claimants from the adverse effects that may result from the suspension of the order.¹⁹²

Thirdly, the courts can also adopt the more coercive mandatory injunctions where there is a manifest failure or delay by the political institutions in the execution of previous, less coercive SER orders of the court.¹⁹³ Liebenberg contends that two types of orders can be made in this instance, the first being an order for the provision of benefits or services, and the second being an order requiring dialogue and deliberation with the affected communities (“meaningful engagement”).¹⁹⁴ She argues that a mandatory order can be made by the courts in the following three situations: where few policy alternatives for the remedy of the violation exist; where the type of violation requires ‘the provision of direct, speedy and concrete form of relief’; and where compliance with the court order is possible through the adoption of straightforward and expeditious measures.¹⁹⁵

4.4.2 Retention of jurisdiction and the exercise of supervisory powers

The remedy which almost always envisages the court retaining jurisdiction and exercising supervisory powers to ensure that its orders are complied with by the political institutions is the



¹⁹¹ Liebenberg - Adjudication under transformative constitution (n 123 above) 391-97. She further states that in suspending an order, the courts should not leave parliament to their own devices, but must lay down the normative parameters within which the resultant legislative sequels or executive action must meet, at 93. See also Roach & Budlender (n 179 above) 340-41.

¹⁹² Liebenberg - Adjudication under transformative constitution (n 123 above) 391-97. See also Roach – Crafting remedies for SERs (n 184 above) 125-126.

¹⁹³ See *TAC* case, para. 112, where the SACC affirmed its authority to issue mandatory injunctions in appropriate cases when the State’s obligations are not being performed diligently and without delay. See also Mbazira (n 145 above) 170-71 who contends that the mandatory injunction is a positive remedy that can be used to remedy either negative or positive violations of SERs; Roach & Budlender (n 179 above) 325, where they affirm the authority of both the SACC and the Canadian Supreme Court to issue mandatory injunctions and to retain supervisory jurisdiction in the adjudication of constitutional cases.

¹⁹⁴ Liebenberg - Adjudication under transformative constitution (n 123 above) 410-424. For a discussion on ‘meaningful engagement’ see chapter three, section 3.5 above.

¹⁹⁵ Liebenberg - Adjudication under transformative constitution (n 123 above) 414.

structural interdict.¹⁹⁶ It involves the court either issuing a reporting order requiring the parties to account to it periodically on the implementation of the judgment, or an order requiring the parties to engage with each other and come up with an implementation plan to be adopted by the court for the vindication of the right at issue.¹⁹⁷ The remedy envisages the court establishing a judgment monitoring commission, as is the practice in the Indian Supreme Court¹⁹⁸ and the CCC,¹⁹⁹ where the substance of the remedy is elaborated in deliberative processes involving the political institutions and a broader spectrum of societal stakeholders, including those who were not directly involved in the litigation.²⁰⁰ The use of the structural interdict thus spurs on dialogue between the courts, the political institutions and other societal actors.²⁰¹

¹⁹⁶ For an extensive discussion of the structural interdict in the enforcement of SERs, see Mbazira (n 145 above) chapter six, especially 176ff. He avers that the main purpose of the structural interdict is to respond to, and remedy, systemic violations within institutional or organisational settings, with the aim of achieving long-term structural reforms.

¹⁹⁷ Liebenberg - Adjudication under transformative constitution (n 123 above) 424; Mbazira (n 145 above) 178; Roach – Crafting remedies for SERs (n 184 above) 113 & 117ff.

¹⁹⁸ The Indian Supreme Court has established an enviable dialogical decision-making technique on environmental litigation. When dealing with such matters, the Court usually relies on the opinions and recommendations of expert bodies, such as the National Environmental Engineering Research institute. The reports of the expert bodies are then subjected to objections by government or other societal actors before it is adopted as the judgment of the Court. In this way, the criticism of a lack of expertise or bias on the part of the Court cannot be upheld. See Muralidhar (n 148 above) 110; Shankar & Mehta (n 132 above) 174-176.

¹⁹⁹ A case in point is the Commission Monitoring Public Policy on Forced Displacement, a coalition of NGOs that was assigned to monitor the implementation of *Decision T-025*, the IDP case, see Rodriguez-Garavito (n 148 above) 1685.

²⁰⁰ See Mbazira (n 145 above) 187-88 & 215-17, who gives an example of the United States case of *Pennsylvania Association for Retarded Children v Pennsylvania*, 334 F Supp 1257, where the Court, in addition to conducting public hearings, also established an advisory panel composed of all the interested groups to design the Court's remedy.

²⁰¹ Rodriguez-Garavito (n 148 above) 1676. See also Tushnet – Social welfare rights (n 136 above) 1911, who contends that in follow-up decisions, in light of the experience of the implementation of the original order, the court can either set up more specific timelines or identify more specific benchmarks for official use, or loosen up the requirements to accord with the realities as they have developed; Dixon (n 5 above) 412, who contends that the supervisory role, coupled with its time-sensitive dimension, ensures that the

The adoption of moderate structural remedies opens up opportunities for societal deliberation on policy alternatives capable of effectively and sustainably fulfilling the rights in question.²⁰² The substantive content of the policy, including fiscal and budgetary imperatives, are thus not contained in the judgment, but are discussed and designed in an inclusive and participatory deliberative remedial commission and also during the monitoring process. To undertake this role, Ellen Wiles advocates the formation of a commission of experts on SERs, whose responsibility is to spearhead a cross-sectoral and multi-disciplinary engagement with SER decisions of the Courts, undertake a hands-on supervision of the implementation of resultant plans and policies by the political institutions, and also undertake periodic reporting of progress to the court.²⁰³ A similar structure, A Social Rights Council, was envisaged in the Canadian Alternative Social Charter, with the aim of enhancing the extent and quality of social and political dialogue on SERs.²⁰⁴ In the Kenyan context, however, it is proposed that the above

political institutions prioritise the implementation of the orders of the courts and also mobilises a broad coalition of political actors to pressurise the political institutions to act to remedy rights violations.

²⁰² See Liebenberg - Adjudication under transformative constitution (n 123 above) 434-38, who summarises some of the dialogical advantages of structural interdicts to include the following: the granting of a margin of appreciation to the political institutions of the State with the active participation of other societal actors to design and implement concrete plans to remedy constitutional violations; in defining only the broader goals to be achieved and leaving the detail to be decided on by the political institutions, the order is respectful of the doctrine of separation of powers; the order enhances the constitutional values of accountability, responsiveness and openness in governance, thus improving the quality of government; it is responsive to the polycentricity concerns raised against the judicial enforcement of SERs as it allows collective deliberation and decision-making that involves all societal actors with different expertise and life-experiences; the order is more capable of enhancing the inclusion of previously marginalised groups; and it is the most appropriate order to respond to systemic and structurally entrenched violations of SERs.

²⁰³ E Wiles 'Aspirational principles or enforceable rights: The future for socio-economic rights in national law' (2006-2007) 22 *American University International Law Review* 35, at 54-56 & 63. She further argues that this commission may also undertake other important duties such as provision of relevant statistical and substantive information to the court to help it in the design of remedies, as well as undertake impact assessment analysis to enable the court to anticipate the potential policy and budgetary consequences of its decisions, thus responding to the polycentric challenges of SER adjudication.

²⁰⁴ J Nedelsky & C Scott 'Constitutional dialogue' in J Bakan & D Schneiderman (eds.) *Social justice and the Constitution: Perspectives on a social union for Canada* (1992) 59, at 65-66, who argue that the

responsibility can be undertaken by the KNHREC as discussed in section 4.2.2 above, and as is the practice in the South African Context with regard to the role of the South African Human Rights Commission.²⁰⁵

4.5 Analysis of the transformative potential of the theory of dialogical constitutionalism in the second and third levels of dialogue

The facilitative role of the courts, as is discussed in the second and third levels of dialogue, is envisioned by Keith Whittington who argues that the judiciary's most useful role in SER adjudication is in framing constitutional disputes for extra-judicial resolution and in enforcing the principled decisions reached elsewhere, rather than in autonomously and authoritatively defining constitutional meaning.²⁰⁶ He bases his argument on the fact that in the context of reasonable societal disagreement about the nature and content of constitutionally entrenched rights, it is more appropriate to allow wide and democratic societal participation in the fashioning of constitutional meaning, than to entrust such important societal decisions to an elite judicial body that will then impose its own ruling on the people at large.²⁰⁷

According to Rodriguez-Garavito, adjudicative dialogue is strengthened by the reservation of the power of the court to make 'new decisions in light of progress and setbacks in the process [of the implementation of the original judgment], and [to] encourage discussion among actors in the case through deliberative public hearings'.²⁰⁸ Therefore, for the courts to enhance deliberation in decision-making on the implementation of SERs, as envisaged in the

Council would undertake its mandate in the context of on-going debate between all sectors of society, especially marginalised and vulnerable groups, as well as the executive and legislative institutions.

²⁰⁵ Wiles (n 203 above) 62-63. See also Liebenberg - Adjudication under transformative constitution (n 123 above) 402-03, who elaborates on the extensive efforts undertaken by the SAHRC to monitor the implementation of the *Grootboom* judgment, and the difficulty they faced due to the failure of the SACC to retain a supervisory jurisdiction over the case.

²⁰⁶ KE Whittington 'Extrajudicial constitutional interpretation: Three objections and responses (2002) 80 *North Carolina Law Review* 773, at 846.

²⁰⁷ As above. See also Young – Typology of SER adjudication (n 96 above) 412, who states that in undertaking a facilitative or catalytic role, the court enhances the opportunities for social transformation by enabling the political institutions, interests groups, social movements and society at large to deliberate and engage in problem-solving aimed at the achievement of a societal common good.

²⁰⁸ Rodriguez-Garavito (n 148 above) 1691.

last two levels of dialogue, it must adopt a strong rights approach affirming, not only the justiciability of the SER in question, but also its content, scope and extent. After delineating a strong content to the right, and holding that the right has been violated, the courts should then adopt a moderate remedy which lays out a clear roadmap, in terms of objectives to be achieved and the benchmarks and indicators to monitor progress, while leaving the specific policy decisions to be adopted to a deliberative process involving active public participation. Lastly, the courts must develop a strong court-facilitated monitoring process involving the use of participatory mechanisms such as implementation and supervisory commissions, public hearings,²⁰⁹ progress reports and follow-up decisions.²¹⁰

The importance of the adoption of a supervisory role by the courts is illustrated by David Bilchitz in his discussion of the *Grootboom* case.²¹¹ He states that the failure of the Court to undertake supervision led to more than a three year delay in the implementation of the *Grootboom* order by the concerned State organs, necessitating subsequent litigation in the High

²⁰⁹ See Landau & Lopez-Murcia (n 5 above) 76- 79, who analyses the extensive monitoring process undertaken by the CCC in the Mortgage case, where the Court held public hearings with senior public officials, including the Ombudsman, the Minister of Housing, the Head of the Central Bank and others taking part in a public discourse on how best to reform the housing finance system in Colombia. The Court also requested and received written submissions and other written representations from the entire societal spectrum including economists, academics, public officials and civil society groups, ensuring that it had sufficient information on how to deal with the mortgage crisis. The authors submit that the courts' efforts were instrumental in restructuring the Colombian housing finance system to the benefit of citizens.

²¹⁰ Rodriguez-Garavito (n 148 above) 1692. See also Landau & Lopez-Murcia (n 5 above) 79ff, who, in analysing the jurisprudence of the CCC, contend that its practice of retaining supervisory jurisdiction is in line with the Court's vision of the Constitution as a transformative document, and the Court's role as a facilitator of constitutional dialogue which engenders societal cooperation in social transformation; Muralidhar (n 148 above) 109, who illustrates the importance of supervisory jurisdiction in the Indian context by discussing the case of *CEHAT v Union of India* (2001) where the Court, in an attempt to prevent female foeticide, sought a strict implementation of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, and adopted a "continuing mandamus" technique which enabled the Court to exercise a continuing jurisdiction over the matter, making periodic orders from time to time to enhance the implementation of its judgment.

²¹¹ Bilchitz – Poverty and fundamental rights (n 164 above) 151-52.

Court, vide *City of Cape Town v Rudolph*.²¹² In this case (*first Rudolph decision*), the High Court adopted a structural interdict, ordering the City to provide the Court with a report of the steps it had taken to comply with the order within four months of the issuance of the order.²¹³ Bilchitz states that in the subsequent order following the first Rudolph judgment (*second Rudolph decision*),²¹⁴ the City acknowledged its responsibility to provide housing for those in most desperate need and had undertaken actual steps to implement its obligations, though it had not fully implemented the first order.²¹⁵ Bilchitz decries the failure of the Court in the *second Rudolph decision* to continue with the structural interdict as issued in the *first Rudolph decision*, stating that this was likely to adversely impact on the overall implementation of the two Rudolph decisions.²¹⁶

Rodriguez-Garavito provides a further illustration of the transformative potential of dialogical adjudication in the realisation of SERs in the Colombian context. He analyses the monitoring process established by the CCC in its *Decision T-025 of 2004* better known as the *Colombian internally displaced persons (IDP) Case*²¹⁷ which traversed a period of seven years, entailed 21 follow-up public hearings involving a wide array of participants, governmental and non-governmental, and engendered over 100 follow-up decisions by the Court leading to a fine-

²¹² *City of Cape Town v Neville Rudolph and Others* 2003 (11) BCLR 1236 (C). See Bilchitz – Poverty and fundamental rights (n 164 above) 151.

²¹³ Bilchitz – Poverty and fundamental rights (n 164 above) 152.

²¹⁴ *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (C).

²¹⁵ Bilchitz – Poverty and fundamental rights (n 164 above) 152.

²¹⁶ As above. Bilchitz similarly critiques the SACC's lack of adoption of supervisory jurisdiction in the *TAC* case and instead expressing confidence in the good faith of the State to execute the Court's orders. He contends that the basis of this failure is the inability of the reasonableness approach to place the critical societal interest protected by the entrenched SERs into sharp focus, a failure which led to the delay in the implementation of the Court's orders in certain provinces (Limpopo and Mpumalanga) with continued devastating effects to the health and well-being of mothers and babies, at 163. For a more elaborate and extensive critique of the application of the structural interdict in the South African context, see Mbazira (n 145 above) 198-212; Liebenberg - Adjudication under transformative constitution (n 123 above) 424-434.

²¹⁷ Corte Constitucional[C.C.][Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op.at 1), available at <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>. Case in Latin, but has extensively been discussed by Rodriguez Garavito (n 146 above). See also Landau & Lopez-Murcia (n 5 above) 80ff.

tuning of the original court orders in the light of implementation progress and change in contextual situations.²¹⁸

The case, resulting from the consolidation by the CCC of 1,150 constitutional complaints (*tutelas*)²¹⁹ by IDPs, led to a declaration that the humanitarian situation that had been caused by the persistent displacement of Colombians as a result of the internal armed conflict was “an unconstitutional state of affairs”.²²⁰ To respond to the deplorable conditions that the IDPs were living in, the Court ordered a series of long-term structural remedies. Firstly, the government was ordered to formulate a coherent plan to tackle the IDP humanitarian situation. Secondly, the Court made an order that the administration calculate the requisite budget to tackle the IDP situation, and to undertake all possible measures to access the requisite resources and apply them to the problem. Lastly, the Court ordered that the government guarantee at least the survival level content of the most basic rights of food, education, healthcare, land and housing for the IDPs.²²¹

As a result of the court-facilitated monitoring, the decision was able to achieve several results. It increased the focus, collaboration and coordination between the different government agencies and departments whose mandate and functions directly or indirectly affected the conditions of the IDPs. The coordination led to the elaboration, development, financing and implementation of a rights-based national policy on IDPs – The National Plan for Comprehensive Care for People Displaced by Violence. The implementation of the national plan was further enhanced by a massive increase in the national budget allocation to programmes

²¹⁸ Rodriguez-Garavito (n 148 above) 1694. See also Easterday (n 175 above) 30-33, who lists some of the areas that the Court has emphasised on the protection of IDPs.

²¹⁹ A *tutela* is an innovative writ of protection of fundamental rights enshrined in article 86 of the Colombian Constitution and which can be filed by any person whose fundamental rights are threatened or violated, and requires immediate protection. It engenders a summary proceeding with the judge obliged to provide a resolution within ten days of a writ being filed. See M Sepulveda ‘The Constitutional Court’s role in addressing social injustice’ in M Langford (ed.) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 144, at 146.

²²⁰ Rodriguez-Garavito (n 148 above) 1669-1670. An unconstitutional state of affairs is a situation of massive and widespread violation of several constitutional rights associated with systemic failure in State action, see Sepulveda – The Constitutional Court’s Role (n 219 above) 148.

²²¹ Rodriguez-Garavito (n 148 above) 1682.

dealing with IDPs, which, in 2010, was over ten times the budget that was available in 2003 before the judgment. The adoption of the decision further led to the formation of a coalition of NGOs to monitor the judgment and engage with the government and to report to the Court on its implementation – The Monitoring Commission on Public Policy on Forced Displacement.²²²

Rodriguez-Garavito compares and contrasts the effects of the above judgment with two other structural judgments of the CCC, *Decision T-153 of 1998*, which dealt with prison conditions,²²³ and *Decision T-760* which dealt with the right to health.²²⁴ In *Decision T-153*, the Court did not put in place a court-facilitated monitoring process, while *Decision T-760* was accompanied by an elaborate court-facilitated monitoring process like in the IDP case. He concludes that the social transformative impact of *Decision T-153* was lower than that of the IDP case and *Decision T-760*, due its lack of a court-facilitated monitoring process.²²⁵ This is an indication that a court-facilitated monitoring process plays an important role in the overall implementation of structural injunctive remedies, thereby leading to a higher social transformative impact with regard to access to SERs, reduction of poverty and inequality as well as the overall enhancement of social justice.

In a normal, properly working democracy, the three levels of dialogue will always follow each other, either as a result of failure of dialogue at the first level,²²⁶ or consequential to the

²²² Rodriguez-Garavito (n 148 above) 1683-1688. See also Landau & Lopez-Murcia (n 5 above) 81; Easterday (n 175 above) 1 & 26, where she avers that the real breakthrough in the IDP case was that it granted IDPs greater access to the courts and thus augmenting their political voice and giving them the ability to engage in dialogue with the government to enforce their rights. She further contends that IDP empowerment and participation in the political process enhanced the government's responsiveness to the protection of their rights, at 42-43.

²²³ In this judgment, the Court declared that an unconstitutional state of affairs existed with regard to prison conditions in Colombia and adopted structural remedies, see Rodriguez-Garavito (n 148 above) 1675.

²²⁴ In this judgment, the Court issued a set of structural injunctive remedies to address long-standing legislative and administrative bottlenecks that crippled the healthcare system, see Rodriguez-Garavito (n 148 above) 1675.

²²⁵ Rodriguez-Garavito (n 148 above) 1675.

²²⁶ Wiles (n 203 above) 40, who argues that SER litigation is minimised if the political institutions of the State put in place optimal implementation frameworks and ensure their faithful observance. She further contends that the role of courts in policy formulation is important as a rights-based approach to policy

dialogue in relation to the second and third levels. Litigation, at the second level, is thus a latent resource for the shattering of bureaucratic blockages in the political institutions of the State.²²⁷ Rodriguez-Garavito summarises the important social transformative effects of litigation as follows:²²⁸

Direct material effects (formulation of a policy ordered by the court); indirect material effects (intervention of new actors in the debate); direct symbolic effects (reframing of media coverage using rights language); and indirect symbolic effects (the transformation of public opinion on the matter).

Litigation, though not a panacea for the enforcement of SERs,²²⁹ has thus played a prominent role in social transformation in India and Colombia. The Colombian reproductive health case, *Decision C-355/2006*,²³⁰ is a good case in point. The case is situated within the context of a

formulation has an ameliorative effect on political decision-making as it ensures increased precision in diagnosing problems and prescribing future developments, thus leading to greater streamlining and rationality, at 44.

²²⁷ Bergallo (n 151 above) 1616; S Gloppen 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) 10 *Health and Human Rights* 21, at 24-25, who contends that to be successful, SER litigation must not only improve the situation of the litigants (material success), but must also improve the situation of similarly situated non-litigants (social success).

²²⁸ Rodriguez-Garavito (n 148 above) 1681. See also Muralidhar (n 148 above) 117-188 who summarises the benefits of PIL in India to include: availing a forum for public discourse on suppressed societal issues; catalysing change in government legislation and policy; devising of benchmarks and indicators for monitoring of SER implementation; as well as development of human rights jurisprudence which is in line with the developments in international law.

²²⁹ See Chong (n 149 above) 190, who affirms this by contending that litigation as a strategy falls significantly short of the actual implementation of SERs, and that the courts were a particularly weak mechanism for SER enforcement; Gloppen - Litigation as a strategy (n 227 above) 23ff, who contends that litigation is not designed to hold governments accountable for SER implementation, and that even though it can enhance government response to "policy and implementation gaps," it may undermine equity, long-term planning and rational priority-setting, thus weakening the overall justice of the SER implementation system.

²³⁰ Sentencia C-355 de 2006 Corte Constitucional [C-355/2006 case], available online at < www.constitucional.gov.co/corte/>. Case in Latin, but discussed extensively in Ordolis (n 132 above).

predominantly Catholic country with strong attitudes towards and a stigma against abortion,²³¹ a total and blanket prohibition on abortion, an estimated 350 000 illegal abortions annually, and reports that 15 per cent of maternity deaths were abortion-related, making abortion the second highest cause of maternal deaths.²³² The CCC, after litigation that involved numerous submissions from many of the societal actors including the Attorney-General, declared this situation an unconstitutional state of affairs as the complete prohibition of abortion was unduly restrictive.²³³ The Court thus legalised abortion in three circumstances, that is, when the life of the mother is at risk, when the foetus is malformed such that it cannot viably live independently, and when the pregnancy is as a result of a criminal act such as rape or incest.²³⁴

The above decision further led to the adoption of a set of policy regulations, *Decreto Numero 4444 de 2006*, aimed at establishing the parameters for the provision of abortion services within the confines of the decision.²³⁵ The regulations 'outlined a wide scope of applicable rights and responsibilities, set out specific measures to ensure women's access to abortion services, and established an enforcement system to sanction violations of the regulation'.²³⁶ Thus through litigation, the reproductive rights of women, and by extension their right to life and equality, improved significantly as the Court has continued to issue judgments in instances of failure of service providers to observe the government's policy framework as outlined in the regulations.²³⁷

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²³¹ This is exemplified by the public excommunication from the Catholic church of the judges involved in the case, and a further threat of excommunication to all those who undertake, foster or assist abortion, see Ordolis (n 132 above) 287.

²³² Ordolis (n 132 above) 265-266.

²³³ Ordolis (n 132 above) 266.

²³⁴ Ordolis (n 132 above) 263.

²³⁵ Ordolis (n 132 above) 275.

²³⁶ Ordolis (n 132 above) 275 - 278. The regulations made abortion services available to all women in Colombia, regardless of their ability to pay and did this by either subsidising or wholly subsuming the costs of the services.

²³⁷ A case in point is Decision T-209/2008 where a service provider refused to provide abortion services to a 13 year old girl who had become pregnant due to rape. The CCC upheld the right of the girl to access abortion services, fined the hospital and ordered compensation for the girl, see Ordolis (n 132 above) 277.

There are many advantages to the Kenyan Courts adopting this dialogical approach to litigation and the fashioning of remedies. First, the approach enhances the transparency and inclusiveness of decision-making processes in the legislative and policy spheres, leading to good governance and encouraging social transformation. Secondly, it empowers societal and governmental actors to act together in a collaborative and coordinated way in their efforts to realise entrenched rights, especially SERs. Thirdly, it transforms socio-economic deprivation into a rights-based dialogue, and thus gives a voice to marginalised groups to advocate for their SERs as entitlements. Lastly, it leads to the coalescing of interested social movements and non-governmental organisations into networks aimed at influencing the government's SER policy with the objective of enhancing social justice.²³⁸

4.6 The theory of dialogical constitutionalism and challenges to the judicial adjudication of socio-economic rights

Concerns abound as to the institutional and constitutional competencies of courts to adjudicate SER cases, the two most prominent ones being separation of powers concerns and polycentricity challenges.²³⁹ The theory of dialogical constitutionalism has been developed with the main objective of responding to these concerns.²⁴⁰ This section entails a brief discussion of the viability of the theory in responding to the above concerns.

4.6.1 Dialogical constitutionalism and polycentricity concerns

Lon Fuller defines a polycentric matter as one in which a decision would have wide unforeseen consequences for a multitude of other people who are not before the court.²⁴¹ Fuller contends that judges may not have the competence to adjudicate on matters that have the effect of “creating new aims for society” or imposing on society “new basic directives” due to the limited

²³⁸ Brinks & Forbath (n 147 above) 1953; Gloppen - Public interest litigation (n 127 above) 356-359.

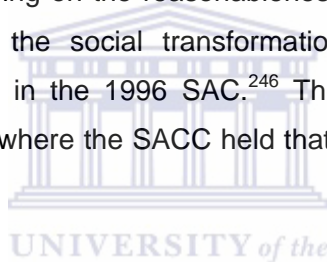
²³⁹ See chapter three, section 3.1 above. See also Gauri (n 120 above) 74 where he chronicles some of these criticisms that have been adduced against judicial activism and the adjudication of SERs and environmental rights by the Supreme Court of India.

²⁴⁰ See also Landau & Lopez-Murcia (n 5 above) 64, who similarly contends that the dialogue model is the most effective in making the enforcement of SERs possible while at the same time addressing concerns of judicial capacity and legitimacy in the adjudication of SERs cases.

²⁴¹ L Fuller & KI Winston ‘The forms and limits of adjudication’ (1978) 92 (2) *Harvard Law Review* 353, at 353.

societal participation that is intrinsic to the traditional court adjudication process.²⁴² Fuller acknowledges that polycentricity concerns straddle all adjudicated controversies, but argues that the main issue is the degree of consequential effects a judicial decision will have.²⁴³ He contends that if polycentric elements have become so significant and predominant, decision-making on such matters is beyond the proper limits of adjudication.²⁴⁴ In his analysis of Fuller's polycentricity argument, Allison contends that the polycentricity argument engenders judicial restraint at two levels: firstly, if a court has a choice in law, it must avoid choosing solutions that may entail complex unintended consequences; and, secondly, the court must not change the law if that would lead to complexity in legal development.²⁴⁵

Polycentricity concerns have had an actual, and in my opinion detrimental, impact in the implementation of constitutional SERs, especially in South Africa. Due to these concerns, the SACC has steadfastly refused to adopt the minimum core approach in the implementation and enforcement of SERs, instead relying on the reasonableness approach that has not been very effective in the achievement of the social transformation that was the objective of the entrenchment of justiciable SERs in the 1996 SAC.²⁴⁶ These concerns are apparent in the *Treatment Action Campaign* case where the SACC held that courts were ill-suited to adjudicate



²⁴² Fuller & Winston (n 241 above) 392; JF Allison 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53(2) *Cambridge Law Journal* 367, at 370.

²⁴³ Fuller & Winston (n 241 above) 398.

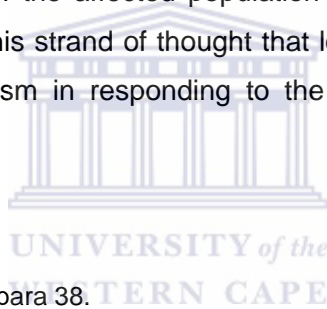
²⁴⁴ As above; R Bone 'Fuller's theory of adjudication and the false dichotomy between dispute resolution and public law models of litigation' (1995) 75 *Boston University Law Review* 1273, at 1311 footnote 142, where he chronicles four situations which Fuller noted were inappropriate for adjudication: 'defining conduct punishable as a crime; where opinion in the society is deeply divided on issues affecting law, government and economic organisation; where society is undergoing rapid and disruptive change; and, where the decision is "managerial" in nature'.

²⁴⁵ Allison (n 242 above) 370-371.

²⁴⁶ Mbazira (n 145 above) 43-44 & chapter three, section 3.2; Liebenberg – Revisiting the reasonableness review (n 157 above) 304-305. Adverse impacts of the reasonableness approach can be seen in the case of *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) 2010 (3) BCLR 239 (CC), where the SACC failed to adopt the minimum water entitlements of the Applicants as was ordered by both the High Court (50 litres per person from 25 litres) and the Supreme Court of Appeal (42 litres per person), to the detriment of the Applicants.

upon issues where court orders could have multiple social and economic consequences for the community.²⁴⁷

Fuller contends that a “mixed form of adjudication” can resolve the polycentric difficulty.²⁴⁸ He argues that a process of collaborative decision-making over-time, subject to reformulation and clarification as problems not previously foreseen arise, is capable of responding to polycentricity concerns.²⁴⁹ He mentions two ways in which polycentric matters can be resolved, that is, through managerial direction and through reciprocity, two important components of the model of dialogical constitutionalism developed in this chapter.²⁵⁰ Fuller further notes that the majority principle on its own is incapable of solving polycentric problems, and that there is a need for societal deliberation involving the affected people, before a voting decision can be taken on the deliberative options identified.²⁵¹ He submits that such deliberations can be undertaken by the political institutions through the conduct of public hearings where reasoned views of the affected population are heard and incorporated in the decision-making process.²⁵² It is this strand of thought that logically points to the viability of the theory of dialogical constitutionalism in responding to the polycentricity concerns of judicial adjudication of SERs.



²⁴⁷ *Treatment Action Campaign* case, para 38.

²⁴⁸ Fuller & Winston (n 241 above) 396.

²⁴⁹ Fuller & Winston (n 241 above) 398. See also Allison (n 242 above) 380-382, who expands on Fuller's argument by contending that adjudication can espouse collaborative expert investigation, requiring the adjudicator not only to consider the litigating parties, but also to consider the possible societal implications of court judgments, and thus provide an opportunity for other affected members of society to participate in the adjudication process (*amici curiae*). He argues that the advantage of the above model of adjudication is: to make polycentricity concerns the object of judicial investigation and thus enabling the adjudicator to better design solutions that do not have adverse societal repercussions; and to better enable a judge to properly demarcate and give effect to rights in a polycentric setting.

²⁵⁰ Fuller & Winston (n 241 above) 398-399.

²⁵¹ Fuller & Winston (n 241 above) 399-400. See also Bone (n 244 above) 1283, 1286 & 1288-1290, who chronicles Fuller's belief that securing a working social order was a continuous process that required the active participation of all citizens. He states that interactive participation was critical in Fuller's theory due to its close connection to human capacity for reason.

²⁵² Fuller & Winston (n 241 above) 400.

The polycentricity problem, as a limit to adjudication in social redistribution, is not viewed by Fuller as an insurmountable obstacle to the judicial adjudication of SERs. He recognises the need to address social inequalities and advance social justice, but contends that adjudication should not be undertaken in an environment where such inequality and injustices exist 'unless the abstract principles of justice supporting social change could be teased out of existing practices and were thus already shared, at least implicitly'.²⁵³ It can be argued that the above requirement for the existence of abstract principles of justice has been achieved in the continued acknowledgement of SERs as an intrinsic part of human rights, the recognition of their justiciability, and the acknowledgment of the role of the courts in their enforcement, as is evidenced by their continued entrenchment in binding international and regional human rights instruments, and as justiciable constitutional rights in many of the new world constitutions. In the Kenyan context, the "abstract principles of justice supporting social change" that Fuller required for judicial adjudication of SERs can be seen in the entrenched justiciable SER provisions in the 2010 Constitution together with the other supporting principles that guarantee their enforcement. The Courts have also been given a direct mandate to engage in the adjudication and enforcement of the entire corpus of human rights, SERs being an intrinsic component thereof. It can thus be confidently said that the requisite necessities for judicial engagement with SERs in Kenya are already in place, and that the courts can undertake adjudication of SERs aimed at enhancing social justice.

The presence of entrenched SER provisions and the constitutional mandate of the courts to undertake adjudication of SERs are, however, not enough. The courts must still take into account the diverse effects that SER judgments have on other related governmental policies and programmes. The theory of dialogical constitutionalism provides this missing link, as it ensures that the courts are able to facilitate the participation of a wide section of society through public interest litigation, through their ability to allow other concerned parties to take part in the litigation as *amici curiae*, and also through their ability to engage experts in the area of concern and thus receive relevant information²⁵⁴ on the probable societal impact of their

²⁵³ L Fuller *The law in quest of itself* (1940) 115-117.

²⁵⁴ One of the recurrent themes against judicial enforcement of SERs has been the concern that judges do not have access to large amounts of information or statistical data from where they can competently engage with and address the possible adverse societal repercussions that may be consequential of their adjudication on SERs, see Mbazira (n 145 above) 43.

judgments.²⁵⁵ Further, the proposal that judgments only lay the basic framework and indicators for implementation, and leave the design of the specific implementation structures to societal actors in deliberative settings, also ensures that all the relevant societal concerns are brought to bear in the implementation of court judgments on the entrenched SERs.

The supervisory role, as envisaged by the theory of dialogical constitutionalism, further enables the court to deal with unforeseen polycentricity problems as the court retains the particular SER case in its docket and is able to revise its orders and give more directions in the implementation of its judgment as the circumstances change or as new situations come to light. This can be seen in the Colombian IDP judgment, as discussed above, which traversed a period of seven years, entailed 21 follow-up public hearings involving a wide array of participants, governmental and non-governmental, and engendered over 100 follow-up decisions by the Court leading to the fine-tuning of the original court orders in light of implementation progress and change in contextual situations.²⁵⁶

4.6.2 Dialogical constitutionalism and democracy concerns

Democratic concerns of judicial review have permeated philosophical and legal argument for a considerable length of time. These concerns, espoused in the language of the “counter-majoritarian dilemma,” presuppose that when judges apply constitutional provisions to review legislative decisions made by the representatives of the people, self-governance is compromised.²⁵⁷ James Thayer expresses these concerns by arguing that judicial review compels the legislature to defer to the judiciary in the interpretation of rights instead of engaging in an independent and analytical exposition of constitutional values.²⁵⁸ Thayer’s concerns are echoed by Alexander Bickel who contends that judicial review has the tendency to weaken democratic governance in the long run.²⁵⁹ Bickel states as follows:²⁶⁰

²⁵⁵ Mbazira (n 145 above) 48-50.

²⁵⁶ Rodriguez-Garavito (n 148 above) 1694.

²⁵⁷ R Dworkin ‘The moral reading and the majoritarian premise’ in H Hongju-Koh & RC Slye (eds.) *Deliberative democracy and human rights* (1999) 81, at 107.

²⁵⁸ JB Thayer ‘The origin and scope of the American doctrine of constitutional law’ (1893) 7 *Harvard Law Review* 155-56.

²⁵⁹ AM Bickel *The least dangerous branch: The Supreme Court at the bar of politics*, 2nd edition (1986) 21.

²⁶⁰ Bickel (n 259 above) 16-18.

When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of here and now; it exercises control, not on behalf of the prevailing majority, but against it... The essential reality is that judicial review is a deviant institution in the American democracy.

Mark Tushnet has portrayed judicial decision-making on SER issues as “policy distortion” and “democratic debilitation”.²⁶¹ Christopher Zurn further chronicles criticisms of judicial review as being paternalistic, and thus undemocratic, because it denies citizens a role in the mutual determination of collective decisions as part of a common venture of self-rule.²⁶² Jeremy Waldron on his part insists that judicial review has a corrosive and denigrating effect on public debate as it removes important societal disagreements from the public forum.²⁶³ To respond to the above concerns, Waldron advocates the importance of “practical political deliberation” aimed at making binding collective societal decisions.²⁶⁴

Proponents of judicial review have on the other hand pointed out the important role it plays in constraining public decision-making so as to enhance the protection of fundamental rights, and to protect minorities from the vagaries of majoritarian decision-making. Some of the major arguments that have been fashioned in support of judicial review, and which denigrate majoritarian decision-making, include: the doctrine of pre-commitment,²⁶⁵ the principle of *nemo*

²⁶¹ M Tushnet ‘Policy distortion and democratic debilitation: Comparative illumination of the counter-majoritarian difficulty’ (1995) 94 *Michigan Law Review* 245, at 247, who argues that judicial review distorts policy decision-making by injecting numerous constitutional norms into the law-making process, supplanting legislative consideration of other important policy concerns; and that it debilitates legislative decision-making as legislators fail to consider the constitutional implications of legislation with the hope that the courts will strike them down if they do not meet constitutional muster.

²⁶² Zurn (n 8 above) 4-5.

²⁶³ Waldron – Law and disagreement (n 8 above) 289. See also Zurn (n 8 above) 32, who argues that judicial review weakens democracy and the collective capacity for self-government over time as citizens and their representatives abdicate their responsibility to engage in deliberations of important societal concerns, leaving those principled value-laden decisions to be made by the courts.

²⁶⁴ Waldron – Law and disagreement (n 8 above) 291.

²⁶⁵ The doctrine is based on the idea that the entrenchment of judicial decision-making into a constitution is a decision made democratically by the people themselves, and so the use of that power by the courts does not detract from democracy. For an extensive discussion and rebuttal of this doctrine, see Waldron – Law and disagreement (n 8 above) Chapter twelve.

iudex in causa sua,²⁶⁶ the tyrannical and self-interest nature of majoritarian decision-making,²⁶⁷ as well as the need for a single authoritative constitutional decision-maker so as to avert interpretive anarchy, and to enhance the principle of legality as well as the rule of law.²⁶⁸

Taken at its most simple level, the counter-majoritarian dilemma is basically the paradox of constitutional democracy which entails a reconciliation of the constitutional demand for the rule of law *vis-à-vis* the democratic demand that people govern themselves.²⁶⁹ Constitutional democracy is the very fulcrum in which the theory of dialogical constitutionalism rotates, and is the basis upon which its response to the counter-majoritarian dilemma is premised.

The theory of dialogical constitutionalism is based on the understanding of the core concept of democracy as “self-government”, that is, popular control over collective decision-

²⁶⁶ The principle is based on the idea that allowing the majority to determine constitutional meaning through deliberation in effect makes them judges in their own cause. This reflects the distrust of majoritarian decision-making in instances where rights and minority protection are concerned. Waldron, however, contends that this argument is flawed, as constitutional decisions still have to be made by members of the community (by judges in instances of judicial review), who also have the same or similar disagreements about rights as members of the community. For a discussion, see Waldron – Law and disagreement (n 8 above) 296-298.

²⁶⁷ To counter this argument, Waldron proposes an understanding of majoritarian decision-making using a model of “opinionated disagreement” a ‘noisy scenario in which men and women of high spirits argue vociferously and passionately about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what is in it for them, but by the desire to get it right’. See Waldron – Law and disagreement (n 8 above) 305.

²⁶⁸ L Alexander & F Schauer ‘On extrajudicial constitutional interpretation’ (1997) 110(7) *Harvard Law Review* 1359, at 1379.

²⁶⁹ M Tushnet, *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2008) xi, who describes this reconciliation of democratic self-governance and constitutionalism as a model of weak-form judicial review. In this weak-form review, the courts retain the constitutional responsibility to undertake an assessment of legislation *vis-à-vis* constitutionally protected rights while the legislature retains the authority to have the last word. See also F Michelman, *Brennan and democracy* (1999) 5-6, who discusses this paradox of constitutional democracy and avers that if legal legitimacy derives from citizens’ participation in law-making, then the insulation of fundamental rights from the dialogical processes is a misnomer.

making by citizens in terms of the equality of all citizens.²⁷⁰ The very entrenchment of SERs in the Constitution as justiciable rights and the authority given to the courts to monitor their enforcement was an act of popular self-government,²⁷¹ as the Constitution was promulgated after extensive deliberation transcending a considerable space of time, which culminated in a plebiscite vote.²⁷² Judicial enforcement of SERs is, therefore, an intrinsic component of democracy as it plays an important role in citizen empowerment to achieve these core aspects of democracy.²⁷³

²⁷⁰ Beetham (n 2 above) 90-91.

²⁷¹ This role of the court is based on express popular sovereignty and was the basis of the arguments of Chief Justice Marshall in the United States, where he argued that the democratic source and authority of the Constitution as a promulgation of the people only engenders the role of the court to protect and enforce the will of the people against the majoritarian political institutions, see S Gardbaum 'The new commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, at 754.

²⁷² Brinks & Gauri – A new policy landscape (n 150 above) 342; P Hogg, A Bushell-Thornton & WK Wright 'Charter dialogue revisited – or "much ado about metaphors"' (2007) 45(1) *Osgoode Hall Law Journal* 1, at 27-29; J Goldsworthy 'Judicial review, legislative override and democracy' (2003) 38 *Wake Forest Law Review* 451, at 459. Stephen Holmes, in his analysis of the 1993 Russian Constitution, however, argues that the legitimacy of a constitution derives from its consequences and not from its source. He contends that constitutional legitimacy depends on the ability of the constitution to enhance decent and effective government, and that proper ratification of a constitution is not through prior ceremonial referenda, but by the constitution being voluntarily used, over time, to organise successful public deliberation and decision-making. See S Holmes 'Constitutionalism, democracy and State decay' in H Hongju-Koh & RC Siye (eds.) *Deliberative democracy and human rights* (1999) 116, at 123.

²⁷³ See S Woolman & H Botha 'Limitations: Shared constitutional interpretation, an appropriate normative framework and hard choices' in S Woolman & M Bishop (Eds.) *Constitutional conversations* (2008) 149, who, in analysing the jurisprudence of the SACC in the cases of *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) and *K v Minister of Safety and Security* 2005 6 SA 419 (CC), state that 'every exercise of power derives its force from basic law, and needs to be justified by reference to the basic law; and that only open and public processes of rational deliberation produce acceptable forms of justification'. See also Beetham (n 2 above) 92, who avers that massive socio-economic inequality, which is the main reason for the entrenchment in the Constitution of justiciable SERs, is incompatible with the principle of equality of citizens as it severely compromises equal participation in collective decision-making, at 96-97.

The theory of dialogical constitutionalism does not envision the courts as ultimate interpreters of the Constitution aiming to foreclose debate once they have dealt with an issue, but envision the courts as forum of societal deliberation as to the meaning of SERs, providing a voice to the poor, marginalised and vulnerable sections of society who do not have a voice in the political processes.²⁷⁴ The theory envisions the courts achieving this goal by encouraging the filing of PIL or class action cases aimed at the structural bottlenecks that delay the realisation of SERs, and then adopting progressive structural remedies aimed at shattering these bottlenecks, and thus facilitating progressive policy changes in government so as to enhance the realisation of the entrenched SERs. It further envisages the courts adopting moderate structural injunction remedies aimed at laying out clear roadmaps, objectives, indicators and benchmarks that government policy must achieve, while leaving the specific policy decisions to be designed and adopted in deliberate decision-making processes that engender the participation of all societal stakeholders, including those most likely to be affected by the developed legislation and policy framework.

To ensure continued societal dialogue in the implementation of SERs, and to respond to changes in societal circumstances, the theory of dialogical constitutionalism envisages the courts undertaking a supervisory role and appointing monitoring commissions to help it monitor implementation and ensure compliance with its decisions.²⁷⁵ In this way, the courts' role does not debilitate political decision-making, but enhances democracy by ensuring that proper checks and balances are in place to promote good governance, as well as accountability and transparency in public decision-making.²⁷⁶ The theory of dialogical constitutionalism thus acknowledges that even though the political institutions have the majoritarian mandate of the people to govern, their use of public power is governed, guided and restrained by the

²⁷⁴ Brinks & Gauri – A new policy landscape (n 150 above) 343; Woolman & Botha - Limitations (n 273 above) 150, who argue that the role of the courts in the dialogical process is to develop, through reasoned engagement with the constitutional text, a normative framework of sufficient density to guide the political institutions and society at large, while the role of the political institutions and the public is then to engage with the normative framework to make it reflective of constitutional and societal values and principles.

²⁷⁵ Brinks & Gauri – A new policy landscape (n 150 above) 343-349.

²⁷⁶ See Rosenkrantz (n 110 above) 242, who, in discussing the justifications for a constitution, avers that the democratic systems need constitutional restrictions to function optimally as democracy cannot work in its purest form.

constitution. Dworkin supports this understanding by stating that even though collective decisions should be made by political institutions whose structure, composition, and practices treat all individuals equally, other institutions and procedures that better protect and respect the autonomy, inviolability and dignity should be resorted to if the political institutions fail to abide by the democratic requirement of the equal status of all citizens.²⁷⁷

The theory of dialogical constitutionalism thus envisages a shared project of constitutional design and development that entail the role of all government institutions and societal actors in the interpretation of the entrenched SERs. Increased coordination and collaboration in decision-making aimed at solving societal problems, coupled with the empowerment of individual citizens, as well as the political institutions, have the advantage of instilling civic virtue in citizens, leading to the entrenchment of good governance and democracy. This is acknowledged by Woolman and Botha who submit that the advantage of this approach is that it mediates the competing doctrinal claims of constitutional supremacy and of separation of powers.²⁷⁸



4.7 Conclusion

The concepts of rule of law and judicial protection of fundamental human rights have always existed in tension with concepts of popular sovereignty and democracy.²⁷⁹ Even though these concepts form important pillars of the doctrine of constitutional democracy,²⁸⁰ the tension has

²⁷⁷ R Dworkin, *Freedom's law: The moral reading of the American Constitution* (1997) 96.

²⁷⁸ Woolman & Botha - Limitations (n 273 above) 162. See Dworkin – Freedoms law (n 277 above) 93, who also contends that the best method of constitutional interpretation is that which strikes the right balance between protecting essential individual rights while at the same time engendering the requisite deference to popular will.

²⁷⁹ C Cronin 'On the possibility of democratic constitutional founding: Habermas and Michelman in dialogue' (2006) 19(3) *Ratio Juris* 343, at 343.

²⁸⁰ See for example F Michelman 'Politics as medicine: On misdiagnosing legal scholarship' (1981) 90 *Yale Law Journal* 1224, at 1225, who acknowledges the importance of the concept of the rule of law to the legitimacy of democratic political institutions; and F Michelman 'Bringing the law to life: A plea for disenchantment' (1988-1989) 74 *Cornell Law Review* 256, at 259-260, who acknowledges that constitutionalism, as a normative political theory, is characterised by a dual commitment to a government of laws (rule of law) and to popular self-government (democracy).

not really been resolved.²⁸¹ This tension is at its highest level in the implementation and enforcement of constitutionally entrenched SERs, especially due to their perceived policy and programmatic nature, as well as attendant concerns of judicial competence and democratic legitimacy on their adjudication. These concerns have led to the development, in this chapter, of a theory of dialogical constitutionalism, which encompasses the role of all the institutions of the State, civil society and citizens in a joint, cooperative and collaborative enterprise of developing the constitutional meaning of the entrenched SERs.

The theory of dialogical constitutionalism, as developed in this chapter, is based on the value-laden nature of constitutional interpretation and the inherence of legitimate disagreement in the meaning, scope and content of SERs, which necessitates that all societal actors be actively involved in the development of their meaning. The theory envisages this involvement at three levels of dialogue, firstly, in the development of an SER implementation framework where the political institutions, with the participation of civil society and other constitutional actors infuse their understanding of the SER provisions into the implementation framework. This level of dialogue acknowledges that the primary responsibility for the implementation of the entrenched SERs is the mandate of the political institutions, and that the bulk of constitutional interpretation occurs at this level as the political institutions develop the legislative, policy and programmatic framework for the implementation of SERs. The Constitution mandates the involvement of the public at this level, requiring that the political institutions create adequate opportunities for the public to participate in the legislative and executive decision-making processes. The chapter acknowledges the difficulty in the design and development of deliberative structures in modern societies due to the large number of people, the inherent nature of legitimate societal disagreements about rights, structural challenges, and the need for decisions to be made in a timely manner. Further, even though acknowledging that the primary responsibility for enhancing public participation in governmental decision-making is the responsibility of the political institutions, the chapter fashions a proposal that the Kenya National Human Rights and Equality Commission, due to its comparative advantages and constitutional

²⁸¹ See for example Michelman – Traces of self-government (n 155 above) 73, who argues that the mediation of these tensions is difficult to articulate in theory or to envision in practice, but that several investigations show that they are better mediated through dialogue and practical reason. See also Michelman – Law’s republic (n 28 above) 1500-1501.

entrenchment, exercise a complementary role in facilitating public participation in governmental decision-making.

The second level of dialogue envisaged by the theory of dialogical constitutionalism is in SER litigation where the courts act as both facilitators and societal fora in which deliberation aimed at ascertaining the meaning, content and scope of SERs takes place. It is based on the idea that in making their submissions to the courts in SER litigation, the litigants and third parties are actually propagating their competing, but legitimate, understandings of the meaning of the entrenched SERs. The role of the courts in this level is based on their constitutional mandate as the guardians of the Constitution and the protectors of fundamental rights. This role is further enhanced by the wide standing provisions of the Constitution which allow a multitude of different societal actors to take part in litigation either as parties (including the AG as the chief government defender), *amici* and other interveners, thus spurring on societal dialogue. The chapter proposes that the courts, in undertaking their role, adopt a “strong rights approach” which entails a principled, substantive and expansive interpretation of the entrenched SERs with the aim of enhancing social justice and thus achieving the transformative aspirations of the Constitution. The chapter further proposes that in undertaking their role, the courts should adopt a dialogical framework of litigation which is a mix between individualised litigation and structural litigation, with the objective of ensuring that the courts balance individualised concerns of litigants and all other similarly placed individuals, while at the same time responding to the structural concerns that militate against the realisation of SERs for the masses.

The third level of dialogue follows from SER litigation discussed in the second level, and it envisages the courts adopting moderate remedies and strong monitoring mechanisms to ensure that their SER judgments are implemented by the political institutions. It is based on the idea that judicial adjudication should not foreclose societal dialogue as to the meaning of SERs, but that it must respect and defer to the societal conception of rights unless there is failure of foresight, accommodation or responsiveness. It thus envisages the courts adopting dialogue-enhancing remedies such as the declaration of rights, suspended declarations of invalidity, mandatory injunctions as well as structural interdicts, where appropriate, taking into account the requirements that remedies be just, equitable and effective. The adoption of structural remedies, of necessity, envisages the courts retaining jurisdiction and establishing strong monitoring mechanisms to enhance the implementation of their decision. It also ensures that appropriate societal structures of deliberation aimed at the amelioration of SER violations are established.

Lastly the chapter undertakes an analysis of the viability of the theory of dialogical constitutionalism to respond to separation of powers and polycentricity concerns, two challenges that have traditionally been fashioned against the judicial enforcement of SERs. On polycentricity, the theory of dialogical constitutionalism envisages wide societal participation in the adjudication process during litigation and at the remedy formulation stage, as well as in the judgment monitoring stage. This ensures that the courts are able to take into consideration all the interests that may be affected by its judgment, engage experts to enlighten it as to the potential effects of any court order, access relevant information and statistical data, as well as modify its orders taking into account new facts or changes in circumstances during implementation. Taking the above into account, the courts will thus be able to effectively respond to any polycentric concerns that may arise due to court orders made in the enforcement of SERs. On the separation of powers challenges, the theory of dialogical constitutionalism contends that the very entrenchment of the adjudicatory role of the judges in the Constitution, a document passed with the active and extensive participation of the people, was a clear endorsement of the judicial role in SER adjudication. This, taken together with the fact that the Constitution is the supreme law of the land which apportions powers and roles to all the institutions of the State, clearly entrenches the judicial review role of the courts as the guardians of the Constitution and protectors of rights. It thus submits that judicial review function of the courts is democracy enhancing as it inculcates good governance as well as institutional transparency and accountability in the exercise of public powers assigned by the Constitution.

The theory of dialogical constitutionalism is thus aimed at enhancing inter-branch dialogue and cooperation in constitutional interpretation and enforcement; enhancement and broadening of democratic participation in the context of equality, fairness, impartiality and respect; increasing the quality of societal deliberations; and, ensuring that collective societal decision-making is principled and is based on publicly accessible reasoning and justifications, thereby enhancing democratic accountability.²⁸²

²⁸² Zurn (n 8 above) 2.

Chapter five: A case for the adoption of a transformative and integrated approach in socio-economic rights adjudication in Kenya

5.1 Introduction

The previous two chapters, chapter three and four, proposed and developed the theoretical framework, that is, the theory of dialogical constitutionalism, to provide a firm basis for the realisation of socio-economic rights (SERs) in the Kenyan context. This present chapter builds on the theoretical framework developed in these two previous chapters in proposing a transformative and integrated approach for the interpretation and enforcement of the entrenched SERs, a progressive interpretive approach aimed at enhancing the achievement of social justice and human development as well as to ensure the improved living standards for the Kenyan people.

The entrenched SERs in the Kenyan Constitution creates a plethora of opportunities for the realisation of the transformative aspirations of the 2010 Constitution as discussed in section 5.2.2 below. One such opportunity is the adoption of transformative adjudication through the espousal of a transformative and progressive approach of purposive interpretation that gives substantive content to the entrenched SERs. This ensures that the entrenched SERs are able to achieve their intended transformative goals of alleviation of poverty and inequality, the realisation of substantive equality as well as social justice.¹ The potential of such a substantive interpretive approach for the realisation of the transformative aspirations of transformative constitutions is acknowledged by Sandra Fredman who contends that the open textured nature

¹ The transformative potential in choosing a proper standard of interpretation and implementation is acknowledged by Joie Chowdhury who contends that the normative base provided by an approach serves as the foundation on which the implementation of that judgment will be understood and complied with by the political institutions of the State, and thus directly affects the degree to which courts can translate abstract rights into tangible realities, see J Chowdhury 'Judicial adherence to a minimum core approach to socio-economic rights – A comparative perspective' (2009) 1, available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=ips_clacp (accessed on 10 October 2012).

of the equality principle and SERs makes it possible to achieve a great deal through interpretation.²

The development of a progressive and purposive approach for the interpretation and enforcement of the entrenched SERs is the main theme and purpose of this chapter. After this brief introduction, the chapter delves into an analysis of the Kenyan Constitution as a transformative constitution in section 5.2. It starts with the definition of transformation and then elaborates on the understanding of the concept of a transformative constitution, especially how the concept has been developed in the discussions relating to the 1996 South African Constitution (SAC). It then undertakes an analysis of the 2010 Kenyan Constitution using the transformative parameters that had been identified in the context of the SAC, concluding that the Kenyan Constitution can also be viewed as a transformative constitution. The section ends with an analysis of the link between the theory of dialogical constitutionalism developed in chapters three and four of this thesis and the concept of transformative constitutionalism, and how this linkage influences the interpretive approach to be adopted in the adjudication of SERs in the Kenyan context. Section 5.3 undertakes an analysis of the two most-used approaches in the adjudication of SERs - the reasonableness approach and the minimum core approach - teasing out their functional positives and negatives in the adjudication of SERs. The analysis leads to the development of the proposed transformative and integrated approach for the adjudication of SERs in the Kenyan context, an approach that espouses the dialogical and democracy-enhancing aspects of the two prevailing approaches - minimum core and reasonableness. Section 5.4 entails an analysis of the link between the theory of dialogical constitutionalism and the proposed transformative and integrated approach. Section 5.5 concludes the chapter.

5.2 The 2010 Kenyan Constitution as a transformative Constitution

In order to understand the concept of transformative constitutionalism, we must first comprehend the transformation that is envisaged by transformative constitutions. Cathi Albertyn and Beth Goldblatt understand transformation to:³

² S Fredman 'Engendering socio-economic rights' (2009) 25 *South African Journal on Human Rights* 413, at 427.

³ C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248, at 249. They

[r]equire a complete reconstruction of the State and society, including redistribution of power and resources along egalitarian lines... [through] the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.

The above definition is supported by Sandra Liebenberg who contends that the transformative impetus is undergirded by a constitution's objective to provide a legal framework aimed at addressing the historical injustices of the past on the one hand, while on the other hand prospectively aiming at the creation of a more just and equitable society in the present as well as in future.⁴ The prospective constructive role of the Constitution is aimed at the creation of a new social, economic as well as political order through the entrenchment of a democratic ethos, the restructuring of institutions of governance, the heightening of a commitment to social justice, and the scrupulous protection as well as enforcement of human rights and fundamental freedoms.⁵

Even though Kenya's history and contextual situation differs from that of South Africa, poverty and inequality are rampant and endemic in both countries, as is discussed more elaborately in chapter one above. Therefore, the need for change in the social, economic and political structures of both countries are similar, if not the same. The definition of transformation, as discussed above in the South African context, is consequently adopted here in the analysis of the transformative potential of the 2010 Kenyan Constitution.

further contend that to tackle inequality, there is a need to reconsider assumptions as well as the realities of domination, and to re-examine and reform laws and institutions which entrench domination.

⁴ S Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010) 25.

⁵ Liebenberg – Adjudication under a transformative constitution (n 4 above) 27. See also M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law* 154, at 159, who contends that constitutional transformation in South Africa entails:

[t]he dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial actions, and the empowerment of poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity.

5.2.1 Transformative constitutionalism and the 1996 South African Constitution

The concept of transformative constitutionalism was first introduced in a discussion of the 1996 SAC by Karl Klare,⁶ and it has generated much debate concerning the transformative aspirations of that Constitution.⁷ An analysis of the concept must therefore, of necessity, start with an analysis of its application in the South African context.

Klare, in his exposition of the concept, commences his argument by contending that for judicial adjudication to contribute to the realisation of the transformative potential of a constitution, there must be a rethink of the role of legal culture as well as a radical transformation of understandings and approaches towards legal interpretation.⁸ Klare defines transformative constitutionalism as:⁹

[a] long-term project of constitutional enactment, interpretation and enforcement committed (... in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.

⁶ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

⁷ An exhaustive list of all the works around transformative constitutionalism in the SA context cannot be provided here. However, apart from the sources directly referred to in this section, the following are of importance: K van Marle 'Transformative constitutionalism as/and critique' (2009) 2 *Stellenbosch Law Review* 286-301; K van Marle 'Meeting the world half-way: The limits of legal transformation' (2004) 16 *Florida Journal of International Law* 651-666; H Botha 'Metaphoric reasoning and transformative constitutionalism (Part 1)' (2002) *Journal of South African Law* 612-627; H Botha, A van der Walt & J van der Walt (eds.), *Rights and democracy in a transformative Constitution* (2003); and D Brand 'Courts, socio-economic rights and transformative politics' (2009) unpublished doctoral dissertation (on file with author).

⁸ Klare (n 6 above) 152. He further avers that this 'invites a new imagination and self-reflection about legal methods, analysis and reasoning consistent with [a constitution's] transformative goals'...thus engendering new roles and responsibilities for the judiciary, at 156. See also D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309, at 315-16, who not only acknowledges the constraints of liberal legalism in undertaking transformative adjudication, but also the conservative, predictable and inflexible South African legal culture, which he argues was intended to be transformed by the adoption of the Constitution.

⁹ Klare (n 6 above) 150. See also Pieterse – Transformative constitutionalism (n 5 above) 155 where he expounds on a socio-democratic understanding of transformative constitutionalism.

Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.

According to Klare, transformative constitutionalism is aimed at the creation of a 'highly egalitarian, caring, multi-cultural community, governed through participatory, democratic processes in both [public and private] spheres'¹⁰. He thus envisions the constitutional project as encompassing both a vision of collective self-determination and a strong parallel vision of individual self-determination.¹¹

In Klare's vision, for a constitution to engender transformative aspirations, it must contain a substantive (redistributive) conception of equality as well as entrench justiciable SERs;¹² must engender positive State duties to combat poverty and inequality as well as promote social welfare; must provide for both vertical and horizontal application of the constitution in general, and the Bill of Rights in particular;¹³ must engender participatory governance; entail multiculturalism; be historically self-conscious;¹⁴ as well as envision transformative adjudication, that

¹⁰ Klare (n 6 above) 150 & 153.

¹¹ Klare (n 6 above) 153.

¹² This is based on the reasoning that a foundational law cannot be neutral with regard to the distribution of social and economic power as well as opportunities that enable people to exercise their complete rights as citizens, Klare (n 6 above) 154. See also P Langa 'Transformative constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351, at 352-53, where he acknowledges the basis of the new society as substantive equality and states the centrality of the provision of social and economic goods and services as well as the levelling of the economic playing field as crucial to the achievement of the concept of transformative constitutionalism; Pieterse – Transformative constitutionalism (n 5 above) 159-61; Albertyn & Goldblatt (n 3 above) 249, who affirm the centrality of equality in achieving transformation, both as a value (giving substance to the vision of the Constitution) and as a right (providing the means/mechanism for achieving substantive equality).

¹³ For an elaboration of the debate on the horizontal application of the Bill of Rights to private law, see generally, AJ van der Walt 'Transformative constitutionalism and the development of South African property law (part 1)' (2005) *Journal of South African Law* 655, at 660ff. He affirms the importance of horizontal application to the realisation of the transformative aspirations of the Constitution, at 663-64.

¹⁴ See Langa (n 12 above) 352, where he contends that the constitutional goal to heal the historic past and provide guidance to a better future is the core of transformative constitutionalism as it contains the impetus to change. See also Pieterse – Transformative constitutionalism (n 5 above) 157-58 who contends that an understanding of a transformative constitution must entail an understanding of what the

is the creation of a new role and responsibilities for the judiciary through the transformation of adjudicative processes and methods.¹⁵ These transformative elements are affirmed by the former Deputy Chief Justice of South Africa, Justice Dikgang Moseneke, who contends that a transformative jurisprudence must support a commitment to substantive equality, contextualise violations within actual societal conditions, re-order systemic and entrenched disadvantages, optimise human development, espouse the concept of the indivisibility and interrelatedness of rights, inclusive of SERs, as well as seek the attainment of the collective good through redistributive fairness.¹⁶ Theunis Roux, in his critique of transformative constitutionalism, also affirms the non-controversial nature of the essential elements of a transformative constitution as expounded by Klare.¹⁷

constitution aspires to transform from, and what it seeks to transform into; a historical justification for such transformation; as well as the means through which the transformation is to take place.

¹⁵ Klare (n 6 above) 154-156. On the need for transformative adjudication, he is of the view that transformative goals in a new constitution cannot be met through old judicial mind-sets and methodologies that are not open to the promotion of substantive equality, a culture of democracy as well as transparent governance, at 156-166. He thus calls for a transformation of the legal culture so as to enhance transformative legal development, as 'un-self-conscious and unreflective reliance on culturally available intellectual tools and instincts...may exercise a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation,' at 166ff, especially 168. He further avers that even though a transformative approach to adjudication does not always guarantee politically and socially transformative outcomes, a progressive legal culture is a necessity for the long-term success of transformative constitutionalism, at 170. See also Moseneke (n 8 above) 318, who acknowledges that the Constitution has created new possibilities in adjudication and calls on his judicial colleagues, especially at the High Court, to undertake the appropriate shift in legal culture so as to embrace and enhance the realisation of the transformative imperatives of the Constitution; H Botha 'Metaphoric reasoning and transformative constitutionalism (Part 2)' (2003) *Journal of South African Law* 20-36, who calls for a change in the understanding of rights as boundaries to an understanding of rights as relations as well as an understanding of rights adjudication as dialogue, changes which have the potential of developing a relational, contextual and potentially transformative constitutional jurisprudence.

¹⁶ Moseneke (n 8 above) 316-19. See also Langa (n 12 above) 355-58, where he proposes a change in legal education and a transformation of the conservative formalistic legal culture so as to enhance substantive legal reasoning and thus achieve the transformative potential of the Constitution.

¹⁷ T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258, at 273-76.

Pius Langa, former Chief Justice of South Africa, further states that transformation must be open-ended and dialogical, envisioning a society that espouses civic virtue as well as political dialogue.¹⁸ He contends that:¹⁹

[t]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services, and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional constitution.

Transformation, as envisaged by the Constitution is thus not a short-term goal to be achieved through the adoption of certain specific activities, but a long-term continuous project to be achieved through the transformation not only of social, economic and political structures, but also by the change of attitudes and ways of life of the entire populace.

Elsa van Huyssteen further broadens the concept of transformative constitutionalism, by pointing to the limits, and/or incapacities of the law on its own to achieve the transformative potential of the Constitution. She advocates an expansive understanding of transformative constitutionalism which encompasses wider social as well as political struggles and

¹⁸ Langa (n 12 above) 354. See also Pieterse – Transformative constitutionalism (n 5 above) 159, who affirms the open-ended nature of transformation, arguing that viewing transformation as a finite journey with a fixed starting and end point is overly simplistic. He terms transformation as a complex metamorphosis that involves a continuous redefinition of the old and new societal elements; U Baxi ‘Preliminary notes on transformative constitutionalism’ a paper presented at the BISA Conference: Courting Justice II, Delhi, April 27-29, 2008, at 6, available at <http://www.conectas.org/IBSA/UBNotesonTransformativeConstitutionalism.pdf> (accessed on 4 October 2012), where he argues that transformation is an epochal conception, making a series of breaks with the past and inaugurating a new order of things.

¹⁹ Langa (n 12 above) 354. He affirms that the transformative nature of a constitution is not based on its peculiar history or socio-economic goals, but is based on its envisioning of a society that is open to change and contestation, that is, a dialogical society. See also Liebenberg – Adjudication under a transformative constitution (n 4 above) 29-30, who affirms the centrality of democratic dialogue and participatory public deliberation in the understanding of transformation.

contestations that feed into the judicial system.²⁰ In acknowledging the important role which civil society plays in the overall project of transformation, she proposes a vision of transformative constitutionalism that does not solely rely on 'a romantic view of the role of law and legal strategies in the processes of social transformation...[or] a government of judges' but which engenders:²¹

[a] "vigorous culture of civil action and democratised power" where the use of the Court as a forum of contestation over the distribution or exercise of power is only one element of broader social and political strategies for transformation.

This is acknowledged by Justice Langa who contends that the responsibility of transformation cannot be borne by the courts alone, but must be coupled with sufficient legislative reforms, sustained positive executive action, as well as social mobilisation and reforms within civil society with the aim of achieving the transformative aspirations of the Constitution.²² Andre van der Walt also argues that to achieve transformation, 'the abolition or reform of what was perceived as having been wrong in the past and the promotion and development of what is considered right for the future,' there must not only be a configuration of judicial power, but also the entrenchment of a strong moral and political impulse in the executive and legislative branches aimed at social and legal transformation.²³

The above discussion provides us with a broad understanding of transformative constitutionalism and sets out the special elements that a constitution must encompass for it to be defined as a transformative constitution. The discussion also enlightens us as to the limits of adjudication in the achievement of the transformative potential of a constitution, indicating the requirement of political will at the political level as well as the political mobilisation and

²⁰ E van Huyssteen 'The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism' (2000) 59(2) *African Studies* 245, at 247. See also Baxi (n 18 above) 19-20, who affirms the importance of direct self-help popular movements as well as mass movements of political or social service delivery protests which keep alive the transformative aspirations of transformative constitutions.

²¹ Van Huyssteen (n 20 above) 259-61. She thus advocates the utilisation of alternative strategies for the achievement of social and material equality in contexts of severe and entrenched structural inequalities where law alone cannot bring about substantive equality.

²² Langa (n 12 above) 358.

²³ Van der Walt - Transformative constitutionalism (Part 1) (n 13 above) 657-58.

participation of citizens in collective self-government. These insights lay the foundation for an analysis of the transformative potential of the 2010 Kenyan Constitution to be discussed below.

5.2.2 An analysis of the Kenyan Constitution and the constitution-making process using the key elements of transformative constitutionalism

The long struggle for constitutional reform in Kenya was basically underpinned by two important objectives. First, the reforms were intended to transform the political governance structures from authoritarianism to a culture of democratic decision-making where all exercises of public power was justifiable and aimed at the attainment of the common good. Secondly, reforms were aimed at the transformation of the classical liberal constitutional,²⁴ economic and social structures that entrenched endemic poverty and pervasive inequality, into an egalitarian, caring society based on substantive redistributive equality, dignity, freedom, respect for human rights, the attainment of social justice and the improvement of the living conditions of all Kenyans.²⁵ These objectives were entrenched in the 2010 Constitution, effectively making it a transformative Constitution.²⁶

²⁴ See Klare (n 6 above) 169, who defines a classical liberal constitution as that which is 'individualistic, highly protective of private property, exceedingly few socio-economic rights, few affirmative governmental duties, little horizontality (...), no communitarian or caring ethos, and no affirmative commitment to [the] deepening [of the] democratic culture'.

²⁵ There are similarities to the South African context where the then Deputy Chief Justice of South Africa, Justice Mohamed, referring to the Interim South African Constitution, in the case of *S v Makwanyane and Another* (CCT3/94) 1995 (6) BCLR 665, para. 262 stated as follows:

The South African Constitution...represents a decisive break from, and a ringing rejection of [the] past, and represents a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.

²⁶ The transformative credentials of the Constitution is underscored by it being the supreme law of the land binding all State organs at all levels of government, its validity being beyond challenge in any court of law, it invalidating any law that is inconsistent with its provisions, as well as it entailing an obligation of all Kenyans to uphold, respect and defend it, see the 2010 Kenyan Constitution, articles 2 & 3. See also J Biegon 'Introduction: Socio-economic rights as one promise of a new constitutional era' in J Biegon & G Musila (eds.), *ICJ Judiciary Watch Report Volume 10: Judicial enforcement of socio-economic rights under the new Constitution – Challenges and opportunities for Kenya* (2012) 3, who contends that the Constitution has been termed "progressive", "historic", and "revolutionary" as it fundamentally reshapes systems and structures of government as well as the horizontal and vertical relationships between citizens and the State; G Musila 'Testing two standards of compliance: A modest proposal on the adjudication of positive socio-economic rights under the new Constitution' in J Biegon & G Musila (eds.),

To affirm the transformative nature of the Kenyan Constitution, an analysis of its provisions, taking into account the essential elements as expounded in the South African context, is undertaken below.

i) Substantive equality

Equality is the foundational value that underpins the new constitutional dispensation, and it is the bedrock on which both political and socio-economic structures of the Constitution aimed at societal transformation are built. This can be expressly seen in the equality provisions in the 2010 Constitution, beginning with the preamble which recognises the aspirations of all Kenyans to be governed by essential values such as human rights, equality, freedom, social justice, democracy and the rule of law.²⁷ Equality as a value forms an intrinsic part of the national values and principles of the Constitution, which binds both State organs and private persons as discussed below.²⁸ Equality further fortifies the Bill of Rights, which not only recognises it (equality) as one of the fundamental values that underpin the interpretation of entrenched rights,²⁹ but also as an integral component of social justice, achievement of which forms the major basis for the entrenchment of fundamental rights in the Bill of Rights.³⁰

Equality is also envisioned as a substantive right in the equality and freedom from discrimination provision in the Constitution which espouses equal protection of the law.³¹ The

ICJ Judiciary Watch Report Volume 10: Judicial enforcement of socio-economic rights under the new Constitution – Challenges and opportunities for Kenya (2012) 55, at 59-60, who also acknowledges that the Constitution can effectively be termed a transformative Constitution even though there is no express word in the Constitution referring to it as such.

²⁷ The 2010 Kenyan Constitution, preamble para. 6.

²⁸ The 2010 Kenyan Constitution, article 10, which contains values such as equity, social justice, inclusiveness, equality, non-discrimination, human rights and the protection of the marginalised.

²⁹ The 2010 Kenyan Constitution, article 20(4).

³⁰ The 2010 Kenyan Constitution, article 19(2). See also B Porter 'The crisis of ESC rights and strategies for addressing it' in J Squires, M Langford & B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 43, at 58-65 who, in the context of Canada, affirms the important link between a substantive conception equality and the realisation of SERs in the emancipation of the historically excluded and marginalised groups.

³¹ The 2010 Kenyan Constitution, article 27. It provides for equal opportunities and treatment for men and women in all sectors of life, but especially in political, economic, social and cultural spheres, at article

Constitution prohibits direct and indirect discrimination by both State organs and private persons on all the prohibited grounds of discrimination which include race, sex, pregnancy, marital status, ethnic or social origin, disability, culture, dress, language or birth.³² It recognises that there are individuals, groups and communities that have been adversely affected by past discrimination, and it obliges the State to put in place legislative and other measures, including affirmative action programmes and policies, to guarantee their equality rights as well as redress their past disadvantages.³³ It specifically identifies these groups and the measures that must be put in place to remedy their situation in Part 3 of the Bill of Rights which is titled “specific application of rights”.³⁴

The Constitution further espouses equality in the private sphere, especially within the family by providing equality of status to the parties in a marriage,³⁵ as well as with regard to land and property rights.³⁶

27(3). To enhance the effectiveness of this provision, the Constitution further requires that the State enacts legislative and other measures to ensure that not more than two thirds of the members of elective and appointive bodies are of the same gender, at 27(8).

³² The 2010 Kenyan Constitution, article 27(4) & (5).

³³ The 2010 Kenyan Constitution, article 27(6) & (7). In *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition No. 15 of 2011, 5-11, available at http://kenyalaw.org/Downloads_FreeCases/83548.pdf (accessed on 2 April 2013), the High Court recognised the importance of a substantive conception of equality in the achievement of social justice and the enhancement of human dignity, holding that a government policy aimed at providing more opportunities in national schools to students from public schools as opposed to students from private schools was legitimate as it was affirmative action aimed at achieving substantive societal equality and reducing the huge inequality gap between the rich and the poor in Kenya.

³⁴ The 2010 Kenyan Constitution, articles 52-57.

³⁵ The 2010 Kenyan Constitution, article 45(3)

³⁶ See The 2010 Kenyan Constitution, Part five, especially article 60 (1) which provides for equitable access to land, the security of land tenure, as well as the elimination of gender discrimination in law, customs and practices related to land, among others. Part five further requires, in article 68 (c) for parliament to enact legislation protecting matrimonial property, especially the matrimonial home, in instances of divorce as well as protecting dependants and spouses of a deceased person having an interest in land.

The extensive entrenchment of equality provisions, though important is, however, not the panacea for the achievement of the transformative goals of the Constitution. There is need for a collective and concerted effort by the entire societal stratum, public and private, to adopt an expansive as well as a substantive conception and understanding of equality, as reliance on formal equality has the potential of entrenching the existing status quo and thus derail the transformative goals of the Constitution.³⁷ The substantive conception of equality not only contextualises the interpretation of rights violations in relation to past systemic forms of domination within society (addressing the actual conditions of human life in context),³⁸ but it also addresses structural disadvantages and maximises human development.³⁹

ii) Espousal of the concept of indivisibility and interrelatedness of rights

One of the key features of the Kenyan Constitution is its entrenchment of a comprehensive Bill of Rights which not only encompasses the entire corpus of human rights (civil, political, social, economic, environmental, cultural and group),⁴⁰ but also forms an integral part of the Democratic State and the framework for all social, economic and cultural policies of the State.⁴¹ Further, the Bill of Rights is not exhaustive in its listing of rights and does not exclude any other

³⁷ For a discussion of instances where a formal conception of equality had a negative impact on transformation, see Albertyn & Goldblatt (n 3 above) 250.

³⁸ Albertyn & Goldblatt (n 3 above) 261, argue that for transformative adjudication to achieve this, it must entail the following:

Firstly, the socio-economic conditions of the individuals and the groups concerned must be examined. Secondly, the impact of the impugned provisions on social patterns and systemic forms of disadvantage should be identified...Thirdly; the complex and compounded nature of group disadvantage and privilege must be understood by looking at grounds of discrimination in an intersectional manner. And finally, the historical context of the case must be fully appreciated and explored.

³⁹ Albertyn & Goldblatt (n 3 above) 250, 255 & 260ff. They envision an equality jurisprudence which places difference and disadvantage at the centre of its conception, and views substantive equality rights as being remedial in nature, at 253 & 256.

⁴⁰ The 2010 Kenyan Constitution, articles 26-57.

⁴¹ The 2010 Kenyan Constitution, article 19(1). The reason for the recognition and promotion of human rights is to preserve human dignity, promote social justice and enhance the realisation of the full potential of all people, at article 19(2).

rights not expressly stated in the Constitution.⁴² This flexibility allows the Constitution to grow and encompass newly emergent rights as the country progresses. Even though the Constitution acknowledges the non-absolute nature of rights by indicating that rights can be legitimately limited, it provides a bulwark against State abuse of its power to limit constitutional rights by enumerating strict standards that must be met for the limitation to be legitimate.⁴³ The espousal of the concept of indivisibility and interrelatedness of rights entails the recognition that rights are mutually self-supporting and that the achievement of transformation is only possible if the entire corpus of fundamental rights are realised. The importance of the concept of indivisibility and interrelatedness of rights was affirmed, in the South African context by the SACC in the *Grootboom* case where the Court held as follows:⁴⁴

The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom.

The courts, the political institutions and the society at large must thus espouse a holistic understanding of rights.

iii) *The entrenchment of justiciable socio-economic rights as well as the adoption of positive State duties to combat poverty and inequality*

The Constitution reflects a commitment to the improvement of the living conditions and the achievement of the well-being, dignity⁴⁵ and self-worth of all citizens.⁴⁶ The values of human

⁴² The 2010 Kenyan Constitution, article 19(3).

⁴³ The 2010 Kenyan Constitution, articles 24 (limitation) and 58 (derogations). For an elaborate discussion of limitation of rights in the Kenyan context, see chapter two, section 2.6 above.

⁴⁴ *Grootboom*, para. 83.

⁴⁵ Dignity is not only a value that underpins all sectors of the Constitution, but it is also a substantive right entrenched in the Bill of Rights, see The 2010 Kenyan Constitution, article 28.

⁴⁶ The 2010 Kenyan Constitution, preamble para. 5, which entails a commitment to the nurturing and protection of the well-being of all. See *John Kabui Mwai* (n 33 above) 6, where the High Court of Kenya, in acknowledging the importance of the entrenched SERs held as follows:

In our view, the inclusion of [SERs] in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform

dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised are encompassed in the Constitution as values which bind all State organs at all levels of government as well as all persons in their interpretation and application of the Constitution; the enactment, interpretation and application of any law; as well as in the making or implementation of any public policy decisions.⁴⁷

The socio-economic situation of individuals and groups have a major impact on their ability to enjoy true freedom, to live dignified lives and to participate actively in collective self-governance through the exercise of their citizenship rights. This is recognised by the Constitution in its entrenchment in the Bill of Rights of SERs such as the rights to health, adequate housing and reasonable standards of sanitation, adequate food and freedom from hunger, clean and safe water in adequate quantities, social security as well as education.⁴⁸ The importance of work/labour in the realisation of improved standards of living, and thus the transformation of the socio-economic conditions of individuals and families, is also acknowledged by the Constitution, in its espousal of an extensive array of labour relation rights such as rights to fair labour practices, fair remuneration, fair working conditions, formation and participation in trade unions, as well as the right to strike.⁴⁹ The inclusion of these rights in the Constitution as justiciable rights has been described by Godfrey Musila as perhaps the single most revolutionary aspect of the 2010 Constitution.⁵⁰ He affirms the potential of the implementation of these rights to remedy the historical injustices of the past, to achieve social justice for marginalised and vulnerable individuals and groups, as well as to achieve substantive equality as demanded by the Constitution.⁵¹

However, the realisation of some of these entrenched SERs, especially the right to food and the right to adequate housing might engender conflict with the right to property which is also entrenched in article 40 of the Constitution. This is because property rights mostly entrench an

Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by articles 6(3) and 10(2)(b).

⁴⁷ The 2010 Kenyan Constitution, article 10.

⁴⁸ The 2010 Kenyan Constitution, articles 43 & Part 3 of the Bill of Rights for their application to specific groups.

⁴⁹ The 2010 Kenyan Constitution, article 41.

⁵⁰ Musila (n 26 above) 55 & 59.

⁵¹ As above.

exclusive bundle of rights to the owners of property without looking at how the property was acquired in the first place or any other interests that may have been appurtenant to the property prior to its acquisition by the owners, thus entrenching the unequal and historically unjust *status quo* prevailing before the enactment of transformative constitutions. The courts will have to adopt transformative adjudicatory balance⁵² when dealing with cases in which such conflicts are at issue, so as to keep alive the transformative aspirations of the Constitution by ensuring that poor, vulnerable and marginalised individuals and groups have equitable access to land and other production resources.⁵³

Further to the inclusion of justiciable SERs, the adoption of positive duties by the State also indicates a paradigm shift from viewing the State as a threat to human rights, towards the conception of the State as a guarantor of rights. This is reflected in article 21 of the Constitution which contains the State's duty to respect, protect, promote and fulfil the rights in the Bill of Rights.⁵⁴ In the realisation of SERs, the Constitution acknowledges the resource constraints that the country may face, it being a developing country, and adopts the standard of progressive realisation, requiring the State to take positive legislative, policy and other measures to enhance realisation.⁵⁵ In the adoption of these obligations, the Constitution especially recognises the contextual and historical situation of the State, by calling for the prioritisation of the needs of vulnerable and marginalised groups and individuals, especially women, older persons, persons with disabilities, indigenous communities, and children.⁵⁶

⁵² For an elaboration of this concept in the context of the right to housing, see chapter seven, section 7.6 below.

⁵³ For a discussion of this conflict in relation to the right to food and the right to housing, see chapters six and seven below.

⁵⁴ The duty to fulfil its obligations in the realisation of human rights is further entrenched by the Constitutional requirement that the State to enact legislation aimed at fulfilling obligations under international law, see The 2010 Kenyan Constitution, article 21(4).

⁵⁵ The 2010 Kenyan Constitution, article 21(2). The standard of progressive realisation is discussed generally in chapter two, section 2.3 below and in specific instances in case studies on the right to food and the right to housing below.

⁵⁶ The 2010 Kenyan Constitution, article 21(3). See the High Court case of *John Kabui Mwai* (n 33 above) 5-11, where the Court acknowledged the importance of the protection of prior marginalised groups and upheld a government policy which provided a higher quota of opportunities in national schools to students from public schools as opposed to those in private schools.

iv) Vertical and horizontal application of the Constitution

Unlike the classical liberal constitution of the past which only bound State organs, the 2010 Kenyan Constitution is a welcome change from the past as it binds State organs as well as natural and legal persons. Article 2 of the Constitution, the supremacy clause, provides that the Constitution 'is the supreme law of the Republic and binds all persons and all State organs at both levels of government'.⁵⁷ Further to this, article 20(1) emphasises that the Bill of Rights 'applies to all law, bind all State organs and all persons'.⁵⁸ This is a recognition of the pervasive role of private power, as is encompassed in common law as well as customary and religious laws, in the creation of endemic poverty, marginalisation and vulnerability among the majority of the Kenyan people, and the requirement that violations occurring in the private sector are also deserving of constitutional protection. It is also a recognition that in the globalising world where non-state actors have acquired as much power as States, there is a need to enhance the constitutional protections that are given to individuals in the private sector.

The pervasive impact of private power on socio-economic deprivation has been recognised by Sandra Liebenberg who states that socio-economic resources have traditionally been distributed through private institutions such as the family and the markets.⁵⁹ The consequence is that this distribution of socio-economic resources is insulated from critical public scrutiny and evaluation to ensure consistency with the normative public values and principles

⁵⁷ See also the 2010 Kenyan Constitution, article 10, which provides that the national values and principles are binding on all State organs and all persons in their interpretation or application of the Constitution, their interpretation or application of any other law as well as the development or implementation of public policy; article 20(1) which provides for the binding nature of the Bill of Rights to all State organs and to all legal and natural persons; article 27(4) & (5) which prohibits direct and indirect discrimination on the prohibited grounds for both State organs and private persons (discussed in the equality element above); as well as article 29 (c) which provides for the security of the person and protection from any form of violence, public or private.

⁵⁸ In relation to the horizontal application of the Bill of Rights to private persons, article 20(1) is more expansive than section 8(2) of the SAC, which only provides for the horizontal application of the Bill of Rights to private persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.

⁵⁹ Liebenberg - Adjudication under transformative constitution (n 4 above) 59-60 and chapter 7. These are basically governed by the private law rules (common, customary and religious laws) such as land, property, contracts, family, and succession laws.

embodied in Bills of Rights, leading to the depoliticisation of social discourse on socio-economic needs and vulnerabilities.⁶⁰ In providing for horizontal application of the Bill of Rights, the Kenyan Constitution aims to improve the development of common, customary and religious laws to enhance the accountability of private institutions to the normative values and principles entrenched in the Constitution, with the aim of achieving the transformative potential of the Constitution. In this context, Liebenberg contends the following:⁶¹

The possibility of the horizontal application of the [SERs] invites a critical re-examination of the network of private law rules and doctrines. It invites the judiciary to participate, along with the legislature, in the transformation of common law institutions such as property and contracts, by considering the needs of those who are without access to basic resources, who are homeless and who lack bargaining power.

She states that in this way, fundamental private law principles are subjected to re-evaluation and development so as to give effect to the spirit, purport and objects of the entrenched SERs.⁶²

The issue of direct horizontal application of the Bill of Rights under the 2010 Kenyan Constitution has already been affirmed by the Court in the case of *Anne Nyokabi Muguiyi v NIC Bank* which dealt with unfair and unjust working conditions, unfair dismissal and discrimination.⁶³ The Respondent bank had raised a defence against the constitutional application stating that since they were a private person, they were unable to breach the fundamental rights of the Petitioner, which, according to them, could only be breached by the State and its organs.⁶⁴ The High Court, relying on articles 2(1) (the supremacy of the Constitution), 20(1) (the application of the Bill of Rights to all law and its binding nature on all State organs and all persons) and 260 (which defined “person” to include ‘a company, association, or other body of persons whether incorporated or unincorporated’) of the Constitution, held that the intention of the framers of the Constitution was for it to have both vertical and horizontal application.⁶⁵ The Court thus held that the Petitioner had a right under

⁶⁰ As above.

⁶¹ Liebenberg - Adjudication under transformative constitution (n 4 above) 63.

⁶² As above.

⁶³ *Anne Nyokabi Muguiyi v NIC Bank*, Petition No. 202 of 2011, judgment delivered on 26th September 2012 (on file with author).

⁶⁴ Nyokabi, para. 12.

⁶⁵ Nyokabi, paras. 26-27.

article 22 of the Constitution to vindicate her rights and that if the Court was to find a private person to have violated fundamental rights, the Court had jurisdiction to grant appropriate remedies.⁶⁶

v) *Democracy and participatory government*

Democracy and good governance, which inculcate collective self-government and popular participation, are the essential pillars of the Republic, and the glue that holds the diverse communities together. The essential nature of these values is expressly stated in the preamble of the Constitution which details them as part of the essential values on which Kenyans aspire to base their government.⁶⁷ The Constitution entrenches the sovereignty of the people, stating that sovereign power is to be exercised directly by the people or through their democratically elected representatives, and that at all times, State power must be exercised for the collective benefit of all Kenyans.⁶⁸ It calls for the establishment of a multi-party system of government based on the values of democracy, the rule of law, participation of the people, good governance, integrity, transparency, and accountability.⁶⁹

Democratic imperatives and the need to enhance participatory collective self-government are at the heart of the devolution project in the Kenyan Constitution. The objectives of devolution, as espoused in the Constitution, include the need to promote the democratic and accountable use of power; to give the power of self-governance to the people and enhance participatory decision-making in the exercise of State power; to recognise the right of communities to manage their own affairs and further their own development; to enhance the promotion and protection of the rights of vulnerable and marginalised communities; to facilitate the decentralisation of State organs, functions and services so as to ensure easy access to proximate government services; to fast-track socio-economic development and promote equitable sharing of State resources; and lastly, to enhance checks and balances in the exercise of public power and thus promote substantive separation of powers.⁷⁰ These objectives

⁶⁶ Nyokabi, para. 27.

⁶⁷ The 2010 Kenyan Constitution, preamble paras. 6 & 7.

⁶⁸ The 2010 Kenyan Constitution, article 1.

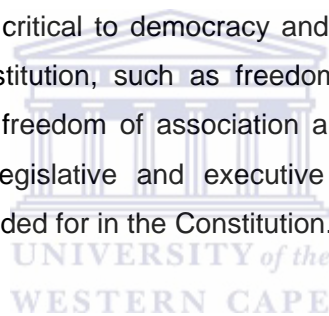
⁶⁹ The 2010 Kenyan Constitution, articles 4 & 10 as well as Chapter Seven of the Constitution (Representation of the people).

⁷⁰ The 2010 Kenyan Constitution, article 174.

are further buttressed by the guiding principles of devolution which requires the devolved levels to be guided by the principles of separation of powers, respect for the democratic imperatives of the Constitution, effective governance and delivery of services, as well as representational equity in the devolved systems.⁷¹

The devolution of power and services is a massive improvement from the old Constitution which entrenched a top-heavy system of centralisation of State power and resources, a system which resulted in the creation of a predatory State rife with poor governance; lack of accountability; failure of service delivery; corruption; the colonisation of State power and resources by the rich minority at the expense of, and with adverse effects to, the majority poor; land grabbing and unaccountable allocation of government land; among many others. Devolution is thus an attempt by Kenya to break from the past and move towards a transformed nation where all citizens are equally valued and protected.

Several substantive rights critical to democracy and public participation in government are also entrenched in the Constitution, such as freedom of expression,⁷² freedom of the media,⁷³ access to information,⁷⁴ freedom of association and assembly,⁷⁵ as well as political rights.⁷⁶ Public participation in legislative and executive decision-making at all levels of government is also expressly provided for in the Constitution.⁷⁷



⁷¹ The 2010 Kenyan Constitution, article 175. These principles are further enhanced by the principle of cooperation between all the levels of government in the conduct of their affairs, at article 189.

⁷² The 2010 Kenyan Constitution, article 33.

⁷³ The 2010 Kenyan Constitution, article 34.

⁷⁴ The 2010 Kenyan Constitution, articles 35 & 232(1)(f).

⁷⁵ The 2010 Kenyan Constitution, articles 36 & 37.

⁷⁶ The 2010 Kenyan Constitution, article 38, which include participation in the activities of a political party; right to a free, fair and regular elections; and the right to vote and vie for elective political positions.

⁷⁷ The 2010 Kenyan Constitution, articles 94(1) as read with 118-119; 95(2); 196 (participation in county assemblies); 201(a) (public participation in public finance), 232(1)(d) (involvement of the people in policy-making process by the Public Service). For a more elaborate discussion of public participation in societal decision-making, see Chapter four, section 4.2.1 above.

vi) Recognition of multi-culturalism

Kenya is a country with a diversity of communities which have co-existed mostly peacefully throughout the currency of the Republic, and this is recognised by the Constitution which reflects the pride of the Kenyan people of their ethnic, cultural and religious diversity and expresses their desire to live together in peace and harmony as one indivisible sovereign nation.⁷⁸ The Constitution calls for the promotion and protection of the diversity of languages, and especially the development of indigenous languages.⁷⁹ It recognises culture as the foundation of the nation as well as the cumulative civilisation of the Kenyan people and calls for the promotion of cultural expression through literature, art, science, communication, mass media, and publications.⁸⁰ It provides for the freedom of conscience, religion, belief, thought as well as opinion as substantive rights within the Bill of Rights.⁸¹ It further provides for cultural and language rights as substantive rights.⁸² This is a reflection of the equality and equal worth of all people from all sectors, communities as well as religions.

vii) *Historical self-consciousness*

The Constitution recalls the struggle against colonialism and acknowledges that the Republic was created as a result of a struggle where sacrifices were made and lives were lost.⁸³ It further acknowledges that there are individuals, groups and communities that have suffered different kinds of discrimination in the past and calls on the State to put in place measures, including legislative and policy measures as well as affirmative action programmes to redress the disadvantages suffered by these groups.⁸⁴

⁷⁸ The 2010 Kenyan Constitution, preamble para. 3.

⁷⁹ The 2010 Kenyan Constitution, article 7(3).

⁸⁰ The 2010 Kenyan Constitution, article 11.

⁸¹ The 2010 Kenyan Constitution, article 32.

⁸² The 2010 Kenyan Constitution, article 44.

⁸³ The 2010 Constitution, preamble para. 2 which honours the heroes and heroines of the struggle which brought freedom and justice to the Republic.

⁸⁴ The 2010 Kenyan Constitution, article 27(6)-(8). See also Part 3 of the Bill of Rights which provides for the specific application of rights to these groups.

viii) *Imperatives for the adoption of a transformative approach to adjudication*

One of the key elements of the Constitution is the prominent role it gives to the courts in the realisation of the transformative potential of the Constitution. This is especially due to the fact that the courts are the guardians of the Constitution,⁸⁵ the supreme law binding on all State organs as well as all natural and legal persons.⁸⁶ The courts have an especially prominent and transformative role in the interpretation and enforcement of the Bill of Rights, which gives them the authority to develop the law to the extent that it does not give effect to fundamental rights,⁸⁷ as well as to adopt the interpretation that most favours the enforcement of fundamental rights during adjudication.⁸⁸

The Bill of Rights provides the courts with several transformative means and guidelines to direct it in the enforcement of fundamental rights during adjudication, and these require the courts to promote:⁸⁹

⁸⁵ The 2010 Kenyan Constitution, articles 23 & 165(2)(b) which gives the courts jurisdiction to vindicate the rights in the Bill of Rights, and further provide a range of remedies available to the courts in their undertaking of adjudication on rights such as declaration of rights, injunctions, conservatory orders, declaration of invalidity of laws that infringe or threaten the realisation of rights, compensation as well as orders of judicial review; article 159(2)(e) which provides that one of the principles to guide the exercise of judicial authority is the promotion and protection of the purposes of the Constitution; article 169(2)(d) which entrusts the courts with the jurisdiction to adjudicate questions related to the interpretation of the Constitution and the determination of validity of laws, policies as well as governmental actions in relation to the Constitution. See also Musila (n 26 above) 65-66.

⁸⁶ The 2010 Kenyan Constitution, article 1. See also article 20(1) which further provides for the binding nature of the Bill of Rights to all State organs and to all legal and natural persons.

⁸⁷ This can be done by infusing the common law and customary law with the values that underpin the Constitution such as dignity, equality, equity, freedom and the protection of the poor, vulnerable and marginalised groups and communities.

⁸⁸ The 2010 Kenyan Constitution, article 20(3).

⁸⁹ The 2010 Kenyan Constitution, article 20(4). These guidelines are further entrenched by article 259(1) which states that the Constitution is to be interpreted in a manner that:

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and,

(b) the spirit, purport and objects of the Bill of Rights.

Further to the above, and in relation to the SERs entrenched in article 43 of the Constitution, especially in instances where the State claims the unavailability of sufficient resources to implement SERs, the courts are to be guided by the following principles: that it is the duty of the State to prove insufficiency of resources; that in resource allocation, the context and vulnerability of individuals and groups must be a guiding factor; and that the courts should accord deference to the political institutions in relation to the choice of policies and programmes aimed at the realisation of SERs.⁹⁰

Further, the Constitution contains a “development clause” in article 20(3)(a) which requires the courts to ‘develop the law to the extent that it does not give effect to a right or fundamental freedom’. This provision is buttressed by the supremacy clause, which in effect encompasses the doctrine that all law, including common, customary and religious laws, derive their force from and are subject to constitutional controls.⁹¹ In effect, the “development clause” thus requires that the common, customary and religious laws (which are the laws governing access to socio-economic resources in the private sphere) be developed in compliance with the constitutional values and principles. This gives the courts a wide interpretive freedom to achieve the transformative aspirations of the Constitution in all spheres of life, especially the private sphere.⁹² This is because it places a positive duty on judges to renovate and revitalise the part of the legal system that has traditionally been governed by the common law and African customary law - rules and principles indelibly stained by the historical injustices of the past and

(d) contributes to good governance.

The importance of these guidelines in the adjudication of rights in the Bill of Rights was affirmed by the High Court of Kenya in the *John Kabui Mwai case* (n 33 above) 5-6; and *Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another*, High Court Petition No. 102 of 2011, at 14.

⁹⁰ The 2010 Kenyan Constitution, article 20(5).

⁹¹ For an affirmation of this principle in the SA context with a similar constitutional “development clause”, see the SACC case of *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC), para. 33.

⁹² See D Davis & K Klare ‘Transformative constitutionalism and the common and customary law’ (2010) 26 *South African Journal on Human Rights* 403, at 409ff.

which are predominantly oriented towards the protection of the powerful as well as the maintenance of existing distributional *status quo* –by infusing their interpretation and application with the constitutional values and principles that populate the Constitution.⁹³

The imperatives for the development of the common law has been widely discussed in the context of South Africa, which has a similar “development clause” to that in the Kenyan Constitution.⁹⁴ In this context, the SACC was especially forthright in holding that common law rules and principles are subject to the SAC, the then President of the Court, the Late Chief Justice Chaskalson, holding as follows:⁹⁵

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

The SACC further buttressed this position by affirming the duty of judges to develop the common law in line with the Constitution when it held in the *Carmichele* case that:⁹⁶

- [c]ourts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights;
- The duty of judges to develop the common law arises whether or not the parties in the particular case request the court to do so;
- The responsibility of the courts to develop the common law conformably to s 39(2) objectives is not optional or discretionary, but an obligation.

⁹³ Davis & Klare (n 92 above) 410-412. For an extensive discussion on the jurisprudence of the South African courts in the implementation of a similar “development clause” see Davis & Klare (n 92 above) Part V, from 449ff.

⁹⁴ For an extensive analysis of the public/private divide and how it detracts from the achievement of the transformative potential of the entrenched SERs in a constitution, see Liebenberg - Adjudication under transformative constitution (n 4 above) 59-63 & chapter 7 and the accompanying texts.

⁹⁵ *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* (2000) (2) SA 674 (CC), para. 44.

⁹⁶ See Davis & Klare (n 92 above) 463, analysing the *Carmichele* case, paras. 36 & 39. To give effect to the SACC’s dicta in *Carmichele*, Davis and Klare propose that the inquiry whether the common law respects and promotes the spirit, purport and objects of the Bill of Rights must become a routine step of analysis in every common law case, at 467. For similar arguments in this line of thought, see JC Froneman ‘Legal reasoning and legal culture: Our vision of law’ (2005) *Stellenbosch Law Review* 3, at 17.

Davis and Klare further contend that to realise the transformative potential of the “development clause” there is a need for adjustment in the education of lawyers, both in law schools, professional training institutions and in all aspects of continuing legal education, to equip them with substantive skills and capabilities demanded for the reformulation and revitalisation of the common law.⁹⁷

The need for a fundamental shift in legal education, from conservative formalistic reasoning to substantive reasoning, is also affirmed by Geo Quinot, Professor of Public Law at the University of Stellenbosch, in his Inaugural Lecture titled “Transformative Legal Education” where he proposes the adoption, in South Africa, of a transformative theoretical legal framework to enhance the realisation of the transformative aspirations of the 1996 SAC.⁹⁸ Quinot envisions the following changes in legal education: adjustment of law curricula to reflect the new paradigm of constitutional supremacy; increased emphasis on fundamental rights and judicial review in law curricula; infusion of constitutional values into established areas of law, especially the private law subjects of property, torts and contracts so as to develop the common law; inculcation of substantive reasoning (innovation and creativity) among students with increased engagement with both legal and extra-legal materials such as context, values, morality, policy and politics; development of an interdisciplinary, integrated and holistic approach to legal education; and the transformation of teaching methodology from the pedagogy of authority to the pedagogy of justification (through the theory of constructivism).⁹⁹

The possibilities for the courts to undertake transformative adjudication are also enhanced by the broad standing provisions that allow a multitude of different actors to institute proceedings for the vindication of rights.¹⁰⁰ The importance of the court’s “company” in

⁹⁷ Davis & Klare (n 92 above) 463.

⁹⁸ G Quinot ‘Transformative legal education’ (September 2011) 5, available at <http://blogs.sun.ac.za/teaching/files/2011/10/G-Quinot-Inaugural-Final2.pdf> (accessed on 7 October 2012).

⁹⁹ Quinot (n 98 above) 5ff.

¹⁰⁰ The 2010 Kenyan Constitution, article 22, which provides for individuals whose rights are violated, infringed, denied or threatened; class actions, public interest litigation, as well as *amici curiae*. See also article 48 which obliges the State to ensure access to justice for all persons; article 50 which call for a fair hearing in the resolution of disputes; and article 258 which entails the right of every person to institute proceedings in instances of contravention or threat of contravention of the Constitution.

undertaking transformative adjudication is acknowledged by Upendra Baxi who states that 'ways of judicial disposition overall depends on how [the judge's] "company" is constituted'.¹⁰¹ The importance of the legal profession in transformative adjudication is also acknowledged by Karl Klare who extensively discusses the importance of the prevailing legal culture – the professional sensibilities, habits of mind, and intellectual reflexes of domestic legal actors - in the realisation of transformative constitutionalism.¹⁰² Klare further introduces the dialectic of freedom and constraint, arguing that while the transformative provisions of the SAC engender judicial freedom to achieve the transformative aspirations of the Constitution, the conservative and formalistic legal culture act as a constraint on judges, limiting their ability to espouse transformative adjudication and thus hampering efforts to achieve the Constitution's egalitarian aspirations.¹⁰³

Henk Botha undertakes a very compelling analysis of freedom and constraint in adjudication which brings to light the important role which the legal culture of a particular national legal system plays in the ability of judges and "company" to give effect to the transformative objectives of progressive constitutions.¹⁰⁴ He contends that the legal culture determines the deeply held assumptions about the nature of the legal materials, the role and functions of judges, as well as the relationship between law and politics.¹⁰⁵ He argues that judicial decision-making is more constrained in a formalistic and conservative legal culture as

¹⁰¹ Baxi (n 18 above) 28. Judges' "company" are simply the parties to constitutional litigation as well as other third parties who take part in the litigation at the second and third levels of dialogue as discussed more substantively in chapter four, sections 4.3-4.5 above.

¹⁰² Klare (n 6 above) 151 & 166ff, where he states that legal culture and socialisation constrains legal outcomes irrespective of the substantive provisions of legal materials, and that it also affects the substantive development of the law. See also Davis & Klare (n 92 above) 403ff. They contend that even though a judicial commitment to constitutional values is key in achieving transformation, the most important aspect of transformative adjudication is the transformation of the judicial mind-set – "the inarticulate premises culturally and historically ingrained" – that determines judicial outlook, analytical methods as well as discursive repertoire, at 405.

¹⁰³ Klare (n 6 above) 149ff; Klare & Davis (n 92 above) 405-406.

¹⁰⁴ See H Botha 'Freedom and constraint in constitutional adjudication' (2004) *South African Journal on Human Rights* 249-283.

¹⁰⁵ Botha – Freedom and constraint (n 104 above) 251. See also Klare & Davis (n 92 above) 406; Froneman (n 96 above) 4.

judges' interpretive attitudes and practices are shaped by their training and experience as members of the same legal culture, as well as by the possibilities of their progressive decisions being reversed on appeal by more conservative colleagues.¹⁰⁶

According to Botha, a conservative legal culture advocates the determinacy of legal rules and views them as 'long straight boundaries that pre-determine the outcome of cases' and which only allow judges the freedom to freely and progressively engage with the legal material and decide cases without being constrained by precedent where there is a gap/lacunae in the legal rules.¹⁰⁷ This, he argues, is in line with a formalistic rule-centred approach which values formal equality, predictability and certainty at the expense of substantive equality and individualised justice.¹⁰⁸ This type of adjudication propagates a view of law as distinctly and strictly separated from politics, and that law is sufficiently determinate to dispose of cases without the need for judges to have recourse to extra-legal considerations.¹⁰⁹

Botha convincingly argues that the above perception of adjudication is unrealistic due to the reality of the indeterminacy of law as well as the fact that legal materials do not apply themselves, but are construed by human beings, and their meaning depends on the interpretive attitudes, experiences, values and reflexes of the interpreter.¹¹⁰ He further argues against the

¹⁰⁶ Botha – Freedom and constraint (n 104 above) 265. He explains that constraint is exerted in the requirement that judges justify their decisions by giving reasons, which must be able to satisfy members of their legal culture that their decision rests on a plausible interpretation of the available legal materials.

¹⁰⁷ Botha – Freedom and constraint (n 104 above) 255 & 267-75.

¹⁰⁸ Botha – Freedom and constraint (n 104 above) 272-73

¹⁰⁹ Botha – Freedom and constraint (n 104 above) 250. See also Klare & Davis (n 92 above) 407; Liebenberg - Adjudication under transformative constitution (n 4 above) 44ff. For a judicial rebuttal of the notion that judges must not have recourse to extra-legal material in constitutional adjudication, see Justice Mokgoro, formerly of the SACC, who held in the *Makwanyane* case, paras.302-304 that:

[t]he interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself.... To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.

¹¹⁰ Botha – Freedom and constraint (n 104 above) 255-56 & 273ff. see also Klare (n 6 above) 159-166, who affirms that legal materials do not self-generate their own meaning, and that interpretation is a meaning-creating activity; Davis & Klare (n 87 above) 436ff who aver that in the presence of gaps, conflicts and ambiguities, judges decide cases by making intermediate judgments or choices that are

strict perception of the determinacy of law, contending that it is contrary to the culture of justification and intelligible reason-giving that is demanded by the Constitution; it frustrates the transformative aspirations of the Constitution and entrenches the status quo; and it induces normative closure.¹¹¹ He is of the view that an acceptance of the reality of the indeterminacy of the law should free judges to critically engage with relevant legal materials with the aim of achieving substantive justice.¹¹²

Botha further contends that freedom and constraint¹¹³ are not mutually exclusive but are graded categories in a continuum that allows judges to redraw existing legal boundaries and to affect a better balance between contradictory policies on a case by case basis through imaginative legal reasoning.¹¹⁴ He submits that this is the best way to achieve transformative adjudication, which he understands as the requirement that 'legal interpreters remain open to different interpretations, to develop a more self-conscious style of adjudication which is characterised by a willingness to challenge deeply-held legal assumptions, and to articulate the moral and political beliefs through which their interpretations are filtered'.¹¹⁵

influenced by their socially-constructed sensibilities and controversial assumptions about political morality and social organisation.

¹¹¹ Botha – Freedom and constraint (n 104 above) 275-282. The language of “ a culture of justification” which reason-giving in the exercise of public power was first discussed in the transitional South African context by Etienne Mureinik in his oft-quoted article E Mureinik ‘A bridge to where?: Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31, at 32.

¹¹² Botha – Freedom and constraint (n 104 above) 255-56. See also Davis & Klare (n 92 above) 443ff, where they contend that due to this freedom of choice, judges should take responsibility for the choices they make, and the effects/impact of those choices on the texture of social life as well as the distribution of power and well-being.

¹¹³ He understands freedom as being associated with openness, flexibility and a willingness of judges to consider alternative interpretations as well as to take responsibility for their decisions. Constraint on the other hand is associated with judicial accountability and fidelity to law, and also with closure, rigidity, and a denial of judges’ responsibility for their decisions, see Botha – Freedom and constraint (n 104 above) 250.

¹¹⁴ Botha – Freedom and constraint (n 104 above) 265.

¹¹⁵ Botha – Freedom and constraint (n 104 above) 249 & 266. See also Froneman (n 96 above) 4-5, who similarly argues and further affirms the linkage between law and politics.

The analysis of freedom and constraint above reflects, and is applicable to, the Kenyan situation, as the Kenyan legal culture has been described as being conservative and formalistic.¹¹⁶ Therefore, to achieve the transformative potential of the Constitution, a new imagination, progressive thinking, as well as open, accountable and substantive legal reasoning¹¹⁷ has to be adopted by the courts and “company” when undertaking adjudication.¹¹⁸

5.2.3 The link between dialogical and transformative constitutionalism and their influence in the choice of an interpretive approach

Dialogical constitutionalism, as discussed in chapters three and four, is linked with transformative constitutionalism in so far as deliberative decision-making, infused by substantive public participation, is fundamental to the realisation of the transformative potential of a constitution. This link is acknowledged by Elsa van Huyssteen, writing in the South African context, when she stresses the need for meaningful democracy, which entails popular participation in political decision-making, government accountability, redistribution of resources and the creation of deliberative spaces for the legitimate expression of differences, in the realisation of the goals of transformative constitutionalism, that is, the shift in social, political and economic power relations necessary for the creation of active as well as dignified citizens.¹¹⁹ This link is affirmed by Klare who avers that transformative constitutionalism is aimed at the achievement of a highly egalitarian, caring and multi-cultural community governed through participatory and democratic processes in both the public and the private sphere.¹²⁰ The approach to be adopted by the courts in the interpretation and enforcement of the entrenched SERs must therefore, of necessity, be guided by both the transformative aspirations of the

¹¹⁶ Musila (n 26 above) 60.

¹¹⁷ See Froneman (n 96 above) 6, who avers that substantive reasoning envisions a purposive and contextual engagement with legal materials with the aim of achieving substantive equality and social justice.

¹¹⁸ See Klare (n 6 above) 156 & 170, where he submits that transformative adjudication requires a new imagination and self-reflection about legal methods, analysis and reasoning consistent with a constitution’s transformative goals, and that the judicial mind-set and methodologies are part of the law, and must be examined and revised so as to promote equality, a culture of democracy as well as transparent governance.

¹¹⁹ Van Huyssteen (n 20 above) 247-48 & 250-51.

¹²⁰ Klare (n 6 above) 150.

Constitution and the theory of dialogical constitutionalism, with the ultimate aim of enhancing social justice and improving the standard of living of all Kenyans.

It is submitted here that, taking into account the analysis of the 2010 Kenyan Constitution in line with the factors that lead to a constitution being referred to as transformative, the 2010 Constitution can safely be referred to as a transformative constitution. Therefore, to realise its transformative potential, the important elements, as discussed above, must be understood as interdependent and mutually reinforcing, and efforts must be made to achieve them not only by the courts, but by the entire spectrum of societal actors in a cooperative and dialogical context. For the courts, the main challenge is how to translate precepts into practice, in the context of interpretation, implementation and enforcement of fundamental rights, especially SERs, so as to achieve the transformative potential of the Constitution.¹²¹ This challenge leads us to the next section of this chapter, an elaboration of the proposed integrated approach to the interpretation of SERs in the 2010 Constitution.

5.3 The proposed integrated approach to the interpretation and enforcement of socio-economic rights in the Kenyan Constitution

The realisation of the transformative potential of the Constitution requires that the courts adopt a progressive interpretive approach in the interpretation and enforcement of the entrenched SERs. Two interpretive approaches have been discussed widely at the international level, the minimum core content approach developed by the Committee on Economic, Social and Cultural Rights (CESCR),¹²² and the reasonableness approach developed by the SACC.¹²³ The integrated

¹²¹ This is the difficulty with achieving constitution-inspired transformation and it is acknowledged by Upendra Baxi (n 18 above) 8 who submits that:

[i]t is a well-known fact that normative promises of any of the original inspirations continue to be betrayed by the everyday experience of life under the actual existing constitutions. This is scarcely a world-shaking discovery simply because outside the norms that constitute the promise, no possibility of naming its betrayal may exist!

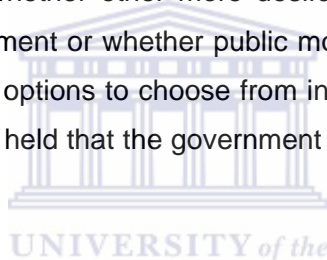
He contends that this betrayal exists when policy-makers and adjudicators fail to heed the transformative aspirations of the constitutional document in the interpretation, implementation and enforcement of fundamental rights.

¹²² CESCR, General Comment No. 3, para 10

approach proposed in this chapter combines the best of these two approaches to develop a substantive and transformative approach aimed not only at the effective realisation of the entrenched SERs, but also to respond to the pervasive challenges that have consistently been raised against the judicial adjudication of SERs, that is, concerns of separation of powers and polycentricity. Before the development of this approach, an exposition of the reasonableness approach and the minimum core approach is necessary, and it is to this analysis that I now turn.

5.3.1 Reasonableness approach

The reasonableness approach has been adopted by the SACC as the standard of scrutiny for the positive obligations arising from the entrenched SERs.¹²⁴ The approach was first expounded by Justice Yacoob in the *Grootboom* case,¹²⁵ a housing rights case brought under section 26 of the SAC. The Judge held that for a measure aimed at the realisation of SERs to be reasonable, it must be coherent, well-coordinated and comprehensive.¹²⁶ He further emphasised that the Court was not bound to inquire whether other 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.¹²⁷ The Court thus held that the government programme in the *Grootboom* case



¹²³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereinafter *Grootboom*); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (hereinafter *TAC*); and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) (hereinafter *Khosa*).

¹²⁴ D Bilchitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 142; D Brand 'The proceduralisation of South African socio-economic rights jurisprudence or "what are socio-economic rights for?"' in H Botha, A van der Walt & J 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.

¹²⁵ *Grootboom*, paras. 21 & 34ff.

¹²⁶ *Grootboom*, para. 41.

¹²⁷ As above. This aspect of the reasonableness approach is apparent in the 2010 Kenyan Constitution article 20(5)(c) which, in providing guidance to courts on the interpretation and enforcement of the SERs in article 43 (as discussed in section 5.2.2 above), requires the courts not to interfere with State decisions concerning the allocation of available resources solely on the basis that the court would have reached a different conclusion. This in essence entrenches this aspect of the reasonableness test into the Kenyan

failed the reasonableness test mainly because it was not responsive to the short-term needs of those in desperate need, as a society based on human dignity, equality and freedom must seek to ensure that the basic necessities of life are provided to all.¹²⁸

Sandra Liebenberg identifies the major components of the reasonableness approach, adopted by the SACC, as follows:¹²⁹

- i) The programme must be a comprehensive and coordinated one, which clearly allocates responsibilities and tasks to different spheres of government and ensures that appropriate financial and human resources are available. It must also reflect the overall responsibility of national government in ensuring that the programme is adequate to meeting the State's constitutional obligations.
- ii) The programme must be capable of facilitating the realisation of the right.
- iii) Policies and programmes must be reasonable both in their conception and in their implementation.
- iv) The programme must be balanced and flexible and make appropriate provision for short-term, medium-term and long-term needs. It must not exclude a significant segment of society.
- v) The programme must be responsive to the urgent needs of those in desperate situations.
- vi) There must be meaningful engagement with the affected communities and civil society in the design and implementation of programmes aimed at the realisation of SERs [*Grootboom* para. 87 and *TAC* para. 123].¹³⁰

constitutional framework, the reasoning which I rely on in proposing the adoption of the integrated approach in the Kenyan context.

¹²⁸ *Grootboom*, paras. 44 & 83.

¹²⁹ S Liebenberg 'The interpretation of socio-economic rights' in S Woolman *et al* (eds.), *Constitutional law of South Africa* (2nd Edition) 2 (2009) 33-1, at 33-34. See also Liebenberg – Adjudication under a transformative constitution (n 4 above) 152 (footnotes omitted); D Bilchitz 'Health' in S Woolman *et al* (eds.), *Constitutional law of South Africa* (2nd Edition) 2 (2009) 56A-1, at 2 & 12-13; Brand (n 124 above) 41; S Wilson 'Breaking the tie: Evictions from private land, homelessness and a new normality' (2009) 126(2) *South African Law Journal* 270, at 274-275.

- vii) In instances of exclusion of specific groups from programmes aimed at the realisation of the right in question, reasonableness analysis must take into account the purpose of the right in question, the impact of the exclusion on the affected groups as well as the impact of the exclusion on the enjoyment of other intersecting rights such as equality, dignity and freedom [*Khosa* case, paras. 45-53].¹³¹

As has been pointed out by several authors, even though the *Grootboom* Court did not expressly take up the minimum core arguments made by the *amici* in the case, the inclusion of the requirement that State programmes must be responsive to the urgent needs of those in desperate situations espoused the idea, and the threshold, of the minimum core approach.¹³² This can be gleaned from the *Grootboom* judgment where the Court stated that an understanding of reasonableness requires that the Bill of Rights be read as a whole because society values human beings and wants to ensure that people are afforded their basic human needs.¹³³ In this context, the Court held as follows:¹³⁴

¹³⁰ Liebenberg – Adjudication under a transformative constitution (n 4 above) 153. The concept of meaningful engagement is discussed more substantively in the development of the theory of dialogical constitutionalism in chapter three above.

¹³¹ Liebenberg – Adjudication under a transformative constitution (n 4 above) 158-59; Bilchitz – Health (n 129 above) 14-15; K McLean, *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 163.

¹³² See Liebenberg – Adjudication under a transformative constitution (n 4 above) 153; Steinberg (n 124 above) 280; McLean – Constitutional deference (n 131 above) 182-83; R Dixon ‘Creating dialogue about socio-economic rights: Strong v weak form judicial review revisited’ (2007) 5 *International Journal of Constitutional Law* 391, at 416; D Bilchitz ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 118 *South African Law Journal* 484, at 498-99; Bilchitz - Poverty and fundamental rights (n 124 above) 140-42. He argues that the *Grootboom* court would not have reached the decision it did without a consideration of some level of minimum core, and undertakes an analysis to prove this point, at 144-46. To support this, he quotes from the *Grootboom* judgment at para. 44 where the Court holds that ‘[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality’. He concludes that in adopting this reasoning, the Court adopted the conception of “dignity as integrity” a conception of dignity which supports the adoption of the minimum core content of SERs, at 147-49.

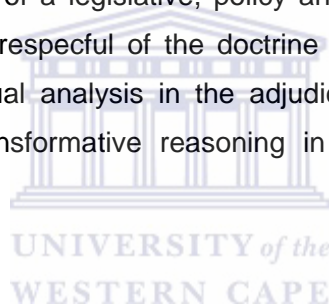
¹³³ *Grootboom*, para. 44.

¹³⁴ As above.

Those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving the realisation of the right. [...] [T]he Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

The Court proceeded to state that human beings must be treated as human beings, failing which the Constitution is worth infinitely less than the paper it is written on.¹³⁵ This link portrays the possibilities of mutuality and interrelatedness of the minimum core and the reasonableness approaches, and the possibility of their combined application in the proposed integrated approach to enhance the realisation of the entrenched SERs in the Kenyan Constitution.

One of the advantages of the reasonableness approach is that its design allows courts to give the requisite deference and margin of appreciation to the political institutions in their development and implementation of a legislative, policy and programmatic framework for the realisation of SERs, and is thus respectful of the doctrine of separation of powers.¹³⁶ It also envisages historical and contextual analysis in the adjudication of SERs, one of the major requirements for substantive transformative reasoning in the adjudication of SERs.¹³⁷ An



¹³⁵ *Grootboom*, para. 83.

¹³⁶ Bilchitz – Health (n 129 above) 11-12; Steinberg (n 124 above) 266; Liebenberg – Adjudication under a transformative constitution (n 4 above) 151 & 173. Liebenberg however submits that in instances where there are no reasonable democratic disagreements as to measures to be employed in the realisation of a particular SER, and the impact on the affected group is severe, the courts will apply more stringent standards of scrutiny and make more specific orders to enhance the realisation of the right in question. She avers that this was the situation in the *TAC*, at 157.

¹³⁷ Liebenberg – Adjudication under a transformative constitution (n 4 above) 152 & 174. She contends that in taking into account the historical and social-economic context in which litigation arises, the reasonableness approach ‘avoids closure and creates an on-going possibility of challenging various forms of socio-economic deprivation in a wide range of different contexts’, at 174. See also Bilchitz – Poverty and fundamental rights (n 124 above) 161-62, who, though acknowledging contextual analysis as one of the major strengths of the reasonableness approach, contends that the contextual analysis must be undergirded by some general standards for the appraisal of State actions in a variety of contexts, in the absence of which the reasonableness inquiry cannot amount to an adequate standard of scrutiny.

appreciation of history and context in adjudication can be gleaned from the SACC case of *Soobramoney* where the Court stated as follows:¹³⁸

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist, that aspiration will have a hollow ring.

The appreciation of the historical and contextual situation of claimants in SER litigation enables the court to appreciate the lived experiences of the claimants, especially in relation to historical injustices, endemic poverty, inequality and marginalisation resulting from those injustices, and thus give an order that responds appropriately to their situation.¹³⁹

Sandra Liebenberg contends that the reasonableness approach has synergies with the understanding of measures necessary for the realisation of SERs as espoused by the CESCR which requires such measures to be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant' in accordance with General Comment Number 3, paragraph 2.¹⁴⁰ Liebenberg further points to the adoption of the

¹³⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (hereinafter *Soobramoney*) para. 8. See also Brand (n 124 above) 41-42, who acknowledges that context plays an important role in the standard of scrutiny that the Court will adopt in any particular case, stating that factors that will influence the stringency or otherwise of the standard of scrutiny adopted include: the position of the claimants in society, the nature and importance of the interest affected, the nature and extent of alleged right violation as well as the nature of the impugned measure.

¹³⁹ See Liebenberg – Adjudication under a transformative constitution (n 4 above) 174, who contends that the reasonableness review is flexible as it allows the courts to 'adjust the stringency of its review standards informed by factors such as the position of the claimant groups in society, the nature of the resources or services claimed, and the impact of the denial of access on the claimant groups' (footnotes omitted).

¹⁴⁰ Liebenberg – Adjudication under a transformative constitution (n 4 above) 151.

reasonableness standard in article 8(4) of the 2008 Optional Protocol to the ICESCR, which states as follows:¹⁴¹

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Liebenberg's submissions above encapsulate the positive attributes of the reasonableness approach in the realisation of SERs. It, however, does not deal effectively with the lack of content, and therefore the lack of clear guidance to States as to what exactly are the purposes and values that underpins the entrenchment of SERs, the very basis for the criticism of the reasonableness approach. The Optional Protocol also espouses both the reasonableness approach and the minimum core approach,¹⁴² an indication that the approaches are not exclusive, but can be employed to comprehensively and mutually support each other, with the result that SERs are more substantively enforced.

The reasonableness approach as adopted and used by the SACC has been criticised by several scholars. One of the ardent critics of the approach, David Bilchitz contends that the adoption of the approach mostly circumvents the task of developing the normative content of SERs, leading to the possibility that the entrenched SERs fail to have practical effects on the

¹⁴¹ Available at http://www2.ohchr.org/english/law/docs/a.RES.63.117_en.pdf (accessed on 22 October 2012).

¹⁴² See CESCR Statement 'An evaluation of the obligation to take steps "to the maximum of the available resources" under an Optional Protocol to the Covenant' E/C.12/2007/1, 10 May 2007, available at <http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf> (accessed on 22 October 2012), where the Committee states that: the State party must protect the most disadvantaged individuals and groups by adopting low-cost measures in instances of severe resource scarcity, para. 4; the obligation of the State to satisfy core obligations as a matter of priority, para. 6; & the requirement that steps taken must prioritise the concerns, precarious situation of as well as the needs of the disadvantaged and marginalised individuals and groups, para. 8(f). These all reflect that even though the minimum core approach is not reiterated expressly in the Optional Protocol, it still forms a crucial component of the Protocol.

lives of the poor, vulnerable and marginalised individuals as well as groups in society.¹⁴³ Bilchitz argues that in failing to develop the content of SERs, the reasonableness approach fails to take into account the constitutional values, purposes and objectives that the entrenchment of SERs in the Constitution was intended to achieve, and instead only scrutinising the reasonableness of government measures for the realisation of SERs.¹⁴⁴ Bilchitz thus calls for an analysis that requires the specification of some normative content to the rights independent of the notion of reasonableness.¹⁴⁵

Other critics such as Moellendorf and Liebenberg similarly argue that the failure to elaborate on the substantive normative content of rights coupled with the contention that the substantive rights incorporated in sections 26(1) and 27(1) are both defined and limited with reference to the State's available resources has been criticised as allowing the State's budgetary decisions to determine the content of rights instead of the constitutional commitments to human rights norms and values guiding the State's economic policies.¹⁴⁶ They contend that



¹⁴³ Bilchitz - Poverty and fundamental rights (n 124 above) 136. He proposes a reading of sections 26(1) & (2) as well as 27(1) & (2) of the 1996 SA Constitution in such a way that the reasonableness of the measures adopted in subsection 26(2) and 27(2) are assessed in relation to the rights provided in subsections 26(1) and 27(1), a reading that necessarily leads to an analysis of the content of the rights contained in the subsections 26(1) and 27(1) of the Constitution, at 156-59. See also J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214, at 235ff for similar arguments.

¹⁴⁴ Bilchitz – Poverty and fundamental rights (n 124 above) 136 & 160; Bilchitz – Health (n 129 above) 22. See also Liebenberg – Adjudication under transformative constitution (n 4 above) 139-140; I Currie & J de Waal *The Bill of Rights handbook* (2005) 577, footnote 46, where they argue that the reasonableness approach is no more than a relational standard which measures the ends against the means leaving the entrenched SERs empty. It thus provides for no more than a right to reasonable administrative action.

¹⁴⁵ Bilchitz – Poverty and fundamental rights (n 124 above) 136. See also chapter six where he develops the minimum core approach to SERs.

¹⁴⁶ D Moellendorf 'Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims' (1998) 14 *South African Journal on Human Rights* 327, at 332; Liebenberg – Adjudication under transformative constitution (n 4 above) 139-140; Bilchitz – Poverty and fundamental rights (n 124 above) 225-234.

this failure detracts from the realisation of the transformative aspirations of a transformative constitution.¹⁴⁷

In responding to the arguments on the failure of the reasonableness approach to develop the content of rights, Carol Steinberg argues that the role of the courts in a constitutional democracy is to scrutinise and evaluate government policy, which requires the courts to develop standards of review as well as define standards of compliance, and not to be involved in policy formulation, which is decision-making based on the weight of numbers and the balancing of competing social goals.¹⁴⁸ She contends that the development of the content of rights cannot rationally be characterised as scrutiny or evaluation, which in her conception, is the proper role of the court as stated above.¹⁴⁹

It is contended that Steinberg's arguments above may be a bit over-stated due to the following reasons. To begin with, the institutional and constitutional incapacity for courts to engage in legitimate policy formulation is often over-stated. The courts have for centuries been involved in law-making in the context of the development of the common law. This role of the courts is acknowledged by both the SAC and the Kenyan Constitution which expressly require the courts to further develop the common law in light of the constitutional values and principles as is discussed in section 5.2.2 (viii) above. It, therefore, does not make sense to turn around and say that the courts have neither institutional nor constitutional competence to engage in

¹⁴⁷ Liebenberg - Adjudication under transformative constitution (n 4 above) 146. She further submits that the conflation of the two-stage constitutional analysis in positive SER adjudication, which results in the absence of a principled consideration of the content and scope of the SER in issue as well as the impact of rights violation on the claimants, leads to a disproportionate dependence on the State's justificatory arguments, and thus the privileging of the politically dominant conception of rights at the expense of the conception of rights held by the politically voiceless poor and marginalised individuals and groups. She contends that this undermines the normative status of SERs *vis-à-vis* other constitutional rights as well as forecloses deliberative opportunities for claimants to participate in the development of the content and scope of the SER in question through the articulation of their own vision and understanding of the entrenched SERs in context of legitimate societal disagreements due to the indeterminate nature of rights, at 201.

¹⁴⁸ Steinberg (n 124 above) 282-283. For similar criticisms of the critics of the reasonableness approach of the SACC, see MS Kende, *Constitutional rights in two worlds: South Africa and the United States* (2009) 261-275.

¹⁴⁹ As above.

policy formulation, a role they have silently played for centuries. In fact it is better if they engage in policy formulation openly and transparently, giving clear reasons for their policy choices so as to enhance accountability and inculcate a culture of justification.

Further, Steinberg's argument that the court's role only requires it to develop standards of review without developing the content of rights is self-defeating. It raises the question of how the courts will be able to develop these standards of review for the scrutiny of the government's SER implementation frameworks without properly understanding the nature, scope, content, purpose, objectives and the values that underpin the constitutionally entrenched SERs. It is submitted here that some general guiding standards in the form of the content of rights, to be further developed in their application in specific factual circumstances, are required in the development of the court's standard of review. Even though the theory of dialogical constitutionalism, expounded in chapters three and four of this thesis, envisages the development of the content of SERs to be better undertaken by the political institutions with the requisite substantive participation of the people, it acknowledges that the courts, as the authoritative interpreters and guardians of the Constitution, play a prominent role in the interpretation and enforcement of the justiciable SERs, a role which necessitates the development of the content of the SERs in the context of adjudication should the political institutions fail to do so.

Bilchitz further contends that the reasonableness approach has a negative effect on the eventual orders that the SACC makes as the orders lack specificity, gives the State no guidance as to what it particularly needs to do to meet minimum essential goods and services for the most needy, and thus provide grounds for State delay, obfuscation as well as subterfuge.¹⁵⁰ The

¹⁵⁰ Bilchitz – Poverty and fundamental rights (n 124 above) 149-150; Bilchitz – Health (n 129 above) 24. Bilchitz also argues that failure to develop the content of rights, which directly leads to vague orders made by courts, is the main reason why the SACC has been reluctant to retain supervisory jurisdiction to ensure that its orders are implemented fully. On this basis he contends that '[O]ne has to know what has to be implemented in order to supervise the implementation thereof; or, at least, one has to have some determinate standards against which to evaluate what the government is doing in order to exercise effective supervision,' at 164-66. For the Kenyan courts to be able to effectively exercise supervisory jurisdiction, it is submitted that they must adopt the integrated approach proposed here as it allows for the development of the content of SERs as well as a more substantive general standard for the scrutiny of the State's legislative, policy and programmatic framework for the realisation of SERs.

reasonableness approach also tends to obscure the vulnerabilities of individuals in particular cases due to its failure to place the fundamental interests of individuals at the centre of its inquiry.¹⁵¹ This eschews the very reason for the entrenchment of justiciable SERs, which is to enhance the living conditions of all, especially through the provision of the minimum basic goods and services to the poor and vulnerable in society.

Kirsty McLean also points out that the reasonableness approach entails a lower standard of scrutiny for positive SER obligations as compared to the proportionality test that is used for civil and political rights.¹⁵² She contends that the approach is restrictive and highly deferential to the political institutions with regard to the interpretation and enforcement of SERs, referring to it as a quasi-administrative review standard.¹⁵³ She elaborates on the administrative law origin of the reasonableness approach by quoting the then Chief Justice Arthur Chaskalson who, in discussing the reasonableness test, argued as follows:¹⁵⁴

Courts have to judge the issue of 'reasonableness'. That is a legal principle that courts are often required to apply when there is a challenge to the validity of administrative action by the executive. In this way, policy is collapsed into principle, and techniques similar to those used in administrative law can be adopted to give effect to the constitutional standard of 'reasonableness'.

She thus contends that the main reason for the adoption of the reasonableness approach was due to the perceived policy and programmatic nature of SERs which detracts from their full justiciability, thus calling for a lower standard of scrutiny, as well as the desire of the courts not to be bogged down with the challenges of counter-majoritarianism and polycentricity.¹⁵⁵

¹⁵¹ Bilchitz – Poverty and fundamental rights (n 124 above) 160; Bilchitz – Health (n 129 above) 22.

¹⁵² McLean - Constitutional deference (n 131 above) 143-44. She, however, acknowledges that the approach can be used at various levels of scrutiny, with the lowest level of scrutiny being “rationality,” the intermediate level being “proportionality” and the most rigorous level being “correctness” at 174.

¹⁵³ McLean - Constitutional deference (n 131 above) 126-27 & 167.

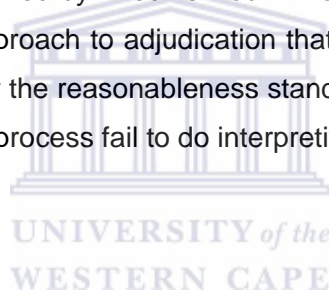
¹⁵⁴ A Chaskalson ‘From wickedness to equality: The moral transformation of South African Law’ (2003) 1 *International Journal of Constitutional Law* 590, at 601, quoted in McLean – Constitutional deference (n 123 above) 144.

¹⁵⁵ McLean – Constitutional deference (n 131 above) 144. Find further analysis of the reasonableness test at 172-76.

Further, it can be argued that the adoption of the more fluid reasonableness standard, as opposed to the more substantive minimum core approach which may have engendered better protection of entrenched SERs, and thus the achievement of the transformative potential of the 1996 SAC for marginalised and poor majorities, was as a result of the prevailing conservative and formalistic Roman-Dutch legal culture in the Court.¹⁵⁶ This conservatism – forming part of a cautious tradition of analysis which is formalistic, highly structured, technician, literal and rule bound - is extensively discussed by Klare who discerns a disconnect between the SAC's substantively transformative aspirations and the traditionalism of the prevailing legal culture in SA.¹⁵⁷ Klare submits that this jurisprudential conservatism:¹⁵⁸

[m]ay induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution than are permitted by the text and drafting history.

Klare's contentions above are affirmed by Theunis Roux who also acknowledges that SA's legal culture is formalist and that an approach to adjudication that masks its political nature, such as is the case with adjudication under the reasonableness standard, is likely to further entrench the formalistic legal culture and in the process fail to do interpretive justice to the Constitution.¹⁵⁹



¹⁵⁶ See Brand (n 124 above) 51.

¹⁵⁷ Klare (n 6 above) 166ff, especially at 170.

¹⁵⁸ Klare (n 6 above) 171. He clarifies his understanding of caution as not the unwillingness to take bold steps or the lack of moral courage, but the 'reluctance to press legal materials toward the limits of their pliability, a tendency to underestimate the plasticity of legal materials, and an exaggerated concern to give the appearance of conforming to traditional canons of interpretive fidelity'.

¹⁵⁹ Roux – Transformative constitutionalism (n 17 above) 281 & 284. See also Van Huyssteen (n 20 above) 257-58, who, writing before the Court's adoption of the reasonableness approach in the *Grootboom* case, discerns a narrowness in the scope of the Courts jurisprudence on issues dealing with redistribution of economic and social resources, predicting, prophetically, that this would have a significant limiting impact on the development of a transformative notion of constitutionalism; Moellendorf (n 146 above) 327ff, who also warns that the restrictive interpretation of the concept of "available resources" in the *Soobramoney* case was likely to have a denigrating effect on future litigation concerning SERs, leading to the lowering of the status of SERs *vis-à-vis* CPRs. This warning has surely come to pass in the subsequent litigation on SERs by the SACC.

To enhance the achievement of the transformative aspirations of the SAC, Klare thus encourages the judges in the SACC to re-examine their adjudication practices to ascertain whether the Constitution affords them more scope for interpretive creativity and innovation than was apparent to them previously, with the aim of promoting democratic and egalitarian values enshrined therein.¹⁶⁰ Similarly, Roux also advises the Court to redouble its efforts to develop a substantive moral reading of the SAC, which entails an elaboration of a discernible content of SERs, and the permissible grounds for their limitation.¹⁶¹ The Kenyan courts, in line with the integrated interpretational approach developed in section 5.3.3 below, should take Klare's and Roux's views seriously to ensure that they enhance the realisation of the transformative potential of the 2010 Kenyan Constitution in relation to the entrenched SERs.

5.3.2 Minimum core content approach

The minimum core content approach was developed by the CESCR in its General Comment Number 3 as follows:¹⁶²

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.... If the Covenant were to be read in such a way as not to establish the minimum core obligation, it would largely be deprived of its *raison d'être*.

It has been further developed extensively and comprehensively by the Committee detailing the content of each of the socio-economic rights provisions in the Covenant.¹⁶³ It has also been

¹⁶⁰ Klare (n 6 above) 171-172.

¹⁶¹ Roux – Transformative constitutionalism (n 17 above) 284.

¹⁶² General Comment No 3, para 10.

¹⁶³ See for example: General Comment No. 4 on the right to adequate housing; General Comment No. 7 on the right to adequate housing: forced evictions; General Comment No. 12 on the right to adequate food; General Comment No. 13 on the right to education; General Comment No. 14 on the right to the highest attainable standard of health; General Comment No. 15 on the right to water; General Comment No. 17 on the right of everyone to benefit from the moral and material interests resulting from any scientific, literary or artistic production of which he is the author; General Comment No. 18 on the right to work; General Comment No. 19 on the right to social security; General Comment No. 20 on the right to non-discrimination on access to economic, social and cultural rights; and, General Comment No. 21 on the right of everyone to take part in cultural life. Available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed on 21 June 2011).

reiterated in the Limburg Principles, principle 25 which posits that 'State parties are obligated, regardless of the level of economic development, to ensure respect for the minimum subsistence rights for all'.¹⁶⁴

It has been argued that the minimum core approach, with its clear specification of the minimum essential elements that the State must provide, gives the government a better standard with which to monitor implementation and provides better protection of SERs generally, and of the basic needs of vulnerable groups in particular.¹⁶⁵ This is starkly captured by Brand who contends that the interpretation and enforcement of entrenched SERs should, in the first instance, be aimed at 'the creation of a society that provides for everyone's basic needs, and that protects everyone against deprivation'.¹⁶⁶ He argues that a court, in undertaking SER litigation, must determine whether the State is pursuing its constitutionally mandated goal correctly in its policies, and in doing so must, of necessity, develop a substantive content to the entrenched SERs.¹⁶⁷ This has also been affirmed by Sandra Liebenberg who, in

¹⁶⁴ Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights, (hereafter Limburg principle). Available at http://www.acpp.org/RBAVer1_0/archives/Limburg%20Principles.pdf (accessed on 9 October 2012).

¹⁶⁵ For a more complete development of the above arguments, see Bilchitz – Poverty and fundamental rights (n 124 above) 150-166 & 221; Bilchitz – Health (n 129 above) 31-32, where he avers that one of the evils sought to be remedied by the introduction of the minimum core concept was the lack of practical benchmarks against which to evaluate State efforts at the realisation of entrenched SERs.

¹⁶⁶ Brand (n 124 above) 36-37. He emphasises that the real problem which efforts aimed at the realisation of SERs should target is deprivation and hardship itself. He contends that in adopting the reasonableness approach, a structural good governance standard leading to the proceduralisation of SER adjudication, the SACC distanced itself from the concrete particular realities of hunger, homelessness, disease and illiteracy that the entrenchment of SERs was intended to deal with. He enumerates the negative effects of this proceduralisation, which are: the failure to enhance the realisation of the transformative potential of the Constitution, the discouragement of future creative SER litigation aimed at effecting social change, the burdening of indigent litigants with the burden to prove the unreasonableness of State policy, the availability of limited tools for the courts to deal with subsequent SER litigation, and the lack of substantive standards to guide the State in future socio-economic policy-making, at 51-56.

¹⁶⁷ Brand (n 124 above) 44-51. He points out that the major failure of the SACC's reasonableness approach is the failure to develop a substantive content for SERs. He states that due to this failure, the Court cannot, in the conduct of its reasonableness analysis, determine whether the State's policy in question is capable of achieving the relevant right (as the substantive content of the essential referent

her analysis of the *Soobramoney* judgment, argues that the failure by the SACC to expound on the nature, scope and content of the right to health left the State with no clear guidelines for its implementation, thus adversely affecting the capacity of the right to exert a fundamental influence on the State's decision-making concerning social programmes and budgetary allocations.¹⁶⁸

The minimum core approach further makes it possible for the courts to adopt a more stringent scrutiny in the evaluation of the State's defences for the non-realisation of the minimum essential needs of the most vulnerable,¹⁶⁹ makes it more feasible for the courts to provide the government with clear timelines within which to implement the court's orders, and also enables the court to properly monitor and supervise compliance with its own orders.¹⁷⁰ This is in line with the Constitutional requirement that the courts grant effective relief in instances of violations of constitutionally entrenched human rights and fundamental freedoms.¹⁷¹

The minimum core approach is, however, not perfect, and it has also faced its fair share of criticism. One of the staunchest critics of the approach is the SACC which has persistently refused to adopt the approach in several SER cases that it has adjudicated.¹⁷² Some of the reasons for the Court's refusal are as follows. Firstly, the Court held that due to the different contextual situation of individuals as well as their diverse and varying socio-economic needs, it is difficult to define the minimum core content.¹⁷³ Secondly, the Court held that unlike the CESCR which had had extensive access to, and experience in scrutinising, several State Reports under the ICESCR to be able to comprehensively define the minimum core content of rights, the Court did not have such information or experience to be able to comprehensively

right is not developed), leaving the Court only with the option of evaluating whether the policy in question is rational, coherent, comprehensive and inclusive, among other good governance standards, at 48-49.

¹⁶⁸ Liebenberg – Adjudication under a transformative constitution (n 4 above) 142.

¹⁶⁹ Bilchitz – Poverty and fundamental rights (n 124 above) 146.

¹⁷⁰ As above.

¹⁷¹ 2010 Kenyan constitution, article 23.

¹⁷² *Grootboom* case; *TAC* case; and, *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) 2010 (3) BCLR 239 (CC). See SA Yeshanew 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317, at 322.

¹⁷³ *Grootboom*, paras. 32-33.

determine the minimum core content of rights given the diversity of needs and circumstances of different groups.¹⁷⁴ Thirdly, the Court stated that the textual construction of the relevant provisions of the South African Constitution did not support the adoption of the minimum core approach, as sections 26(1) and 27(1) did not give an independent and self-supporting positive right, but must be read in relation to sections 26(2) and 27(2) which basically limited/qualified the content of the rights to the standards of progressive realisation, resource availability as well as the reasonableness of government measures aimed at their realisation.¹⁷⁵ Fourthly, the Court argued that it was not pragmatic to read the minimum core content into the SER provisions as this would impose unrealistic demands on the State due to the impossibility of giving everyone 'access even to a "core" service immediately'.¹⁷⁶ Finally, the court acknowledged its institutional incompetence to undertake the formulation of the minimum core content of rights, holding that

¹⁷⁴ *Grootboom*, para. 31.

¹⁷⁵ *Soobramoney*, para. 24; *Grootboom*, para. 95; *TAC*, para. 32. The limiting of rights in this manner has been extensively criticised by several authors who argue that even though these standards should of necessity limit the obligations of the State, they should not limit the meaning, nature, content and the scope of SERs. See K McLean 'Housing' in S Woolman *et al* (eds.), *Constitutional law of South Africa*, 2nd edition Original Service, volume 4 (2006) 55-1, at 55-9 – 55-12; Bilchitz – Health (n 129 above) 56A-9 & 10, especially footnote 4. Bilchitz especially argues passionately for an independent determination of the content of rights separate from the determination of the obligations of the State which he avers are the ones limited by the availability of resources. He argues convincingly that the rationale for the recognition of fundamental rights is the need to protect the inherent basic human interests, which people have by virtue of their human characteristics and not by virtue of the resources at their command. He avers that the available resources only affect the capacity of people to realise these inherent rights, and not the rights themselves. He thus contends that an understanding of the content of rights separate from the issue of resources, the approach which he advocates, makes it possible to expect the State to take measures to realise the already present rights as soon as the problem of scarcity of resources is lessened, see Bilchitz – Poverty and fundamental rights (n 124 above) 40-42 & 215-220. See McLean – Constitutional deference (n 131 above) 176-181 for similar arguments. Mclean provides four reasons for the adoption of her preferred reading. The two critical ones are that, first, the jurisprudential soundness of having a right not restricted by the availability of resources enables the court to align its interpretation of the scope of SERs in accordance with international and comparative norms, and further requires the State to justify failures to realise SERs. Second, it allows for a 'wider socio-political understanding of rights as political or ethical claims against the State which stand, even where the State is not able to realise these rights fully,' at 179-181.

¹⁷⁶ *TAC*, para. 35.

'courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining the minimum core standards'.¹⁷⁷ Despite the above reasons, the Court did not, however, completely reject ever elaborating the minimum core of SERs, holding that the minimum core might be used to determine the reasonableness of a State measure for the realisation of SERs in particular instances.¹⁷⁸

Liebenberg also provides a critique of the minimum core approach, arguing that the development of the minimum core content of SERs using only the basic survival standard does not guarantee certainty and clarity in the identification of priorities; results in either under- or over-inclusivity in the specification of core obligations; is unduly reductionist and detracts from the achievement of the aspirations of a transformative constitution; encourages minimalism which detracts from the expansive realisation of SERs where resources are available; is inflexible and unresponsive to the diverse needs and circumstances of differently placed individuals and groups; and also fails to take into account the interrelated character of needs.¹⁷⁹

Liebenberg, however, makes suggestions aimed at ameliorating some of these criticisms. She contends that instead of relying solely on the minimum survival standards in the elaboration of the minimum core content of SERs, the minimum core could be better developed by also taking into account the constitutional values of democracy, equality, human dignity, and freedom, values that underpin both the South African and the Kenyan Constitutions.¹⁸⁰ The use of these values in the context of deliberative democracy in the political institutions, as is envisaged by the theory of dialogical constitutionalism, can go a long way in ensuring that the minimum core content adopted in the SER implementation framework has taken these criticisms

¹⁷⁷ *TAC*, para. 37-38.

¹⁷⁸ *Grootboom*, para. 33; *TAC*, para. 34. See also Liebenberg - Adjudication under transformative constitution (n 4 above) 148-151 for a similar analysis.

¹⁷⁹ Liebenberg – Adjudication under a transformative constitution (n 4 above) 168-173. For an analysis of the origins and application of the basic needs/survival standard and its relation to the right to life in the interpretation of SERs, see KG Young, *Constituting economic and social rights* (2012) 35ff.

¹⁸⁰ Liebenberg – Adjudication under a transformative constitution (n 4 above) 169 & 173. See also Dixon (n 132 above) 399-401 & Young – Constituting SERs (n 179 above) 39-42, who similarly advocates an expansive interpretation of the minimum core, contending that a minimalist focus on biological survival misses the important connection between human dignity and human flourishing that are intrinsic to the the right to life.

into account. Liebenberg's second suggestion, responding to the concerns of the interdependence of rights, is that care must be taken in the development of SER implementation frameworks so that an optimal development approach which takes into account and balances long-, medium- and short-term goals in the realisation of SERs for the entire populace is adopted.¹⁸¹ She avers that this optimal approach must achieve synergies between short-term measures aimed at the amelioration of the conditions of the most vulnerable and desperate in society, and the long-term programmes aimed at achieving the maximal sustainable and adequate realisation of the whole spectrum of SERs for the entire populace.¹⁸² This is the very balance that the integrated approach proposed in this chapter is aimed to realise in the interpretation, implementation and enforcement of SERs.

Kartharine Young further enumerates some general criticisms of the minimum core approach at the international level which include concerns that: it threatens the realisation of the long-term goals of development as it calls for the prioritisation of the short-term needs of the poor; it only directs attention at the developing world without any analysis of the implementation of SERs in developed countries; and that it ranks the different claimants of rights without any focus on government's macro-economic growth and defence policies.¹⁸³ Carol Steinberg adds to this by arguing that the minimum core approach restricts the policy choices of political institutions, putting them in what she calls "a constitutional straightjacket".¹⁸⁴ Steinberg further contends that the 'prescriptive diachronic element of the minimum core position – that the rights necessarily entail the prioritisation of the delivery of minimum core obligations -' does not take into account the legitimate diversity of competing views of the best available alternatives for the eradication of poverty, and the role of SERs in that endeavour.¹⁸⁵

¹⁸¹ Liebenberg – Adjudication under a transformative constitution (n 4 above) 172.

¹⁸² As above.

¹⁸³ KG Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 114.

¹⁸⁴ Steinberg (n 124 above) 274.

¹⁸⁵ Steinberg (n 124 above) 275. She contends that the reasonableness approach on the other hand, with its flexibility, context-sensitivity and incremental character based on a case-by-case development of SERs, has the capacity to take a legitimate diversity of views into account and facilitate a 'more comprehensive and particularist analysis of the relative strengths of incommensurable developmental options and of the repercussions, in each instance, of prioritising certain interests'. She thus argues that

David Bilchitz extensively responds to the criticism of the minimum core approach provided above. He contends that the approach is aimed at the protection of the fundamental interests of individuals as well as the prioritisation and ameliorisation of the plight of the worst off, whose needs are not adequately met by the reasonableness standard that fails to recognise the equal importance of each person in society.¹⁸⁶ He thus states that taking into account the weighted prioritisation he advocates, the minimum core is a flexible standard which takes into account the needs of the differently situated individuals and groups in society, and is thus not rigid and absolutist.¹⁸⁷ On the difficulty of the principled minimum core in the realisation of certain rights such as the right to health, Bilchitz advocates the formulation of a pragmatic minimum threshold based on the cost of treatment required, availability of resources, the need for a balance between a preventive and curative strategy, equal opportunity of all in access to health services as well as the impact of the achievement of the pragmatic minimum threshold on the realisation of other rights and the achievement of other pressing societal needs.¹⁸⁸

5.3.3 An integrated approach to interpretation

In deciding on the interpretive approach to be adopted by Kenya, the courts must firstly ensure that they adopt an approach that is not only respectful of Kenya's history and context (economic, social and political), but that also engenders a generous and purposive interpretation¹⁸⁹ of the

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the choice between competing developmental paradigms is not a choice that courts are institutionally or constitutionally competent to make on their own.

¹⁸⁶ Bilchitz - Poverty and fundamental rights (n 124 above) 208-213. He, however, rejects lexical prioritisation (the requirement that the minimum core must be fulfilled for all before maximal needs are attended to) and instead advocates weighted priorities, which requires that in instances where the minimum core cannot be fulfilled, the State must provide justifications for such failure, and that such justifications must be subjected to stringent scrutiny by the courts, at 212.

¹⁸⁷ Bilchitz - Poverty and fundamental rights (n 124 above) 213.

¹⁸⁸ Bilchitz - Poverty and fundamental rights (n 124 above) 220-225.

¹⁸⁹ A generous and purposive approach to constitutional interpretation was adopted by the SACC in *Makwanyane*, paras. 9-10. It has also been adopted by the High Court of Kenya in the case of *Federation of Women Lawyers* case (n 89 above) 11, where the Court held as follows:

When interpreting the Bill of Rights the court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Such an interpretation must be generous and sustainable to give individuals the full measure of the the fundamental rights

SERs so as to give expression to and enhance the realisation of the transformative aspirations of the Constitution. The Constitution itself gives the courts a clear guide on how the rights in the Bill of Rights, which encompass the SERs, should be interpreted. As has been discussed in section 5.2.2 above, article 20 provides that any approach adopted in interpreting the Bill of Rights must not only promote the values underlying an open and democratic society based on human dignity, equality, equity and freedom; but must also promote the spirit,¹⁹⁰ purport¹⁹¹ and objects of the Bill of Rights. The Constitution further requires the courts to adopt an interpretation that most favours the implementation and enforcement of rights.¹⁹²

With the transformative aspirations of the Constitution in mind, I propose that Kenya adopts a two-tiered integrated approach to constitutional interpretation that not only gives content to SERs;¹⁹³ but also promotes societal dialogue and public participation in their interpretation, implementation and enforcement, as is envisaged by the theory of dialogical constitutionalism

and freedoms and the court must take full cognizance of the social conditions, experiences and perceptions of the people of this country.

¹⁹⁰ The spirit of the Bill of Rights can be gleaned from article 20(2) which provides that “every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the rights or fundamental freedoms”. This calls for an expansive and generous interpretation of rights, and with regard to SERs, that they are given content as far as possible to enable them to achieve their desired goals and objectives.

¹⁹¹ The purpose of the Bill of Rights is provided for in article 19(2) of the Constitution and it provides that “the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings”. This is affirmed by the Kenyan case of *Ibrahim Songor Osman v Attorney General & 3 Others*, High Court Constitutional Petition No. 2 of 2011, at 7; and *Federation of Women Lawyers* case (n 89 above) 14.

¹⁹² 2010 Constitution of Kenya, article 20(3)(b).

¹⁹³ See McLean - Constitutional deference (n 131 above) 175, where she emphasizes the importance of a clear definition of the meaning, scope and content of rights as providing a meaningful framework for undertaking the reasonableness inquiry. The content of the rights developed, however, should not be viewed as a single and determinate truth, but must be understood as provisional and subject to a collective and collaborative adjustment by an epistemic community through deliberative dialogue, see Young – Constituting SERs (n 179 above) 4; Bilchitz – Poverty and fundamental rights (n 124 above) 160.

as discussed in chapters three and four of this thesis.¹⁹⁴ The first tier of the two-tiered integrated approach calls for Kenya, especially the political institutions, with the requisite substantive participation of the people, to adopt a minimum core approach which provides clear substantive content to the entrenched SERs, including the basic minimum essentials for a dignified life.¹⁹⁵ These processes of the development and incorporation of a substantive content of SERs in the

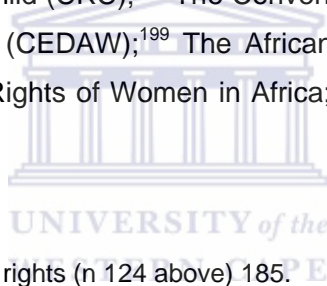
¹⁹⁴ This envisages the courts giving due deference to the SER implementation framework as designed by the political arms of the State with the requisite substantive public participation by all sectors of society. This approach has been supported by the CESCR, especially following the adoption of the Optional Protocol to the ICESCR, in a statement where it stated that it will use a similar approach when considering communications under the Optional Protocol. See CESCR Statement ‘An Evaluation of the Obligation to take steps (n 142 above). In the context of South Africa, aspects of this approach were proposed by David Bilchitz in his book, *poverty and fundamental rights*, as well as in book chapters and articles related to the book as referenced elsewhere in this chapter. It has been further elaborated on by Sandra Liebenberg in her book, *Socio-economic rights adjudication under a transformative constitution*, and related book chapters and articles also referenced in this thesis. Reliance on the ideas of these authors is therefore acknowledged. However, while these authors envisage the substantive content of the rights to be developed by the courts, the integrated approach proposed in this chapter, taken together with the theory of dialogical constitutionalism developed in chapters three and four, contends that the responsibility for the development of the meaning, content, scope as well as the elaboration of the values and purposes underpinning the entrenchment of justiciable SERs lies with the political institutions, with the substantive participation of all the sectors of society, in the development of the legislative, policy and programmatic framework for the realisation of the entrenched SERs. The court only assumes a role when there is clear failures of foresight, perspective, accommodation or responsiveness, and even in those instances, the courts must provide an opportunity for the political institutions to adopt, develop and implement the specific measures aimed at the vindication of violations of SERs.

¹⁹⁵ Bilchitz – Health (n 129 above) 35-36, who suggests an understanding of progressive realisation to contain two components, the first being the adoption of a minimum core content so as to respond to the minimum essential needs of the most vulnerable in society, while the second component entails the duty of the State to take steps to ensure the maximal enjoyment of SERs for the entire population. This ensures that all societal needs and interests are taken into account in the development of the State’s SER implementation framework, and the failure to adopt such an interpretation loses coherence and also significantly weakens the protection which was intended by the entrenchment of justiciable SERs in a constitution. See Bilchitz – Poverty and fundamental rights (n 124 above) 193ff. where he further advocates the understanding of progressive realisation to entail the movement from the realisation of the minimal interests protected by SERs towards the realisation of maximal interests.

implementation framework by the political institutions must be undertaken in a manner that ensures that the entrenched SERs have practical tangible benefits for the worst-off in society.¹⁹⁶

Three questions arise from the above proposal. Firstly, why should Kenya feel obliged to adopt the minimum core approach to SERs? Secondly, how will the content of the SERs be determined in practice and how is the adoption of the minimum core approach beneficial to the poor as well as vulnerable and marginalised individuals, groups and communities? Thirdly, how will the adoption of the minimum core approach by the political institutions impact on the work of the judiciary in relation to the protection and enforcement of socio-economic rights? I will proceed to deal with each of the questions in turn.

In dealing with the first question, it is important to point out that Kenya has ratified several international and regional human rights instruments providing for SERs. These include: The International Covenant on Economic Social and Cultural Rights (ICESCR);¹⁹⁷ The Convention on the Rights of the Child (CRC);¹⁹⁸ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹⁹⁹ The African Charter on Human and Peoples' Rights²⁰⁰ and its Protocol on the Rights of Women in Africa,²⁰¹ and The African Charter on the



¹⁹⁶ Bilchitz – Poverty and fundamental rights (n 124 above) 185.

¹⁹⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. Accented to by Kenya on the 1 May 1972, available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed on 22 June 2011).

¹⁹⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49. Ratified by Kenya on the 30 July 1990, available at <http://www2.ohchr.org/english/law/crc.htm> (accessed on 22 June 2011).

¹⁹⁹ Adopted and opened for signature, ratification and accessions on 18 December 1979 and entered into force on 3 September 1981. Accented to by Kenya on 9 March 1984, available at <http://www2.ohchr.org/english/law/cedaw.htm> (accessed on 22 June 2011).

²⁰⁰ Adopted and opened for signature, ratification and accessions on 1 June 1981 and entered into force on 21 October 1986. Ratified by Kenya on 23 January 1992, available at <http://www.au.int/en/treaties> (accessed on 22 June 2011).

²⁰¹ Adopted and opened for signature, ratification and accession on 1 July 2003 and entered into force on 25 November 2005. Ratified by Kenya on 6 October 2010, available at <http://www.au.int/en/treaties> (accessed on 22 June 2011).

Rights and Welfare of the Child.²⁰² The above instruments engender the obligation of the State to respect, protect, promote and fulfil SERs.²⁰³ The Kenyan Constitution acknowledges all these international human rights instruments and all the general rules of international law accruing from them as forming part of Kenyan law.²⁰⁴

In interpreting and developing the SERs provided for in the above instruments, the international institutions charged with their implementation, especially the CESCR, have adopted a minimum core approach to these rights.²⁰⁵ Even though the General Comments coming from the above international institutions with regard to the interpretation of rights only have persuasive value and are not legally binding, it is submitted that the State is constitutionally obliged to take them into account and adopt a minimum core approach to the SERs in the Constitution. Unlike South Africa, which has not ratified the ICESCR, Kenya has

²⁰² Adopted and opened for signature, ratification and accession on 1 July 1990 and entered into force on 29 November 1999. Ratified by Kenya on 25 July 2000, available at <http://www.au.int/en/treaties> (accessed on 22 June 2011).

²⁰³ See for example General Comment No. 3 of the Committee on ESCR; para 9 of General Comment No. 28 of the CEDAW Committee 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf> (accessed on 22 June 2011); and article 1 of the African Charter as interpreted by the African Commission in case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (hereafter SERAC case) paras 44-48, (2001) AHRLR 60 (ACHPR) 2001 Reprinted in Heyns and Killander (eds.) *Compendium of key human rights documents of the African Union* (2007) 251 at 255-256. See also Africa Commission 'Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' available at <http://www.communitylawcentre.org.za/achpr/files-for-achpr/draft-pcpl-guidelines.pdf> (accessed 22 June 2011) which further strengthens the Commission's adoption of the obligations to respect, protect, promote and fulfil, page 6-7.

²⁰⁴ 2010 Constitution of Kenya, article 2(5) & (6). For a more substantive discussion on the place of international human rights law in the Kenyan domestic jurisdiction, see Chapter two, section 2.2 above.

²⁰⁵ General Comment No. 3 ESCR, para 10 and the subsequent General Comments of the Committee on ESCR; African Commission's Draft Principles and Guidelines on ESCR which provides that the obligation of State Parties to fulfil the minimum core content of rights in the Charter is an immediate obligation, see especially paras 16-17. The Draft principles further develop the content of the SERs enshrined in the Charter, see paras 45 ff.

ratified the same and is legally bound by it under international law, and the interpretation of its provisions by the CESCR must thus also have legal effect at the domestic level in Kenya.²⁰⁶ A similarly situated jurisdiction as Kenya is Colombia which, having ratified the ICESCR, not only adopted the minimum core approach as is expounded by the CESCR, but also extensively and comprehensively used the General Comments of the CESCR in its judgments on SERs as is discussed in chapter two, section 2.5 above.

The issue at stake in the second question has been one of the major concerns that led to the SACC declining to adopt the minimum core approach to the interpretation of SERs.²⁰⁷ It raises the issue of how, in a diverse society with different understandings of minimum essential needs for human survival and well-being, there can be an imposition of a detailed and comprehensive theory of value to determine what the minimum core content of each of the SERs entail. However, the very entrenchment of justiciable SERs in the Constitution is an acknowledgment of the diversity of society and a realisation that different individuals and groups have different needs that must be provided for. These needs can be met either through the adoption of relevant legislative, policy and programmatic frameworks by the State to provide an enabling environment to allow people to be able to meet their basic socio-economic goods; or through the actual provision of basic socio-economic goods to individuals and groups in society that are unable to provide for themselves. This acknowledgment resonates perfectly with the international obligations of the State to respect, protect, promote and fulfill SERs as discussed in the specific contexts of the right to food and the right housing in chapters six and seven

²⁰⁶ See, Liebenberg – Interpretation of SERs (n 129 above) 33-11, who makes this argument in relation to countries that have ratified the ICESCR. The Kenyan High Court in the *Federation of Women Lawyers* case (n 89 above) 46-48, especially at 47 where the Court states as follows:

In our view, the minimum core obligation of the State is determined generally by having regard to the needs of the most vulnerable groups that are entitled to the protection of the right in question. In that case, however, the Court noted the difficulty of determining the minimum core of the right to affirmative action due to the varying needs and opportunities of the different vulnerable groups, and that these variations had to be holistically addressed.

²⁰⁷ *Grootboom*, paras 32-33.

below. This, in essence, therefore places the responsibility for the development of the content of SERs squarely on the doorstep of the State, especially the political arms of government.²⁰⁸

How then will the political arms of government determine the contents of SERs? It is submitted that there is no need to reinvent the wheel. A lot of work has already been done in the international arena, especially by the CESCR and other international experts,²⁰⁹ to develop the minimum essential elements for most of the entrenched SERs. All the government needs to do therefore, and this can be done almost immediately without raising arguments about the availability of resources, is to use the available international material to develop the minimum essentials to the SERs in the Constitution, taking into account Kenya's peculiar historical context, priorities and long term objectives.²¹⁰ As a part of the process of developing the minimum core content of SERs, the State's implementation framework must also incorporate the requisite achievable targets, indicators, benchmarks and specific timelines to provide guidance in the implementation, monitoring and evaluation of the State's implementation strategy and plan of action as well as enabling the public and other watchdog institutions to monitor progress.²¹¹

If the development of the minimum content of SERs is undertaken in an inclusive and deliberative process allowing for participation of all the Kenyan people in accordance with article 10 of the Constitution and as discussed in chapter four above, the government will be able to

²⁰⁸ The approach of the resolution of rights-based controversies according to a majoritarian principle of democracy, provided that the democratic process are appropriately deliberative and inclusive in nature is supported by Dixon (n 132 above) 401-402. The approach is further supported by Frank Michelman who contends that "a commitment to constitutional democracy implies resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit". See FI Michelman 'Foreword – The Supreme Court 1985 Term: Traces of Self-Government' (1986) 100 *Harvard Law Review* 34.

²⁰⁹ See generally, S Chapman & S Russell (eds.) '*Core obligations: Building a framework for economic, social and cultural rights*' (2002); P Hunt, *Reclaiming social rights: International and comparative perspectives* (1996).

²¹⁰ See Dixon (n 132 above) 416-417, who acknowledges the possibility of the domestication of a normative and conceptual account of the minimum core concept in the domestic arena so as to enhance the elaboration of the content of rights and to ensure improved protection and enforcement of SERs. Such a standard can then be developed further and perfected by the courts in specific SER adjudication.

²¹¹ Liebenberg – Interpretation of SERs (n 129 above) 33-42.

develop a detailed and comprehensive standard detailing the minimum core content of each of the SERs that is inclusive and that is acceptable to all Kenyans. The minimum core contents developed by these arms of government will then be polished by the courts over time as and when cases dealing with specific SERs come to the High Court and other superior courts for interpretation. The advantage of an elaboration of the minimum core by the political institutions with the substantive participation of the people in a deliberative process is that it ensures that the meaning, content and scope of the rights are not permanent, but remain contingent and incomplete so as to allow for their evolution to meet emerging societal contexts as well as new forms of injustices.²¹²

The adoption of the minimum core approach by the State has the potential to enhance the realisation of the transformative aspirations of the Constitution as it has the capacity to breathe life into the abstract SER provisions and ensure that the State has clear criteria within which to structure its legislative, policy and programmatic implementation framework. Such criteria will ensure that both the citizenry and the government have a clear understanding of the extent of the rights provided by the constitutional provisions and a clear understanding of the duties imposed by these provisions, making it possible for them to engage the courts and other forms of political strategies to vindicate their SERs in instances of violation. Such criteria are also important for the donor community and other international agencies as they can then choose specific aspects within the criteria to fund, in the fulfilment of their solidarity obligations espoused under the duty of international cooperation and assistance. The criteria also make it possible for the State as well as civil society to develop indicators and benchmarks for monitoring and evaluating State programmes aimed at the realisation of SERs.

The third issue raised dovetails into the second tier of the two-tiered interpretation approach advocated in this chapter. The adoption of a minimum core by the political institutions will then make it easier for the courts to also adopt a practical, progressive and purposive approach to the interpretation of the entrenched SERs that ensures that the rights have a practical benefit to Kenyans without the counter-majoritarian and the polycentricity challenges that have bedevilled judicial enforcement of justiciable SERs in other jurisdictions. For the judiciary to achieve this objective, it is submitted here that they adopt an expansive reasonableness approach to assess the government's legislative, policy and programmatic

²¹² Liebenberg – Adjudication under a transformative constitution (n 4 above) 180.

framework aimed at fulfilling SERs.²¹³ The first level of analysis using this expansive reasonableness approach will assess whether the government programme has incorporated and implemented the minimum core that meets the needs of the most vulnerable in society. This recognises that if indigent and vulnerable peoples' basic needs and interests are not catered for, all the other rights and fundamental freedoms become redundant.²¹⁴ If the government framework has not been able to provide the minimum essential elements to the most vulnerable in society in the first instance, then the courts should, in the absence of any substantive countervailing reasons, hold it as being *per se* unreasonable.²¹⁵ This is in line with the jurisprudence of the SACC in the *Port Elizabeth Municipality* case where the Court held as follows:²¹⁶

It is not enough to have a programme that works in theory [or in the distant future]. The Constitution requires that everyone be treated with [equal] care and concern. If the measures taken, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom it cannot be

²¹³ A similar approach of giving content to socio-economic rights in the interpretation of the reasonableness approach is advocated for in D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 9 & 11.

²¹⁴ Bilchitz – Towards a reasonable approach to minimum core (supra n 213 above) 12. Young – Constituting SERs (n 179 above) 82-83.

²¹⁵ The issue of the availability of resources does not arise in relation to the fulfilment of the minimum essentials of life, as has been evidenced by the progression in the socio-economic jurisprudence of the CESCR, see chapter two, section 2.5 above, especially footnote 276. See also Young – Constituting SERs (n 179 above) 82-84, who similarly advocates the same strategy and affirms that the minimum core approach is useful in SER adjudication as it reverses the onus of proof in SER claims, in that claimants only have to prove that the minimum core of their SERs were not protected, at which point the onus is on the State to justify the limitation of the claimants' rights as reasonable or to prove that adequate legislative, policy and programmatic steps have been put in place to enhance the realisation of the rights. The minimum core thus requires a large measure of scrutiny and a higher level of justification of failures to realise the SERs of the most vulnerable in society, turning "paper rights" into "practical realities"; and M Langford 'Judging resource availability' in J Squires, M Langford & B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 89, at 99-100, also with a similar proposition.

²¹⁶ *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) 2005 (1) SA 217 (CC), para. 29.

presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress can be avoided.

This first level of analysis is based on the idea that there are varying degrees of needs and thus varying degrees of fulfillment of rights. From this basis, it follows that the possibilities for the realisation of the maximal human interests and needs can only exist after the minimal survival needs have been met, for the basic sustenance needs must be met for human beings to survive. Therefore, the fulfillment of the most essential minimum levels of needs required to ensure survival must, of necessity, take precedence and be prioritised over the more extensive and maximal fulfillment of rights.²¹⁷ This approach is supported by the CESCR in its General Comment Number 3 where it states that 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant'.²¹⁸

It is only after determining that the government's SER implementation framework has sufficiently provided for the basic essential goods and services to the most needy and vulnerable groups that the court should proceed to review it under the other reasonableness benchmarks set by the SACC as discussed in section 5.3.1 above. The judiciary must assess

²¹⁷ Bilchitz – Towards a reasonable approach to minimum core (supra n 213 above) 13. See also Liebenberg – Adjudication under a transformative constitution (n 4 above) 172-73, where she acknowledges that the adoption of the minimum core approach indicates the need for a prioritisation of the urgent needs of marginalised and vulnerable individuals and groups. She further avers that this prioritisation places a strict burden of justification on the State should it fail to meet the basic minimum essential needs of the most vulnerable individuals and groups in society, at 184.

²¹⁸ CESCR, General Comment No. 3, para 10. The approach has also been envisaged by the Kenyan High Court in the *Federation of Women Lawyers* case (n 89 above) 48, where the Court stated as follows:

An issue which would arise is whether the measures taken by the State or state organ to realize the rights awarded by Article 27 are reasonable. In that regard we think there may be cases or situations where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken or to be taken are reasonable and satisfy the needs and aspirations of all vulnerable groups.

This indicates that the Court acknowledged the importance of both the reasonableness approach and the minimum core approach in the prioritisation of the needs of the most vulnerable in the society.

that the government's legislative, policy and programmatic framework is supported by sufficient and cogent reasons and evidence, is rationally connected to the purpose it is aimed to achieve, and is objectively capable of furthering that purpose. It must also reveal the proportionality between ends and means, benefits and detriments for all groups of people, but especially for the poor and vulnerable groups.²¹⁹ The judiciary must at this point use its coercive and concrete judicial powers to directly counter any failings or gaps in the legislative, policy or programmatic framework by using its powers of invalidation, reading-in or the provision of injunctive relief in a way which helps put individual rights-based claims on the broader public and political agenda.²²⁰ In this way, the judiciary will have a much greater capacity and a direct responsibility in countering blockages in the government's legislative, policy and programmatic framework, and also ensure the viability of the government's overall framework of implementation of the constitution.

The transformative and integrated two-tiered approach, a strong rights-based approach to constitutional interpretation, therefore adopts the best of both the minimum core content approach and the reasonableness approach thereby ensuring that the constitutionally entrenched SERs achieve their true potential in alleviating human suffering, eradicating poverty and reducing the gap between the rich and the poor. On the other hand, it also reacts to the criticisms leveled at the minimum core approach and thus allows a proper margin of appreciation for the decisions of the other arms of government best suited to make decisions on the distribution of State resources to meet the diverse obligations of the State.²²¹ The integrated approach thus shows sensitivity to democratic legitimacy and acknowledges the limits of judicial competence.²²² It allows for the separation of powers and a participatory approach to decision making where all the arms of the State as well as all the sectors of society are actively involved in the development and implementation of the State's legislative, policy and programmatic

²¹⁹ Bilchitz – Poverty and fundamental rights (n 124 above) 142.

²²⁰ Dixon (n 132 above) 405-406.

²²¹ This is in line with the holding of the then President of the SACC, Justice Chaskalson, in the *Soobramoney* case that 'a court will be slow to interfere with rational decisions taken in good faith by political organs....whose authority is to deal with [matters concerning the development of implementation framework as well as the allocation of resources for the realisation of justiciable SERs],' at para. 29.

²²² Dixon (n 132 above) 393.

framework for the implementation of SERs. The integrated approach can thus aptly be summarised by borrowing the words of Cuss Sunstein that:²²³

[it] is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met...[and that] it suggests that [SERs] can serve, not to pre-empt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate.

Properly implemented, the transformative and integrated approach has the benefit of inculcating a collaborative cooperation between the judiciary and the other levels of government allowing each of them to bring their unique expertise and skills on the legislative, policy and programmatic framework dealing with the implementation of SERs and thus promoting overall implementation and enforcement.²²⁴ This in turn will enhance the realisation of the transformative aspirations of the Constitution as is discussed above.

5.4 The connection between the integrated approach and the theory of dialogical constitutionalism

In understanding the link between the integrated approach proposed in this chapter and the theory of dialogical constitutionalism discussed in chapter three and four of this thesis, it is imperative that an analysis is undertaken of how the composite parts of the integrated approach, the minimum core approach and the reasonableness approach, link with the theory of dialogical constitutionalism.

5.4.1 The minimum core and dialogical constitutionalism

Carol Steinberg, in her analysis of the SER jurisprudence of the SACC, provides the most searching critique of the dialogical credentials of the minimum core approach. Steinberg argues that the minimum core approach is an intrusive rule-based approach which is likely to stifle

²²³ CR Sunstein 'Social and economic rights? Lessons from South Africa' (1999-2001) 11 *Constitutional Forum* 123, at 123.

²²⁴ Dixon (n 132 above) 393, acknowledges that the idea of constitutional dialogue between the judiciary and the legislature is not a new phenomenon and has been extensively debated in the context of Canada, the United States of America, United Kingdom and Australia.

institutional conversation and collaboration between the three branches of government.²²⁵ Related reservations as to the dialogical competences of the minimum core approach have been expressed by Rosalind Dixon who avers that a complete normative definition of the minimum core by the courts will foreclose legitimate dialogue within civil society about the conceptual and value-based underpinnings of SERs, and the best way of enforcing them in differing contexts.²²⁶ Liebenberg also raises important concerns with regards to a once-off judicial determination, formulation and enforcement of the minimum standards for the implementation of SERs, contending that this limits societal dialogue as it does not take into account the value-laden nature of SERs, and the reality of the existence of legitimate diversity in society.²²⁷ Marius Pieterse further chronicles these concerns, stating that judicial elaboration of the minimum core:²²⁸

[m]ay result in over- or under-inclusive specification of SER obligations; may invite undue reductionism and/or minimalism in need-definition; may exclude or marginalise the needs of various groups that do not fit the background norms informing the definition of core obligations; and, may oversimplify the interaction between and co-dependence of interconnected socio-economic needs of varying levels of complexity, urgency and costs.

These are genuine concerns in relation to the judicial elaboration of SERs, especially taking into account the conservative legal culture prevailing in Kenya and South Africa, and the

²²⁵ Steinberg (n 124 above) 269. She contrast this with the democracy and deliberation promoting aspects of the reasonableness approach that she terms 'abstract and open-ended' and which is better able to engender societal exchanges, learning and compromise in the case-by-case evolution of SER implementation standards, as well as enabling the State to function efficiently through the fostering of a culture of justification, at 274-276.

²²⁶ Dixon (n 132 above) 416-417.

²²⁷ S Liebenberg 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in S Woolman & M Bishop (eds.) *Constitutional conversations* (2008) 303, at 308-319; Liebenberg – Adjudication under a transformative constitution (n 4 above) 167. She contends that such judicial establishment of a normative essence of SERs that is beyond contestation and debate promotes closure in societal dialogue on the interpretation, implementation and enforcement of SERs.

²²⁸ M Pieterse 'On dialogue, translation and voice: A reply to Sandra Liebenberg' in S Woolman & M Bishop (Eds.) *Constitutional conversations* (2008) 331, at 340.

echelons of society where judges are most likely to emanate from.²²⁹ The concerns, however, need to be clarified in the context of the theory of dialogical constitutionalism elaborated on in chapters three and four of this thesis. First, these arguments do not take into account the critical function that SERs play in enhancing the equal and effective substantive participation of all people in collective self-government, which is one of the most important aspects of democracy as is discussed in chapter four above.²³⁰ Without the protection from material deprivation, human dignity and self-worth - necessary for the active participation in collective self-government - are impaired. This leads to the political and social voicelessness of the poor, marginalised and vulnerable individuals and groups, thus eroding the chances of equality in deliberation. The elaboration of the content of rights, and especially the prioritisation of the basic essential needs of these poor and vulnerable individuals, is thus critical in the inculcation of a culture of democracy which entails meaningful deliberation in collective public decision-making.

Secondly, the theory of dialogical constitutionalism, as discussed in chapter four above, does not envisage the court developing the minimum core content of the entrenched SERs. It identifies correctly that this is a legitimate role of the political institutions of the State working in collaboration with larger societal actors in a process of participatory dialogue and deliberation.²³¹ The legitimacy of the political institutions rests on their representation of the concerns, and the protection of the rights, of citizens, and a government that is unable to undertake these responsibilities effectively loses its legitimacy to govern.²³² In accordance with the 2010 Kenyan

²²⁹ Judges mostly come from the middle or high echelons of society and may not be able to relate to the lived experiences of poverty and deprivation of the poor and marginalised individuals and groups in society. The judges may, thus, not be able to effectively capture these lived experiences as well as the basic survival needs of the poor if the task of developing the content of rights is left exclusively to them.

²³⁰ See Young – Constituting SERs (n 193 above) 4-6; A Sen, *Development as freedom* (1999) 152-153; Moellendorf (n 146 above) 332; Brand (n 124 above) 35.

²³¹ See E Wiles 'Aspirational principles or enforceable rights: The future for socio-economic rights in national law' (2006-2007) 22 *American University International Law Review* 35, at 40, who argues that SER litigation is minimised if the political institutions of the State put in place optimal implementation frameworks and ensure their faithful observance.

²³² See N Udombana 'Social rights are human rights: Actualising the right to work and social security in Africa'(2006) 39 *Cornell International Law Journal* 181 at 188, who contends that the primary responsibility of the State is to take care of the welfare of its citizens, and a government's legitimacy entails meeting the basic needs of the citizens.

Constitution, the power to design and implement policy is a power of the people, to be exercised on their behalf and for their benefit.²³³ The people themselves must, therefore, be involved in the design and implementation of policy, through their participation in both democratic and deliberative institutions of the State. To enhance their equal participation in these democratic and deliberative institutions, they must be capable of meeting their basic survival needs as discussed in the paragraph above. The adoption of the minimum core approach does not, therefore, denigrate democracy; but enhances democracy because it enables all sectors of society to engage equally in the democratic process as well as in deliberative public decision-making processes.

Thirdly, these arguments do not take into account the fact that the very reason for litigation in the first place is the failure of these democratic institutions to put in place adequate measures and programmes for the alleviation of poverty.²³⁴ The courts do not act on their own motion; they have to be moved by litigants whose rights, as entrenched in the Constitution, have not been realised or are being violated by the State itself. These arguments thus fail to realise that the courts are a forum for societal dialogue and that the very process of litigation is an aspect of constitutional conversation between the political institutions, the courts and society at large in the form of litigants, *amici* and expert witnesses brought in by parties or summoned by the courts.²³⁵ Litigation spurs dialogue as the policies of the government are subjected to

²³³ The 2010 Kenyan Constitution, articles 1 (sovereignty of the people), 94 (legislative authority derives from the people and is to be exercised by parliament for the benefit of the people), 129 (executive authority, which includes the design, development and implementation of policy and programmatic framework, derives from the people and must be exercised in a manner compatible with the principle of service to the people, as well as for their well-being and benefit, 159 (judicial authority also derives from the people and is to be used for the benefit of the people) as well as 232 (1) (d) & (f) (which calls for the participation of the people in the process of policy-making and transparency in the provision of timely as well as accurate information to the public).

²³⁴ See Dixon (n 132 above) 401, where she acknowledges that the political processes are rife with blind spots and burdens of inertia which may result in SER implementation frameworks that do not take into account their adverse impact on rights.

²³⁵ See Dixon (n 132 above) 405, who submits that due to the visibility of court proceedings and decisions, courts play a prominent role in bringing out the claims of vulnerable and marginalised groups whose voices are not represented adequately, or at all, in the political processes, thus helping counter political inertia and blind spots.

societal deliberation so as to enhance their effectiveness in responding to the dire needs of the most desperate in society. As has been pointed above, the failure to ensure access to the basic material needs of the poor and vulnerable in society makes true democracy - which is respectful of the dignity and equal worth of all individuals in society - impossible.²³⁶ For this dialogue to take place, there must be some basic standard against which the State's policy is measured, of which the minimum core approach forms a part. As Danie Brand has convincingly argued, the reason for the proceduralisation of the SACC's SER jurisprudence is because of the failure of the Court to define the content of SERs, leading to its failure to evaluate the State's policies and programmes with regard to their effectiveness to realise the constitutionally mandated goals.²³⁷ Thus the elaboration of the content of rights, especially the adoption of a minimum core to the entrenched SERs, spurs on dialogue rather than stifle it.

Fourthly, and perhaps more importantly, these arguments fail to acknowledge the important role entrenched SERs were meant to play in policy formulation as well as in social activism aimed at policy change, as they (the arguments) are based on a view of SERs as reactive tools used as standards to test policy in the instances of live controversies.²³⁸ Brand argues that the most important role of SERs is to guide and shape policy formulation from the outset, a task that will be more effectively realised if the meaning, scope and content of these

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²³⁶ Wiles (n 231 above) 49, who contends that SERs are an important means in the achievement of a just form of democracy as they are designed to empower the marginalised societal voices to improve their situation, and thus redresses concerns of the "tyranny of the majority" that results from a democracy without such safeguards. See also Hunt (n 209 above) 183, where he contends that social rights are necessary for marginalised individuals and groups to enjoy full and effective citizenship; C O'Conneide 'Emerging models of socio-economic rights adjudication: Lessons from home and abroad' (2011) available at <http://www.juridicas.unam.mx/wccl/ponencias/10/186.pdf> (accessed on 22 October 2012) who affirms the difficulty of establishing a rights-based democracy on unstable socio-economic foundations, and calls for the realisation of basic SERs as a necessary and integral building blocks of a rights-based polity, at 12-13; L Osberg & S Phipps 'A Social Charter for Canada' available at <http://myweb.dal.ca/osberg/classification/book%20chapters/A%20social> (accessed on 18 June 2012), who submits that the effective expression of individual legal and political rights requires a minimum level of social and economic standing, without which they cannot effectively participate in political life, at 2-3.

²³⁷ Brand (n 124 above) 44-51.

²³⁸ Brand (n 124 above) 53.

SERs are clearly developed.²³⁹ To enhance this argument, Brand quotes the arguments by the Centre for Applied Legal Studies (CALs) at the University of Witwatersrand who submit as follows:²⁴⁰

Constitutional SERs are not just tools used by lawyers to force government to accede to awkward political demands. Rather [they] are policy-structuring devices intended to inform the very way government goes about its business.

The development of the content of rights thus has the potential to enhance dialogue as it provides the requisite tools for social actors to engage actively with the political institutions in the design and development of policy.

Lastly, despite the importance of the above-discussed challenges, they are not just apparent in instances of judicial adjudication of SERs; they are also experienced during the design of SER implementation frameworks by the political institutions, specifically with regard to the design of legislative and policy frameworks.²⁴¹ Societal dialogue is thus critical in responding to the mentioned challenges, and societal participation in an environment of dignity and equality is crucial in bringing out all the societal voices, especially of the poor, vulnerable and marginalised individuals and groups whose voices are almost never present in the normal political or judicial processes of decision-making. The only way to empower such groups to actively participate in societal decision-making is by ensuring that they have access to basic survival needs, the very basis of the proposal that the political institutions develop the minimum core content of rights in the SER implementation frameworks at the first level of dialogue as is elaborated in chapter four, section 4.2 above. This is also the basis for the proposal that the courts adopt the integrated approach discussed above, an interpretive approach that entails a searching scrutiny of the SER implementation frameworks to ensure that the minimum core content is entrenched therein, in the absence of which the implementation framework must be

²³⁹ Brand (n 124 above) 54.

²⁴⁰ As above.

²⁴¹ See Liebenberg – Adjudication under a transformative constitution (n 4 above) 166, where she acknowledges the institutional inadequacies of the political institutions of the State, especially the legislature, in the development of an SER implementation framework. The inadequacies include lack of sufficient time and resources, insufficient technical expertise, capture by family dynasties, powerful businesses and other dominant societal interest groups, as well as political sycophancy and lack of party discipline among parliamentarians.

held to be *per se* invalid. It is thus only with the adoption of a minimum core approach as an aspect of the integrated approach proposed herein that progress towards societal transformation and the creation of a just and equal society where all citizens participate effectively in self-governance can be realised.

5.4.2 Reasonableness and dialogical constitutionalism

Due to its perceived flexibility and open-ended nature, the dialogical credentials of the reasonableness approach have been emphasised.²⁴² Sandra Liebenberg argues that due to its contextual sensitivity as well as its sensitivity to the diverse needs of differently placed individuals, the reasonableness approach has the capacity to facilitate societal dialogue and public participation in the development of the substantive meaning, scope and content of entrenched SERs as well as in the design, development, implementation and enforcement of the State's legislative, policy and programmatic framework for the realisation of SERs.²⁴³

The dialogical credentials of the reasonableness approach have, however, been questioned, with Marius Pieterse providing the most searching critique. Pieterse contends that the "conceptual emptiness" of the approach with regard to the content of rights denigrates the transformative potential of rights translation through dialogue.²⁴⁴ He avers that the approach changes the dialogue taking place in the courts from a dialogue on the rights in question to a dialogue on the desirability and instrumental astuteness of government's legislative and policy framework.²⁴⁵ He submits that this basically shifts the dialogue to the political institutions,

²⁴² See Steinberg (n 124 above) 268ff who extensively emphasizes the dialogical potential of the reasonableness approach. See also Yeshanew (n 172 above) 326, who similarly states that reasonableness ensures scrutiny of the State's SER programmes while at the same time giving appropriate deference to the political institutions of the State, and thus escapes the institutional legitimacy objections.

²⁴³ Liebenberg – Adjudication under a transformative constitution (n 4 above) 174-175. See also C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484, at 509-513, who, in defining the reasonableness standard, acknowledges that it allows for the legitimate diversity of views, which in essence promotes dialogue and deliberation.

²⁴⁴ Pieterse – A reply to Liebenberg (n 228 above) 341-342.

²⁴⁵ As above. See also Liebenberg – Adjudication under a transformative constitution (n 4 above) 175-179, who similarly contends that in conflating the traditional two-stage approach to constitutional analysis and failing to develop substantive content to the entrenched SERs, the dialogic and relational potential of the reasonableness review is weakened as it eschews a limitations analysis as well as allows the courts

a dialogue venue that is almost always inaccessible to the voiceless poor and marginalised individuals and groups in society.²⁴⁶ He terms this an abdication of the responsibility of the courts, who are the constitutionally mandated guardian of the Constitution and the primary protectors of rights, and contends that the courts' failure to take up a more active role in the development of the content of the entrenched SERs is lamentable.²⁴⁷ With regard to individual and group participation, he submits that the reasonableness approach also stifles dialogue due to its chariness towards individual entitlements, making it worthless for individuals or groups to articulate and pursue rights claims in the courts.²⁴⁸

In the same vein, Liebenberg also points out that due to its conflation of the two-stage approach to constitutional adjudication, which in essence detracts from the development by the courts of the meaning, scope, content, purpose as well as the relevant values protected by a specific SER, the reasonableness approach forecloses societal dialogue on these important aspects of the implementation and enforcement of justiciable SERs.²⁴⁹ This is because societal actors are denied the opportunity to persuade the court to adopt a certain interpretation of entrenched SERs, as well the foreclosing of the courts as a societal forum in which legitimately

to avoid a substantive engagement with other societal actors on the purposes and underlying values of the entrenched SERs and the impact of their deprivation on claimant groups.

²⁴⁶ Pieterse – A reply to Liebenberg (n 228 above) 342-344, he contends that the only instance when the poor get to be heard is if their agenda coincides with the agenda of a powerful, well-resourced and well-connected social movement, at 344. This is affirmed by Liebenberg – Adjudication under a transformative constitution (n 4 above) 167, who states that even though the abstractness and minimalism associated with the reasonableness approach allows political institutions to develop the SER implementation framework, it reinforces the marginalisation of vulnerable groups that do not have a political voice in these institutions.

²⁴⁷ Pieterse – A reply to Liebenberg (n 228 above) 343. He mentions the delimiting effect which a restrictive understanding of SERs by the highest constitutional court in a legal system has in enhancing dialogue in other subordinate judicial fora due to the principle of *stare decisis*.

²⁴⁸ Pieterse – A reply to Liebenberg (n 228 above) 344.

²⁴⁹ Liebenberg – Adjudication under a transformative constitution (n 4 above) 175-177. She contends that the non-elaboration or non-reliance on these purposes and values in the analysis of reasonableness by the courts leads to further deprivation of the vulnerable and marginalised in society, thus further eroding their voice in the deliberative as well as elective democratic processes, at 177-179.

held and competing conceptions of the purposes and values of the entrenched SERs can be legitimately mediated.²⁵⁰

The main challenge to the dialogical credentials of the reasonableness approach is its lack of elaboration of the meaning, content and scope of SERs, including the minimum core content as well as its non-reliance on the values and purposes underpinning the entrenchment of SERs as justiciable constitutional rights. The theory of dialogical constitutionalism together with the integrated interpretational approach proposed herein responds effectively to the above concerns. The theory of dialogical constitutionalism requires that political institutions, in collaboration and cooperation with other societal actors in deliberative processes based on the equality of worth of all human beings, undertake the development of a comprehensive legislative, policy and programmatic framework that elaborates the meaning, scope and content of each of the entrenched SERs, including the minimum core content of each of the SERs, taking into account the values that underlie an open and democratic society, that is, democracy, human dignity, equality and freedom. The theory further requires that the courts, as the guardians of the Constitution, adopting the integrated approach proposed here, undertake a two-tiered analysis of the State's SER implementation framework with the aim of ensuring that all the societal long-, medium- as well as short-term needs, goals and aspirations are met. The theory envisages deference by the courts to the political institutions as to choices in policy aimed at the realisation of SERs, but also retains both a substantive and a facilitative role for the courts, in their design of remedies, to ensure that the transformative aspirations of the Constitution, envisaged in the entrenchment of justiciable SERs are achieved.

5.5 Conclusion

In the realisation of the transformative potential of the Kenyan Constitution, the critical importance of adopting a progressive and purposive approach to the interpretation, implementation and enforcement of the entrenched SERs cannot be overstated. This is because the normative foundation that is provided by the adopted approach will inform the understanding of the nature of the SERs as well as determine the scope and the content of SERs. This chapter undertook an extensive analysis of the current approaches to the interpretation and enforcement of SERs, the minimum core approach and the reasonableness approach.

²⁵⁰ Liebenberg – Adjudication under a transformative constitution (n 4 above) 176.

The analysis found that the reasonableness approach has several advantages which are democracy enhancing such as its flexibility as well as its sensitivity to the historical, social, economic and political context, which allows the courts to accord the requisite deference and margin of appreciation that is respectful of the doctrine of separation of powers. It acknowledges that there can be legitimate disagreements with regard to the interpretation and implementation of the indeterminate, constitutionally entrenched SERs, and thus provides the opportunity for legitimate societal deliberation and dialogue as to the meaning, content and scope as well as the best framework to be adopted for the implementation and enforcement of the entrenched SERs. The major flaw of the reasonableness approach is its lack of substantive delineation of the normative content of SERs, leading to the difficulty in developing review guidelines and standards for the evaluation of the State's SER implementation frameworks. This flaw has resulted in the courts' adoption of varying degrees of scrutiny in relation to the positive obligations arising from the entrenched SERs which, as has been argued by several authors, is lower than the standard of scrutiny that the courts use for the adjudication of CPRs as well as negative SER obligations. This flaw has also led to the criticism that in using the approach, the courts have neglected the values that underpin the Constitution, to the detriment of the achievement of the transformative aspirations of the Constitution and the better protection of the rights of the poor, marginalised and vulnerable individuals and groups in society.

An analysis of the minimum core approach has, on the other hand, revealed that this approach, with its clear specifications of the basic minimum essentials, gives the State better guidance in policy formulation and development, enhances the monitoring and evaluation of State policy by both governmental and non-governmental institutions as well as individuals, ensures better protection of important interests of poor and vulnerable individuals and groups and is thus better able to enhance the achievement of the transformative potential of a transformative constitution. The above positive features of the minimum core approach have been affirmed by Brand, who contends that the advantage of the approach is that it targets deprivation and hardship itself, and thus deals specifically with the concrete realities of hunger, homelessness, disease and illiteracy. The minimum core approach has also had its fair share of criticism, and it has been argued that it is rigid and unresponsive to the diverse needs of differently situated individuals and groups; it is difficult to ascertain due to varying degrees of need and the large pool of information required to develop it; the courts are not institutionally and constitutionally competent to develop it; its development is based solely on survival needs

and does not take into account other important constitutional values such as equality, dignity and freedom; and that it restricts the policy choices of political institutions.

Taking into account the above important critique of the two approaches, it has been submitted that Kenya should adopt a transformative and integrated approach that espouses the best of both approaches in the interpretation, implementation and enforcement of the entrenched SERs. The integrated approach proposed in this chapter is amalgamated with the theory of dialogical constitutionalism developed in chapters three and four of this thesis, and thus espouses the view that it is the primary responsibility of the political institutions, in the first instance, to develop the legislative, policy and programmatic framework for the implementation of the entrenched SERs. It states that in developing this framework, the political institution must, as mandated by the Constitution itself, substantively ensure public participation of all sectors of society in the legislative and executive decision-making processes so as to ensure that all societal concerns and interests are substantively espoused, in line with the principle of equal importance or worth of all human beings. The approach proposes that in the design and development of the implementation framework, the political institutions must, in line with their coordinate interpretive authority, infuse their understanding of the meaning, content and scope of the entrenched SERs into the implementation framework, including the espousal of the minimum core content of the entrenched SERs.

At the second level and in relation to the courts, the proposed transformative and integrated approach envisions them adopting an expansive reasonableness approach in the evaluation of the State's implementation framework, where the courts will, in the first instance, review whether the implementation framework has incorporated the minimum core content of the relevant SERs. The integrated approach proposes a searching scrutiny in this first instance of analysis, and if the courts find, after that analysis, that the framework has not incorporated the minimum core and the political institutions have not provided any substantive justification as to why it has not been incorporated, then the courts should find that the relevant legislative, policy or programmatic framework is *per se* unreasonable. The rationale for this searching analysis is the acknowledgement that if the needs and interests of the most indigent and marginalised in society are not catered for, the entire corpus of rights in the Bill of Rights becomes redundant. If, on the other hand the courts find that the needs and interests of the indigent and marginalised individuals and groups have been sufficiently catered for, the court

can then proceed to undertake the reasonableness analysis using the criteria provided by the SACC, as enumerated in section 5.3.1 above.

It is submitted that the adoption of this approach will enhance the alleviation of human suffering, eradicate endemic poverty and inequality, enhance the realisation of social justice, entrench democracy as well as good accountable governance, and thus ensure the realisation of the transformative aspirations of the Constitution for the betterment of all people.



Chapter six: The right to food in Kenya

6.1 Introduction

The thesis in chapter two undertook an analysis of the substantive nature, scope, content and extent of socio-economic rights (SERs), developed the theory of dialogical constitutionalism as a theoretical framework for the interpretation, implementation and enforcement of SERs in chapter three and four, as well as the transformative and integrated approach, a progressive interpretive approach aimed at the realisation of the transformative aspirations of the 2010 Kenyan Constitution in chapter five. This previous chapters have set up the requisite substantive, theoretical and interpretive framework for an analysis of the right to food as a case study in the present chapter. The chapter looks at the food security situation in Kenya, the meaning, scope, content and scope of the right to food and the obligations arising from the right both at the national and international level, as well as the role of the courts in enforcing the right to food.

Hunger and malnutrition are endemic concerns that have straddled Kenya for a long time. The situation has, however, worsened in the recent past due to declining food production as a result of climate change and its attendant change in rainfall patterns in the food producing areas; the 2007 political violence after the bungled general election which resulted in the displacement of people mainly from the food producing regions; the recent global economic downturn; the spike in international oil prices leading to the skyrocketing in food prices; and the runaway inflation that has wiped out people's capacity to feed themselves.¹ The situation is

¹ United Nations Economic Commission for Africa (UNECA) 'An overview of the food security situation in Eastern Africa' (February 2010) 5, available at <http://www.uneca.org/ea/meetings/srcm2010/Food%20Security%20OVERVIEW.pdf> (accessed on 5 July 2012). See also G Obare 'Querying the fire-fighting approach to food security in Kenya: The innovations extension alternative (2011) 12-13, available at https://fsc.uni-hohenheim.de/fileadmin/einrichtungen/fsc/FSC_in_dialog_Presentation/Approach_to_food_security_in_Kenya_-_Obare.pdf (accessed on 5 July 2012), who outlines the underlying causes of food insecurity as follows: growing population and endemic poverty; insecure land tenure and land degradation; skewed income distribution; increasing frequency and severity of droughts; limited government investment in agriculture, corruption; and, poorly integrated markets; DE Buckingham 'A recipe for change: Towards an

further exacerbated by the extremely unequal international trade regime entrenched by developed States through the World Trade Organisation (WTO), the imposition of the “Washington consensus” which emphasises trade liberalisation, deregulation, privatisation and the compression of social spending in the national budget, and the external debt-servicing burden.²

Kenya is, in reality, a food deficient country, as is indicated by the graph below which shows that over the recent past, Kenya has become a net food importer, further reducing the capacity of Kenyans, especially poor and vulnerable individuals and groups, to feed themselves and their families. The dire food security situation has been acknowledged by the Kenyan President, Mwai Kibaki, who on 16th January 2009 declared it a national emergency, with one out of every three Kenyans (approximately 15 million people) threatened with starvation.³

integrated approach to food under international law’ (1994) 6 *Pace International Law Review* 285, at 286 – footnote 5, who documents causes of world hunger as poverty, poor production and distribution infrastructure, corruption, civil strife, discrimination, overpopulation, the lack of political will to acknowledge and actively pursue the fulfilment of basic human needs, international debt, domination of food trade by transnational corporations, unfair international trade and aid policies, and environmental concerns.

² J Ziegler ‘Preface’ in J Ziegler *et al*, *The fight for the right to food: Lessons learned* (2011) xiii-xiv. See also Commission on Human Rights ‘Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, E/CN.4/2002/58’ (January 2002) Executive Summary paras. 4-7 & Report paras. 16-17 & 107-119, available at <http://www.righttofood.org/publications/un-reports/> (accessed on 21 November 2012) (Second Report of the SR Jean Ziegler). He notes that efforts by developing countries to introduce a “food security box” that reflected the food security needs of these countries, and which gave them greater policy autonomy to protect their staple foods was ignored at the Doha Round of WTO negotiations, at paras. 116-117.

³ Oxfam GB *et al*, ‘The Nairobi informal settlements: An emerging food security emergency within extreme chronic poverty – A compilation and synthesis of key food security, livelihood, nutrition and public health data’ (April 2009) 2, available at <http://www.givewell.org/files/DWDA%202009/Concern/KenyaTechnicalBrief09.pdf> (accessed on 20 July 2012).

Figure 1.0 – Kenya national food security indicators and trends.⁴

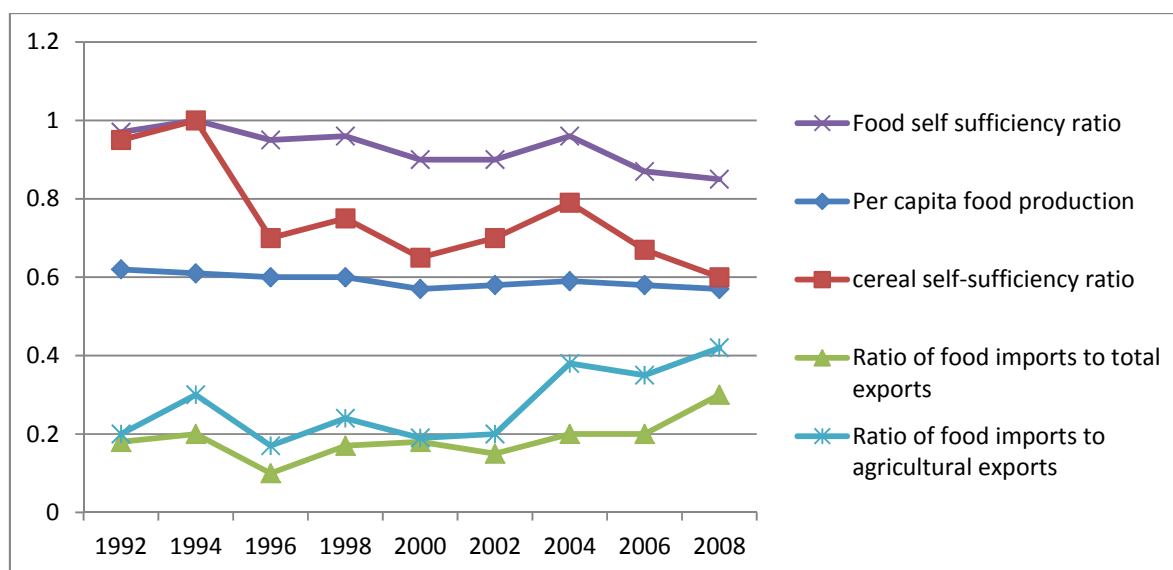
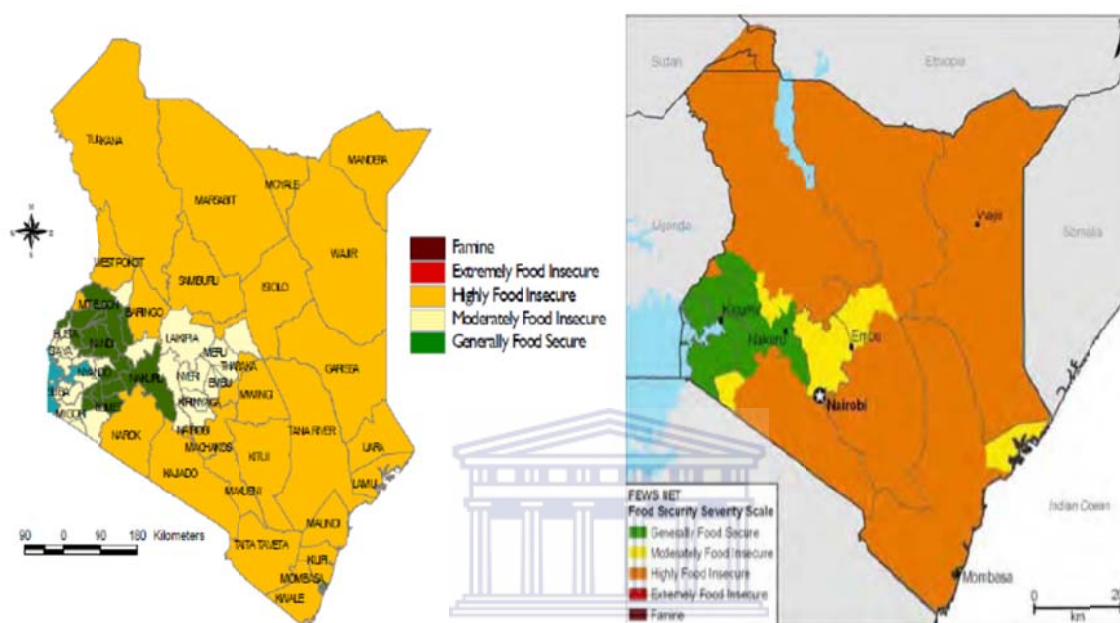


Figure 1.0 indicates a steady decline in cereal self-sufficiency, which refers especially to maize, rice and wheat - the main staple foods of a majority of the Kenyan people. This is mainly due to global warming and the resultant change in rainfall patterns, increase in the cost of farm implements, forcing many farmers to reduce plantation sizes or to abandon large-scale farming altogether, exploitation by middlemen, and lack of proper storage facilities leading to losses in crop yields, among others. Apart from the declining cereal production, the production of other food crops are also threatened, as is indicated by the steady decline in per capita food production and food self-sufficiency ratio over the years as shown by the graph above. To stabilise the dire food security situation, the graph indicates a steady increase in food importation to cover for the steady reduction in per capita food production, leading to a steady decline in food self-sufficiency among the Kenyan people. Credence is further lent to the authenticity of trends and indicators in figure 1.0 above by a look at the overall food-sufficiency situation in the country as is indicated by figure 2.0 below. It shows that over 80 per cent of the country is highly food insecure; approximately 8 per cent is moderately food insecure; approximately 10 per cent is food secure, with the other parts either facing famine or being extremely food insecure.

⁴ Obare (n 1 above) 5.

Figure 2.0 – A snapshot of the food security situation in Kenya.⁵

A SNAPSHOT OF THE FOOD SECURITY SITUATION ACROSS THE COUNTRY



Food Security conditions 2009 (Arid Lands Resource Management Project (ALRMP) and Kenya Food Security Steering Group (KFSSG)),

Food security conditions, January 2010 (FEWS NET)

21/03/2011

11

Even though sufficient national food production is crucial in enhancing access to adequate and nutritious food, people do not experience hunger, however, due to food deficiency and unavailability, but due to poverty,⁶ inequality,⁷ inequity and powerlessness⁸ caused by

⁵ Obare (n 1 above) 11.

⁶ See L Niada 'Hunger and international law: The far-reaching scope of the human right to food' (2006-2007) 22 *Connecticut Journal of International Law* 131, at 134-135, who affirms that poverty and hunger reinforce each other across generations as poverty impedes access to food while hunger prejudices labour productivity and impairs the physical and mental growth of children, crippling their capacity to learn and earn.

⁷ Kenya is the 10th most unequal country in the world, and this is reflected in income distribution, with 10% of households controlling 42% of the total income, while the bottom 10% control less than 1%, see

social, economic, as well as political marginalisation.⁹ This is affirmed by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment Number 12 on the right to food where they contend that ‘fundamentally, the roots of the problem of hunger and malnutrition are not lack of food, but lack of access to available food, *inter alia* because of poverty by large segments of the world’s population’.¹⁰ It is estimated that over 51

FIAN International ‘Kenya’s hunger crisis – The result of right to food violations: A report of a joint international mission by RAPDA and FIAN International’ (February 2010) 7, available at <http://www.fian.org/resources/documents/others/kenyas-hunger-crisis-the-result-of-right-to-food-violations/pdf> (accessed on 20 July 2012). See also O de Schutter & KY Cordes ‘Accounting for hunger: An introduction to the issues’ in O de Schutter & KY Cordes (eds.), *Accounting for hunger: The right to food in the era of globalisation* (2011) 1, at 6 who acknowledge that hunger is a result of poverty and inequality, indicating that even though increases in annual world grain production have consistently exceeded demographic growth, the number of hungry people has consistently increased.

⁸ Those who are most food insecure lack the requisite political, social or economic power or the ability to hold the government to account be it through the political or the judicial processes, see FIAN International (n 7 above) 10.

⁹ GT Butcher ‘Foreword: The relationship of law to the hunger problem’ (1987) 30 *Howard Law Journal* 193, at 195; M Watts ‘Entitlements or empowerments? Famine and starvation in Africa’ (1991) 51 *Review of African Political Economy* 9, at 13-15; A Eide, A OShauge & WB Eide ‘Food security and the right to food in international law and development’ (1991) 1 *Transnational Law and Contemporary Problems* 415, at 418, who contend that to realise the right to adequate food, causes and manifestations of poverty must be addressed. They further argue that primary attention must be given to the human dimension in efforts to realise the right to adequate food, and that the focus should not be on the overall per capita increase in food production, but a decrease in inequalities in access to food or food production resources, at 422. See also Ziegler *et al* (n 2 above) 3, who aver that ‘those who have money eat, and those without suffer from hunger and the ensuing disabilities, and often die,’ and that reducing hunger does not mean increasing food production, but increasing access to resources for the poor; D Brand ‘The right to food’ in D Brand & C Heyns (eds). *Socio-economic rights in South Africa* (2005) 153, at 157-58, who acknowledges the above and affirms that the achievement of food security requires not only the availability of sufficient supply of food, but also the ability of the people to acquire the available food.

¹⁰ CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, para 5, available at: <http://www.unhcr.org/refworld/docid/4538838c11.html> (accessed on 2 July 2012). See also R Kunnemann ‘The right to adequate food: Violations related to its minimum core content’ in A Chapman & S Russell (eds.) *Core obligations: Building a framework for economic, social and cultural rights* (2002) 161, at 168, who contends that ‘hunger and malnutrition are problems of people

per cent of the Kenyan population lack access to adequate food,¹¹ reflecting statistical data which indicate that 56 per cent of the Kenyan population live in absolute poverty, 53 per cent of these living in rural areas and 47 per cent in urban areas.¹² Of this number, between 10-15 million people are permanently reliant on food relief, which is almost always inadequate to provide the requisite 2000 calorie content recommended by the World Health Organisation (WHO) as the basic minimum level of nutrition.¹³ The worsening food security situation is especially evidenced by the rate of malnutrition among children under five years of age, which was 18 per cent a decade ago but is now over 35 per cent.¹⁴ According to the UN Development Assistance Framework 2009-2013, child nutrition has not improved in the last 20 years, and currently indicates dire nutritional statistics for children under five years, with 33 per cent stunting, 6.1 per cent wasting and 20.2 per cent underweight.¹⁵ These statistics are affirmed by statistical data from the 2008-2009 Kenya Demographic and Health Survey (KDHS) which

lacking the freedom to feed themselves, of people lacking the power to influence the political and economic decisions that would give them access to food in dignity’.

¹¹ UNECA (n 1 above) 6.

¹² FIAN International (n 7 above) 7; Obare (n 1 above) 12. For a more substantive analysis of poverty and inequality in Kenya, see chapter one, section 1.2.

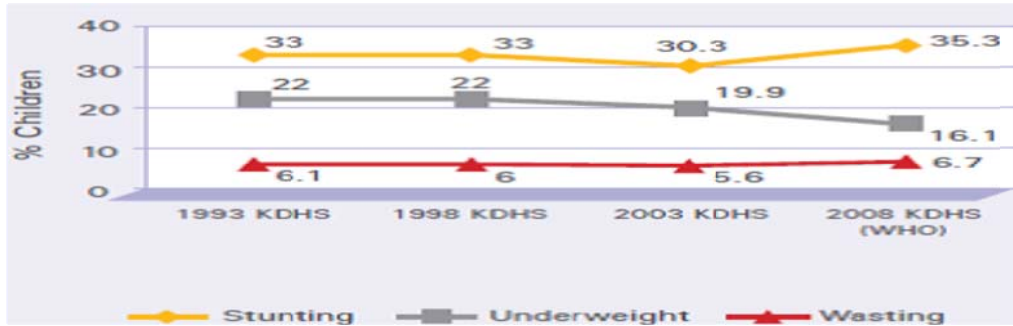
¹³ FIAN International (n 7 above) 9.

¹⁴ UNECA (n 1 above) 6. Malnutrition has serious consequences, handicapping children throughout their life as it retards mental and physical development and heightens vulnerability to other illnesses. This limits their potential for productive existence, further exacerbating their marginalisation and vulnerability, and extending the vicious cycle of poverty and underdevelopment, see Ziegler *et al* (n 2 above) 2-3; Second Report of the SR Jean Ziegler (n 2 above) paras. 21-24; MJ Cohen & M Brown ‘Access to justice and the right to adequate food: Implementing Millennium Development Goal One’ (2005) 6 *Sustainable Development Law and Policy* 54, at 54.

¹⁵ UN Development Assistance Framework - Kenya 2009-2013 (May 2008) 6-7, available at <http://www.ke.undp.org/index.php/UNDAF> (accessed on 20 July 2012); FIAN International (n 7 above) 7. The dire malnutrition situation was also recognised by the CESCR in its consideration of Kenya’s Initial Report to the Committee and it recommended in its Concluding Observation that Kenya should allocate sufficient resources to relevant programmes to ensure physical and economic access for everyone, including children in rural and deprived urban areas, to a minimum essential level of food that is sufficient, nutritionally adequate and safe. The CESCR further called on Kenya to ensure freedom from hunger in accordance with the Committee’s General Comment No. 12. See CESCR Report on the 40th and 41st Sessions – Supplement No. 2, E/C.12/2008/3’ (2009) para. 381, available at <http://www.unhcr.org/refworld/pdfid/4a002b812.pdf> (accessed on 18 September 2012).

indicates that 7 per cent of children under 5 years are wasted, 16 per cent are underweight and an outstanding 35 per cent are stunting, as is represented by figure 3.0 below.¹⁶

Figure 3.0 – Trends in stunting, underweight and wasting among children under five.¹⁷



The grim food security situation in Kenya and the place of law, especially the human right to adequate food, in responding to the situation is the main concern of this chapter. The chapter is divided into eight interrelated sections. After this brief introduction, the chapter delves into an elucidation of the meaning of the right to adequate food and analyses the function of law in the fight against hunger and the realisation of food self-sufficiency in section 6.2. Sections 6.3 and 6.4 delve on an exposition of the right to food in international law and in the Kenyan domestic legal system respectively. Section 6.5 discusses the normative content of the right to food in the Kenyan legal system, taking into account both comparative national and international law jurisprudence. Section 6.6 delves into an extensive discussion of the State obligations arising from the entrenchment of the right to food in the Kenyan Constitution. This analysis is

¹⁶ UNICEF 2011, quoted in Transform Nutrition 'Kenya: Situation analysis' (2011) 1, available at http://www.transformnutrition.org/files/2011/11/Kenya_situation_analysis.pdf (accessed on 24 November 2012).

¹⁷ Stunting is a form of chronic malnutrition that causes growth failure (reflects a deficit in height relative to age due to linear growth retardation), and is mostly caused by poor maternal nutrition, poor feeding practices, poor food quality as well as frequent nutrition-based infections. Wasting is a form of acute malnutrition resulting from lack of sufficient nutrition over a short period of time. It (wasting) reflects a deficit in weight relative to height due to a deficit in tissue and fat mass. Underweight is a combination of stunting and wasting. For a more comprehensive elaboration of these terms, see ID Fernandez, JH Himes & M de Onis 'Prevalence of nutritional wasting in populations: building explanatory models using secondary data' (2002) available at <http://www.who.int/bulletin/archives/80%284%29282.pdf> (accessed on 24 November 2012).

undertaken using three tools: the progressive realisation standard; the tripartite typology tool; and the 4-A's scheme. Section 6.7 delves into an analysis of the role of judges in the realisation of the right to adequate food in Kenya, and proposes the dialogical approach to SER adjudication to mitigate the challenges to judicial enforcement of the right to adequate food. Section 6.8 is a short conclusion of the chapter. Even though this chapter attempts to deal with the major concerns relating to food security and challenges facing Kenya with regard to the same, its scope does not allow for an exhaustive review of all aspects of the right to food.

6.2 The meaning of the right to adequate food and the place of the law in the realisation of food security

In his speech in 1941, the former president of the United States of America (US), Franklin D Roosevelt expounded on the four freedoms, being freedom of speech, faith, freedom from fear, and want.¹⁸ Even though freedom from want was an integral part of the quartet of rights, globally in general and in Kenya in particular, it has been honoured more in breach than in implementation, and it does not exist in reality for a majority of Kenyans. The right to adequate food is an important segment of the freedom from want, and it has been entrenched in several international and national binding legal instruments as will be discussed below.

What does the right to adequate food mean, and what have law and judges got to do with it? The CESCR contends that the right to food is realised when 'every woman, man or child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement'.¹⁹ The above interpretation has been buttressed by Asbjorn Eide who contends that the right implies 'the availability of food in quantity and quality sufficient to satisfy dietary needs'.²⁰ A further definition of the right to adequate food has been provided by the current UN Special Rapporteur on the Right to Food, Olivier de Schutter who defines it as:²¹

¹⁸ FD Roosevelt, *Message to Congress: The state of the Union*, 7 vital speeches of the day 197,200 (1941), quoted in Eide, Oshauge & Eide (n 9 above) 416.

¹⁹ CESCR, General Comment No. 12, para. 6.

²⁰ A Eide 'The right to adequate standards of living including the right to food' in A Eide, C Krause & A Rosas (eds.) *Economic and social rights: A textbook*, 2nd revised edition (2001) 133, at 134.

²¹ O de Schutter 'The right to food' available at <http://www.srfood.org/index.php/en/right-to-food> (accessed on 5 July 2012). It was the same definition used by the former UN Special Rapporteur on the

The right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.

This definition captures all the relevant components of the right to food, which include accessibility of food either by production or purchase, adequacy and safety of food, sustainability of food acquisition for present as well as future generations, cultural or consumer acceptability of available food, dietary sufficiency of food, and State accountability for the realisation of the right to food.²²

Law in general and legal rights in particular are partly responsible in the creation of conditions of starvation and nutritional deprivation through legally guaranteed ownership as well as property rights, trade and exchange systems (the WTO and its skewed international trade regimes – TRIPs),²³ among others.²⁴ In responding to these concerns, law can thus be used as a tool for transformation. Goler Teal Butcher argues as follows:²⁵

Law is relevant to the problem of hunger and securing food for hungry people with respect to both the short and long-term approaches to the problem because it is *through law* that we structure both the various mechanisms to respond to hunger in a crisis and the means to assist people with [the] pursuit of a development policy aimed at achieving food self-sufficiency.

Law plays a two-fold role, that is, firstly the creation of a right to adequate food as well as its correlative duty, and secondly, the development of the institutional framework for the implementation and enforcement of the right to adequate food.²⁶ In Kenya, the first role of law has been achieved through the entrenchment in the 2010 Constitution of important socio-

right to food, Mr. Jean Ziegler, see Ziegler *et al* (n 2 above) 15; Second Report of the SR Jean Ziegler (n 2 above) paras. 26-28.

²² Ziegler *et al* (n 2 above) 16-18.

²³ Butcher (n 9 above) 195, who avers that hunger is a problem of global inequity and that responses to the hunger problem cannot ignore the world economic system.

²⁴ See J Dreze & A Sen *Hunger and public action* (1989) 20; D Brand 'Food' in S Woolman *et al* (eds.) *Constitutional law of South Africa* (2nd Edition) 2 (2009) 56C-1.

²⁵ Butcher (n 9 above) 193.

²⁶ Butcher (n 9 above) 195. See also C Dias 'The legal resources approach' in A Eide *et al* (eds.) *Food as a human right* (1984) 175, at 175.

economic rights, such as the right to food and water, the right to social security and the right to health - rights intended to guarantee the minimal protection and survival needs for the most vulnerable in society.²⁷ However, entrenchment on its own is not enough; the most important part, as envisaged by the second role of law above, is the interpretation, implementation and enforcement of the above legal provisions to translate them into concrete legal claims capable of ensuring their practical impact in the lives of the food-insecure individuals and groups in society. It is this second role of the law that is the main concern of this chapter, and will be tackled in the sections below.

6.3 The right to food in international and regional law

The right to adequate food can be gleaned from the Charter of the United Nations, especially article 55 which espouses the responsibility of the United Nations (UN) and its Member States to promote higher standards of living, full employment as well as conditions of economic and social progress and development; to find solutions for international economic, social, health and related problems; as well as to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction.²⁸ The right was first expressly entrenched internationally in the Universal Declaration of Human Rights (UDHR) which espoused it as an important component of the right to an adequate standard of living.²⁹ Though not legally binding at the time, it has been argued that due to the continued incorporation of the right in international and regional binding legal instruments, coupled with its incorporation in contemporary national constitutions as a justiciable right, it can confidently be said that the right to adequate food as incorporated in the UDHR has achieved the status of customary international law.³⁰ Laura Niada has argued that due to the 'oft pronounced revulsion for worldwide hunger' and the espousal of the right to food in several binding and non-binding international legal instruments as well as in State constitutions and legislation, the right to food has, of necessity, achieved the status of customary international law, and should even be

²⁷ The 2010 Kenyan Constitution, article 43.

²⁸ UN Charter, article 55 (a)-(c) as read with articles 1(3) and 56. For more in-depth discussion on this, see, Buckingham (n 1 above) 289-290.

²⁹ See UDHR, article 25(1). See also article 25(2) which further entails special care and assistance for motherhood and childhood, two most vulnerable statuses with regard to hunger and malnutrition.

³⁰ See Buckingham (n 1 above) 293; Niada (n 6 above) 171; R Kunnemann & S Epal-Ratjen *The right to food: A resource manual for NGOs* (2005) 31.

considered to be a *jus cogens* norm.³¹ Smita Narula, however, adopts a more cautious stance, arguing that even though the right to food may have not yet achieved the status of customary law, its minimum core, which is, the fundamental right to be free from hunger, has achieved that status.³² Therefore, even if it is at a minimum, the right to food forms an important component of customary international law and is binding on non-state actors such as transnational corporations who are not bound by treaty obligations on the right to food.

As an international binding legal right, the right to adequate food was first expressly enshrined in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as an integral component to the right to an adequate standard of living.³³ 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.³⁴ Specific to children, the right to adequate food is envisaged in article 24(2)(c) of the Convention on the Rights of the Child (CRC) which envisages it as a component of the right to health, and which encompasses the obligation of the State to take appropriate measures to combat disease and malnutrition through the provision of adequate nutritious food and clean drinking water.³⁵ Article 24(2)(e) of the CRC further calls for the provision of information to, and the education of, parents and communities on child nutrition and the importance of breastfeeding. Article 27(1) of the CRC further buttresses the protection of children's right to adequate food by providing for the right of every

³¹ Niada (n 6 above) 173-176.

³² S Narula 'The right to food: Holding global actors accountable under international law' (2006) 44 *Columbia Journal of Transnational Law* 691, at 771-796. He undertakes an extensive analysis of a plethora of treaties both under international human rights law and international humanitarian law, Resolutions of the UN and its agencies, UN Declarations, national and international judicial declarations as well as provisions in national constitutions and legislation which have all at least affirmed the right to be free from hunger and concludes that the right to be free from hunger can safely be said to have customary law requirements of practice and *opinio juris*.

³³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. Accented to by Kenya on the 1 May 1972, available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed on 2 July 2012).

³⁴ ICESCR, article 11 (2).

³⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49. Ratified by Kenya on the 30 July 1990, available at <http://www2.ohchr.org/english/law/crc.htm> (accessed on 2 July 2012).

child to a standard of living adequate to the child's physical, mental, spiritual, moral and social development. The right to adequate food for specific groups is further entrenched in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),³⁶ and the Convention on the Rights of Persons with Disability (CRPD).³⁷

The right to food subsists even in times of armed conflict, be it international or non-international armed conflict (civil war). This is because the right has been entrenched in international humanitarian law (IHL) treaties, especially the Geneva Convention I,³⁸ Geneva Convention III³⁹ and Geneva Convention IV⁴⁰ as well the two Additional Protocols.⁴¹ The provisions of the Geneva Conventions have widely been affirmed as having attained the status of customary international law, thus enhancing the protection that they accord as they then bind

³⁶ Adopted and opened for signature, ratification and accessions on 18 December 1979 and entered into force on 3 September 1981. Accented to by Kenya on 9 March 1984, available at <http://www2.ohchr.org/english/law/cedaw.htm> (accessed on 2 July 2012), articles 12(2) & 13.

³⁷ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <http://www.unhcr.org/refworld/docid/45f973632.html> (accessed 31 January 2012). Signed by Kenya on 30 March 2007 and ratified on 19 May 2008, article 28.

³⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), 12 August 1949, 75 UNTS 31, articles 3 & 32, available at <http://www.unhcr.org/refworld/docid/3ae6b3694.html> (accessed 25 November 2012).

³⁹ Geneva Convention Relative to the Treatment of Prisoners of War (GC III), 12 August 1949, 75 UNTS 135, articles 3, 20, 26-28, 31, 46, 51, 72, among others, available at <http://www.unhcr.org/refworld/docid/3ae6b36c8.html> (accessed 25 November 2012).

⁴⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), 12 August 1949, 75 UNTS 287, articles 3, 15, 23, 36, 40, 49-51, 55, 59-62, among others, available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html> (accessed 25 November 2012).

⁴¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, 1125 UNTS 3, articles 54, 70(1), among others available at <http://www.unhcr.org/refworld/docid/3ae6b36b4.html> (accessed 25 November 2012); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977, 1125 UNTS 609, articles 5(1), 14, 18(2), among others, available at <http://www.unhcr.org/refworld/docid/3ae6b37f40.html> (accessed 25 November 2012).

non-state actors as well as non-state parties.⁴² The protection in these conventions has further been enhanced by the adoption of the Rome Statute and the establishment of the International Criminal Court (ICC) as the violation of the right to food forms an important component of genocide, war crimes as well as crimes against humanity, international crimes over which the ICC has jurisdiction.⁴³

The right to adequate food is also recognised in the African Human Rights System as a legal right. Even though the main normative treaty cataloguing fundamental human rights in Africa, the African Charter on Human and Peoples' Rights (African Charter), does not expressly provide for the right to adequate food, the right was derived from the right to life (article 4), the right to dignity (article 5), the right to health (article 16), and the right to economic, social and cultural development (article 22) by the African Commission on Human Peoples' Rights, the authoritative body mandated by the African Charter to interpret, promote and protect the rights in the Charter, in the case of *SERAC v Nigeria*.⁴⁴ The place of the right to adequate food in the overall framework of the right to health in Africa was further affirmed by the 2004 *Pretoria Declaration on Economic, Social and Cultural Rights in Africa*, which espouses the content of the right to health as encompassing the right of access to minimum essential food which is



⁴² Narula (n 32 above) 782-783.

⁴³ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, articles 6(b), 7(2)(b), 8(2), among others, available at <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (accessed 25 November 2012).

⁴⁴ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), para. 64, reprinted in C Heyns & M Killander (eds.) *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 251, at 260. Similar practices of protecting SERs through a broad interpretation of civil and political rights can be gleaned from the practice of the Human Rights Committee (HRC) which, in its General Comment No. 6 contends that the “inherent right to life” must be interpreted broadly to include positive State duties such as the elimination of malnutrition (at para. 5). This trend has been adopted by the Indian Supreme Court which has developed a jurisprudence of SER protection through the broad interpretation of the right to life such as in *Francis Coralie Mullin v The administrator, Union Territory of Delhi* (1981) 2 SCR 516 at 529 and in *People’s Union for Civil Liberties v Union of India*, (Writ Petition [Civil] No. 196 of 2001) available at <http://www.righttofoodindia.org/case/case.html> (accessed on 3 September 2012).

nutritionally adequate and safe to ensure freedom from hunger to everyone and to prevent malnutrition.⁴⁵

The right to adequate food is further provided for in the African Human Rights System, in relation to women, in the Protocol to the African Charter on the Rights of Women in Africa which, in making provision for the right to food security, affirms the obligation of the State to ensure that women have the right to adequate and nutritious food.⁴⁶ In relation to children, the African Charter on the Rights and Welfare of the Child (African Children's Charter) also recognises the right to adequate food within the right to health, requiring State Parties to ensure the provision of adequate nutrition and safe drinking water, as well as undertaking societal education with regard to child health and nutrition, advantages of breastfeeding, hygiene and environmental sanitation.⁴⁷ Further in this regard, the Children's Charter encompasses the responsibility of the State, where needed, to materially assist and support parents as well as guardians, specifically in relation to nutrition.⁴⁸

A discussion of the right to food in international and regional law is imperative as international law contained in ratified international and regional treaties as well as customary international law have been directly incorporated into the Kenyan domestic legal system as sources of law as discussed chapter two, section 2.2 above. The right to food obligations arising from these laws are, therefore, as binding to the Kenyan government as those arising from the 2010 Kenyan Constitution and any other domestic legislation enacted by the Kenyan parliament. The political institutions as well as the courts must, therefore, take these international legal provisions on the right to food into account in developing a legislative, policy

⁴⁵ *Pretoria Declaration on Economic, Social and Cultural Rights in Africa* 2004, paras. 7 & 10 Adopted by the African Commission at its 36th Session in December, 2004, reprinted in C Heyns & M Killander (eds.) *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 315, at 317-318.

⁴⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005) article 15, reprinted in C Heyns & M Killander (eds.) *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 47, at 54.

⁴⁷ African Charter on the Rights and Welfare of the Child (1990/1999), article 14 (c) & (h), reprinted in C Heyns & M Killander (eds.) *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 62, at 66.

⁴⁸ African Children's Charter, article 20(2).

and programmatic framework on the realisation of the right to food as well as in litigation relating to the right to food.

6.4 The right to food in the Kenyan legal system

Hunger, starvation and the food security crisis in Kenya is not a totally exceptional phenomenon, but the result of endemic and persistent human mismanagement as well as a lack of adequate government planning. It is the culmination of a situation described by Richard H. Tawney as follows:

Famine is the final stage of a disease which, though not always conspicuous, is ever present. As a calamity, it affords us the opportunity to grasp in a more profound sense the structure of society itself in the same way that disease permits the physician to better understand the secret life of the body.

The State's inability to recognise the political, economic and social determinants of starvation is exemplified by the multiplicity of fragmented, contradictory and, at times, conflicting legislative, policy and programmatic framework that has hampered the realisation of the right to adequate food. However, with the adoption of the 2010 Constitution and the elaboration of a Draft National Food and Nutrition Security Policy 2011, there is a concerted effort to develop and implement a comprehensive and coordinated legal, policy and programmatic framework for the realisation of the right to food in Kenya.

6.4.1 The right to food in the Kenyan Constitution

The right to adequate food, as a justiciable right, has, for the first time, been entrenched in the Kenyan national legal system with the commencement of the new constitutional dispensation as a result of the promulgation of the 2010 Constitution. It is provided for both as a direct constitutional provision,⁴⁹ and through the incorporation of international law into the Kenyan domestic legal system through articles 2(5) and (6) of the 2010 Constitution.⁵⁰ Other

⁴⁹ The 2010 Constitution of Kenya, articles 43(1)(c) which entrenches the right to adequate food and freedom from hunger, and article 53(1)(c) which entrenches the right of children to basic nutrition.

⁵⁰ Debate abounds as to the correct place of international law, especially with regard to its hierarchy, in the Kenyan domestic legal system. As submitted in chapter two of this thesis, international law, especially binding treaty law, which has been ratified by Kenya, forms part of Kenyan law and can be directly applied by the Kenyan Courts. For a more elaborate discussion, see chapter two, section 2.2 above.

complementary rights have also been entrenched in the Constitution, such as the right to life,⁵¹ the right to health,⁵² the right to clean and safe water in adequate quantities,⁵³ the right to social security,⁵⁴ the right to clean and healthy environment,⁵⁵ right to fair labour practices,⁵⁶ consumer protection rights,⁵⁷ and more importantly the right of access to land and land tenure rights, the basic means of food production.⁵⁸

6.4.2 The right to food in the national legislative and policy arena

At the legislative and policy level, Kenya has not put in place framework legislation aimed at the holistic realisation of the right to food. The food security sphere has for a long time been governed by a myriad of contradictory legislative,⁵⁹ policy and structural frameworks devoid of

⁵¹ The 2010 Kenyan Constitution, article 26(1). See FAO, *The right to food guidelines: Information papers and case studies* (2006) 72.

⁵² The 2010 Kenyan Constitution, article 43(1)(a).

⁵³ The 2010 Kenyan Constitution, article 43(1)(d).

⁵⁴ The 2010 Kenyan Constitution, article 43(1)(e). This is further buttressed by article 43(3) which enjoins the State to provide appropriate social security to persons who are unable to support themselves and their dependants.

⁵⁵ The 2010 Kenyan Constitution, article 42 which enjoins the State to protect the environment for the present and future generations, thus espousing the concept of sustainable development.

⁵⁶ The 2010 Kenyan Constitution, article 41, which includes the right to work and earn fair remuneration, an important aspect in the enhancement of people's food entitlements as discussed in section 6.6.3 below.

⁵⁷ The 2010 Kenyan Constitution, article 46.

⁵⁸ The 2010 Kenyan Constitution, Part V, especially article 60, which provides for an equitable, efficient, productive and sustainable access to and use of land, and prohibits gender discrimination in access to, and use of, land. Article 68, among other things, further requires parliament to enact legislation regulating the recognition and protection of matrimonial property during and on the termination of marriage, an important safeguard to ensure continued access to food production or access to resources in instances of separation, divorce or the attempted sale of matrimonial property in the execution of debts.

⁵⁹ Some of the legislation related to food security and thus the right to food include: The Agriculture Act, Cap 318 (aimed at promoting and maintaining stable agriculture and the management and conservation of agricultural land for crop production); The Crop Production and Livestock Act, Cap 32 (aimed at the improvement of livestock and crop production and marketing); Price Control of Essential Foods Act, 26 of 2011 (aimed at controlling prices of essential commodities with the objective of cushioning Kenyans against arbitrary price increases and thus enhance the affordability of especially food commodities); and,

adequate coordination.⁶⁰ However, with the adoption of the Constitution and the entrenchment of the right to food as a justiciable right, efforts have been undertaken to develop a holistic policy on the right to food, and this has culminated in the Draft National Food and Nutrition Security Policy, 2011. The Policy is premised on the State's commitment to ensure that all Kenyan throughout their life-cycle enjoy safe food⁶¹ of sufficient quality and quantity to enable them satisfy their nutritional needs and live healthy lives.⁶² The major objectives of the policy aimed at realising this goal are to increase the quantity and quality of food available so as to enhance accessibility and affordability, as well as the development of safety-nets to cushion vulnerable groups and individuals, and to ensure their long-term development.⁶³

The Policy acknowledges the importance of adequate food and nutrition at all stages of a person's life for proper growth, development and productivity and thus adopts a life-cycle

The Environmental Management and Coordination Act, 8 of 1999 (establishes the National Environmental Management Authority tasked with the management of all environmental issues). For a more elaborate discussion of these legislation, see FM Bulimo, *The effects of climate change on the realisation of the right to adequate food in Kenya* (January 2012) chapter five, an LLM thesis submitted at Rhodes University, available at <http://eprints.ru.ac.za/2993/1/KHAYUNDI-LLM-TR12-69.pdf> (accessed on 24 November 2012).

⁶⁰ Some of these policies included: the Poverty Reduction Strategy Paper of 2001; the Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007; the Strategy for Revitalising Agriculture, 2004-2014; Kenya's Vision 2030; the Agricultural Sector Development Strategy, 2010-2020; the Food Policy, Sessional Paper No. 4 of 1981; and the National Food Policy, Sessional Paper No. 1 of 1994, see Kenya's Draft National Food and Nutrition Security Policy, 2011, paras. 1.4-1.5, available at http://www.disasterriskreduction.net/fileadmin/user_upload/drought/docs (accessed on 23 November 2012).

⁶¹ Food safety has been an area of concern for Kenya and the responsibility for ensuring food safety and quality has been scattered in 20 uncoordinated or loosely coordinated Acts of Parliament monitored by 12 different regulatory ministries and departments of the State. This, coupled with the fact that most of the regulatory regimes are not in conformity with current international standards, has led to inefficiency and threatened the well-being of people. However, the Draft Policy aims to rectify this situation through the creation of the National Food Safety Coordination Committee, an inter-ministerial body aimed at reforming and harmonising the regulatory regime and ensuring coordination between the relevant government structures, see Draft Food and Nutrition Policy (n 60 above) chapter 3.

⁶² Draft Food and Nutrition Policy (n 60 above) Executive Summary (ES) para. 4 & para. 1.6.

⁶³ As above.

approach to food security and nutrition.⁶⁴ It further affirms the important role knowledge and access to information plays in enhancing nutritional well-being, and calls for efforts to improve nutritional education for all sectors of society.⁶⁵ It envisages the establishment of early warning systems to detect threats to food security and advocates the establishment of innovative response mechanisms such as transfer-based entitlements, cash transfers, public works programmes, input support, livelihood restoration (the *Njaa Marufuku Kenya* programme is a case in point),⁶⁶ and livestock management programmes.⁶⁷ The Policy recognises that the failure in the previous framework for the realisation of food security was due to a lack of coordination among the myriad legal and institutional frameworks which had differing mandates, as well as a lack of financial and human resources. To respond to this state of affairs, the Policy envisages the development of a comprehensive and coordinated legal framework for the enhancement of food security as well as the establishment of an adequate structural framework for the coordination of all efforts geared towards the realisation of food security.⁶⁸ It further espouses the commitment of the State to avail resources through its Medium Term Expenditure Framework to enhance the realisation of the goals contained in the Policy.⁶⁹

Though the Policy does not employ the language of the right to food, it recognises the entrenchment in the Constitution of the right to be free from hunger and the right to food, and

⁶⁴ Draft Food and Nutrition Policy (n 60 above) ES para. 8 & para. 4.2.

⁶⁵ Draft Food and Nutrition Policy (n 60 above) ES para. 9. It calls for the collection and utilisation of data in the formulation and implementation of policies and strategies aimed at the realisation of food security, at para. 10.

⁶⁶ The Programme is aimed at increasing agricultural productivity, food utilisation, agro-processing and value addition, health and nutrition improvement, water harvesting, as well as conservation of natural resources, see Bulimo (n 59 above) 110-111.

⁶⁷ Draft Food and Nutrition Policy (n 60 above) ES para. 11 & chapter 7.

⁶⁸ Draft Food and Nutrition Policy (n 60 above) ES para. 12 & chapter 8.

⁶⁹ Draft Food and Nutrition Policy (n 60 above) para. 2.2.6 which envisages some of the resource commitments of the State to include: the establishment of an Agricultural Development Fund to enhance agricultural production; increased funding to the food and agriculture sector to 10 per cent of the national budget; support of sustainable irrigation and water management systems; support for the markets and the private sector to provide input and financial services at affordable prices to food producers; subsidisation of production inputs to support those experiencing food insecurity; and support of investment in infrastructure to enhance production.

also closely links the realisation of food security to national security, affirming that substantive peace cannot be achieved unless food security is ensured.⁷⁰ It also recognises the adverse effects of global warming as well as global food and financial crisis on agriculture and livestock farming. To respond to these challenges, it envisages the establishment of adaptation interventions to cushion affected people and enhance their food security.⁷¹

6.4.3 Proposed strategies towards the realisation of the right to adequate food in Kenya

Though comprehensive, the Draft National Food and Nutrition Security Policy, 2011 discussed above, has not sufficiently incorporated the international standards on the right to food. First, it does not employ the language of the right to food, and thus detracts from an understanding of food as an entitlement and not a charity. This failure delinks the realisation of food security from the realisation of other human rights, taking into account the internationally entrenched principle of the indivisibility, interrelatedness and interdependence of rights.⁷² It is also contrary to the recommendations by the CESCR that to enhance the realisation of the right to food at the national level, a State must adopt a national strategy which is 'based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks'.⁷³

⁷⁰ Draft Food and Nutrition Policy (n 60 above) paras. 1.2, 2.9.4. & Annex 1.

⁷¹ Draft Food and Nutrition Policy (n 60 above) para. 1.3. It affirms the importance of supporting domestic production as well as the diversification of food production and consumption. It also recognises that the use of agricultural land for bio-fuel and agricultural export production, as well as the non-strategic agricultural trade liberalisation which has turned Kenya into a net food importer, have adverse effects on Kenya's food security and must be addressed to ensure that food and nutritional security remains Kenya's priority at para. 1.3.8-1.3.10.

⁷² See CESCR General Comment No. 12, para. 4, which affirms that the right to food is inherently linked to human dignity, is indispensable to the realisation of other human rights, and is inseparable from social justice. It further contends that to enhance the realisation of food security, States must adopt sound economic, environmental and social policies aimed at the eradication of poverty and the realisation of all human rights. See also FAO's Voluntary Guidelines, Preface, paras. 7 & 19 and Guideline 3.1 which calls for the adoption of a national human rights-based strategy for the realisation of the right to food.

⁷³ CESCR General Comment No. 12, para. 21. See also C McClain-Nhlapo 'Implementing a human rights approach to food security'(2004) 4, available at <http://www.ifpri.org/sites/default/files/publications/ib29.pdf> (accessed on 6 January 2013), where she acknowledges the importance of food in the realisation of all the other human rights, and advocates the adoption of a rights-based approach to food security, contending that this approach has several advantages, that is, it introduces international principles of equality and non-discrimination, it is supportive of both CPRs and SERS, it draws attention to the needs

Secondly, the Policy has failed to adopt the minimum core approach to the right to food, which is, putting in place sufficient measures aimed to alleviating and mitigating hunger.⁷⁴ Thirdly, the Policy was developed using the top-down approach to policy formulation and development, and thus did not sufficiently incorporate the voices of the most vulnerable and marginalised individuals and groups, the very people who are the most food insecure.⁷⁵ Fourthly, the Policy failed to provide a clear time-frame within which the programmes incorporated therein are to be developed and operationalised.⁷⁶ Finally, the Policy fails to set clear and verifiable indicators and benchmarks for the monitoring and evaluation of its implementation, only providing, in paragraph 9.3, that this are to be developed at some later stage.⁷⁷

Since the Draft Policy has not yet been adopted by the Cabinet, there is still room for further improvements to enhance its capacity to meet the practical challenges to food security

of the most vulnerable and food insecure, and it addresses not only the consequences of food insecurity, but also its causes.

⁷⁴ CESCR General Comment No. 12, paras. 6, 8, 14, 17 & 28, which affirm the minimum core approach in relation to the right to food. For a more elaborate discussion on the minimum core of the right to food, see section 6.5 below.

⁷⁵ This was contrary to the requirements of the espousal of the principles of accountability, transparency, people's participation and other good governance principles which are key to the realisation of human rights, reduction of poverty and the achievement of social justice, see General Comment No. 12, paras. 23 & 24; FAO's Voluntary Guidelines, Guideline 1; McClain-Nhlapo (n 73 above) 4, who affirms the importance of a rights-based approach in the development of national food security strategy as it ensures people's participation, promotes good governance, empowers local communities to take part in public decision-making and holding the government accountable to its obligations, as well as empowering people to take direct responsibility to meet their food needs, thus being part of the solution to food insecurity challenges. Public participation in government decision-making is the bedrock on which the theory of dialogical constitutionalism, developed in chapters two and three, and applied in this chapter, is premised.

⁷⁶ See General Comment No. 12, para. 24, which requires that a national strategy for the realisation of the right to food must not only set out responsibilities for its implementation, but must also contain clear timelines within which measures aimed at its realisation are to be implemented. The National Policy provides generally that it will be implemented in a period covering 15 years, with three five-year phases. It, however, does not clearly set out which specific activities within the policy will be implemented within which phases of the 15 year period, see Draft Food and Nutrition Policy (n 60 above) para. 9.2.2.

⁷⁷ See CESCR General Comment No. 12, para. 29. See also FAO's Voluntary Guidelines, Guideline 3.3.

and thus lead to the realisation of the right to adequate food for everyone in Kenya.⁷⁸ Some suggestions for the improvement of the Draft Policy, and the subsequent legislative and programmatic framework anticipated in line with the Draft Policy, are thus made below.

To begin with, the development of the national food security strategic framework, which encompasses the Draft policy and subsequent legislative and programmatic frameworks aimed the realisation of the right to adequate food, must be informed by the livelihood approach, taking into account the different entitlements of different people as discussed in the legal obligations of the State in section 6.6 below. The need to adopt this approach is supported by the FAO's Voluntary Guidelines which advocates a holistic and comprehensive approach to hunger and poverty reduction, and requires the adoption of the following measures:⁷⁹

[d]irect and immediate measures to ensure access to adequate food as part of a social safety net; investment in productive activities and projects to improve the livelihoods of the poor and hungry in a sustainable manner; the development of appropriate institutions, functioning markets, a conducive legal and regulatory framework; and access to employment, productive resources and appropriate services.

The development of such a holistic and comprehensive strategic framework should be aimed at the realisation of the short-, medium- and long-term goals of ensuring food security for the entire Kenyan populace.⁸⁰ This, in essence, therefore requires that the strategic framework addresses all levels of the food system, being production, processing, distribution, marketing, safety; non-discrimination in access to production resources such as land, credit, natural resources and

⁷⁸ This should be done by taking incorporating the areas that the Policy has failed to expressly provide for as discussed above. The need to adopt a human rights-based national strategy for the realisation of the right to food is especially emphasised by the FAO's Voluntary Guidelines, especially Guideline 3.5. The adoption of the minimum core approach in the realisation of the right to food is emphasised by the FAO's Voluntary Guidelines, Guideline 3.6, which requires the prioritisation of basic services to the poorest.

⁷⁹ FAO's Voluntary Guidelines, Guideline 2.4. See also CESCR General Comment No. 12, paras. 29-30, which calls for the development of a framework legislation as an important component of the national strategy for the realisation of the right to food.

⁸⁰ CESCR General Comment No. 12, paras. 21-22 & 29. See also FAO's Voluntary Guidelines, Guideline 3 which calls for a national rights-based strategy for the realisation of the right to food (Guideline 3.1).

appropriate technology; as well as food-related fields such as health, education, employment and social security.⁸¹

Secondly, in developing the strategic framework, the State must, in line with the theory of dialogical constitutionalism expounded in chapters three and four above, undertake an inclusive and participatory food security assessment of the whole country, and undertake an analysis of that assessment to identify groups and communities who are food insecure, as well as the causes of food-insecurity of these groups.⁸² It should then use its analysis to design the requisite remedial measures to ensure short-,⁸³ medium- and long-term food security of these vulnerable groups.⁸⁴ Such framework must include the time-frames for implementation, the

⁸¹ CESCR General Comment No. 12, paras. 25 & 26. See also the FAO's Voluntary Guidelines, Guidelines 3.3 & 3.6; Brand – Right to food (n 9 above) 160, who summarises the requisite measures as follows:

[m]easures to ensure the creation and maintenance of a sufficient supply of food (agricultural production planning and subsidisation, food import and export planning and sustainable management and use of natural and other resources for food production); measures to ensure that standards of nutritional adequacy, safety and cultural acceptability of food are maintained (nutritional supplementation of basic foodstuffs...); measures facilitating access to food (tax zero-rating of basic foodstuff, food price monitoring, market regulation, subsidisation or actual price control); measures actually providing food or the means to acquire it to those who are deprived (direct food provision to disaster victims, food stamp or other social assistance programmes to indigent people); measures to monitor the nutritional situation in the country so as to inform policy formulation and implementation; measures to prevent discrimination in access to food.

⁸² Eide – Right to adequate standards of living (n 20 above) 140-141. He argues that the identification of the food-insecure groups, their location, and the particular causes underlying their food insecurity increases the possibility of developing precise and appropriate responses to their situations. See also FAO's Voluntary Guidelines, Guidelines 2.2, 3.8-3.9 & 17.2.

⁸³ Short-term measures may include the design of social as well as food safety nets to cushion those who are unable to feed themselves, see the FAO's Voluntary Guidelines, Guideline 14.

⁸⁴ FAO's Voluntary Guidelines, Guideline 13, which calls for a disaggregated analysis of food insecurity, vulnerability and the national nutritional status of different groups in society, and to put in place both immediate and progressive corrective measures to remedy the situation of the food-insecure and vulnerable groups.

institutional responsibility for the implementation of the framework,⁸⁵ collaboration with national and international civil society organisations and the private sector, as well as specific indicators and benchmarks for monitoring and evaluation of the success of the resultant programmes.⁸⁶ Further, the framework must identify the resources capable of implementing the national food strategic framework, be it from national or international sources taking into account the principle of international responsibility for the realisation of the right to food, and use the available resources in the most cost-effective way to enhance the realisation of the right to food for a majority of the food-insecure people in Kenya.⁸⁷ In this vein, the process of developing the national food strategic framework must thus engender societal dialogue and participation, incorporating the voices of the vulnerable food-insecure groups and communities.⁸⁸ It must also comply with the good governance principles such as transparency and accountability.⁸⁹

⁸⁵ See FAO's Voluntary Guidelines, Guideline 5 which calls on the State to establish, reform, or improve institutional structures aimed at the realisation of the right to adequate food, and to ensure that there is national inter-sectoral coordination and collaboration between all government ministries and other stakeholders concerned with the realisation of the right to adequate food.

⁸⁶ Eide – Right to adequate standards of living (n 20 above) 141-142; FAO's Voluntary Guidelines, Guidelines 3.3 & 17.3-17.4. Guideline 17.4 specifically provides that indicators should be developed in such a way that 'they explicitly relate and reflect the use of specific policy instruments and interventions with outcomes consistent with the progressive realization of the right to adequate food in the context of national food security'.

⁸⁷ CESCR General Comment No. 12, para. 21.

⁸⁸ CESCR General Comment No. 12, paras. 23 & 24. See also Eide – Right to adequate standards of living (n 20 above) 155, where he interprets the limitations on individual duties imposed in article 29 of the UDHR "that limitations must not go beyond what is justly required in a democratic society" as containing an essential principle that in ascertaining a proper balance of competing interests in the design of the legal and implementation framework with regard to the right to adequate food, there must be an all-inclusive societal dialogue on the basis of equality. For an elaboration of the need for public participation in the design and development of an SER implementation framework, see chapter four, section 4.2.

⁸⁹ CESCR General Comment No. 12, para. 23, which provides that good governance is essential to the realisation of all human rights, including the elimination of poverty and the enhancement of livelihood for all people. See also the FAO's Voluntary Guidelines, especially Guideline 1 which sets out the responsibility of States to ensure democracy, good governance, the rule of law and the protection of human rights in their efforts to realise the right to adequate food.

6.5 The content of the right to food in the Kenyan legal system

The development of the content of the right to food must of necessity be understood within the scope of the objective of the right to adequate standards of living, which is to ensure human dignity and the full participation of people in ordinary social interaction.⁹⁰ The major source of its legal content is derived from article 11 of the ICESCR as it is both a codification of the norms contained in the UDHR, and is the norm from which other international and national legal instruments providing for the right to adequate food draw their inspiration and content.⁹¹

The right to food as enshrined in article 11 of the ICESCR has two components: the right to adequate food as provided for in article 11(1) and the right to be free from hunger as is provided for in article 11(2).⁹² In analysing the two rights, most commentators have argued that the right to adequate food is a much broader right in scope, engendering a maximalist approach to the right to food, while the fundamental right to be free from hunger is a sub-norm of the broader norm, which espouses the starting point (first step) for national as well as international efforts in the overall realisation of the right to food.⁹³ Taking into account the maximalist approach, adequacy of food thus demands that it is of such quantity to facilitate a normal, active existence, rather than a mere minimum calorie package aimed at preventing death by starvation.⁹⁴ The maximalist approach is adequately espoused by the definition of the right to

⁹⁰ Eide – Right to adequate standards of living (n 20 above) 133; Kunnemann & Epal-Ratjen (n 30 above) 39.

⁹¹ P Alston 'International law and the right to food' in A Eide *et al* (eds.) *Food as a human right* (1984) 162, at 165; Kunnemann - The right to adequate food: Violations related to its minimum core content (n 9 above) 168.

⁹² Alston - International law and the right to food (n 91 above) 166-167; Niada (n 6 above) 151.

⁹³ CESCR General Comment 12, para. 1, which provides that the realisation of the fundamental right to freedom from hunger and malnutrition needs immediate and urgent steps. It further affirms that States have a core obligation to take necessary action to mitigate and alleviate hunger as provided in article 11(2), at para. 6; Alston - International law and the right to food (n 91 above) 167; Butcher (n 9 above) 194; HJ Richardson 'The right to food in international perspective: The international human rights response' (1987) 30 *Howard Law Journal* 233, at 241; Kunnemann - The right to adequate food: Violations related to its minimum core content (n 10 above) 168; Buckingham (n 1 above) 292-293.

⁹⁴ Alston - International law and the right to food (n 91 above) 167. See also CESCR General Comment No. 12, para. 6 which warns against a narrow or restricted interpretation of the right to adequate food that equates it to a minimum package of calories, proteins or other specific nutrients.

adequate food as is provided by de Schutter above. The CESCR details the core content of the right to adequate food as follows:⁹⁵

The availability of food in a quantity and quality sufficient to satisfy the dietary needs⁹⁶ of individuals, free from adverse substances,⁹⁷ and acceptable within a given culture; [as well as] the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

The content of the right to adequate food, as is discussed above, is further elaborated in the discussion on the attendant State obligations below.

6.6 The obligations of the State with regard to the right to food in Kenya

The obligations of the State discussed here proceed from the direct constitutional provision on the right to food, supportive constitutional provisions as well as international human rights law.⁹⁸ This is because the direct constitutional provision on the right to adequate food has an international law DNA, and thus its content as well as attendant obligations must be gleaned from, and be understood within the context of, international law.⁹⁹ This section thus discusses

⁹⁵ CESCR General Comment No. 12, para. 8.

⁹⁶ Dietary needs require that the food contains a sufficient mix of the nutrients to enhance physical and mental growth, development and maintenance, as well as the daily activities of the individuals concerned, see CESCR General Comment No. 12, para. 9.

⁹⁷ Requires that the food is safe for human consumption and is free from contamination or adulteration by any harmful agents, see CESCR General Comment No. 12, para. 10.

⁹⁸ Though Kenya has extra-territorial obligations with regard to the right to food in other countries, this component of the obligations is beyond the scope of this study. For an analysis of the extra-territorial obligations of States in the context of the right to food, see Niada (n 6 above) 158-163. See also Narula (n 31 above) 691-800, who argues passionately for the reform of the human rights system to enhance accountability for global actors such as transnational corporations (TNCs) and International Financial Institutions (IFIs) through the mechanisms of extra-territorial obligations as well as international cooperation so as to ascertain the realisation of the right to food.

⁹⁹ See P de Vos 'The right to housing' in D Brand & C Heyns (eds). *Socio-economic rights in South Africa* (2005) 85, at 89, who acknowledges the importance of international SER law in interpreting domestic constitutional law contending that international SER law is more developed and more nuanced than equivalent domestic law on SERs.

the obligations of the right to adequate food as it is generally understood in international law.¹⁰⁰ This approach is important as the fulfilment of the right to adequate food encompasses both national and international obligations, and failures at any of these levels almost always leads to the violation of the right to adequate food for the most vulnerable and marginalised groups in society.¹⁰¹

In discussing the State's obligations with regard to the realisation of the right to adequate food, two points must be borne in mind. First, this discussion must commence from the premise that it is the primary duty of an individual to feed him/herself and his/her family, and that the obligations of the State are intended to supplement these personal efforts whenever needed.¹⁰² This point is affirmed by commentators who argue that in fulfilling the right to adequate food, the main role of the State is not feeding or maintaining everyone, but creating a social and economic environment which fosters development and which ensures that individuals have the ability to feed themselves.¹⁰³ This has further been affirmed by the current UN Special

¹⁰⁰ An integrated discussion of Kenya's obligations in national and international law in relation to the right to food is especially important due to the constitutional provisions incorporating customary international law as well as international law in ratified international and regional treaties directly in the Kenyan domestic legal sphere as has been more elaborately discussed in chapter two, section 2.2 above.

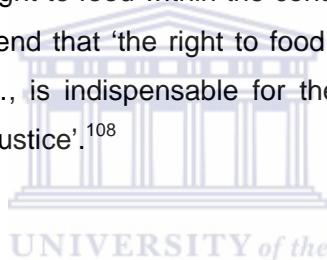
¹⁰¹ See Kunnemann & Epal-Ratjen (n 30 above) 32.

¹⁰² Eide – Right to adequate standards of living (n 20 above) 140. See also A Eide 'The international human rights system' in A Eide *et al* (eds.) *Food as a human right* (1984) 152, at 157-158, who contends that rights cannot be realised unless individuals accept the duty 'not only to do what is within their power to secure their own basic needs, but they are also obliged to participate in common endeavours, as directed by the State, in order to realise human rights for all'.

¹⁰³ M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998) 310; K Tomasevski 'Human Rights: The right to food' (1985) 70 *Iowa Law Review* 1321, at 1325; C Christensen *The right to food: How to guarantee* (1978) 33; Alston - International law and the right to food (n 91 above) 168-169, where, in answer to the question "what are the exact individual entitlements with regard to the right to adequate food" he avers that the most important requirement at the national level is to develop a set of relevant legal norms which reflect and seek to satisfy the State's international legal obligations to promote the realisation of the right to adequate food; Eide, Oshauge & Eide (n 9 above) 430-433, where they decry the traditional wisdom that the provision of SERs, of which food is a part, is the sole responsibility of the State, and contend that this is a narrow, incorrect understanding of the nature of SERs and their corresponding obligations. They argue, relying on article 2 of the Declaration on the Right to Development, that individuals have the responsibility, whenever

Rapporteur on the Right to Food, who avers that the right requires States to provide an enabling environment in which people can use their full potential to produce or purchase adequate food for themselves and their families.¹⁰⁴ The principle is further acknowledged, with regard to children, in the CRC which affirms the primacy of parental responsibility in securing conditions of life necessary for a child's development, though limiting that responsibility in relation to the abilities and financial capacities of the parents.¹⁰⁵

Secondly, in undertaking an analysis of the obligations of the State to realise the right to food, it is important to take into account the principle of the interdependence, interconnectedness and interrelatedness of rights.¹⁰⁶ It is generally agreed among commentators that the realisation of the right to food is dependent upon the realisation of other mutually supportive rights such as the right to health, water, work, social security and even participatory rights such as labour rights and the right to self-determination.¹⁰⁷ The crucial importance of understanding the right to food within the context of other human rights has been affirmed by the CESCR who contend that 'the right to food is indivisibly linked to the inherent dignity of every human person ..., is indispensable for the fulfilment of other human rights, ...[and] is inseparable from social justice'.¹⁰⁸



possible, to use their own efforts and employ their own resources to ensure the satisfaction of their needs.

¹⁰⁴ Schutter - The right to food (n 21 above) para. 2.

¹⁰⁵ CRC, article 27(2).

¹⁰⁶ See, Food and Agricultural Organisation (FAO) 'Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security' adopted by the 127th Session of the FAO Council (November 2004) para. 19, available at <http://www.fao.org/righttofood/publi09/y9825e01.pdf> (accessed on 6 July 2012).

¹⁰⁷ Craven (n 103 above) 311. For an analysis of the intrinsic interrelation of the right to food to other rights in the context of South Africa, see Brand – The right to food (n 9 above) 163-165.

¹⁰⁸ CESCR General Comment No. 12, para. 4. It thus provides that the fulfilment of the right to food requires the adoption of appropriate economic, environmental and social policies aimed at the eradication of poverty and the fulfilment of the entire corpus of human rights for everyone. See also Kunnemann - The right to adequate food: Violations related to its minimum core content (n 10 above) 164, who contends that without the right to feed oneself, political participation, cultural identity and democracy lose their meaning.

In acknowledging the important role that the realisation of the right to food plays in relation to other rights, the African Commission on Human and Peoples' Rights found that the right is intricately linked to human dignity and is essential in the enjoyment of other rights such as health, education, work as well as political participation.¹⁰⁹ Phillip Alston, referring to the need for a comprehensive approach to the realisation of the right to food argues that 'a compartmentalised approach to the right to food is both empirically unworkable and theoretically unacceptable'.¹¹⁰ Similar calls have been made for a "livelihood approach to food security" instead of a "food-first approach" in the realisation of the right to adequate food.¹¹¹ The Supreme Court of India espoused the livelihoods approach in *Olga Tellis v Bombay Municipal Corp* where it held as follows:¹¹²

An equally important facet of the right [to life] is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to a livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to a point of abrogation.

The Indian Court, therefore, considered the right to food as an integral part of the right to life. The present chapter advocates a livelihoods approach to the realisation of the right to adequate food, and calls on all the institutions of the State to put in place an environment conducive for people to feed themselves through the protection of people's resources and survival entitlements as discussed below.

¹⁰⁹ *SERAC v Nigeria* (n 44 above) para. 65. See also *Government of the Republic of South Africa v Grootboom & Others*, 2001 (1) SA 46 (CC), para. 23, where Justice Yacoob held that:

[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording [SERs] to all people therefore enables them to enjoy other rights enshrined in [the Bill of Rights]. The realisation of these rights is the key to the achievement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

¹¹⁰ P Alston 'International law and the human right to food' in P Alston & K Tomasevski (eds.), *The right to food* (1984) 9, at 19.

¹¹¹ FAO – Voluntary Guidelines, Guideline 2, especially 2.4, which also advocates for a holistic and comprehensive approach to hunger and poverty reduction.

¹¹² *Olga Tellis v Bombay Municipal Corporation* (July 10 1985) para. 2.1, available at http://droits-sociaux.u-paris10.fr/assets/files/Jurisprudence/D.Roman/Olga_Tellis.pdf (accessed on 20 August 2012).

6.6.1 General obligation with regard to the right to adequate food

The general obligation of the State with regard to the right to food, as with the other SERs is provided in articles 2(1) and 11¹¹³ of the ICESCR as well as article 21(2) of the 2010 Kenyan Constitution. Article 2(1) of the ICESCR states as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This general obligation has several intertwined and mutually reinforcing components as has been discussed more expansively and comprehensively in chapter two, section 2.3 above: progressive realisation; obligation to take steps; maximum of available resources; and, international cooperation and assistance, as is discussed below.¹¹⁴

i) Progressive realisation

The standard of progressive realisation is a flexibility device¹¹⁵ which entails a recognition of the inability of the State to immediately, or in the short-term, fulfil the right of everyone to adequate food.¹¹⁶ Progressive realisation is not, however, futuristic; it demands that States, regardless of level of economic development, ensure respect for the minimum subsistence rights for all.¹¹⁷

¹¹³ ICESCR article 11 affirms the responsibility of States to take appropriate steps to ensure the realisation of the right to adequate standards of living, of which the right to food forms an integral part, and the duty is to be undertaken taking into account the importance of international cooperation based on free consent.

¹¹⁴ The standard of progressive realisation in relation to the fulfilment of SERs in general has been discussed extensively in chapter two, section 2.3 above. This part of the discussion is a continuation of that particular discussion, though more attuned to the realisation of the right to food as a component of the right to an adequate standard of living.

¹¹⁵ See Eide, Oshauge & Eide (n 9 above) 434, who contend that the flexibility was intended to make it possible for States to realise their SER obligations in ways that correspond to their particular situations.

¹¹⁶ CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, para. 9, available at: <http://www.unhcr.org/refworld/docid/4538838e10.html> (accessed on 2 July 2012).

¹¹⁷ Eide – Right to adequate standards of living (n 20 above) 138.

CESCR has affirmed that the standard requires States to move expeditiously in taking steps to realise the right to adequate food,¹¹⁸ and further avers that ‘every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate, and safe, to ensure their freedom from hunger’.¹¹⁹ Asbjorn Eide summarises this obligation by stating as follows:¹²⁰

States are ...under an immediate obligation to ensure the minimum essential level required to be free from hunger, and an immediate obligation and continuous obligation to move as expeditiously as possible towards the full realisation of the right to [adequate] food, particularly for the vulnerable population groups and individuals.

This necessarily leads us to the concept of the minimum core content of rights and its attendant minimum core obligations.¹²¹ In its General Comment Number 3, the CESCR states that:¹²²

[a] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party [and that] a State party in which any significant number of individuals is deprived of essential foodstuff....is, prima facie, failing to discharge its obligations under the Covenant.

¹¹⁸ For a requirement that the State moves expeditiously in realising SERs, see Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, guideline 8, available at http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425803 (accessed on 2 July 2012); Limburg Principles on the Implementation of Economic Social and Cultural Rights, para 7, UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135, principle 21. See also Kunnemann - The right to adequate food: Violations related to its minimum core content (n 10 above) 172-173.

¹¹⁹ CESCR General Comment No. 12, para. 14.

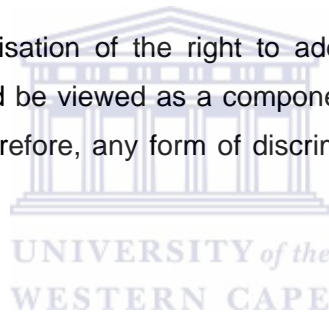
¹²⁰ Eide – Right to adequate standards of living (n 20 above) 139.

¹²¹ Ziegler *et al* (n 2 above) 21. For a comprehensive and illuminating discussion of the minimum core approach and its place in the development of Kenya’s SER jurisprudence, see chapter two, section 2.5 and chapter five, section 5.3.2. The submission emanating from the discussion in the two sections is that, if Kenya is to achieve the transformative aspirations of 2010 Constitution, a substantive conception of SERs, which encompasses an espousal of the minimum core approach to the interpretation, implementation and enforcement of SERs, must be adopted both by the political institutions and the courts.

¹²² CESCR General Comment No. 3, para. 10.

Rolf Kunnemann contends that the CESCR's recognition of "access to essential foodstuff" as part of the minimum core content of the right to adequate food is in line with the emphasis that has been placed on the "fundamental right to be free from hunger" as contained in article 11(2) of the ICESCR, and he concludes that freedom from hunger is the baseline and minimum core content of the right to adequate food.¹²³ For its part, the African Commission on Human and Peoples' Rights has found, in the *SERAC* case, that the minimum core of the right to food requires the State not to contaminate or destroy food sources, to prevent third parties from destroying or contaminating food sources, and not to prevent people from feeding themselves.¹²⁴ The exposition of the minimum core by the African Commission is reflective of the minimum core content of the right to food as advocated by the CESCR, as both are aimed at ensuring that people are free from hunger and starvation.¹²⁵ Therefore, failure to realise the minimum core obligation, which is essentially a failure to satisfy the minimum essential levels of food to ensure freedom from hunger is a violation of the right to food.¹²⁶

Non-discrimination in the realisation of the right to adequate food is also an immediate obligation of the State, and should be viewed as a component of the minimum core content of the right to adequate food.¹²⁷ Therefore, any form of discrimination on any prohibited grounds



¹²³ Kunnemann - The right to adequate food: Violations related to its minimum core content (n 10 above) 171; Kunnemann & Epal-Ratjen (n 30 above) 36-37.

¹²⁴ *SERAC v Nigeria* (n 44 above) 65. The African Commission held that the Nigerian government had violated all three minimum core obligations of the right to food in relation to its oil extraction activities and the activities of Shell petroleum with regard to the Ogoni community, at para. 66.

¹²⁵ See Second Report of the SR Jean Ziegler (n 2 above) paras. 42 & 45, who affirms that the standard of progressive realisation entails an immediate minimum core obligation for the realisation of the right to food.

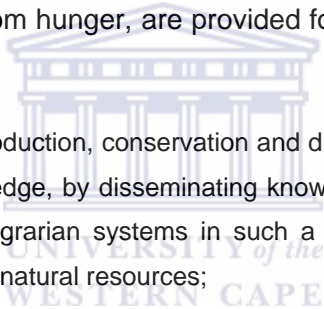
¹²⁶ CESCR General Comment No. 12, para. 17. For a more in-depth analysis and the sampling of violations of the minimum core content of the right to adequate food, see Kunnemann - The right to adequate food: Violations related to its minimum core content (n 10 above) 177-182.

¹²⁷ Kunnemann - The right to adequate food: Violations related to its minimum core content (n 9 above) 178. See also Niada (n 6 above) 156-157; Second Report of the SR Jean Ziegler (n 2 above) paras. 41 & 45, who affirms that non-discrimination in accessing food is an immediate obligation not subject to the standard of progressive realisation and which must be enforced irrespective of resource scarcity.

with regard to access to food or means for its production also constitutes a violation of the right to adequate food.¹²⁸

ii) *Obligation to take steps*

This is an immediate obligation and it requires that the steps taken by the State to implement the right to adequate food be deliberate, concrete and targeted.¹²⁹ The obligation to take steps is further emphasised by the UN Food and Agriculture Organisation (FAO) in their *Voluntary Guidelines for the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* (2004) who contend that strategies for the progressive realisation of the right to adequate food must include: 'objectives, targets, benchmarks, time-frames as well as actions to formulate policies, identify and mobilize resources, define institutional mechanisms, allocate responsibilities, coordinate the activities of different actors, and provide for monitoring mechanisms'.¹³⁰ The requisite steps to meet the minimum core of the right to food, that is the realisation of the right to be free from hunger, are provided for in article 11(2) of the ICESCR as follows:

- 
- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;
 - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Phillip Alston divides the above obligations into two dimensions: national obligations as espoused in article 11(2)(a), and international obligations as is espoused in article 11(2)(b).¹³¹

¹²⁸ CESCR General Comment No. 12, paras. 18 & 26; Second Report of the SR Jean Ziegler (n 2 above) para. 45. For a brief analysis of cases where unfair discrimination has been held to constitute a violation of SERs, see FAO – Information papers and case studies (n 51 above) 78-79.

¹²⁹ CESCR General Comment No. 3, paras.2 & 4.

¹³⁰ FAO – Voluntary Guidelines, Guideline 3.3.

¹³¹ Alston - International law and the right to food (n 91 above) 167.

He summarises the national obligations as requiring the state to improve methods of food production, conservation and distribution so as to enhance the realisation of the right to food.¹³²

The obligation to take steps to enhance the realisation of fundamental rights, the right to adequate food included, is a constitutional obligation of the State. The Kenyan Constitution adopts the requirement that the State undertakes legislative, policy and other measures for the progressive realisation of entrenched SERs.¹³³ The Constitution further affirms, in section 21(4), the duty of the State to enact and implement legislation aimed at fulfilling its international human rights obligations. Other steps which are necessary to enhance the realisation of the right to adequate food also include the provision of practical, accessible, affordable, timely and effective remedies for the violation of the right to adequate food and other related entitlements; as well as the creation of implementation and monitoring institutions.

iii) Maximum of available resources

The realisation of the right to adequate food requires resources, which are almost always limited for a developing State like Kenya. Despite limitation, it should also be acknowledged that it is the most marginalised and vulnerable groups that are almost always food insecure, and, therefore, the right to adequate food must, of necessity, be a priority area for the State in terms of allocation of the available limited resources. Both national and international law affirm the responsibility of the State to protect the most vulnerable, even in the context of limited resources. The need for the prioritisation of Kenya's resources in the realisation of its SER obligations is entrenched in the 2010 Kenyan Constitution which provides that:¹³⁴

[i]n 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 or individuals.

¹³² As above. He avers that these are the main objectives of the provision, and that the other requirements such as the use of technical and scientific knowledge, dissemination of nutritional knowledge, and the reform of agrarian systems are just secondary requirements aimed at achieving the three main objectives.

¹³³ The 2010 Kenyan Constitution, article 21(2) & (4).

¹³⁴ The 2010 Kenyan Constitution, article 20(5)(b).

The Constitution further provides that in the instances where the State alleges the unavailability of resources to fulfil SERs, it is the responsibility of the State to prove that such resources are lacking.¹³⁵

On its part, the CESCR has argued, in relation to resources and vulnerability that ‘the duty of States parties to protect the vulnerable members of their societies assumes greater rather than lesser importance in times of severe resource constraints’.¹³⁶ Kunnemann and Epal-Ratjen contend that this prioritisation in the context of limited resources can be achieved through an emphasis on basic food production, targeting programmes to the most vulnerable members of the population, especially maternal and child nutrition programmes, among others.¹³⁷

iv) International cooperation and assistance

As has been noted by Phillip Alston above, the realisation of the right to adequate food has both a national and an international dimension. The requirement that States use all the available resources for the prioritised realisation of the right to adequate food not only refers to resources within the concerned State, but also resources that can be harnessed from the international community through international assistance and cooperation.¹³⁸

International cooperation and assistance in the realisation of human rights is the cornerstone of the UN Charter which provides that one of the purposes of the UN is the achievement of international cooperation in promoting and encouraging respect for human

¹³⁵ The 2010 Kenyan Constitution, article 20(5)(a).

¹³⁶ CESCR, General Comment No. 3, para. 12. This is further affirmed in CESCR General Comment No. 12, para. 28 which provides the following:

Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.

¹³⁷ Kunnemann & Epal-Ratjen (n 30 above) 40.

¹³⁸ CESCR, General Comment No. 3, para. 13. See also SI Skogly ‘Right to adequate food: National implementation and extraterritorial obligations’ (2007) 11 *Max Planck Yearbook of United Nations Law* 339, at 344-345. See also FAO’s Voluntary Guidelines, section three - international measures, actions and commitments for the realisation of the right to adequate food.

rights and fundamental freedoms.¹³⁹ Further, for SERs in general, it is entrenched in article 2(1) of the ICESCR.¹⁴⁰ Article 11, which provides specifically for the right to adequate food, also contains a requirement for international cooperation and assistance.¹⁴¹ The CESCR has emphasised the importance of international cooperation and assistance in the realisation of the right to adequate food in its General Comment Number 12, calling on States to: recognise its essential role in the full realisation of the right to adequate food; to respect the enjoyment of the right in other countries; to facilitate access to food; to provide food aid where necessary; and to give due attention to the right to food in the development of international instruments.¹⁴² It urges States to desist from using food as a tool for political or economic pressures in the context of economic sanctions, as well as to refrain from declaring food embargoes or any other measures that deter production and access to food.¹⁴³

Sigrun Skogly contends that the above provisions provide a strong legal basis for an extraterritorial obligation requiring developed States to assist developing States such as Kenya to enhance the realisation of the right to adequate food.¹⁴⁴ It has also been argued that international cooperation is an important tool that can be used to support the extraterritorial obligations of States to control the activities of TNCs and IFIs that violate the right to food.¹⁴⁵

6.6.2 Tripartite typology

The obligations with regard to the right to food can be analysed by using the tripartite typology, as developed by Asbjorn Eide and which includes the obligation to respect, protect and fulfil the

¹³⁹ UN Charter, article 1(3) as read with articles 55 and 56. See Skogly (n 138 above) 341-343.

¹⁴⁰ See ICESCR, article 2 (1) which provided for individual and collective action by States through international cooperation and assistance, both economic and technical in the realisation of entrenched SERs.

¹⁴¹ ICESCR article 11, which provides that 'The States Parties will take appropriate steps to ensure the realization of this right, recognising to this effect the essential importance of international co-operation based on free consent'. It further provides for steps to be taken to ensure freedom from hunger, which steps are also to be taken 'individually and through international co-operation'.

¹⁴² CESCR, General Comment No. 12, para. 36.

¹⁴³ CESCR, General Comment No. 12, para. 37. For further elaborations see also paras. 37-41.

¹⁴⁴ Skogly (n 138 above) 346.

¹⁴⁵ Narula (n 32 above) 735-737.

right to food.¹⁴⁶ David Bilchitz argues convincingly that an understanding of the obligations of the State using the tripartite typology can only make sense when the substantive content of the rights in question have been developed, as the obligations flow from the content of rights.¹⁴⁷ It is thus imperative that if the courts are going to understand and assess State obligations using the tripartite typology, they must, of necessity, adopt the integrated approach to interpretation and enforcement of SERs as developed in chapter five above. The integrated approach ensures that the courts not only develop the substantive content and scope of the SERs in question in the event of litigation, but also adopt a purposive interpretation of the entrenched SERs that takes into account the constitutional values of human dignity, equality and freedom, as well as the purpose of the entrenchment of SERs, which is the amelioration of the conditions of the poor, vulnerable and marginalised individuals and groups, and the achievement of social justice.

i) Duty to respect

The duty to respect is based on the reasoning that individuals and groups will seek to find their own solutions to their food and nutritional needs. It thus requires the State to respect the resources owned by individuals, such as land, capital, labour, and the intellectual ability to optimally use those resources to provide for themselves individually or in groups; as well as the freedom of individuals to undertake employment of their preference.¹⁴⁸ In a further elaboration of the duty to respect, Manisuli Sseyonjo avers that this duty obliges States to adopt laws or other

¹⁴⁶ See A Eide 'The human right to adequate food and freedom from hunger' Final Report prepared by Asbjorn Eide for the UN Sub-Commission on Human Rights, E/CN.4/Sub.2/1987/23, available at <http://www.fao.org/docrep/W9990E/w9990e03.htm> (accessed on 2 July, 2012). See also CESCR General Comment No. 12, para. 15; Ziegler *et al* (n 2 above) 18-20; Second Report of the SR Jean Ziegler (n 2 above) paras. 44-45. For further elaboration of the tripartite typology in the later works of Eide, see: A Eide 'The realisation of economic, social and cultural rights: the right to adequate food and to be free from hunger; Updated study on the right to food, submitted by Mr. Asbjorn Eide in accordance with Sub-Commission decision 1998/106, E/CN.4/Sub.2/199/12, 28 June 1999, paras. 52-53, available at <http://www.unhchr.ch/Huridocda/Huridoca.ns> (accessed on 2 July 2012); A Eide 'Economic, social and cultural rights as human rights' in A Eide, C Krause & A Rosas (eds.) *Economic, social and cultural rights: a textbook* (2001) 22-28.

¹⁴⁷ D Bichitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 184 & 195-96.

¹⁴⁸ Eide – Final report on the right to food (n 146 above) paras. 15-16; Eide, Oshauge & Eide (n 9 above) 432.

measures, and to reform laws, policies, administrative measures and programmes that contravene protected SERs such as the right to food.¹⁴⁹ In discussing the obligation to respect the right to food in the context of South Africa, Danie Brand divides the duty to respect into three State obligations, that is, first, the obligation to refrain from impairing people's existing access to adequate food;¹⁵⁰ secondly, the obligation to undertake mitigative steps should impairment be unavoidable; and thirdly, the obligation to refrain from placing obstacles in the way of people newly gaining access or enhancing existing access to food.¹⁵¹

ii) *Duty to protect*

The duty to protect means that it is not enough for the State to just refrain from interfering with the use of resources by right-holders, but that it has a further secondary obligation to prevent more economically powerful or assertive third parties from adversely interfering with the possible options available to right-holders in the fulfilment of their food and nutritional needs.¹⁵² It thus requires the creation of State structures and institutions, and the adoption, implementation and enforcement of laws and policies to protect rights-holders from fraud, unethical behaviour in trade and contractual relations, and the marketing and dumping of hazardous or dangerous products.¹⁵³ Legislative measures aimed at the realisation of this duty may include price regulation to ensure that basic foodstuffs remain reasonably stable and affordable,¹⁵⁴ standard-setting with regard to the safety and nutritional content of food, as well

¹⁴⁹ M Sseyonjo, *Economic, social and cultural rights in international law* (2009) 23. See also FAO – Information papers and case studies (n 51 above) 76.

¹⁵⁰ This is exemplified by the South African case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W). In this case dealing with access to water, an important right related to the right to food, the Court held that the action of the Council to disconnect Applicants' water due to non-payment of water charges was a prima facie violation of the constitutional duty to respect the Applicants' right to water.

¹⁵¹ Brand – Right to food (n 9 above) 165-170.

¹⁵² Eide – Final report on the right to food (n 146 above) paras. 17-18; Eide, Oshauge & Eide (n 9 above) 432, who contend that the obligation to protect is the most important State obligation with regard to the right to food and other survival rights.

¹⁵³ Eide – Final report on the right to food (n 146 above) paras. 17-18

¹⁵⁴ This is exemplified by the German *Milk and Butterfat case* 18 BVerfGE 315, 1965, which concerned a challenge to legislation regulating the price of drinking milk on the basis that it infringed on freedom of competition for milk suppliers and dairies. The German Constitutional Court rejected the above challenge,

as laws protecting land tenure and production resources from arbitrary private interferences.¹⁵⁵ Due to the continuing difficulty of subjecting transnational corporations (TNCs) to the human rights regime, the duty to protect, which includes the establishment of regulatory structures as well as the provision of effective judicial and administrative remedies, plays an important role checking the uncompetitive conduct of agribusiness TNCs which have adverse effects on the availability, access and affordability of essential foods.¹⁵⁶

iii) *Duty to fulfil*

This is a tertiary level of obligation that requires the State to fulfil the rights of everyone who is otherwise unable to meet their right to adequate food. It contains three sub-components, that is, the obligation to facilitate, promote, and provide.¹⁵⁷ The *obligation to facilitate* requires the State to pro-actively create opportunities or the environment in which the substantive right to adequate food can be realised, especially when the obligations to respect and protect have not been realised.¹⁵⁸ Apart from the recognition of the right to food in political and legal systems, the duty to facilitate requires the adoption of a comprehensive national strategy and plan of action for the realisation of the right to adequate food.¹⁵⁹

The second component, the *obligation to provide*, means that the State must, directly or indirectly, meet the food needs of those who are unable, for reasons beyond their control, to

holding that due to the nature of milk as a basic foodstuff, public interest required that its price be kept at an affordable level. According to Brand, the Court judgment in effect allowed the State to infringe on competition rights in fulfilling its constitutional obligation of ensuring that people's basic food needs are met on a sustainable basis, see Brand – The right to food (n 9 above) 173.

¹⁵⁵ Brand – The right to food (n 9 above) 170-172. He avers that these measures need not only be enacted, but must also be effectively implemented and enforced, failing which a prima facie violation of the right to food is present, at 172.

¹⁵⁶ Niada (n 6 above) 155 & 184. She enumerates some of these practices to include: promotion of export-oriented production of cash crops; conspicuous collusion in the control of agricultural trade, marketing and processing; and the imposition of low producer prices while maintaining high consumer prices to maximise profit margins, at 182-183. See also Narula (n 32 above) 715-724.

¹⁵⁷ Eide – Final report on the right to food (n 146 above) paras. 19-23.

¹⁵⁸ As above.

¹⁵⁹ Sseyonjo – SER in international law (n 149 above) 25. For a discussion on this in the context of South Africa, see Brand – The right to food (n 9 above) 180-187.

meet their basic needs, such as through the development of safety nets or through the provision of social security.¹⁶⁰ Eide argues that this obligation has gained more currency due to increasing urbanisation and the destruction of the traditional social support structures within families and communities.¹⁶¹ It, however, remains a difficult obligation for States due to the fact that the satisfaction of food needs has traditionally been entrusted, in a high degree, to the markets, and that food still remains a commodity subject to the vagaries of demand and supply.¹⁶² Strategies aimed at the realisation of the right to food, just like those aimed at the realisation of the right to housing as discussed in chapter seven below, must thus espouse a pragmatic balance of the right to food as both a birth-right for all human beings and a commodity that can be bought and sold in the open market.¹⁶³ This balance necessitates that the strategy is based on a broad and holistic understanding of the right to food that incorporates all the relevant societal stakeholders including food producers and distributors, as well as national and international governmental and non-governmental organisations in the efforts aimed at the realisation of the right to food.¹⁶⁴ The duty to provide is exemplified by the case of *Gebrüder v Regierungsrat des Kanton Berns*,¹⁶⁵ where the Swiss Federal Court recognised the obligation of the State to provide the

¹⁶⁰ See FAO – Information papers and case studies (n 51 above) 83, who contend that this duty is subject to the State's available resources, and that it also extends to victims of natural and other disasters.

¹⁶¹ Eide – Final report on the right to food (n 146 above) paras. 19-23.

¹⁶² C Courtis 'The right to food as a justiciable right: Challenges and strategies' (2007) 11 *Max Planck Yearbook of United Nations Law* 317, at 323-324. See also Second Report of the SR Jean Ziegler (n 2 above) para. 109, who acknowledges the traditional reliance on markets to satisfy people's food needs, but contends that this can no longer be the practice in the current circumstances as it has been ascertained that unregulated markets cannot guarantee the basic food needs of the whole of society.

¹⁶³ For a discussion of the need for this balance in the context of the right to housing, see S Leckie 'Where it matters most: Making international housing rights meaningful at the national level' in S Leckie (eds.), *National perspectives on housing rights* (2003) 3, at 6-7.

¹⁶⁴ Courtis (n 162 above) 324-325. This approach has been espoused in the Kenyan Draft National Food Nutritional Security Policy (n 60 above) ES paras. 3 & 5-13 & chapters 2-9, which addresses all related food security issues such as food availability and access, food safety standards and quality control, nutritional improvement, food security and nutrition information, early warning and emergency management, institutional and legal framework, and financing.

¹⁶⁵ *Tribunal fédéral suisse, références: ATF 121 I 367, 371, 373 V. = JT 1996 389*, quoted in Second Report of the SR Jean Ziegler (n 2 above) para. 58.

basic minimum conditions of life, that is, food, clothing, and housing, to ensure a dignified human existence.¹⁶⁶

The third component, the *obligation to promote*, was added to the tripartite typology by Godefridus van Hoof.¹⁶⁷ It requires positive action of a long-term character such as advocacy, human rights education, training and the dissemination of human rights information so as to change public consciousness and understanding of rights as well as the obligations they engender both horizontally and vertically.¹⁶⁸ Kunnemann, contributing to the debate on the tripartite typology, argues that the obligation to fulfil only requires the State to provide the remainder of what is lacking after individuals and groups have strived to fulfil their needs using their own private resources.¹⁶⁹

This typology is envisioned in section 21(1) of the Kenyan Constitution which provides for the duty of the State with regard to all the entrenched fundamental rights and freedoms, and which states that 'it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.'¹⁷⁰

6.6.3 The 4-As scheme

In analysing the obligation of the State to realise the right to food, further regard can be paid to the 4-As scheme, that is, availability, accessibility, acceptability and adaptability.

i) *Availability*

¹⁶⁶ As above.

¹⁶⁷ GHJ van Hoof 'Legal nature of economic, social and cultural rights: a rebuttal of some traditional view' in P Alston & K Tomasveski (eds.) *the right to food* (1984) 106-108.

¹⁶⁸ As above.

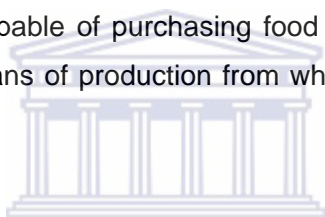
¹⁶⁹ R Kunnemann 'A coherent approach to human rights' (1995) 17 *Human Rights Quarterly* 323, at 328. This argument is in line with the argument at the beginning of section 6.6 of this chapter that the primary obligation is for individuals and groups to feed themselves, and the obligation of the State is to supplement these efforts where people are unable, due to circumstances beyond their means, to satisfy their own food needs.

¹⁷⁰ The tripartite typology was also adopted in the formulation of FAO's voluntary guidelines on the right to food; see FAO 'Voluntary Guidelines, para. 17.

Availability of food refers to *national food security*.¹⁷¹ Food security has been defined by the Food and Agricultural Organisation (FAO) to encompass: adequate food production; increasing stability in the flow of supplies; and, securing access to food supplies.¹⁷² Enhancing national food security encompasses the responsibility of the State to ensure the existence of sufficient food supply to meet the quantitative and nutritional needs of the entire national population.¹⁷³ This can be done either through the national production of food, or through the importation of food to ensure the existence of adequate food reserves at all times. Apart from ensuring a sufficient national food reserve, the State should also ensure adequate distributional networks to enhance the physical availability of food in all parts of the country.¹⁷⁴

ii) *Accessibility*

Accessibility of food refers to *household food security* and recognises the fact that the right to food can only truly be realised if food security exists at the household level.¹⁷⁵ Accessibility thus requires that people are either capable of purchasing food from the opportunities available to them, or are in possession of means of production from which they can produce food for their own use.¹⁷⁶



¹⁷¹ Brand – the right to food (n 9 above) 158.

¹⁷² FAO, *Progress in Implementation of the Plan of Action to Strengthen World Food Security-A Reappraisal of Concepts and Approaches*, Doc. C/83/20 (1983), available at <http://www.fao.org/docrep/x5563E/X5563e06.htm> (accessed on 5 July 2012). The third aspect of the definition, securing access to food, has also been captured by the World Bank which defines food security as ‘access by all people at all times to enough food for an active and healthy life’, see World Bank ‘Poverty and hunger: Issues and options for food security in developing countries (1986) v, available at <http://www-wds.worldbank.org/external> (accessed on 20 July, 2012).

¹⁷³ Brand - Food (n 24 above) 56C - 3.

¹⁷⁴ As above. See also CESCR General Comment No. 12, para.12.

¹⁷⁵ Eide, Oshauge & Eide (n 9 above) 451. They define household food security to imply that:

[a] household enjoys access to a basket of food which is nutritionally adequate, safe, and culturally acceptable, procured in a manner consistent with the satisfaction also of other basic human needs, and obtained from supplies, and in ways, which are sustainable over time, at 455.

¹⁷⁶ Brand - Food (n 24 above) 56C-3. See also Eide, Oshauge & Eide (n 9 above) 450, who argue that the lack of economic assets, which is so crucial in determining access to adequate food, is often overlooked in policy formulation, with focus instead on ensuring the availability of national reserve stock of grain.

Accessibility to food has two components: economic and physical accessibility.¹⁷⁷ Economic accessibility requires that food must be available at a price that is affordable to citizens, and at a level that does not have adverse effects on personal or household financial resources to the extent that threatens or compromises the satisfaction of other basic needs.¹⁷⁸ Eide, Oshauge and Eide expound on this by contending that food competes for scarce household resources with other basic household needs such as housing, water and education, and that food security can only be realised at the household level when there are sufficient resources to be expended simultaneously on food and these other basic needs.¹⁷⁹ To better understand the dynamics of economic accessibility of food at the household level, reliance can be placed on Amartya Sen's concept of "entitlements", that is, the means through which different households or groups have access to adequate food.¹⁸⁰ Sen elaborates on a quartet of entitlements as follows:¹⁸¹

- i) *Trade-based entitlement*—one is entitled to own what one obtains by trading something one owns with a willing party or parties.
- ii) *Production-based entitlement* – one is entitled to own what one gets by engaging in production using one's own resources or resources hired from willing parties meeting the agreed conditions of trade.
- iii) *Own-labour entitlement* – one is entitled to one's own labour power, and thus to the trade-based and production-based entitlements related to one's own labour power.
- iv) *Inheritance and transfer entitlement* – one is entitled to own what one is willingly given by another who legitimately owns it, to take effect before or after the latter's death.

Sen contends that unless measures aimed at the realisation of the right to food are focussed around these entitlements, with the aim of addressing people's lack of entitlements, the problems of economic access to adequate food cannot effectively be addressed.¹⁸² Eide, Oshauge and Eide agree with Sen and aver that to enhance the realisation of the right to food, 'domestic legal systems should be transformed in such a way that everyone possesses a legally-sanctioned, operational entitlement to food'.¹⁸³ Such a process will entail land reform;

¹⁷⁷ CESCR General Comment No. 12, para.13.

¹⁷⁸ As above.

¹⁷⁹ Eide, Oshauge & Eide (n 9 above) 457.

¹⁸⁰ A Sen *Poverty and famines: An essay on entitlements and deprivation* (1981) 1-8.

¹⁸¹ Sen (n 180 above) 2.

¹⁸² Sen (n 180 above) 8.

¹⁸³ Eide, Oshauge & Eide (n 9 above) 423.

State subsidies on production resources such as farm implements, seeds, fertilizers and pesticides; creation of employment and encouragement of self-employment; and the provision of social assistance to cushion vulnerable individuals and groups, among many others.¹⁸⁴ A holistic approach to food security encompassing broad legal entitlements to food has been adopted by Kenya's Draft National Food and Nutrition Security Policy 2011, with the aim of enhancing availability and access to adequate food of nutritional quality to all Kenyans.¹⁸⁵

Physical accessibility on the other hand requires that adequate food is accessible to everyone, including vulnerable groups such as children, the elderly, and persons with disabilities.¹⁸⁶ Rolf Kunnemann, in his analysis of General Comment Number 12, contends that physical accessibility entails a requirement of immediate as well as unconditional access to adequate food, and that should a person be unable to buy or otherwise gain access to food, the State is under an obligation to provide such.¹⁸⁷ This is acknowledged by Brand who, in analysing the distinction between economic and physical accessibility, as discussed in General Comment Number 12, contends that economic accessibility refers to entitlements which self-sufficient people require to gain access to food, while physical accessibility refers to those who are not self-sufficient and have to receive State assistance to gain access to food.¹⁸⁸ Physical accessibility further requires sustainability in food production, that is, the requirement that current production techniques must not adversely affect the opportunities of future generations to feed themselves.¹⁸⁹

iii) Acceptability

¹⁸⁴ As above. See also generally Dreze & Sen – Hunger and public action (n 24 above); FAO –Voluntary guidelines, Guideline 8.1.

¹⁸⁵ Draft Food and Nutrition Policy (n 60 above) chapter 2.

¹⁸⁶ CESCR General Comment No. 12, para.13.

¹⁸⁷ Kunnemann - The right to adequate food: Violations related to its minimum core content (n 10 above) 169; Kunnemann & Epal-Ratjen (n 30 above) 38. See also CESCR General Comment No. 12, para. 15, which provides that 'whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly'.

¹⁸⁸ Brand - Food (n 24 above) 56C-3.

¹⁸⁹ Brand – The right to food (n 9 above) 158.

Acceptability refers to the non-nutrient based value attached to food as well as food consumption, and requires that the available food must recognise the many cultural roles and meanings of food to the identity of the communities in question. This ensures respect for a people's traditional dietary diversity and by extension a recognition of their human dignity.¹⁹⁰ This aspect of State obligation with regard to food was acknowledged in the South African case of *Huang v Head of Grootvlei Prison*, a case which dealt with the cultural and nutritional rights of Taiwanese prisoners.¹⁹¹ The Court ordered that the prisoners be provided with raw food, as the State's expense, for them to cook in accordance with their cultural requirements, an order that was in line with the South African Correctional Services Act 111 of 1998, section 8(3) which provided that 'where reasonably practicable, dietary regulations must take into account religious requirements and cultural preferences'.¹⁹²

iv) *Adaptability*

Lastly, adaptability, in relation to the right to adequate food entails the requirement that food production, accessibility and availability is sustainable over-time, both for the current and for future generations. Food production strategies and other resource entitlements must therefore be adaptable to changing ecological and economic situations to ensure that households are capable of realising their right to adequate food continuously in the long-term.¹⁹³ Over-reliance on rain-fed agriculture in the context of global warming and its attendant change in weather patterns,¹⁹⁴ unsustainable use or overuse and exhaustion of natural production resources, run-away and unchecked population growth, and inadequacy of the minimum wage, among others,

¹⁹⁰ CESCR General Comment No. 12, paras. 8 & 11; Eide, Oshauge & Eide (n 9 above) 458; Kunnemann - The right to adequate food: Violations related to its minimum core content (n 10 above) 170; Kunnemann & Epal-Ratjen (n 30 above) 37; FAO's Voluntary Guidelines, Guidelines 10.9-10.10.

¹⁹¹ *Huang v Head of Grootvlei Prison*, Case No. 992/2003 (ZAFSHC) (unreported judgment of 15 May 2003).

¹⁹² *Huang*, at para. 35.

¹⁹³ Kunnemann & Epal-Ratjen (n 30 above) 38-39.

¹⁹⁴ See Draft Food and Nutrition Policy (n 60 above) para. 2.10, which recognises that Kenya is heavily dependent on rain-fed agriculture, leading to adverse consequences for food security. It, however, notes the huge potential for irrigation in Kenya (1.3 million hectares) and affirms the commitment of the State to enhance irrigation through the provision of requisite funding and the reform of the legal regulatory framework on irrigation.

are the areas that must be addressed to enhance adaptability in the realisation of the right to adequate food for all.

In synchronising the tripartite typology and the 4-A's scheme approaches used in analysing the right to adequate food, as discussed above, Oliver de Schutter is of the opinion that the 4-A's scheme combines seamlessly with the tripartite typology as it 'describes the characteristics of the goods or services that the individual rights holder has a right to' while the tripartite typology framework ascertains the 'different obligations of the State either not to interfere with the enjoyment of those goods or services, or to regulate private actors, or to facilitate access to those goods or services by market mechanisms, or in certain cases to provide for it'.¹⁹⁵

6.7 The role of courts in the realisation of the right to food

The question then is, what is the role of the judiciary in the realisation of the right to adequate food? In other words, what is the potential for the judiciary in enhancing the realisation of the right to adequate food in Kenya? In answering this question, reliance is placed on the theory of dialogical constitutionalism, as discussed in chapters three and four above, which envisages an active role for the courts both as a forum and as an active facilitator of societal dialogue on the interpretation, implementation and enforcement of entrenched SERs. Further, the analysis of the role of the courts in the realisation of the right to food also ties in closely with the integrated and transformative approaches to the interpretation of SERs discussed in chapter five above, which similarly envisages an active role for the courts in protecting people's food entitlements.

6.7.1 Mandate and duties of the court with regard to the right to food

To begin with, the courts have a fidelity to the Constitution,¹⁹⁶ and also have a duty (as State organs) to observe, respect, promote and fulfil the rights and fundamental freedoms in the Constitution.¹⁹⁷ This, therefore, means that the SER obligations of the State as discussed generally in chapter two, sections 2.3 - 2.5, and specifically in relation to the right to food in

¹⁹⁵ O De Schutter *International human rights law: cases, materials and commentaries* (2010) 256-257.

¹⁹⁶ The 2010 Constitution of Kenya, articles 23 & 165.

¹⁹⁷ The 2010 Constitution of Kenya, article 21(1). For an affirmation of this role of the courts in the context of South Africa, see generally J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214; K Young *Constituting economic and social rights* (2012) 133.

section 6.6 above, also applies to the courts. The courts thus have a responsibility to provide effective remedies to victims of violations of the right to adequate food, which may include reparations in the form of restitution, compensation, satisfaction or guarantee of non-repetition.¹⁹⁸ The provision of remedies is essential in the enhancement of the accountability of the political institutions in the realisation of their obligation arising from human rights, as was recognised in the UDHR.¹⁹⁹

Secondly, and has been discussed in section 6.6 above, article 21(2) of the 2010 Kenyan Constitution entails the responsibility of the State to put in place legislative, policy and other measures, including the setting of standards to achieve the progressive realisation of the rights guaranteed under article 43, of which the right to adequate food forms a part.²⁰⁰ Even though this is normally the responsibility of the political institutions, if they fail to undertake the same, or if there is an inordinate delay in fulfilling this duty, or if the legislative, policy and programmatic framework developed by the political institutions do not pass constitutional muster, then the courts, as guardians of the Constitution, have a duty to ensure that the requisite measures capable of operationalising the right to food are put in place.²⁰¹ Thirdly, and in relation to the second point above, courts and judges, as State organs and State officers

¹⁹⁸ The 2010 Constitution of Kenya, article 23(3) which provides for these and other remedies in instances of violation of entrenched fundamental rights. See also CESCR, General Comment No. 12, paras. 32-34.

¹⁹⁹ See UDHR, article 8, which provides for the right to an effective remedy at the national level in instances of rights violation. This is further affirmed by the CESCR in its General Comment No. 9, para. 2 where it states that appropriate means of remedies must be put in place at the domestic level to enhance government accountability in the realisation of the provisions of the ICESCR. See also CESCR General Comment No. 12, paras. 32-25, on the need for domestic remedies for the violation of the right to food.

²⁰⁰ See Courtis (n 162 above) 319-320, who acknowledges that adjudication should not be the main means for the realisation of SERs, especially the right to food, and that the most important aspect is the development, implementation and monitoring of policies and programmes, a task that better suits the political institutions. He, however, contends that courts have a role to play and this role includes: giving a voice to rights-holders and offering them a remedy in instances of violation of their rights; subjecting the duty-bearers to control in instances of failure to realise rights and instituting the requisite democratic checks and balances in the exercise of public power; enhancing the resolution of legal uncertainties and balancing the interpretation of conflicting rights; as well as the protection of minorities and disadvantaged groups.

²⁰¹ For a more elaborate discussion of this duty in the context of the theory of dialogical constitutionalism, see chapter four above.

respectively, have a duty to address the needs of vulnerable groups and communities,²⁰² and this duty includes enhancing the protection of the food-insecure, who are almost always vulnerable and marginalised individuals, groups or communities.

The courts must, therefore, play a major role if the right to adequate food and other related rights in the Constitution are to achieve their transformative potential of eliminating hunger, improving the living standard of the Kenyan people, achieving social justice, and ultimately ensuring sustainable development.

6.7.2 Transformative adjudication in the context of the right to food

As has been discussed in chapter five above, if Kenya is to realise the transformative aspirations of the Constitution, the judiciary must, of necessity, adopt a progressive attitude and disposition towards the adjudication of SERs.²⁰³ This is due to the requirement that the Courts develop the law to the extent that it does not give effect to fundamental rights,²⁰⁴ as well as to adopt the interpretation that most favours the enforcement of fundamental rights during adjudication.²⁰⁵ This, therefore, requires that when cases dealing with the right to food arise, be they based on the constitutional provisions on the right to food or other relevant legislation, the courts must adopt a substantive and progressive interpretation of the right to food, detailing the meaning, content and scope of the right to food in line with the integrated approach proposed in chapter five above.²⁰⁶

In this regard, the courts must require that the political institutions design, develop and implement a comprehensive and holistic national strategy encompassing legislative, policy and programmatic frameworks for the realisation of the right to adequate food as discussed in section 6.4.3 above.²⁰⁷ If the national strategy has been developed and is the basis of the

²⁰² The 2010 Constitution of Kenya, article 21(3).

²⁰³ Chapter five, section 5.2.2 (viii).

²⁰⁴ This can be done by infusing the common law and customary law with the values that underpin the Constitution such as dignity, equality, equity, freedom and the protection of the poor, vulnerable and marginalised groups and communities.

²⁰⁵ The 2010 Kenyan Constitution, article 20(3).

²⁰⁶ Chapter five, section 5.3.

²⁰⁷ This is in line with the obligation of the State “to take steps” as discussed in section 6.6.1(ii) above. See also the FAO – Information papers and case studies (n 51 above) 77 & 92, who contends that failure to take steps in the context of widespread starvation and famine is a clear violation of the State’s

litigation, the courts must conduct a comprehensive and critical analysis of the same using a substantive reasonableness review standard to ensure that it has made provision for the short-, medium- and long term food needs as well as food entitlements for all sectors of society, especially for the poor, vulnerable and marginalised individuals and groups.²⁰⁸ In undertaking this substantive analysis, the courts, taking into account the integrated approach to the interpretation of SERs discussed in chapter five, must adopt the minimum core approach to SERs and ensure that at the very least, the government's national strategy is capable of realising the minimum core content of the right to food, that is the right of everyone to be free from hunger.²⁰⁹ If the strategy has failed to provide for the food needs of the most vulnerable, that is, if it fails to incorporate the minimum core approach as an intrinsic component of the progressive realisation standard, then the courts should, unless substantive countervailing reasons are provided by the political institutions, hold the strategy to be *per se* invalid.²¹⁰ Should the courts determine that the strategy has sufficiently provided for the food needs of the most

obligations and the courts must be competent to order the State to take the requisite steps to end the unconstitutional state of affairs; V Abramovich 'Fostering dialogue: The role of the judiciary and litigation' in J Squires, M Langford & B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 167, at 168ff, who affirms that when constitutional or legal provisions set guidelines for the design of social policy for the realisation of SERs and the political institutions fail to develop such policies, the judiciary must ensure that the political institutions are accountable to the Constitution by requiring them to design, develop, finance and implement such social policies. He contends that it is only in the exceptional instances when the magnitude of violations justifies or when the political institutions completely refuse to cooperate that the judiciary can substantively design the concrete social measures to be adopted.

²⁰⁸ See FAO – Information papers and case studies (n 51 above) 83, who affirm the mandate of the courts to undertake this analysis to assess whether State policies and programmes are reasonable and appropriate.

²⁰⁹ For a substantive analysis of the minimum core content approach generally, see chapter two, section 2.5 and chapter five, section 5.3.2. For a discussion of the same in relation to the right to adequate food, see section 6.5 above.

²¹⁰ See FAO – Information papers and case studies (n 51 above) 92-93, who in analysing the Swiss Federal Court case of *Gebrüder v Regierungsrat des Kanton Berns*, discussed in section 6.6.2 (iii) above, contend that the Court held that it could 'set aside legislation if the outcome of the legislative framework failed to meet the minimum claim required by constitutional rights'.

vulnerable, it should then go ahead and review it using the other reasonableness benchmarks that have been gleaned from the SER jurisprudence of the SACC.²¹¹

The Kenyan Courts have shown a propensity towards the protection of SERs, acknowledging their competence to undertake SER adjudication relating to the right to food in the case of *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others*.²¹² The case was filed in relation to the failure of the relevant government agencies to take necessary fiscal, regulatory, good governance and other necessary steps to control, stabilise or reduce high fuel prices, leading to the high cost of subsistence goods and services, and thus violating the right to be free from hunger as well as the right to adequate food as enshrined in article 43 of the Constitution and in the UDHR.²¹³ The Court affirmed its jurisdiction to adjudicate SERs by stating that:²¹⁴

[i]t is not in dispute that the court has jurisdiction to determine whether there has been a violation of the [SERs] set out in article 43. The inclusion of the rights in the Bill of Rights, and the vesting of jurisdiction in the High Court under article 165 to determine whether a right or fundamental freedom has been violated, is a clear indication of the intention by Kenyans to ensure social transformation through the protection of these rights.

Despite the willingness of the Court to entertain the case, the Petitioner failed to provide sufficient evidence linking the actions or omissions of the Respondents and the violations of the relevant SERs, leading to the case being thrown out by the Court.²¹⁵ This was a golden opportunity for the Court to expound on the right to adequate food in Kenya, but the opportunity was lost due to the poor litigation strategy by the Petitioner, leaving the Court to lament the

²¹¹ See chapter five, section 5.3.3 for a more elaborate discussion of the integrated approach. See also FAO – Information papers and case studies (n 50 above) 91, who affirms the applicability of the reasonableness standard as a valuable tool in the judicial scrutiny and assessment of a national strategy for the realisation of the right to food.

²¹² *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others*, High Court Petition No. 88 of 2011.

²¹³ *COFEK* case (n 212 above) 1-3. The Petitioner was seeking an order that the Respondents undertake requisite legislative, policy and other measures to control the rise in price of fuel and thus bring down the cost of living, at paras. 30 & 34.

²¹⁴ *COFEK* case (n 212 above) 4.

²¹⁵ *COFEK* case (n 212 above) 4-5.

laxity and the lack of seriousness with which public interest litigation of such fundamental importance was conducted. The Court stated as follows:²¹⁶

It must be stated that in bringing matters such as this before the court, which have a critical bearing on the rights, lives and livelihoods of citizens, it is not enough to make bare statements with regard to the violation of rights without seriously addressing oneself to the manner in which the violations have occurred and the reasonableness or otherwise of the measures taken to avert or ameliorate their impact. At this nascent stage in the implementation of the new Constitution, parties in the position of the Petitioner, should they determine to take on cases which have a bearing on the public interest, must take them on with all due seriousness.

With the progressive thinking of the courts and their willingness to adjudicate the right to food as indicated by the COFEK case above, it is hoped that should there be a more substantive and properly litigated case on the right to food, the courts will be willing to adopt the intergrated and transformative approach to adjudication that is proposed here.

However, as has been the practice in many national jurisdictions, cases dealing expressly with the right to food are rarely litigated in courts, and most of the jurisprudence dealing with the right to food has been as a result of cases which dealt with other rights relevant to the right to food, but which substantively affected the right to food. Such cases are regularly litigated in the Kenyan courts, especially those dealing with access to land and land rights, labour relations, family law cases such as succession, matrimonial property rights, as well as wife and child maintenance, among many others. It is in these cases that the courts can progressively protect the food entitlement rights of Kenyans, especially the poor, marginalised and vulnerable. It is thus proposed here that the courts adopt a livelihoods approach to the realisation of the right to food and to undertake what can be called “adjudication with a human face” in which the courts take into account the context and the circumstances of the litigants, especially with regard to their food entitlements as discussed in section 6.6.3 (ii) above.

The livelihood approach to adjudication is contemplated by the Constitution which requires that its provisions, principles and values permeate all areas of law and apply to all persons, public and private.²¹⁷ The Constitution mandates the judiciary to interpret and develop

²¹⁶ COFEK case (n 212 above) paras. 43-45.

²¹⁷ The 2010 Kenyan Constitution, articles 2, 10, 20(1) and 20(4). See SA Yeshanew ‘Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on

all areas of law so as to infuse them with the constitutional values enshrined therein. This not only entails new responsibilities for the judiciary in the interpretation of the statutes subsisting prior to the 2010 Constitution, but also calls on the courts to develop the common and customary law in its adjudication of common and customary law rules and principles, which govern the majority of private relationships, especially the conduct of trade - of which food is a key commodity, and access to land and other property rights either through acquisition or inheritance/succession.²¹⁸

The pervasiveness of common and customary law rules and principles in private transactions is acknowledged by Dennis Davis and Karl Klare who contend that this structuring of relations has consequences for the relative distribution of power and welfare, resulting in inequality in the distribution of welfare and absolute levels of deprivation.²¹⁹ They further convincingly argue that the ground rules of social and economic interactions significantly affect distributive outcomes in transactions and relationships such as employment, access to land and land benefits, trade as well as marital and family relationships with diverse implications for the

Human and Peoples' Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317, at 332-339, where he advocates the interdependence approach, an approach similar to the livelihoods approach proposed here, in the interpretation and enforcement of SERs in the African Human Rights System. He contends that this approach is not only applicable in jurisdictions where there are substantive normative gaps and challenges in the protection of SERs, but can also be utilised in systems with entrenched justiciable SERs with the aim of strengthening the protection of these entrenched SERs, at 334. See also M Scheinin 'Justiciability and the indivisibility of human rights' in J Squires, M Langford & B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 20-23.

²¹⁸ Adjudication on inheritance should specifically take into account article 82(4) of the 2010 Constitution which exempts certain customary law practices, such as those related to marriage and inheritance from constitutional guarantees against discrimination, and should ensure that the article is not interpreted in a manner that adversely affect the livelihood of women, and thus adversely affecting the right to adequate food for themselves as well as their families, see FIAN International (n 7 above) 14.

²¹⁹ D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403, at 434. They argue that market-based distribution rules are a result of conscious or unconscious choices made by communities, and that if 'the prevailing rule-set produces a constitutionally unacceptable distribution of basic, life-sustaining goods, [the] government [is in violation of] the Constitution unless it undertakes to rearrange the background rules so as to yield a constitutionally adequate level of access to the minimum components of human welfare'.

pursuit of well-being.²²⁰ To illustrate this point, they give the example of P, a landowner who negatively affects the interests of Q, a malnourished and homeless person, when P denies Q rent-free access to her property or edible yields. Though P's refusal adversely affects Q's chances of feeding himself, her refusal is privileged by the common law rules of property which empowers her to refuse access to Q and even to use State machinery to do so.²²¹ Their conclusion is that private law rules which govern social and economic relationships always disproportionately empower already privileged actors while disempowering and subordinating others, especially those who have previously been vulnerable or marginalised.²²²

Davis and Klare argue that the victims of these massive common and customary law inequalities should be able to challenge the common law rules on which the exploitative economy is based for the violation of entrenched egalitarian provisions of the Constitution, especially the SER provisions, of which the right to adequate food forms an intrinsic part.²²³ In such litigation, the court must embrace its transformative obligations as is espoused by the Constitution and undertake transformative adjudication (adjudication with a human face) to develop the common and customary law taking into account the egalitarian values and principles that populate the Constitution, and thus vindicate the entrenched rights of the poor and vulnerable whose nutritional security is in danger.

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²²⁰ Davis & Klare (n 219 above) 445-46. They contend that these rules have a direct effect on the distribution of entitlements, privileges and liabilities in a society, and thus directly relate to people's lived experiences and quality of life. See also Courtis (n 162 above) 325-326, who similarly argues that in order to comply with State obligations for the realisation of the right to food, indirect horizontal obligations should also be placed on private parties, and the possibilities for SER litigation against private parties for the violation of SERs in areas such as labour relations, protection against forced evictions, protection of dependent children from parental neglect, consumer protection and antitrust protection, be encouraged. Since most of these spheres are governed by common or customary law, the courts have a role, using their mandate, to develop the law in accordance with the constitutional values and principles, to enhance protection of the right to food in the context of litigation in these spheres.

²²¹ Davis & Klare (n 219 above) 445-46.

²²² As above.

²²³ Davis & Klare (n 219 above) 434. They aver that to achieve substantive equality and widen opportunities for self-realisation for a majority of the people, adjudication must be aimed at an equality-seeking renovation of the common and customary law structures, at 448.

The adjudicative proposals above are in line with the concept of the interdependence and interrelatedness of rights as well as the livelihoods approach advocated in section 6.6 above, and the transformative constitutionalism approach advocated in chapter five of this thesis. Christian Courtis affirms the applicability of these approaches in the judicial adjudication of the right to food by contending that in comparative perspective, issues dealing with food rights have mostly been indirectly adjudicated through their (the right to food issues) framing in the context of judicial adjudication of the violation of other related rights.²²⁴

This is illustrated by the Indian case of *People's Union for Civil Liberties v The Union of India*,²²⁵ a case which is reflective of the important role judges can play in the realisation of the right to adequate food. Nearly 50 per cent of the world's hungry live in India, with over 35 per cent of its population being food insecure, nine out of ten women between the ages of 15-49 years suffering from malnutrition, and nearly half the children under five suffering from severe malnutrition as well as stunting.²²⁶ Despite the above statistics and raging drought in most parts of India in the year 2001, the government had not taken any measures to respond to the crisis situation, even though India had accumulated an impressive surplus of 17 million tonnes of food-grain stocks.²²⁷ The Supreme Court, on 2 May 2003, made extensive preliminary orders to address the situation, ordering the government to introduce midday meals in all government-assisted primary schools, to provide food security benefits through a card system and nationwide food security schemes to the most vulnerable groups, as well as ordering the government to increase its budgetary allocations to schemes aimed at enhancing employment.²²⁸ To ensure that these orders were fulfilled, the Supreme Court proceeded to appoint two commissioners to monitor their implementation, and to work with both the

²²⁴ Courtis (n 162 above) 326-336. He contends that this is due to the overlapping nature of duties in relation to different rights, and that the protection of one right usually leads to the automatic protection of another related right.

²²⁵ *People's Union for Civil Liberties v Union of India* (n 44 above).

²²⁶ Bilchitz – Poverty and fundamental rights (n 147 above) 241; Cohen & Brown (n 14 above) 55.

²²⁷ *People's Union for Civil Liberties v Union of India*, Interim Orders of 2 May 2003, at page 2, available at <http://www.escri-net.org/docs/i/401033> (accessed on 29 January 2013). See also Bilchitz – Poverty and fundamental rights (n 147 above) 241.

²²⁸ *People's Union for Civil Liberties v Union of India*, Interim Orders of 2 May 2003, at 3-6; Bilchitz – Poverty and fundamental rights (n 147 above) 242; DP Chong 'Five challenges to legalising economic and social rights' (2009) 10 *Human Rights Review* 183, at 187.

government and non-governmental organisations to enhance the realisation of the right to food.²²⁹ Through this monitoring mechanism, the court was further able to make follow up orders in instances where implementation was either slow or had not taken off.²³⁰

The approach of the Indian Supreme Court contains important aspects of the theory of dialogical constitutionalism discussed in chapter four above as the Court provided a forum for wide societal engagement running over a period of time, retained jurisdiction and appointed a monitoring commission to engage with both governmental as well as non-governmental organisations to ensure that its orders were fulfilled, and further made follow-up orders to enhance the implementation of its previous orders and to also reformulate the orders taking into account changes in circumstances on the ground. The case has further elevated the food programmes from charity to legal entitlements and has also enhanced the legal standing of the Right to Food Campaign, India, enabling it to undertake further advocacy and awareness campaigns to empower people to demand their right of access to adequate food of nutritional value, something which is also envisaged by the theory of dialogical constitutionalism.²³¹ David Bilchitz contends that the PUCL case portrays the positive benefits that properly balanced SER litigation can have in enhancing the realisation of SERs, by shattering bureaucratic bottlenecks as well as placing SER issues on the political agenda.²³²

A similar instance where the right to food was protected as an adjunct of the right to life was the Inter-American Court case where Paraguay had failed to ensure access to food, water and healthcare to a group of 19 extremely indigent members of an indigenous community.²³³

²²⁹ *People's Union for Civil Liberties v Union of India*, Interim Orders of 2 May 2003, at 5-6; Bilchitz – Poverty and fundamental rights (n 147 above) 242; Food and Agricultural Organisation (FAO) 'Jurisprudence on the right to food justiciability: Cases on Switzerland, India and South Africa' in FAO, *The right to food guidelines: Information papers and case studies* (2006) 122-124, available at http://www.fao.org/docs/eims/upload/214344/RtFG_Eng_draft_03.pdf (accessed on 29 January 2013).

²³⁰ Bilchitz – Poverty and fundamental rights (n 147 above) 245.

²³¹ See Cohen & Brown (n 14 above) 55. For a substantive discussion of the theory of dialogical constitutionalism, see chapters three and four of this thesis.

²³² Bilchitz – Poverty and fundamental rights (n 147 above) 242-43.

²³³ Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v Paraguay* (March 2006) paras. 145-178, available at <http://www.crin.org/Law/instrument.asp?InstID=1217> (accessed on 25 November 2012).

Even though a Presidential Order had been made to supply indigenous people with food and medicine, the Court held that the State failed to put in place adequate measures to guarantee the food rights of this indigenous group, only delivering small quantities of food ten times in a period of six years, and only providing medical assistance two times in that same period, measures which were inadequate to guarantee the right to life of the affected population.²³⁴ The Court thus found the State to have violated the right to life of the members of the indigenous community who had died due to the failure of the State to put in place adequate health and nutrition measures to ensure the survival of the community.²³⁵

6.8. Conclusion

Kenya is undergoing a food insecurity crisis due to its inability to produce a sufficient quantity and quality of food to feed its entire populace. This is exacerbated by rampant and endemic poverty and inequality that makes it impossible for more than half the population to access the food required to feed themselves and their families, endemic corruption and nepotism in access to food entitlements, socio-economic and political exclusion of vulnerable groups, lack of investment in sustainable agriculture as well as a fragmented and contradictory legislative and policy agenda.²³⁶ Food insecurity is, however, not a natural disaster, but results from poor and unresponsive governance leading to deeply entrenched structural inefficiencies in the State bureaucracy. To respond to these structural problems and ensure food security in Kenya, a comprehensive multi-disciplinary and cross-sectoral national food security strategy (legislative, policy and programmatic) that engages all sectors of society must be formulated, implemented and enforced.

Though not a panacea for the realisation of food security, the adoption of the right to food as a legal entitlement, as well as the development of a comprehensive legal and regulatory framework to enhance the capacity of people to access adequate food, is a promising starting point. As this chapter in section 6.4 has shown, Kenya has chosen to adopt this approach by the entrenchment, in the 2010 Constitution, of the right to adequate food and other complementary

²³⁴ As above, at para. 170.

²³⁵ As above, at 178.

²³⁶ Right to Food and Nutrition Watch 'Land grabbing and nutrition: Challenges for global governance' (October 2010) 75, available at <http://www.icco.nl/nl/linkservid/3A3B149A-D24C-800E-3A8068FCE004C868/showMeta/0/> (accessed on 23 November 2012).

SERs such as the right life, land, water, health and social security. The constitutional provisions are buttressed by a plethora of international and regional legal instruments detailing the right to food that Kenya has ratified, and which now have a direct applicability at the national level due to articles 2(5) and (6) of the Constitution which incorporates ratified international treaties and customs into the Kenyan legal system as is more elaborately discussed in chapter two, section 2.2 above. The entrenchment of these food-related constitutional rights has been followed by the drafting of a National Food and Nutritional Security Policy, 2011, a policy which adopts a life-cycle as well as livelihoods approach to food security with the aim of enhancing the availability, accessibility, affordability, quality and safety of food for all Kenyans. The policy responds to the previous food security challenges that have faced Kenya, that is, lack of adequate financing of agricultural production, reliance on rain-fed agriculture, lack of legislative and policy coherence, lack of sufficient coordination between the government structures mandated with the realisation of food security, as well as lack of early warning systems to enhance disaster preparation. Despite these progressive provisions, the Policy has failed to incorporate some of the requisite international standards that must be met by national food security strategies as is discussed more elaborately in section 6.4.3 above. It is hoped that the Draft Policy will be developed further in accordance with the proposals made in section 6.4.3 of this chapter so that it is in line with the international standards provided by the CESCR in its General Comment Number 12 and the FAO in their voluntary guidelines on the right to food. The proposed improvement of the Draft Policy will enhance the chances for the design, development and implementation of a comprehensive legislative and programmatic framework for the realisation of food security in Kenya, and with that the realisation of the right to adequate food.

The entrenchment of the right to food and its complementary rights creates an opportunity for the courts to play an active role in the protection of people's food entitlements. This is a role that must be embraced by the judges if the transformative potential of the Constitution, as is expounded in chapter five, section 5.2 of this thesis, is to be realised. This chapter proposes that in adjudicating cases in which the right to food has been expressly pleaded, the courts must adopt a substantive and progressive interpretation of the right to food, detailing the meaning, content, scope and the obligations of the State arising from the right to food in accordance with the integrated approach proposed in chapter five above. In this regard, where there is no functional implementation framework for the realisation of the right to food, the courts must require that the political institutions develop a comprehensive national strategy,

based on legislative, policy and programmatic framework, capable of efficiently realising the right to food.²³⁷ The courts should require that the strategy be developed with the substantive participation of all societal actors, especially the most food vulnerable groups, and it must also retain jurisdiction, in accordance with the theory of dialogical constitutionalism developed in chapter four above, to ensure that the resulting strategy meets all the constitutional requirements and has made sufficient short-, medium- and long-term provisions to cater for all sectors of society. If the strategy fails to prioritise the short-term needs of the most food-insecure sectors of society, that is, if it fails to incorporate the minimum core of the right to food – the fundamental right to be free from hunger - then the courts must *per se* hold it to be invalid and require that it be revised to take into account these needs. If the courts are satisfied that the strategy has sufficiently provided for the needs of the most vulnerable, then it should go ahead and review it using the reasonableness standards as has been developed in the jurisprudence of the SACC, as detailed in chapter five, section 5.3 above.

However, express cases dealing with the right to food are rarely filed in courts and the jurisprudence resulting from the right to food has mainly been developed in litigation involving rights relevant to the right to food. This chapter is alive to this challenge and proposes that the courts embrace a livelihoods approach to the adjudication of the right to food by protecting people's entitlements to food in the adjudication of cases in which the right to food issues are relevant such as cases dealing with land, succession, intellectual property, consumer protection, matrimonial property, and labour relations. In this way, the courts will be able to develop the law, especially common and customary law, in line with the constitutional values and principles, and thus achieve the constitutional requirement that the law be developed in accordance with the Constitution, as the supreme law of the land. The livelihoods approach is consonant with the principle of interdependence and interrelatedness of rights, a principle that traverses the entire international human rights law framework. Sandra Liebenberg contends that an approach to interpretation that encompasses the importance of the interrelatedness of rights is capable of

²³⁷ Even though substantive efforts have been made in developing the Draft National Food and Nutrition Policy, the same has not been adopted by the Cabinet and therefore does not have any operational force. Further, No framework legislation on the right to food has so far been adopted by the State to enhance the implementation of the right to food. The development of a national food security strategy requires the development of not only policy, but also legislative and programmatic frameworks for the realisation of the right to food. Kenya has thus not yet achieved these international standards in relation to the right to food.

achieving the transformative potential of the Constitution as it embraces the complexity of human experience as well as the interrelated dimensions of poverty without reducing it to a single constitutional right.²³⁸



²³⁸ S Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010) 142.

Chapter seven: The right to housing in Kenya

7.1 Introduction

As has been outlined in chapter six above, this chapter, a case study of the right to housing in Kenya, relies on the substantive, theoretical and interpretive approaches that have been developed in the previous chapters two, three, four and five of this thesis. Further, similar to the case study on the right to food as is illustrated in chapter six above, the present chapter looks at the housing and tenure security situation in Kenya, the meaning, scope, content and scope of the right to housing and the obligations arising from the right both at the national and international level, as well as the role of the courts in enforcing the right to housing.

Access to adequate housing plays an important role in ensuring the dignified existence of human beings and the enjoyment of all the other rights, civil and political as well as economic, social and cultural. The importance of access to a house was affirmed in the South African case of *City of Johannesburg v Rand Properties* where the High Court stated as follows:¹

Housing forms an indispensable part of ensuring human dignity. "Adequate housing" encompasses more than just the four walls of a room and roof over one's head. Housing is essential for normal, healthy living. It fulfils deep-seated psychological needs for privacy and personal space; physical needs for security and protection from inclement weather; and social needs for basic gathering points where important relationships are forged and nurtured. In many societies, a house also serves an important function as an economic centre where essential commercial activities are performed.

The essential nature of housing was further elaborated on in the South African Constitutional Court (SACC) case of *Port Elizabeth Municipality*, where Justice Albie Sachs contended that 'a home is more than just shelter from the elements [but] a zone for personal intimacy and family

¹ *City of Johannesburg v Rand Properties (Pty) Limited and Others* (10330/04) [2006] ZAGPHC 21 (3 March 2006), available at <http://www.saflii.org/za/cases/ZAGPHC/2006/21.html> (accessed on 19 October 2012).

security [as well as] the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world'.²

Access to adequate housing, however, is a global challenge, with an estimated 100 million people being homeless, over a billion people being inadequately housed, and an estimation that by the year 2050, over 3 billion people will be living in slums and other informal settlements.³ These challenges are compounded by the difficulty in accessing other elements intrinsic to housing such as water and sanitation, with data further indicating that over a billion people globally have no access to water and 2.6 billion people lack access to basic sanitary installations.⁴

The challenges are similar, if not more dire, in the Kenyan context in relation to access to adequate housing. Even though housing challenges are experienced both in rural and urban areas, the situation is especially dismal for the urban population, which forms 32.3 per cent of the Kenyan population. Of the urban population, 60-70 per cent live in informal settlements that are crowded,⁵ lack proper housing structures, as well as basic essential services such as

² *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) 2005 (1) SA 217 (CC), para. 17. To further illustrate the importance of housing, justice Sachs quotes from the United Nations Housing Rights Programme, Report No 1, 'Housing Rights Legislation: Review of International and National Legal Instruments' (2002) at 1, which states as follows:

To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognise adequate housing as a basic and fundamental human right.

³ Centre Europe (CETIM), Brochure: *Right to housing* (2007) 1, available at <http://www.cetim.ch/en/documents/bro7-log-A4-an.pdf> (accessed on 12 September 2012).

⁴ As above.

⁵ United Nations-HABITAT, UN-HABITAT and the Kenya Slum Upgrading Programme, Strategy Document, (2008) 10-11, available at www.unhabitat.org/ (accessed on 20 September 2012), states that while 60 per cent of the population in the Capital City, Nairobi, live in informal settlements, their homes only occupy a total of 5 per cent of land area in the city and its environs. See also C Bodewes & N Kwinga 'The Kenyan perspective on housing rights' in S Leckie (eds.), *National perspectives on housing*

healthcare, education, water, electricity, sanitation facilities, and also suffer from chronic insecurity.⁶ These informal settlements lack official legal recognition by the State and thus not only experience tenure insecurity,⁷ but are also not serviced by government urban services, leading to their exploitation by unscrupulous business-people who make them pay higher fees for basic services than the other formal parts of the urban areas.⁸ With the urban population expected to grow to over 50 per cent by 2050 due to the rapid rural-urban migration,⁹ the housing challenges will grow exponentially unless the government takes drastic, comprehensive

rights (2003) 221, who also aver that 55 per cent of Nairobi's total population live in over 100 slum communities that occupy only 1.5 per cent of the total land area of the city.

⁶ Hakijamii 'Assessment of the realisation of the right to housing in Kenya – 2009-2010 (January 2011) 2, available at <http://www.hakijamii.com/publications/hr-finalreport.pdf> (accessed on 13 September 2012). See also Centre on Housing Rights and Evictions (COHRE) Mission Report 'Listening to the poor? Housing rights in Nairobi-Kenya' (June 2006) 26, available at <http://sheltercentre.org/library/listening-poor-housing-rights-nairobi-kenya-revised-edition> (accessed on 16 September 2012), which contends that there are approximately 199 informal settlements in Nairobi alone.

⁷ The refusal by the Kenyan government to grant land title deeds and thus guarantee land tenure security to the Nubian community who own land and reside in Kenya's biggest informal settlement, Kibera, was one of the grounds for the submission of the Nubian children's communication to the Committee on the African Charter on the Rights and Welfare of the Child, see *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, Decision: No 002/Com/002/2009, para. 3

⁸ COHRE Report (n 6 above) Chapter two, especially 40ff. The report avers that water is sold in the informal settlements at between 3 to 30 times more than the normal City Council charges, at 42. See also Bodewes & Kwinga (n 5 above) 221-224, who affirm that the greatest challenge to informal settlement dwellers is the lack of State recognition of their existence, and thus the constant fear of forced evictions. This challenge was recognised by the Committee on Economic, Social and Cultural Rights (CESCR) when it considered Kenya's Initial Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR recommended that Kenya should take adequate measures to ensure the availability and affordability of adequate water and sanitation in informal settlements as well as in arid and semi-arid areas in accordance with the Committee's General Comment No. 15. See CESCR Report on the 40th and 41st Sessions – Supplement No. 2, E/C.12/2008/3' (2009) para. 383, available at <http://www.unhcr.org/refworld/pdfid/4a002b812.pdf> (accessed on 18 September 2012).

⁹ Hakijamii (n 6 above) 3.

and extensive measures to enhance the realisation of the right to adequate housing for all spheres of society.¹⁰

Forced evictions by both governmental and non-governmental entities as well as individuals have been a scourge in the Kenyan context since the colonial days, with communities having been forced out of their lands to create land for the white settlers. This trend of eviction continued after independence with Kenya witnessing massive spates of land grabbing of both public and private land by people who exercised State authority, forcing out the inhabitants of those grabbed lands.¹¹ Forced evictions have also been undertaken in the guise of tribal land clashes, a phenomenon which has been prevalent since Kenya reverted to political multi-partism in 1990, and which has seen land clashes resulting in displacements of people before and during the 1992 and the 1997 multi-party elections.¹² This phenomenon came to a head after the 2007 presidential and parliamentary elections when circles of ethnic violence led to the displacement of over 300, 000 people from their land, with most of them losing their land and other property, including houses. Forced evictions have exacerbated the dire housing situation in Kenya, further decimating government efforts to realise the right to accessible and

¹⁰ The government has acknowledged the housing challenges in informal settlements and lists the causes of those challenges as follows: the deficit in housing supply due to poverty, rural urban migration and population growth; the inability of the market economy to cater for low-cost housing to respond to the housing needs of the majority low income groups; failure to prioritise the housing sector in the general economic development plans; prohibitive building standards and regulatory requirements making housing construction unaffordable to the low income sectors of society; lack of adequate land policy leading to insecure tenure, land grabbing as well as land holding for speculative purposes; poor urban governance leading to non-provision of essential services; and the politicisation of development leading to a desire for the maintenance of the *status quo* for the benefit of the rich structure owners in the informal settlements. See Government of Kenya 'Kibera-Soweto Slum Upgrading Project – 2004' quoted in COHRE (n 6 above) 24. COHRE further contends that this politicisation of land resulted in a dramatic increase in forced evictions in different parts of the country, providing a list of such evictions, at 37-38.

¹¹ On land grabbing and forced evictions in Kenya, see Bodewes & Kwinga (n 5 above) 230-39; COHRE (n 6 above) chapter three. See also African Commission on Human and Peoples Rights, Communication 276/2003, *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v Kenya* (decision of February, 2010)(hereinafter *Endorois case*), a case resulting from the forced eviction of an indigenous community from their ancestral land without adequate compensation by the Government of Kenya, especially paras. 99, 144, 163,173 & 200-238.

¹² This aspect of forced evictions is recognised by the CESCR in General Comment No. 7, para. 5-6.

adequate housing.¹³ Despite a moratorium being adopted by the Kenyan government in 1997 and 2004 suspending all forced evictions¹⁴ as well as the promulgation in 2010 of the Constitution with an entrenched provision on the right to accessible and adequate housing, forced evictions continue to be a challenge in Kenya.

An analysis of the housing situation in Kenya in the context of the promulgation of the 2010 Constitution is the main concern of this chapter. The chapter is divided into seven main sections. After this brief introduction, the chapter delves into an exposition of the legal instruments providing for the right to adequate housing in international law in section 7.2, and in the Kenyan domestic legal jurisdiction in section 7.3. Section 7.4 contains an analysis of the meaning and content of the right to adequate housing, while section 7.5 undertakes an extensive analysis of Kenya's legal obligations in national and international law in relation to the right to adequate food. Section 7.6 delineates the role of the courts in the realisation of the right to adequate housing, proposing that the courts adopt the theory of dialogical constitutionalism as well as the transformative and the integrated approaches proposed in chapters three to five above, in the adjudication of cases on housing rights. Section 7.7 is a short conclusion. Even though this chapter attempts to deal with the major concerns relating to housing and challenges facing Kenya with regard to the same, its scope does not allow for an exhaustive review of all aspects of the right to accessible and adequate housing.

7.2 The right to adequate housing in international law¹⁵

The right to adequate housing is one of those rights in international human rights law that are universally acknowledged, having been recognised in numerous international law instruments,

¹³ Forced evictions have overall denigrating effects on the protection and promotion of human rights. It also has negative effects on victims of evictions due to the resultant trauma; physical, emotional and psychological distress; increased impoverishment resulting from loss of means of economic sustenance; physical injury and sporadic deaths; family break-ups; an increase in homelessness; and the inaccessibility of social services such as hospitals, schools and day-care centres, among other ills. For an illustration of these problems, see S Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010) 268-270.

¹⁴ COHRE (n 6 above) 38 & 70.

¹⁵ For a comprehensive history of the right to housing in international law, see M Craven 'History, pre-history and the right to housing in international law' in S Leckie (eds.), *National Perspective on Housing Rights* (2003) 43-62.

binding and non-binding, as well as in over 100 national constitutions,¹⁶ but which infamously continues to be observed more in breach than in actual realisation.¹⁷ It was first entrenched internationally in the Universal Declaration of human rights in 1948 as an integral component of the right to adequate standards of living.¹⁸ With the elaboration of the provisions of the UDHR into binding legal instruments, the right to adequate housing was entrenched both in the International Covenant on Civil and Political Rights (ICCPR)¹⁹ and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right is more completely entrenched in article 11 of the ICESCR which encompasses the commitment of States to:

[r]ecognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The components of the right to housing as contained in the ICESCR have been extensively elaborated by the Committee on Economic, Social and Cultural Rights (CESCR), which is the main United Nations mechanism charged with monitoring the ICESCR's implementation, in its General Comment Number 4²⁰ and General Comment Number 7.²¹ These general comments form the bedrock of the discussion of the content of the right to adequate housing below.



¹⁶ CETIM (n 3 above) 1. For a discussion of constitutional provisions entrenching the right to adequate housing, see UN Housing Rights Programme (UNHRP) Report No. 1 'Housing rights legislation: Review of international and national legal instruments' (2002) Part III, at 28-30 & Part IVA, at 36-40, available at <http://www.ohchr.org/Documents/Publications/HousingRightsen.pdf> (accessed on 19 September 2012).

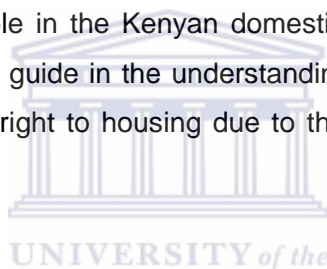
¹⁷ S Leckie 'The human right to adequate housing' in A Eide, C Krause & A Rosas (eds.), *Economic, social and cultural rights: A textbook*, 2nd revised edition (2001) 149, at 149; S Leckie 'Where it matters most: Making international housing rights meaningful at the national level' in S Leckie (eds.), *National perspectives on housing rights* (2003) 3, at 4-5.

¹⁸ Universal declaration of Human rights (hereinafter UDHR), article 25 which provides that '[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...'.

¹⁹ See ICCPR, article 17 which entrenches the right not to be subjected to arbitrary or unlawful interference in one's privacy, family or home.

²⁰ CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, available at: <http://www.unhcr.org/refworld/docid/47a7079a1.html> (accessed 12 September 2012).

Further, the right to adequate housing has been entrenched in several binding international legal instruments aimed at the protection of specific vulnerable groups. These include the International Convention on the Elimination of All forms of Racial Discrimination (CERD),²² the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),²³ the Convention on the Rights of the Child (CRC),²⁴ the Convention on the Rights of Persons with Disabilities (CRPD),²⁵ the 1951 Convention Relating to the Status of Refugees (Refugee Convention),²⁶ the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990 Migrant Workers' Convention),²⁷ and the International Labour Organisation Convention 169.²⁸ All these conventions have been signed and ratified by Kenya, making the Kenyan government legally obliged to ensure the realisation of the right to adequate housing. The legal force of these international provisions is further enhanced by the entrenchment in the Kenyan Constitution of a right to accessible and adequate housing, coupled with articles 2(5) and (6) of the Constitution which make ratified international legal instruments directly applicable in the Kenyan domestic jurisdiction.²⁹ They thus form an important authoritative source and guide in the understanding and interpretation of the content of the constitutionally entrenched right to housing due to the paucity of comparative domestic



²¹ CESCR, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, available at: <http://www.unhcr.org/refworld/docid/47a70799d.html> (accessed 12 September 2012).

²² CERD, article 5(e)(iii).

²³ CEDAW, articles 14(2)(h) & 15(2).

²⁴ CRC, articles 16(1) & 27.

²⁵ CRPD, articles 9 & 28.

²⁶ 1951 Refugee Convention, article 21. This protection is augmented, in cases of internally displaced persons (IDPs) by the UN Guiding Principles on Internal Displacement, Principle 18; and also by the UN Principles on housing and property restitution for refugees and displaced persons, also known as the "Pinheiro Principles", especially Principles 2, 12, 13 and 18.

²⁷ 1990 Migrant Workers' Convention, article 43(1)(d).

²⁸ ILO Convention 169, articles 16 & 20(2)(c). The protection of indigenous people by this Convention is augmented by the provisions of the 2007 United Nations Declaration on the Rights of Indigenous People, especially article 21(1) which recognises their right to improved housing.

²⁹ For an extensive discussion on these provisions, see chapter two, section 2.2 above.

jurisprudence in relation to national implementation and enforcement of the right to adequate housing.³⁰

In addition to the incorporation of the right to housing in the above binding international legal instruments, the right has also been incorporated into other internationally developed non-binding legal instruments.³¹ This has especially been so with regard to the resultant instruments of the two United Nations Conferences on Human Settlement, being the 1976 Vancouver Declaration, the 1996 Istanbul (Habitat II) Declaration and the Habitat Agenda. The Vancouver Declaration affirmed that adequate shelter and attendant services are basic human rights which oblige States to ensure their realisation through measures such as direct assistance through guided programmes of self-help and community action and to remove obstacles hindering access to adequate housing.³²

The affirmation of the legal nature of the right to adequate housing was also repeated in the Istanbul Declaration, which further reaffirmed the commitment of States to ensure adequate shelter for all as well as making human settlement safer, healthier, more liveable, equitable, sustainable and productive.³³ The Istanbul Declaration further encompassed an undertaking by States to seek the active participation of all societal actors, public, private and non-governmental organisations in the realisation of the right to adequate housing including ensuring legal security of tenure, equal access to affordable housing and protection from discrimination in accessing housing.³⁴ The Habitat Agenda also encompasses the commitment to a holistic realisation of the right to adequate housing as provided in international human rights

³⁰ See P de Vos 'The right to housing' in D Brand & C Heyns (eds.) *Socio-economic rights in South Africa* (2005) 85, at 89, where he acknowledges the importance of international SER law in interpreting domestic constitutional law contending that international SER law is more developed and more nuanced than equivalent domestic law.

³¹ See UNHRP Report (n 16 above) 7-11 for a list of UN Resolutions by the different UN Agencies affirming the right to adequate housing, as well as other international declarations and mechanisms.

³² United Nations Conference on Human Settlement, Vancouver Declaration on Human Settlement (1976) section III para. 8, available at <http://habitat.igc.org/vancouver/van-decl.htm> (accessed on 19 September 2012).

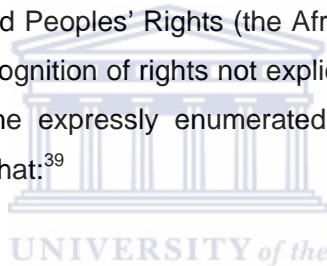
³³ United Nations Conference on Human Settlement, Istanbul Declaration on Human Settlement (1996), para. 1, available at http://www.unhabitat.org/downloads/docs/2072_61331_ist-dec.pdf (accessed on 19 September 2012).

³⁴ Istanbul Declaration, paras.7-8 & 12.

instruments.³⁵ The commitment to the implementation of the Istanbul Declaration and the Habitat Agenda were affirmed in the UN Declaration on Cities and other Human Settlements in the New Millennium,³⁶ which also affirmed the economic, social as well as environmental interconnectedness and interdependence of rural and urban areas and called for their concurrent development.³⁷

Though not binding *per se*, these declarations and resolutions acknowledge the importance of the realisation of the right to adequate housing and thus have persuasive value in the understanding, implementation and enforcement of the constitutionally entrenched right to accessible and adequate housing.

At the regional level, the main human rights document, the African Charter on Human and Peoples' Rights (African Charter) does not expressly recognise the right to housing. However, this right was recognised to be intrinsic to other protected rights in the Charter by the African Commission on Human and Peoples' Rights (the African Commission) using an implied rights theory (which entails the recognition of rights not explicitly provided for in a treaty through the expansive interpretation of the expressly enumerated rights) in the case of *SERAC v Nigeria*.³⁸ The Commission found that:³⁹



³⁵ UN Habitat, *The Habitat Agenda Goals and Principles, Commitments and the Global Action Plan* (1996) paras. 39 & 40, available at <http://www.unhabitat.org/downloads/docs> (accessed on 19 September 2012).

³⁶ UN General Assembly Resolution 25/2 'Declaration on Cities and other Human Settlements in the New Millennium' (2001) paras. 1 & 4-6, available at <http://www.unbrussels.org/agencies/habitat.html> (accessed on 19 September 2012).

³⁷ Declaration on Cities, para. 3, which further calls for the eradication of rural poverty, the improvement of living conditions, as well as creating educational and employment opportunities.

³⁸ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), para. 64, reprinted in C Heyns & M Killander (eds.) *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 251, at 260. Similar practices of protecting SERs through the broad interpretation of civil and political rights can be gleaned from the practice of the European Court on Human Rights as well as the now defunct European Commission on Human Rights in cases such as *Akidivar and others v Turkey*, *Cyprus v Turkey*, see Leckie – Right to adequate housing (n 17 above) 158-61. This trend has been adopted by the Indian Supreme Court which has developed a jurisprudence of SER protection through the broad interpretation of the right to life such as in *Olga Tellis v Bombay*

[a]lthough the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health [article 16], the right to property [article 14] and the protection accorded to the family [article 18(1)] forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected.

The Commission further found that the right to housing, as implicitly protected under the Charter, encompasses the right to protection against forced evictions.⁴⁰

Further to the African Charter, the right to adequate housing, in relation to women, has been expressly recognised in the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,⁴¹ which provides in article 16 that:

[w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

The Protocol also protects women in relation to matrimonial property and inheritance rights, entrenching their right to continue living in their matrimonial houses whether they remarry or not.⁴² In relation to children, the African Charter on the Rights and Welfare of the Child (African Children's Charter) also explicitly recognises the rights of children to adequate housing and contains the commitment of States to assist parents in the realisation of that right.⁴³ The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa

Municipal Corporation (1985, 3 SCC 545); *Ram Prasad v Chairman, Bombay Port Trust*, AIR 89 S.C.R. 1306 (Decided on 29 March 1989); and, *Shanti Star Builders v Naryan Khimalal Totame & Others* (JT 1990 (1) S.C. 106, Civil Appeal No. 2598 of 1989). For a discussion of these cases, see UNHRP Report (n 16 above) 94-96; Leckie – Where it matters most (n 17 above) 27, footnote 50.

³⁹ *SERAC v Nigeria* (n 38 above) para. 60.

⁴⁰ *SERAC v Nigeria* (n 38 above) para. 63.

⁴¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005) article 16, reprinted in C Heyns & M Killander (eds.), *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 47, at 54.

⁴² African Women's Protocol, article 21 (1).

⁴³ African Charter on the Rights and Welfare of the Child (1990/1999), article 20(2), reprinted in C Heyns & M Killander (eds.), *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 62, at 68.

(the Kampala Convention) also provides for the protection of housing rights of internally displaced persons in its article 9.

A discussion of the right to adequate housing in international and regional law is imperative as international law contained in ratified international and regional treaties as well as customary international law have been directly incorporated into the Kenyan domestic legal system as sources of law as discussed chapter two, section 2.2 above. The right to housing obligations arising from these laws are, therefore, as binding to the Kenyan government as those arising from the 2010 Kenyan Constitution and any other domestic legislation enacted by the Kenyan parliament. The political institutions as well as the courts must, therefore, take these international legal provisions on the right to adequate housing into account in developing a legislative, policy and programmatic framework on the realisation of the right to adequate housing as well as in litigation relating to housing and other related rights.

7.3 The right to accessible and adequate housing in the Kenyan legal system

Kenya has for a long time failed to put in place a comprehensive framework for the realisation of housing rights and the protection of tenure, adhering mostly to the principle of the sanctity of private property, a relic of Kenya's colonial legacy.⁴⁴ However, with the advent of legal reforms in the 1990s, there has been a slow progress towards the recognition of housing rights which culminated in the entrenchment, in the 2010 Constitution, of a right to accessible and adequate housing. This section looks at the constitutional as well as legislative and policy provisions on the right to housing in Kenya.

7.3.1 Constitutional provisions

For the first time, the right to adequate housing has been entrenched as a justiciable right in the 2010 Kenyan Constitution, which provides that 'every person has the right to accessible and adequate housing and to reasonable standards of sanitation'.⁴⁵ The wording of the

⁴⁴ Bodewes & Kwinga (n 5 above) 226-27.

⁴⁵ The 2010 Kenyan Constitution, article 43(1) (b). The importance of the constitutional entrenchment of housing rights is discussed by the UNHRP Report (n 16 above) 36-37, where it is averred that it: provides the strongest national commitment to the realisation of the right; helps establish clear substantive norms at the national level; protects housing rights from legislative capriciousness; introduces the language of rights in the discussion of housing issues; provides a powerful advocacy tool for individuals, communities

constitutional provision differs markedly from the wording of the ICESCR which provides only for “adequate housing”.⁴⁶ This raises the question of whether the content of the constitutional provision substantively differs from the content of the right to adequate housing in international law. A response to this question necessitates a comparison with the South African context where the SACC in its seminal housing case of *Government of the Republic of South Africa v Grootboom* held that the housing provision in the 1996 South African Constitution (SAC) was markedly distinct from the provision in the ICESCR.⁴⁷ However, after making this distinction, the Court still proceeded to enumerate elements similar to those expounded by the CESCR as delineating the content of adequate housing.⁴⁸

Kirsty McLean, in her analysis of housing rights in South Africa, contends that the arguments of the SACC, as to the marked distinctness of the housing rights provision in the SAC and that in the ICESCR, were in stark contrast to the South African national government policy on housing which expressly accepted the interpretation of the word “adequate” as expounded by the CESCR.⁴⁹ She attributes this to two reasons, firstly, the failure of the Court to

and organisations working on housing rights issues; helps in the understanding, design and interpretation of a national legislative, policy and programmatic framework for the realisation of housing rights; as well as ensuring that non-retrogressive legislative or policy measures are not adopted, and if adopted, enabling judicial challenge of the adopted measure as unconstitutional.

⁴⁶ ICESCR, article 11(1).

⁴⁷ *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC) (hereinafter *Grootboom*), para. 35. Justice Yacoob held, in the case, that section 26 only provided for the right to access adequate housing, and not a right to adequate housing as in the ICESCR, and the arising obligations were thus distinctly different from those arising under international law. The Kenyan Constitution is, however, more comprehensive, not only providing for the right to accessible and adequate housing, but going further to provide for reasonable standards of sanitation. It thus encompasses all the aspects of housing rights at the international level that Justice Yacoob may have felt did not apply in the South African context due to the wording of the SAC.

⁴⁸ This included availability of land (security of land tenure in accordance with the CESCR), provision of services such as water, sanitation and sewage services (similar recognised by the CESCR) and the financing of all the elements of housing (delineated by CESCR as accessibility and affordability of housing). See General Comment No. 4, para. 8.

⁴⁹ K McLean ‘Housing’ in S Woolman *et al* (eds.), *Constitutional law of South Africa*, 2nd edition Original Service, volume 4 (2006) 55-1, at 55-35 – 55-36. She quotes the National Housing Code (2000) part 1, 7 which provides that:

adequately understand and assess the housing policy before it, leading to the Court adopting a lower constitutional standard than that adopted in the policy.⁵⁰ Secondly, she argues that the Court's rejection of the definition of "adequacy" by the CESCRC was less about the difference in wording between the SAC and the ICESCR, than a pretext aimed at camouflaging the Court's refusal to engage in a discussion over the substantive meaning of section 26(1) of the Constitution, and to delineate the substantive content of the right to housing, especially the minimum core.⁵¹

The United Nations Housing Rights Programme (UNHRP) contends, in relation to the many formulations of the right to housing, that the distinctions are overstated, as 'international agreement does exist as to the intent, meaning and actions required with a recognition of such rights as established under international human rights law'.⁵² From the above discussion, it is submitted here that the difference in the wording of housing rights in the Constitution *vis-à-vis* that in international law does not in any way distinguish their substantive contents, and thus international law can authoritatively be used to give content to the right to housing as entrenched in the Constitution. Both formulations of housing rights are thus used interchangeably in this chapter.⁵³

The right to housing is also provided for, in relation to children, in article 53 of the Constitution which guarantees every child's right to shelter.⁵⁴ The provisions on the right to housing are further bolstered by the entrenched right to property⁵⁵ and land rights.⁵⁶ In

[t]he wording of the housing right provision corresponds with the [ICESCR]. In that context, 'adequate housing' is measured by certain core factors: legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. South Africa's housing policy concurs with this concept of housing.

⁵⁰ Mclean – Housing (n 49 above) 55-36.

⁵¹ As above. For a more comprehensive exposition of these arguments, see K McLean, *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 138-143.

⁵² UNHRP Report (n 16 above) 14-15.

⁵³ For a similar use, see Leckie - Where it matters most (n 17 above) 3.

⁵⁴ The 2010 Kenyan Constitution, article 53(1)(c).

⁵⁵ The 2010 Kenyan Constitution, article 40 which guarantees the right of people, individually or in association with others, to acquire and own property in any part of Kenya as well as further guaranteeing against arbitrary deprivation of property and the payment of just, prompt and equitable compensation in instances of compulsory acquisition by the State.

comparative perspective, the constitutional provision on the right to housing is not as expansive as those found in other constitutions, such as the SAC, as it does not expressly provide for protection against forced evictions, one of the major challenges to accessing adequate housing in Kenya today,⁵⁷ as well protection of prisoners' right to adequate accommodation.⁵⁸ A look at the drafting history of the 2010 Constitution, however, indicates that attempts were made to expressly prohibit forced eviction through a constitutionally entrenched provision.⁵⁹ The provisions were later omitted from the Draft Constitution adopted at the Constitutional Conference at the Bomas of Kenya, the Bomas Draft, which only provided for "the right to accessible and adequate housing".⁶⁰ The Harmonised Draft Constitution 2009, added the wording "and to reasonable standards of sanitation"⁶¹ to give the housing provision its form as is

⁵⁶ See The 2010 Kenyan Constitution, Part five, especially article 60(1) which provides for equitable access to land, the security of land tenure, as well as the elimination of gender discrimination in law, customs and practices related to land, among others. Part five further requires, in article 68(c) for parliament to enact legislation protecting matrimonial property, especially the matrimonial home, in instances of divorce as well as protecting dependants and spouses of a deceased person having an interest in land.

⁵⁷ See the 1996 South African Constitution, section 26(3) which provides that '[N]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.

⁵⁸ The 1996 South African Constitution, section 35(2)(e). This apparent omission can, however, be cured by article 51 which provides that prisoners retain all their fundamental rights as contained in the Bill of Rights, and the requirement that parliament enact legislation to ensure their humane treatment taking into account relevant international human right instruments.

⁵⁹ Report of the Constitution of Kenya Review Commission (CKRC) 'The Draft Bill to amend the Constitution – volume two' (2004), also known as the "Ghai Draft," article 59, available at <http://www.ldphs.org.za/resources/local-government-database/by-instrument/constitution> (accessed on 16 September 2012), which had similar eviction provisions as those entrenched in the SAC.

⁶⁰ National Constitutional Conference 'The Draft Constitution of Kenya – 2004,' article 63, available at <http://www.ldphs.org.za/resources/local-government-database/by-instrument/constitution> (accessed on 16 September 2012).

⁶¹ Committee of Experts on Constitutional Review 'Harmonised Draft Constitution of Kenya, 2009', article 64, available at <http://www.ldphs.org.za/resources/local-government-database/by-instrument/constitution> (accessed on 16 September 2012).

currently reflected in the 2010 Constitution.⁶² The failure to retain the provision on the prohibition of forced evictions conflicts with the concerns espoused by the CESCR which, in its consideration of Kenya's Initial State Report on the ICESCR, had recommended that Kenya include such a provision in the Constitution.⁶³

However, the lack of express prohibition of forced evictions in the 2010 Constitution is not fatal, as the prohibition of evictions has been found to be an intrinsic component of the right to housing in international law by the CESCR in its General Comment Number 7.⁶⁴ This has also been affirmed, in the context of South Africa, by the SACC in the case of *Jaftha v Schoeman*, where the Court held that section 26 of the 1996 South African Constitution must be read as a whole, and that the whole section was aimed at 'creating a new dispensation in which every person has adequate housing, and in which the State may not interfere with such access unless it would be justifiable to do so'.⁶⁵ The Court further held that the prohibition of forced evictions was the negative aspect of the right to housing and that any measure allowing such forced evictions violated the right to housing as provided for in section 26(1) of the SAC.⁶⁶

7.3.2 Legislative and policy provisions

Legal protection of housing rights in Kenya can also be found in several legislative and policy documents. One of the oldest pieces of legislation intended to protect tenants against

⁶² For a similar analysis see I Ndegwa 'A roof over Wanjiku's head: Judicial enforcement of the right to housing under the Constitution of Kenya' in J Biegon & G Musila (eds.), *ICJ Judiciary Watch Report Volume 10: Judicial enforcement of socio-economic rights under the new Constitution – Challenges and opportunities for Kenya* (2012) 143, at 154-156.

⁶³ CESCR, Concluding Observations on Kenya's Initial Report – 1993, para. 16, available at <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/89263c23858e2a0cc125663c00343b10?OpenDocument> (accessed on 16 September 2012).

⁶⁴ General Comment No. 7, para. 5. See also Office of the High Commissioner for Human Rights (OHCHR) & UN-Habitat 'The right to adequate housing: Fact-Sheet No. 21/Rev.1, at 4, available at http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf (accessed on 15 September 2012); *SERAC v Nigeria* (n 38 above) para. 63, where the African Commission acknowledged that the protection from forced eviction was an important component of the right to adequate housing implicitly protected in the African Charter.

⁶⁵ *Jaftha v Schoeman & Others* 2005 (2) SA 140 (CC), para. 28.

⁶⁶ *Jaftha*, para. 34.

exploitation by landlords was the Rent Restriction Act of 1982, which prohibited arbitrary rent increases above the standard rent, making it an offence punishable by a fine or imprisonment to charge more than the standard rent.⁶⁷ It also established a Rent Tribunal mandated to investigate complaints by landlords and tenants, and to mediate or find a resolution to rent disputes.⁶⁸ However, since the Act only applies to tenant-landlord relationships in which the monthly rent does not exceed Kshs. 2, 500 (approximately 30 US dollars), it has lost its protective value as most rental houses are priced far above that amount, even in the informal settlements.⁶⁹ The Act is also inapplicable in most informal settlements either because the structure owners have no legal title to the land or because the structures are built of temporary materials.⁷⁰ It has been suggested that if the Act was to be effectively made applicable to the informal settlements, rent would decrease by 70 per cent, thus making accommodation in the informal settlements more affordable.⁷¹

With the adoption of the National Housing Policy in 2004,⁷² efforts are being made to revise the pecuniary limits of the Act so as to provide the requisite protection to all low cost housing. These efforts have culminated in the drafting of the Landlord and Tenant Bill 2007, aimed at simplifying and modernising laws relating to the renting of residential premises, the regulation of landlord and tenant relationships so as to enhance stability in the rental housing sector, and to protect tenants from unlawful rent increases as well as unlawful forced evictions.⁷³ Though it

⁶⁷ Rent Restriction Act, Cap 296, Revised Edition 2010 (1982), sections 9-10

⁶⁸ Rent Restriction Act, sections 4-8.

⁶⁹ Rent Restriction Act, section 2(1)(c).

⁷⁰ COHRE Report (n 6 above) 86-87. They state that home owners insist on the use of 'temporary materials' such as mud so as to evade the provisions of the Act.

⁷¹ P Syagga, W Mitullah & S Gitau-Karirah, *Nairobi situation analysis supplementary study: A rapid economic appraisal of rents in slums and informal settlements* (2002) 5.

⁷² Sessional Paper No. 3 of 2004: National Housing Policy for Kenya' (2004) available at <http://mail.housing.go.ke/home/ict@housing.go.ke/Briefcase/Website%20Downloads/National%20Housing%20Policy%20for%20Kenya.pdf> (accessed on 24 September 2012). The policy is aimed at responding to the dire housing situation in Kenya and to bridge the shortfall in housing stock resulting from increased demand caused by population explosion, rapid urbanisation, widespread poverty, and escalating costs of housing. The policy forms the basis of the Tenant and Landlord Bill 2007, the Housing Bill 2011 and the Evictions and Resettlement Procedure Bill 2012 discussed herein below.

⁷³ The Landlord and Tenant Bill 2007, preamble & part III.

increases the pecuniary limits to Kshs. 15, 000 per month, the draft is ambiguously or wrongly crafted creating an impression that the Bill is not intended to apply to residential premises that have a fair rent not exceeding Kshs. 15, 000.⁷⁴ The Bill retains the Landlord and Tenant tribunal to settle disputes arising from the application of the Bill, but further empowers it to grant more substantive remedies such as the award of costs, the issuing of injunctions, the ordering of compensation, and the reinstatement of tenants into their former houses if they were wrongfully evicted.⁷⁵ The Bill also retains the offence of not complying with the lawful orders and decisions of the Tribunal, but enhances the penalty to a fine of Kshs. 100, 000, a twelve month prison sentence or both.⁷⁶

The Housing Act of 1990, which was supposed to be the main legal document on housing, does not adopt the language of a right to housing.⁷⁷ It establishes a National Housing Corporation and a National Housing Fund to be controlled by the Corporation, from which loans and grants to local authorities, companies and individuals can be made for the construction of dwellings.⁷⁸ The Corporation is also mandated to undertake research and collect data on housing as well as to operate housing finance institutions.⁷⁹

In line with the 2004 National Housing Policy and the 2010 Constitution, the Housing Act will be replaced by the proposed Housing Bill 2011, which specifically adopts the language of rights, proposes the establishment of a National Housing Authority, the appointment of a Commissioner of Housing, and the Establishment of a National Housing Development Fund for

⁷⁴ Contrast the drafting in the Bill which provides as follows:

This Act applies to – (a) all residential premises, other than – (iii) residential premises which have a fair rent not exceeding [Kshs. 15, 000] per month...

With the drafting in the Rent Restriction Act which provides as follows:

This Act shall apply to all dwelling houses, other than – (c) dwelling houses which have a standard rent exceeding [Kshs. 2, 500] per month...

In my opinion the 'not' between 'rent' and 'exceeding' in the Bill is misplaced as it totally destroys the protection that was intended to be given to low income tenants who stay in houses below Kshs. 15, 000, and who are the majority of the population who need the protection.

⁷⁵ Landlord and Tenant Bill, section 4

⁷⁶ Landlord and Tenant Bill, section 9.

⁷⁷ The Housing Act, Cap 117, Revised Edition 2010 (1990).

⁷⁸ Housing Act, sections 3-7.

⁷⁹ Housing Act, section 10.

the provision of the right to accessible and adequate housing as entrenched in the 2010 Constitution.⁸⁰ It adopts the definition and content of the right to housing as espoused the CESCR in General Comment Number 4, that is, security of tenure, availability, affordability, habitability, accessibility, location as well as cultural adequacy.⁸¹ It encompasses a broad definition of housing to include local, national and international policies, strategies, programmes and practices that provide for housing rights.⁸² The guiding principles of the Bill includes an affirmation of housing as key to economic and social development; an adoption of the language of progressive realisation of housing rights; facilitation as well as provision of adequate housing, including social housing; the recognition of the private sector as the engine in housing development and the government as a facilitator, enabler and catalyst in housing development; and the facilitation of access to land and security of tenure for housing.⁸³

To complement the extensive provisions in the Housing Bill, efforts are being made to put in place an evictions regulation regime, starting with the development of the Evictions and Resettlement Guidelines⁸⁴ as well as the drafting of the Evictions and Resettlement Procedures Bill, 2012.⁸⁵ The aim of the Bill is to provide protection, prevention and redress in instances of

⁸⁰ The Housing Bill, November 2011, preamble and sections 4 (objectives), 5 (implementing agency), 6 (housing financing, including financing for low-cost housing), 7 (provision of land for housing development), 10 (national housing development fund into which it is to be deposited 5 per cent of the government budget for the first ten years from when the fund is established as well as contributions from employers and employees), 14 (Commissioner of Housing who is to be the chief government adviser on matters relating to housing and human settlement, and who is also mandated to develop a comprehensive national shelter program aimed at ensuring the availability of affordable and descent housing and basic services, among other duties), 16 (National Housing Authority mandated to exercise general supervisory authority over all matters relating to housing and human settlement), and 49 (Housing Dispute Tribunal to resolve any disputes related to housing as provided for by the Bill).

⁸¹ Housing Bill, section 2.

⁸² Housing Bill, section 2.

⁸³ Housing Bill, section 3.

⁸⁴ Ministry of Lands, Evictions and Resettlement Guidelines, Final Edited Version, March 2011 (on file with author).

⁸⁵ Evictions and Resettlement Procedures Bill, 2012, available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2012/EvictionsandResettleBill2012.pdf> (accessed on 25 September 2012).

forced evictions for all persons including unlawful occupiers and squatters.⁸⁶ It prohibits forced evictions and demolitions without a court order, and provides the procedures for evictions including the giving of an opportunity for genuine consultation between all affected parties;⁸⁷ the issuing of sufficient notice of not less than three months; an undertaking of economic, environmental and social impact assessment before evictions; availability of adequate resettlement plans; and the availability of an opportunity for legal redress.⁸⁸ The Bill also provides guidelines to courts when dealing with eviction applications, requiring the court to cause service of application documents to all the affected parties; to issue an order of eviction for groups that have occupied a piece of land for less than six months only if it is just and equitable to do so taking into account all the relevant circumstances, including the needs of special vulnerable groups such as children, the elderly, persons with disabilities, persons living with HIV/AIDS; not to issue an order of eviction if it will result in homelessness; and in instances where occupiers have been on the land for more than six months, evictions are to be ordered only if it is just and equitable taking into account all the circumstances and also whether alternative land has been made available, among other conditions.⁸⁹ The Bill directs the courts to only issue an eviction order if they are satisfied that all the conditions set out in the Bill have been met, and that in doing so, they should also indicate a just and equitable date when the occupiers are expected to vacate or when the eviction is to be carried out should the occupiers fail to vacate on the date set out by the court.⁹⁰

If enacted and effectively implemented, the Tenant and Landlord Bill, the Housing Bill and the Evictions Bill have the potential to respond to most of the housing challenges being experienced in Kenya today. The challenge, however, will be to translate precepts into practice.

⁸⁶ Evictions Bill 2012, preamble.

⁸⁷ Similar to the requirement of meaningful engagement which is discussed more elaborately in chapter three, section 3.5 above.

⁸⁸ Evictions Bill 2012, sections 4-7. For evictions being undertaken by organs of the State, see sections 10ff.

⁸⁹ Evictions Bill 2012, section 8. See also section 11 for the mandatory requirements during evictions which include: the presence of a government official during evictions; proper identification of those conducting the eviction; evictions to be done transparently and in compliance with international human rights principles; evictions not to be conducted at night or in bad weather; and that evictions be conducted in a manner respectful of the life, security and dignity of those affected.

⁹⁰ Evictions Bill 2012, section 8 (9) & (10).

The provisions in the above housing policy and proposed legislation are further augmented by policy and legislation dealing with land, especially the National Land Policy of 2009⁹¹ and its attendant Land Act 2012,⁹² as well as the Land Registration Act 2012.⁹³ Other legislation which provide for housing for special groups includes the Children's Act 2001, Act No. 8 of 2001, sections 23 and 98; The Refugees Act, 2006, section 16, which has been expanded by the proposed Refugees Bill, 2011, section 14; as well as the Kenya Railways Corporation Act, section 16(3).

7.4 The meaning and content of the right to accessible and adequate housing

The formulation of an all-encompassing definition of the right to adequate housing is not an easy task as it will depend on a specific context, the circumstances of households and

⁹¹ Ministry of Lands, 'Sessional Paper No. 3 of 2009: National Land Policy (August 2009) available at http://www.lands.go.ke/index2.php?option=com_docman&task=doc_view&gid=81&Itemid=26 (accessed on 25 September 2012). The policy is aimed at ensuring efficient, equitable and sustainable use of land (para. 3) as well as security of tenure and other rights over land with the aim of poverty reduction through equitable access to land for all Kenyans (paras. 5, 7, 29-33, & 52-55). It calls for the equal recognition and protection of all tenure systems, non-discrimination in ownership of and access to land in all tenure systems as well as the promotion and protection of the multiple values attaching to land, not just the economic value as is the current practice (paras. 69-80).

⁹² The Land Act 2012, *Kenya Gazette Supplement No. 37 (Acts No. 6)*. It provides for equitable access to land, security of land rights, transparent and cost-effective management of land and land resources, elimination of gender discrimination in access to land, public participation and democratic decision-making in land matters as well as non-discrimination and the protection of the marginalised, in section 4. It also provides for equal recognition and protection of land rights emanating from all the provided tenure systems, in section 5. It allows for the issuing of temporary licences for the use of public land, a tool that can be used to enable people in distress to temporarily use public land for housing purposes pending a more permanent government solution to their plight, in sections 20-21. It further provides for the Commissioner to implement settlement programmes to provide access to land for shelter and livelihoods, to ameliorate the land and housing needs of squatters and displaced persons. This is to be undertaken through the reservation of public land or through the purchase of private land, and a Land Settlement Fund is established for this purpose, in sections 134-135.

⁹³ The Land Registration Act, 2012, *Kenya Gazette Supplement No. 33 (Acts No. 3)*.

individuals, as well as the prevailing housing needs and priorities.⁹⁴ However, a working definition has been adopted and it defines the right to adequate housing as ‘the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity’.⁹⁵ Both international and national courts as well as quasi-judicial organs have adopted this interpretation of the right to adequate housing, holding that the right should be broadly interpreted not only to include a roof over one’s head or be viewed exclusively as a commodity, but must be seen as an important component of the right to human dignity, the pillar on which all the other SERs are premised.⁹⁶

The CESCR, therefore, contends that adequate housing should mean ‘adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost’.⁹⁷ The CESCR further expounds on the above requirements for adequate housing by delineating the content of the right to adequate housing to include: legal security of tenure to

⁹⁴ K Tissington (Socio-Economic Rights Institute of South Africa (SERI) ‘A review of housing policy and development in South Africa since 1994’ (September 2010) 28, available at <http://www.sprii.org.za/agentfiles/434/file/Research/Review%20of%20the%20Right%20to%20Housing.pdf> (accessed on 18 September 2012).

⁹⁵ Report of the Special Rapporteur on the Right to Adequate Housing to the 57th Commission on Human Rights, E/CN.4/2001/51, 25 January 2001, para. 8, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/105/87/PDF/G0110587.pdf?OpenElement> (accessed on 20 September 2012); Final Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/7/16 (February 2008) para. 4, available at <http://www.unhcr.org/refworld/docid/47ce73f32.html> (accessed 26 September 2012).

⁹⁶ General Comment No. 4, para. 7 & also para. 9 which affirms that the right to housing is important for the realisation of other complimentary rights, and thus basically advocates a comprehensive rights-based approach when dealing with issues related to housing. See also OHCHR & UN-Habitat (n 64 above) 3-4, which summarises the content of the right to adequate housing as comprising of freedoms such as protection from forced eviction and the demolition of dwellings; freedom from arbitrary interference with one’s privacy, home and family; and freedom of movement and the choice of one’s residence; as well as housing entitlements which include security of tenure; housing, land property restitution; equality and non-discrimination; and participation in housing related matters at the national and community level.

⁹⁷ General Comment No. 4, para. 7.

guarantee legal protection of inhabitants from forced evictions, harassment and other threats;⁹⁸ availability of services, infrastructure and other facilities essential to health security and comfort;⁹⁹ affordability to ensure that people are capable of accessing adequate housing without jeopardising access to other essential elements for a dignified life; habitability to ensure protection against the elements and other threats to a healthy life; physical and economic accessibility of adequate housing to all persons, but especially the poor, vulnerable and marginalised individuals and groups; appropriate location with adequate affordable transport to allow access to employment, healthcare facilities, educational institutions, and other social facilities; as well as being culturally adequate to take into account the diversity of the population and their cultural identities.¹⁰⁰

This expansive understanding of the right to adequate housing was also adopted by the SACC in the *Grootboom* case where the Court held as follows:¹⁰¹

Housing entails more than brick and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: 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.

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⁹⁸ Tenure takes a variety of forms including 'rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property,' see General Comment No. 4, para. 8(a). Scott Leckie contends that security of tenure is the most indispensable core element of the right to adequate housing, the absence of which makes the enjoyment of housing rights unlikely. He says that the enforcement of this component ensures the protection of not only property owners, but also of tenants, thus expanding human rights protection to all people of all incomes and in all housing sectors. He, therefore, labels it as the baseline or core minimum entitlement of the right to housing, see Leckie – Where it matters most (n 17 above) 35-37.

⁹⁹ These include safe drinking water, electricity, sanitation, refuse disposal, site drainage, and emergency services. See General Comment No. 4, para. 8(b).

¹⁰⁰ General Comment No. 4, para. 8. See also Habitat Agenda, para. 60; Final Report of the Special Rapporteur on the Right to Housing (n 95 above) para.5. For an elaboration of this components of the right to adequate housing, see Leckie – Where it matters most (n 17 above) 10-11, FN 14.

¹⁰¹ *Grootboom*, para. 35.

Land as an important component of the right to adequate housing was also affirmed in the Habitat Agenda where it is stated that 'access to land and legal security of tenure are strategic prerequisites for the provision of adequate shelter for all'.¹⁰² This broad understanding is important as it encompasses all the elements that are required to ensure that housing contributes to a dignified life for the whole population.

An important component of the right to adequate housing, which is encompassed in the requirement of security of tenure, is the protection from forced, arbitrary and unprocedural eviction.¹⁰³ Forced eviction is defined by the CESCR as:¹⁰⁴

[t]he permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

The UN Commission on Human Rights has affirmed the detrimental nature of forced evictions on the realisation of the right to housing, terming the practice as contrary to international human rights standards and a gross violation of a broad range of human rights.¹⁰⁵

The right to adequate housing also entails a minimum core content, the realisation of which is an immediate obligation of the State.¹⁰⁶ This was expounded by the CESCR in its General Comment Number 3 where it stated that a State Party in which any significant number of individuals are deprived of basic shelter and housing is *prima facie* failing to discharge its obligations under the Covenant, and that if the Covenant were to be read in a way not providing

¹⁰² Habitat Agenda, para. 75. See also Final Report of the Special Rapporteur on the Right to Adequate Housing (n 95 above) paras. 65-78, where he emphasises the important linkages between land and the realisation of the right to adequate housing for numerous individuals and groups including the rural poor, women, informal settlement inhabitants, indigenous people, refugees and IDPs, and calls for a continued focus on the important place access to land has in the realisation of the right to adequate housing.

¹⁰³ General Comment No. 7, para. 1-2; OHCHR & UN-Habitat (n 64 above) 10.

¹⁰⁴ General Comment No. 7, para. 3.

¹⁰⁵ Commission on Human Rights Resolution: 2004/28 'Prohibition of forced evictions' (16 April 2004) para. 1, available at www.unhabitat.org/downloads/.../1341_73776_forced%20evic4.doc (accessed on 20 September 2012).

¹⁰⁶ For a comprehensive and illuminating discussion of the minimum core approach and its place in the development of Kenya's SER jurisprudence, see chapter two, section 2.5 and chapter five, section 5.3.2.

for the minimum core, it would be deprived of its *raison d'être*.¹⁰⁷ The question then is, what forms the minimum core of the right to housing? The office of the High Commissioner for Human Rights and UN-Habitat contend that the provisions highlighted by the CESCR in General Comment Number 4, paragraph 8, as discussed above, entail the minimum essentials for adequate housing and must be met for housing to be considered adequate.¹⁰⁸ This is acknowledged by Kirsty McLean writing in the context of South Africa.¹⁰⁹ McLean advocates the adoption of this flexible approach to the understanding of the minimum core content of the right to housing as it allows for its use as a universal benchmark while at the same time taking into account the local needs and resource capacity of different States.¹¹⁰

From the above analysis, it can be concluded that the minimum core content of the right to adequate housing encompasses security of tenure to guarantee protection from forced eviction, harassment and other threats; access to services, materials, facilities and infrastructure; adequate space and habitability – protection from the elements as well as other threats to health, structural hazards and disease vectors; appropriate location allowing for access to employment options, healthcare services, schools, child-care centres and other facilities.¹¹¹ Protection from forced eviction forms an important part of the minimum core content of the right to housing.¹¹² This has been acknowledged by the CESCR in its General Comment Number 7 where it contends that the standard of progressive realisation is not relevant to the prevention of forced eviction and that ‘the State’s obligation to ensure respect for that right is not qualified by obligations relating to its available resources’.¹¹³

David Bilchitz, analysing the reasonableness approach in the context of the *Grootboom* case, has also called for the adoption of the minimum core approach in relation to housing rights, arguing that failure to provide for the short-term urgent needs of homeless people

¹⁰⁷ CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, para. 10, available at: <http://www.unhcr.org/refworld/docid/4538838e10.html> (accessed 16 September 2012).

¹⁰⁸ OHCHR & UN-Habitat (n 64 above) 9-10.

¹⁰⁹ McLean - Housing (n 49 above) 55-40 – 55-41.

¹¹⁰ McLean - Housing (n 49 above) 55-40 – 55-41.

¹¹¹ General Comment No. 4, para. 8; McLean - Housing (n 49 above) 55-40.

¹¹² UNHRP Report (n 16 above) 21-22.

¹¹³ General Comment No. 7, para. 8. See also COHRE (n 6 above) 29.

necessarily limits their chances of enjoying the benefits of housing rights realised progressively due to death or ill-health caused by their inter-mediate deprivation.¹¹⁴ He argues that a programme aimed at the realisation of long-term housing goals is self-defeatist if it does not provide for short-term and intermediate housing needs, and therefore, in that context, the reasonableness approach naturally leads to the recognition of a minimum core content of housing rights.¹¹⁵ Bilchitz, therefore, concludes that the findings of the unreasonableness of the South African Government's housing policy would not have been possible without the *Grootboom* court adopting, without expressly saying so, the minimum core approach.¹¹⁶

Bilchitz, however, does not adopt an expansive understanding of the minimum core approach to housing rights as is espoused by the Office of the High Commissioner, UN-Habitat and by McLean as is discussed above.¹¹⁷ He argues that this entails providing a more expansive form of housing than is required to meet the minimal housing interests.¹¹⁸ In this light, he criticises the judgment of the Indian Supreme Court in the case of *Shantistar Builders v Narayan Khimalal Totane*, where the Supreme Court held that human beings require 'suitable accommodation which allows them to grow in every aspect – physical, moral and intellectual',¹¹⁹ as failing to distinguish between the minimal and the maximal housing interests protected by the right to adequate housing.¹²⁰ To him, the expansive understanding of the minimum core content of the right to housing, as is expounded by the UN-Habitat and McLean above, is the second (maximal) threshold of interest protected by the right to adequate housing, the first threshold (minimum core) being the need to have 'at least minimal shelter from the elements so that one's

¹¹⁴ D Bilchitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 145.

¹¹⁵ As above.

¹¹⁶ Bilchitz – Poverty and fundamental rights (n 114 above) 145-46.

¹¹⁷ Bilchitz – Poverty and fundamental rights (n 114 above) 188.

¹¹⁸ As above.

¹¹⁹ AIR 1990 SC 630, (1990) 92 BOMLR 145, JT 1990 (1) SC 106, para.9, available at http://droits-sociaux.u-paris10.fr/assets/files/Jurisprudence/D.Roman/Shantistar_Builders.pdf (accessed on 19 October 2012).

¹²⁰ As above.

health and thus one's ability to survive are not compromised'.¹²¹ It is submitted here that this understanding of the minimum core to housing rights based on survival needs is too thin and does not take into account the interrelated nature of housing rights and other important human needs. It is thus proposed that in the development of the minimum core of the right to adequate housing, the relevant institutions of the State must also take into account other constitutional values such as equality, dignity and freedom so as to espouse a more expansive understanding of the minimum core as is entailed in the integrated approach proposed in chapter five, section 5.3 above.

7.5 Kenya's national and international obligations with regard to the right to accessible and adequate housing

Kenya's obligations in the realisation of the right to housing are discussed using three analytical approaches, that is, the progressive realisation standard,¹²² the tripartite typology and the 4-A's scheme.

7.5.1 General obligations with regard to the right to housing

Kenya's general obligations in respect of the realisation of the right to accessible and adequate housing, like all other SERs, are contained in article 21 of the Constitution, which borrows from article 2(1) of the ICESCR.¹²³ As has been discussed generally in chapter two, section 2.3,¹²⁴

¹²¹ Bilchitz – Poverty and fundamental rights (n 114 above) 187. Bilchitz slightly expands this minimum core to include 'at least, protection from the elements in sanitary conditions with access to basic services such as toilets and running water,' at 198.

¹²² For a comprehensive general discussion of the components of the 'progressive realisation' standard for the realisation of SERs, see chapter two, section 2.3.

¹²³ The 2010 Kenyan Constitution, article 21 which provides that:

- (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
- (2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

¹²⁴ An integrated discussion of Kenya's obligations in national and international law in relation to the right to accessible and adequate housing is especially important due to the constitutional provisions incorporating customary international law as well as international law in ratified international and regional treaties directly in the Kenyan domestic legal sphere as has been more elaborately discussed in chapter two, section 2.2 above.

and specifically in relation to the right to food in chapter six, section 6.6 above, these obligations consist of several intertwined and mutually reinforcing components, which are, progressive realisation; obligation to take steps; maximum of available resources; and, international cooperation and assistance.

i) *Progressive realisation*

The standard of progressive realisation is a recognition that even though every person has a right to accessible and adequate housing, this cannot be achieved immediately by States as measures aimed at the realisation of the right are always complex, time consuming and costly.¹²⁵ This was acknowledged by the former UN Special Rapporteur on housing rights, Justice Rajindar Sachar, who contended that the right to housing should not be taken to imply that the State is required to immediately build housing for the entire population as soon as it assumes obligations under the ICESCR.¹²⁶

¹²⁵ See M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998) 330; S Leckie 'The UN Committee on Economic, Social and Cultural Rights and the right to adequate housing: Towards an appropriate approach' (1989) 11 *Human Rights Quarterly* 522 at 527, who argues that the complexity of realising the right to housing is due to its numerous elements which are difficult to reconcile with one another such as private versus public ownership of property, rented versus owned housing, self-built versus State-built housing, the difficult balance between the right to property and the right to housing of those living in a property belonging to others, as well as the diversity of housing users who have distinct housing needs. See also McLean - Housing (n 49 above) 55-1, who affirms the complexity of housing law due to its animation by a complex network of law, policy, politics, international law, macro-economic planning, multi-layered and cooperative government as well as finance.

¹²⁶ See Commission on Human Rights, *The Right to Adequate Housing: Second progress report submitted by Mr. Rajindar Sachar, Special Rapporteur*, E/CN.4/Sub.2/1994/20 (June 1994) Part II, available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.1994.20> (accessed on 26 September 2012); Commission on Human Rights, 'The Right to Adequate Housing: Final report submitted by Mr. Rajindar Sachar, Special Rapporteur (1995) para. 11, available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.1995.12.En?Opendocument> (accessed on 26 September 2012). See also *Grootboom*, para. 95, where the SACC also held that the right of access to adequate housing in the SAC did not entitle the respondents to claim shelter or housing from the government immediately upon demand.

The standard was also adopted at the national level, in the *Grootboom* case where the SACC contended that the basic goal of the right to housing was to enhance the realisation of the basic needs of all in society, and the standard of progressive realisation contemplated that the right could not be realised immediately.¹²⁷ Progressive realisation was thus to be achieved through the taking of effective steps that facilitate access by ensuring that legal, administrative, operational as well as financial challenges are examined and possibly lowered over time, with the aim of making housing accessible not only to a larger number of people, but also to a wider range of people as time progressed.¹²⁸ The SACC further held in the *Modderklip* case that progressive realisation of the right to housing required 'careful planning, fair procedures and orderly and predictable processes'.¹²⁹ In his analysis of section 26 of the SAC, David Bilchitz calls for an interpretation of progressive realisation to entail two components: the first component being the minimum core content aimed at the protection of minimal housing interests; and the second, the achievement of maximal housing interests to enable human beings to achieve their goals and live productive lives.¹³⁰ To him, progressive realisation is thus the movement from the first component to the second component.¹³¹

The practical application of the obligation to progressively realise the right to housing was given by the CESCR in its consideration of the State Report of the Dominican Republic. In its Concluding Observation to that Report, the CESCR stated that the fulfilment of this obligation required the State to provide basic essential services to dwellings, ensure that public housing is provided to those in greatest need, and to undertake substantive dialogue and consultation with all affected communities in the design, implementation and enforcement of programmes aimed at the realisation of the right to adequate housing, among other requirements.¹³² This followed a finding by the Committee that by planning and undertaking massive forced evictions, the Dominican Republic had not only failed to implement its obligations under the ICESCR, but was

¹²⁷ *Grootboom*, para. 45.

¹²⁸ As above.

¹²⁹ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) 2005 (5) SA 3 (CC), para. 49.

¹³⁰ Bilchitz – Poverty and fundamental rights (n 114 above) 193.

¹³¹ As above.

¹³² See OHCHR & UN-Habitat (n 64 above) 32; Leckie – Where it matters most (n 17 above) 14 note 22.

in actual violation of the internationally recognised right to adequate housing, the first time the Committee had found a violation of an SER in relation to the ICESCR.¹³³

ii) Obligation to take steps

Although the overall realisation of the right to accessible and adequate housing is subject to progressive realisation, there is an immediate obligation that the State takes steps or adopts measures that are sufficiently capable of realising the right to housing over the shortest period possible, taking into account the resources available to the State internally and externally.¹³⁴ The steps taken must be deliberate, concrete and targeted as clearly as possible towards the realisation of the right to housing and must actually be capable of realising the right.¹³⁵

Matthew Craven contends that the first step should entail an analysis of the housing situation in the entire country so as to ascertain the full extent of homelessness and inadequate housing.¹³⁶ The CESCR contends that this obligation to undertake a nationwide housing situational analysis is an immediate obligation that must be undertaken either by the State on its own or through international cooperation where the State lacks sufficient resources to undertake the assessment.¹³⁷

The national survey and assessment should then be followed by the development of a comprehensive national housing strategy which 'defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-

¹³³ Leckie- Where it matters most (n 17 above) 20.

¹³⁴ Craven (n 125 above) 331-333.

¹³⁵ General Comment No. 3, para. 2.

¹³⁶ Craven (n 125 above) 331-333. See also Bilchitz – Poverty and fundamental rights (n 114 above) 253, who contends, in analysing the right to housing in India, that proper statistics and an analysis of the overall housing situation in the country is the first step towards developing an appropriate strategy for the provision of shelter to the destitute.

¹³⁷ General Comment No. 4, para. 13. See also CESCR, Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the ICESCR, E/C.12/2008/2 (March 2009), para. 50, available at <http://www2.ohchr.org/english/bodies/cescr/> (accessed on 26 September 2012), which requires State Parties to indicate in their Reports to the CESCR whether this national survey has been undertaken as well as its findings with regard to the level of homelessness as well as those insufficiently housed.

effective way of using them, and sets out the responsibilities and time-frames for the implementation of the necessary measures.¹³⁸ Scott Leckie proposes that the national strategy must be developed in a pragmatic manner that envisions housing as both a basic birth-right of human beings and a commodity that can be bought and sold in the open market, thus acknowledging both the human rights dimensions and the economic interests associated with housing.¹³⁹ Further, the strategy must take into account the housing needs in the rural areas, a segment of society that is almost forgotten in policies and programmes aimed at the realisation of the right to adequate housing, particularly in Kenya.¹⁴⁰ It must also encompass sufficient mechanisms to enhance collaboration and cooperation among all sectors of society, including government, NGOs and individuals, in the realisation of the right to adequate housing.¹⁴¹

The obligation to take immediate steps to develop a national strategy was also affirmed, in the South African context, in the *Grootboom* case where the SACC upheld the duty of the State to develop a coherent, coordinated programme capable of realising the right.¹⁴² The SACC further developed criteria to scrutinise the reasonableness of such adopted programme, and it included the requirements that it must: be adopted through both legislative and policy means; be reasonably implemented; be flexible and balanced taking into account both short, medium and long-term housing needs of the people; not exclude a significant segment of

¹³⁸ General Comment No. 4, para. 12. This is acknowledged and anticipated by the Kenya Housing Bill, 2011 in section 2 where it interprets housing to include the process of:

- (a) analysis of shelter needs and demands;
- (b) determination, organisation and management of the production and maintenance of dwelling units including supporting infrastructure; and,
- (c) the resources required thereof, while upholding environmental sustainability.

¹³⁹ Leckie – Where it matters most (n 17 above) 6-7, who argues that strategies treating housing either as purely social goods or exclusively as market-based assets are unrealistic in the fulfilment of housing rights.

¹⁴⁰ See Declaration on Cities, para. 3 which calls for concurrent development of rural areas, the eradication of poverty, provision of educational as well as employment opportunities. See also Final Report of the Special Rapporteur on the Right to Adequate Housing (n 95 above) paras. 79-80 & 105, where he also calls for a continued emphasis on rural development if the housing challenges in both rural and urban areas are to be tackled.

¹⁴¹ General Comment No. 4, para. 12.

¹⁴² *Grootboom*, para. 41.

society; contain a clear as well as efficient assignment of functions to all the relevant levels and departments of government; ensure that appropriate financial and human resources are available at all the relevant levels and departments of government; and provide a procedure for review so as to take into account changing societal circumstances.¹⁴³

The adoption or reform of legislation is an important, though not the only, measure that can be taken by a State to enhance the realisation of the right to adequate housing.¹⁴⁴ The Revised State Reporting Guidelines to the ICESCR give a long list of types of legislation that the State can put in place to enhance the realisation of the right to adequate housing which include:¹⁴⁵

- a) Legislation which gives substance to the right to housing by defining the content of this right;
- b) Legislation relevant to land use, distribution, allocation, zoning, ceilings (total amount of land that can be owned by one person), expropriations (including provision for compensation) and planning (including procedures for community participation);
- c) Legislation concerning the rights of tenants to security of tenure and conferring legal title to those living in the 'illegal' sector; to protection from eviction; to housing finance and rent control (or subsidy); and to housing affordability;
- d) Legislation concerning building codes, building regulations and standards as well as the provision of infrastructure;
- e) Legislation prohibiting any and all forms of discrimination in the housing sector, including of groups not traditionally protected;

¹⁴³ *Grootboom*, paras. 42-44. For an evaluation of the South African housing policy in relation to the *Grootboom* criteria, see McLean - Housing (n 49 above) 55-14 – 55-30.

¹⁴⁴ See UNHRP Report (n 16 above) 30ff. See also Final Report of the Special Rapporteur on the Right to Adequate Housing (n 95 above) para. 9, who states that the lack of an effective national legislative and policy framework was one of the major challenges to the realisation of the right to adequate housing at the national level.

¹⁴⁵ CESCR, General Reporting Guidelines - Official Records of the Economic and Social Council, 1991, Supplement No. 3 (E/1991/23-E/C.12/1990/8), annex IV, part (c), at 88-110.

- f) Legislation restricting speculation on housing or property, particularly when such speculation has a negative impact on the fulfilment of housing rights for all sectors of society; and
- g) Legislation concerning environmental planning and health in housing and human settlements.

The UNHRP details several advantages to the adoption of legislation as a measure in the realisation of the right to adequate housing. First, it provides judicial redress in cases of violation of housing rights; secondly, the permanency of legislation provides an assurance as to the continuity of housing rights obligations in differing political administrations; thirdly, it may be the only way of equitably protecting the housing rights of the poor, vulnerable and marginalised groups as it is an important incentive towards ensuring substantive equality; and lastly, it provides tangible substantive content to vague international obligations, and thus encourages governmental accountability to citizens.¹⁴⁶

Even though Kenya has put in place some of these types of legislation, they do not sufficiently capture the entire spectrum of all the interests related to the right to adequate housing that require protection. The legislative reforms being undertaken in this direction, as discussed in section 3.2 above are to be welcomed, but they must be followed by well-crafted and efficiently implemented programmes so as to realise their potential in the realisation of the right to adequate housing.

iii) Maximum of available resources

The standard of progressive realisation is an acknowledgement that the full realisation of the right to adequate housing requires a lot of resources, which, in reality, are always scarce. Availability of resources contextualises a State's obligation for the realisation of the right to housing, as States can only be expected to do as much as their available resources permit, taking into account other societal needs and concerns. Availability of resources thus acts as an internal limitation to a State's obligations for the realisation of the right to housing. Resources in this context should not, however, be understood restrictively as those resources committed to housing in the State's budget, but must be broadly understood to include resources that can be

¹⁴⁶ UNHRP Report (n 16 above) 33.

harnessed from the private sector, individual citizens as well as resources that can be accessed from the international community through international cooperation and assistance.¹⁴⁷

The importance of the availability of resources in the realisation of the right to adequate housing and other constitutionally entrenched SERs was emphasised, in the context of the SAC, by the SACC in the *Soobramoney* case where the then President of the Court, Justice Chaskalson, held as follows.¹⁴⁸

What is apparent from these provisions is that the obligation imposed on the State by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

This approach was also adopted by the SACC in its decisions in the *Grootboom* case¹⁴⁹ in relation to housing and in the *Khosa* case in relation to social security.¹⁵⁰ The availability of resources thus forms an internal limitation on the obligations of the State in the realisation of the right to adequate housing, but does not affect the content of the right itself.¹⁵¹

iv) *International cooperation and assistance*

The principles of solidarity and shared responsibility are the fundamental values that inform the duty to cooperate internationally to enhance the realisation of the right to adequate housing.¹⁵²

¹⁴⁷ Istanbul Declaration, para. 13; OHCHR & UN-Habitat (n 64 above) 30.

¹⁴⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), para. 11.

¹⁴⁹ *Grootboom*, para. 46

¹⁵⁰ *Khosa & Others v Minister of Social Development & Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) 2004 (6) SA 505 (CC), para. 43.

¹⁵¹ For a more nuanced discussion of this aspects, see McLean - Housing (n 49 above) 55-9 – 55-12; D Bilchitz 'Health' in S Woolman *et al* (eds.), *Constitutional law of South Africa*, 2nd edition Original Service, volume 4 (2006) 56A-1, at 56A-9 & 10, especially footnote 4.

¹⁵² M Kothari 'Privatising human rights – the impact of globalisation on adequate housing, water and sanitation' *Social Watch* (undated) 18, at 20-21, available <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN010131.pdf> (accessed on 26 September 2012).

International cooperation is thus a key asset in the global reallocation and redistribution of resources with the aim of enhancing access to housing and other attendant rights, especially for the poor and marginalised individuals and groups.¹⁵³ This has been recognised in several binding and non-binding international legal instruments aimed at the realisation of the right to adequate housing such as the ICESCR,¹⁵⁴ CRC,¹⁵⁵ and CESCR General Comment Number 4.¹⁵⁶ The commitment of States to international cooperation in the realisation of the right to adequate housing was further affirmed in the Habitat Agenda as follows:¹⁵⁷

We commit ourselves... to enhancing international cooperation and partnerships that will assist in the implementation of national plans of action and the global plan of action and in the attainment

¹⁵³ As above.

¹⁵⁴ ICESCR, article 11(1) which provides that 'The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'.

¹⁵⁵ CRC, preamble para. 11, which recognises the importance of international cooperation in improving the living condition of children in every country and especially developing countries; as well as article 45 which encourages international cooperation so as to foster the effective implementation of the CRC.

¹⁵⁶ CESCR General Comment No. 4, para. 10, which provides that in instances of the inability of a State to take immediate steps towards the realisation of the right to housing due to scarcity of resources, the State should seek international cooperation and assistance to undertake the same. Para. 13 further requires international cooperation in ascertaining the level of homelessness and inadequate housing in a State, and para. 19 recognises that not only less than 5 per cent of international assistance has been directed towards the realisation of the right to adequate housing, but even this funding has not been used to meet the housing needs of the poor and vulnerable groups. Para. 19 thus calls for more resources being directed at the realisation of adequate housing for all, especially the vulnerable groups.

¹⁵⁷ UNGA 'The Habitat Agenda: Chapter III: Commitments, A/CONF.165/14 (June 1996), para. 49, available at <http://www.un-documents.net/ha-3.htm#F> (accessed on 26 September 2012). The States further agreed, in para. 50, to:

- a) Strive to fulfil the agreed target of 0.7 per cent of the gross national product of the developed countries for official development assistance as soon as possible and to increase, as necessary, the share of funding for adequate shelter and human settlement development programmes, commensurate with the scope and scale of activities required to achieve the objectives and goals of the Habitat Agenda;
- c) Promote responsive international cooperation between public, private, non-profit, non-governmental and community organisations.

of the goals of the Habitat Agenda by contributing to and participating in multilateral, regional and bilateral cooperation programmes and institutional arrangements and technical and financial assistance programmes; by promoting the exchange of appropriate technology; by collecting, analysing and disseminating information about shelter and human settlements; and by international networking.

This obligation is also affirmed in the UN Declaration on Cities as one of the essential pillars in the realisation of the right to adequate housing.¹⁵⁸ The realisation of the right to adequate housing does not, therefore, depend only on the resources available in a specific State, but can be realised using resources that can be availed by other States using the facility of international assistance and cooperation.

7.5.2 The tripartite typology

The obligation of the State in relation to the right to accessible and adequate housing can be understood within the tripartite typology of the obligation to respect, protect and fulfil as has been discussed in relation to the right to food in chapter six above. David Bilchitz argues convincingly that an understanding of the obligations of the State using the tripartite typology can only make sense when the substantive content of the rights in question have been developed, as the obligations flow from the content of rights.¹⁵⁹ It is thus imperative that if the courts are going to understand and assess State obligations using the tripartite typology, they must, of necessity, adopt the transformative and integrated approaches to interpretation and enforcement of SERs as developed in chapter five above. The integrated approach ensures that the courts not only develop the substantive content and scope of the SERs in question in a particular case, but also adopt a purposive interpretation of the SERs that takes into account the constitutional values of human dignity, equality and freedom, as well as the purpose of the entrenchment of SERs, which is the amelioration of the conditions of the poor, vulnerable and marginalised individuals and groups, as well as the achievement of social justice. The adoption of the integrated approach in the interpretation of the right to adequate housing thus expands the opportunities for the progressive realisation of the transformative aspirations of the 2010 Kenyan Constitution.

i) Duty to respect

¹⁵⁸ Declaration on cities, paras. 58, 65 & 67.

¹⁵⁹ Bilchitz – Poverty and fundamental rights (n 114 above) 184 & 195-96. See also K Young *Constituting economic and social rights* (2012) 82-83.

The duty to respect requires of the State to desist from taking away people's existing right to housing through the arbitrary and unprocedural destruction of homes, or the adoption of measures that obstruct access to housing for those who do not already have housing.¹⁶⁰ This duty was emphasised by the African Commission in the *Endorois* case when it recognised that the right to housing formed an intrinsic part of the right to property as is enshrined in article 14 of the African Charter, and found Kenya in violation of this article by its forced eviction of the Endorois indigenous community from their ancestral land.¹⁶¹ The Commission further found that to enhance the protection of the land and housing rights of indigenous and tribal people, Kenya must put in place a legal regime that recognises and protects their collective land tenure systems, even if this requires the adoption of affirmative action measures.¹⁶²

The duty to respect encompasses the obligation to prohibit discrimination vertically and horizontally in all aspects of housing and to prioritise the housing needs of individuals and groups previously discriminated against in access to housing such as the elderly, children, women, people with disabilities, people living with HIV/AIDS, and poor, vulnerable and marginalised communities.¹⁶³ It further obliges the State to desist from taking retrogressive

¹⁶⁰ Craven (n 125 above) 331. See also *SERAC v Nigeria* (n 38 above) para. 61, where the African Commission acknowledged the duty to respect as entailing the obligation of the government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes; UNHRP Report (n 16 above) 22, which summarises this duty as requiring of the State to allow individuals and groups freedom to use their available resources in ways most appropriate for them to meet their housing needs; enhance popular participation and inculcate a conducive environment for self-help initiatives; as well as respecting the freedom of organisation and assembly to enhance the voice of tenant groups.

¹⁶¹ *Endorois* case, para. 238.

¹⁶² *Endorois* case, paras. 196-199 & 241-248.

¹⁶³ ICESCR article 11 as read with article 2(2). For an elaboration, see General Comment No. 4, para. 6; Craven (n 125 above) 337; Habitat Agenda, para. 40(b), (c), (j), (l) & (m); Final Report of the Special Rapporteur on the Right to Adequate Housing (n 95 above) paras. 22-25, where he avers, in the context of indivisibility, interdependence and universality of human rights, that the eradication of discrimination in the realisation of the right to adequate housing has a direct positive bearing on the protection of other congruent rights such as life, adequate standards of living, freedom of movement and residence, and popular participation.

measures that reverse the enjoyment of already existence housing rights.¹⁶⁴ This is emphasised by the CESCR which contends that a general decline in living and housing conditions that are directly attributable to the legislative or policy actions of a State and which are not accompanied by equitable compensatory measures are inconsistent with the Covenant obligations.¹⁶⁵ This is specifically relevant in the prohibition of forced evictions that are undertaken arbitrarily without any laid-down legal procedure, and without the provision of alternative accommodation.¹⁶⁶ The CESCR, referring to the prohibition of eviction in the ICCPR article 17 that prohibits arbitrary and unlawful interference with one's home, emphasises the obligation of the State to refrain from forced evictions and to ensure that relevant laws are enforced against its agents or third parties who are engaged in forced evictions.¹⁶⁷ To enhance protection from forced evictions, the

¹⁶⁴ See General Comment No. 3, para. 9, which prohibits retrogressive measures and requires that any deliberately retrogressive measures be justified in taking into account a holistic consideration of all the Convention rights and in the context of the full use of the State's maximum available resources. See also UNHRP Report (n 16 above) 13 & 65; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (1997), guideline 14(e), available at http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425803 (accessed on 23 January 2012). See also *Grootboom*, para. 45, where the SACC adopts the CESCR's understanding of the progressive realisation standard which contains the component prohibiting the adoption of retrogressive measures.

¹⁶⁵ General Comment No. 4, para. 11. See Craven (n 125 above) 331-32 for further discussion on this point. An illustration of this point is *Communication No. 31/2003: Slovakia CERD/C/66/D/31/2003* where the Committee on Elimination of Racial Discrimination (CERD Committee) found that a resolution adopted by Dobsina Municipal Council, cancelling a previous resolution to construct low cost housing for Roma inhabitants living in poor conditions, was contrary to, and was thus in violation of article 5(e)(iii) of the International Convention on the Elimination of all forms of Racial Discrimination. Aoife Nolan contends that even though the CERD Committee did not categorically state so, the second resolution constituted a retrogressive measure with regard to the housing rights of poor Roma inhabitants in Slovakia, see A Nolan 'Litigating housing rights' Conference on Economic, Social and Cultural Rights, 9-10 December 2005, at 6, available at <http://www.ihrc.ie/publications/list/aoife-nolan-litigating-housing-rights-conference-o/> (accessed on 26 September 2012).

¹⁶⁶ Hakijamii (n 6 above) 9. See also General Comment No. 4, para. 18, which provides that forced eviction is prima facie incompatible with the obligations entrenched in the ICESCR and can only be justified in the most exceptional circumstances.

¹⁶⁷ General Comment No. 7, para. 7, which further contends that this obligation is not qualified by considerations relating to availability of resources. See also UNHRP Report (n 16 above) 22 which avers that the duty to respect, with regard to forced evictions, also requires the full realisation of the right to

State is duty-bound to put in place effective legislative measures that '(a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant, and (c) are designed to control strictly the circumstances under which evictions may be carried out'.¹⁶⁸ Such measures must specifically take into account marginalised and vulnerable groups such as women, children, and indigenous communities, who always suffer disproportionately in instances of forced eviction.¹⁶⁹

The duty to respect is an immediate duty that the State must implement even in the context of resource constraints, and the CESCR has emphasised that in the instances when a State does not have sufficient resources to implement these immediate obligations, that State should request international assistance.¹⁷⁰

ii) Duty to protect

The duty to protect on the other hand requires the State to put in place all measures, including an effective legislative, policy and programmatic framework to protect people from interference with their housing rights by third parties such as landlords, property developers, landowners, as well as corporations.¹⁷¹ This framework must include provisions protecting the population from land and property speculation,¹⁷² a phenomenon that is prevalent in Kenya and which is solely responsible for the high housing and rental prices that have made adequate housing unaffordable for the majority of Kenyans. The duty to protect further requires the State put in place and effectively enforce legislation and other measures to prevent discrimination, especially discriminatory customary inheritance as well as matrimonial property practices that affect women's access to land, property and housing.¹⁷³ The duty also encompasses the responsibility of the State to protect people from unlawful and unprocedural evictions by third

equality of treatment, principles of non-discrimination, the right to privacy of the home, among other relevant rights.

¹⁶⁸ General Comment No. 7, para. 9.

¹⁶⁹ General Comment No. 7, para. 10.

¹⁷⁰ General Comment No. 4, para 10. See also OHCHR & UN-Habitat (n 64 above) 31.

¹⁷¹ OHCHR & UN-Habitat (n 64 above) 33. See also *SERAC v Nigeria* (n 38 above) para. 61, where the African Commission acknowledges this and further states that where an infringement has occurred, the government should act to stop it and to ensure access to legal remedies.

¹⁷² CITEM (n 3 above) 20.

¹⁷³ OHCHR & UN-Habitat (n 64 above) 33.

parties as well as to provide adequate legal and equitable remedies in cases of such evictions which include compensation or restitution.¹⁷⁴

Further to this, the State must regulate financial loan and mortgage practices by banks and financial institutions to ensure stability of lending rates, protection of mortgage debtors as well as ensure non-discrimination in access to housing financing. This duty was emphasised by the Colombian Constitutional Court (CCC) in the *Mortgage* cases, which concerned a situation of rising interest rates in the context of declining wages in a financial crisis that had seen over 200, 000 mortgagees either defaulting or being in danger of defaulting and losing their homes.¹⁷⁵ The Court made orders restructuring the entire mortgage sector, orders which imposed specific caps on interest rates in housing, requiring that they be no higher than the lowest real interest rates being charged in the financial system; banned capitalisation of interests as well as prepayment penalties in mortgages; and required government bailout of mortgage debtors as well as those in danger of defaulting.¹⁷⁶ The intervention of the Court has been termed fairly successful, as it was able to initiate far-reaching reforms in the housing finance sector that was more favourable to debtors, and thus more in line with the realisation of the right to adequate housing.¹⁷⁷

The duty to protect has also been developed in the South African context, in relation to the horizontal application of the Bill of Rights, to ensure State protection of individuals from the infringement of their rights by third parties.¹⁷⁸ This development occurred in a delict case of

¹⁷⁴ General Comment No. 7, paras. 9-10; CITEM (n 3 above) 20; UNHRP Report (n 16 above) 22.

¹⁷⁵ For a discussion of these cases, see D Landau & JD Lopez-Murcia 'Political institutions and judicial role: An approach in context, the case of the Colombian Constitutional Court' (2009) 55, at 76ff, available at http://works.bepress.com/julian_lopez_murcia/26 (accessed on 26 September 2012).

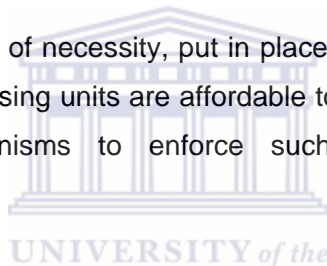
¹⁷⁶ Landau & Lopez-Murcia (n 175 above) 77-78.

¹⁷⁷ As above.

¹⁷⁸ For an extensive discussion of this jurisprudence, see AJ van der Walt 'Transformative constitutionalism and the development of South African property law (part 1)' (2005) *Journal of South African Law* 655, at 679ff; Van der Walt 'Transformative constitutionalism and the development of South African property law (part 2)' (2006) *Journal of South African Law* 1, where he extends the discussion in part 1 with the German system as a comparator, and he argues that the emergence of the duty to protect is a paradigm shift from the liberal image of the State as threat to fundamental rights to a new image of the State as a guarantor of fundamental rights. He states that the central idea of the concept is that:

Carmichele, where the SACC called for the development of the common law to reflect the constitutional obligation of the State to protect fundamental rights.¹⁷⁹ The reasoning by the SACC in the *Carmichele* case was applied by the SA Supreme Court of Appeal in the *Modderklip* case, a case which concerned the inability of a landowner to evict illegal occupiers on his land because they had nowhere else to go.¹⁸⁰ The Supreme Court held that the occupation was due to the State's failure to realise and fulfil the occupiers' constitutionally entrenched housing rights, and was thus, by extension, a failure by the State to fulfil its duty to protect the property rights of the landowner from violation by third parties.¹⁸¹ The Supreme Court of Appeal thus ordered the State to pay damages to the landowner until alternative accommodation was secured for the occupiers.¹⁸² Andre van der Walt contends that this is an important development in the protection of fundamental rights in a globalised world as it reflects a response to the increasing exercise of State or quasi-State powers by individual private parties such as multinational corporations.¹⁸³

The State must therefore, of necessity, put in place effective measures to regulate the housing market to ensure that housing units are affordable to the majority of the population and to establish competent mechanisms to enforce such regulations.¹⁸⁴ This duty was



[t]he State, through private law statutes and through civil law adjudication, has to protect the fundamental rights of individual citizens against all infringements, including those by other private persons, at 11.

¹⁷⁹ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para. 32.

¹⁸⁰ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA).

¹⁸¹ *Modderklip*, paras. 26-27, where the Court further stated that 'Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties'. See also AJ van der Walt 'The State's duty to protect property rights owners v the State's duty to provide housing: Thoughts on the *Modderklip* case' (2005) 21 *South African Journal of Human Rights* 144, at 155-156.

¹⁸² As above.

¹⁸³ Van der Walt – Transformative Constitutionalism Part 2 (n 178 above) 11.

¹⁸⁴ See Final Report of the Special Rapporteur on the Right to Adequate Housing (n 95 above) para. 7, where he contends that the acquiescence and complicity of States in allowing unfettered dominance of

acknowledged by the European Court of Human Rights in the *James and others* case where the Court noted that 'modern societies consider housing of the population to be a prime social need, the regulation of which cannot be left entirely to the play of market forces'.¹⁸⁵

To achieve the requisite regulation, the Kenyan State must, as a priority, undertake amendments to the Rent Restriction Act to enhance its pecuniary reach, and to also ensure the efficiency of the Tribunal to deal with rent disputes between tenants and landlords as well as reduce instances of arbitrary and unsustainable rent increases, an effort that is underway with the drafting of the Tenant and Landlord Bill, 2007, as discussed in section 3.2 above. For the informal settlements, the government must enhance their recognition, ensure security of tenure and also ensure the regularisation of the landlord-tenant agreement by bringing them under the provision of the Rent Restriction Act.

iii) Duty to fulfil

The duty to fulfil is a positive duty of the State and it is divided into three components, being the duty to facilitate, promote and provide.¹⁸⁶ It has been acknowledged that the State on its own cannot fulfil the duty to provide adequate housing to the entire population.¹⁸⁷ This does not,

the market over housing and property rights is one of the main challenges to access to adequate housing by low and middle income individuals and groups.

¹⁸⁵ *James and Others v the United Kingdom*, European Court on Human Rights, series A, vol. 98 (Judgement of 21 February 1986), para. 47, Quoted in Leckie – The human right to adequate housing (n 17 above) 160.

¹⁸⁶ See UNHRP Report (n 16 above) 23, which summarises this duty as requiring public expenditure and resource allocation; State regulation of the economy, especially the land and housing sectors; provision of housing subsidies; monitoring of rent levels and other costs; the provision of public housing, basic services and related infrastructure; as well as the adoption of taxation and subsequent redistributive measures.

¹⁸⁷ See General Comment No. 4, para. 14, which provides that experience has shown the inability of governments to fully realise the right to housing through publicly built housing; OHCHR & UN-Habitat (n 64 above) 6, who argue that the expectations of governments to build housing for entire populations is a misconception of the right to adequate housing; UNHRP Report (n 16 above) 17-19, which undertakes an analysis of this issue, contending that even though States are not legally obliged to provide housing to everyone, the duty is incumbent on them to provide housing in special instances of vulnerability or inability of people to access housing using their own resources; and Leckie – Where it matters most (n 17

however, absolve the State from its responsibility with regard to the right to adequate housing. The State, in its *duty to fulfil (facilitate)*, thus has a responsibility to put in place a conducive legislative, policy and programmatic framework to enable people to meet their own housing needs, as well as engender the role of the private sector in the realisation of the right to adequate housing.¹⁸⁸ This approach borrows from the “enabling approach” which was developed in the *Global Shelter Strategy to the Year 2000* by the UN Commission on Human Settlement,¹⁸⁹ and reaffirmed in the Habitat Agenda,¹⁹⁰ and which calls for the employment of the full potential and resources of all societal actors in the provision of adequate housing.¹⁹¹ This approach includes strategies such as private-public partnerships in the construction of housing and the provision of relevant services; social housing, a form of low cost rental or cooperative housing for low income groups;¹⁹² and the provision of housing finance and subsidies.¹⁹³

above) 22. A practical example can be seen in the South African context where, even though the government has undertaken a massive housing project, building over 1, 916, 918 houses, to provide housing to approximately 7, 859 363 people, and also approving 2, 784, 675 subsidies benefitting approximately 1, 698, 788 people between 1994 to 2005, the housing backlog is still heavy with very many applicants having been on a housing waiting list for over 15 years, see McLean - Housing (n 49 above) 55-1 & 55-18. See also SERI (n 94 above) 7, which acknowledges an increase in the backlog from 1.5 million units in 1994 to 2.1 million units in 2010, and generally section 8 of the report which provides a more extensive discussion on housing delivery and backlogs.

¹⁸⁸ General Comment No. 4, paras. 14 & 15. See also *Grootboom*, para. 35, where the SACC acknowledged that the obligation to provide adequate housing does not only rest with the State, but that other societal actors also had the obligation to contribute to the realisation of the right, and that they must be enabled, through the adoption of relevant legislative and other measures, to contribute towards the realisation of the right.

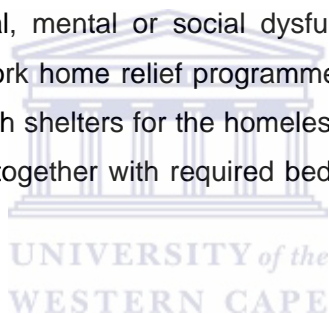
¹⁸⁹ UNGA ‘Global Strategy for Shelter to the Year 2000, A/RES/43/181’ (December 1988) para. 2(a), available at http://www.unhabitat.org/downloads/docs/1393_76192_other1.htm (accessed on 26 September 2012).

¹⁹⁰ Habitat Agenda, paras. 3, 6, 18, 44-45, 53, 58-64, among others.

¹⁹¹ See Leckie - Towards an appropriate approach (n 125 above) 545-46, where he discusses this approach. See also Leckie – Where it matters most (n 17 above) 33-34, where he calls for the refinement of the enabling approach to ensure that the State retains sufficient control of the housing sector and not leave it entirely to the market forces to the detriment of citizens.

¹⁹² For an elaboration of the concept of social housing in the context of South Africa, see SERI (n 94 above) 51ff.

The *duty to fulfil (promote)* requires of the State to take positive steps to advance the right to adequate housing.¹⁹⁴ The *duty to fulfil (provide)* requires the State to directly provide housing for the poor, vulnerable and marginalised individuals and groups who, for reasons beyond their control, are not able to provide housing for themselves and their families.¹⁹⁵ The duty to provide is exemplified by the United States case of *Callahan v Carey*, a case for the provision of shelter to homeless men in Manhattan which sought a temporary mandatory injunction to order State officials to provide the applicants and other similarly placed individuals with lodging and meals.¹⁹⁶ The New York Supreme Court held that the applicants were entitled to shelter in accordance with article XVII of the New York State Constitution which declared that ‘the aid, care and support of the needy are public concerns and shall be provided by the State...’, and ordered the responsible officials to provide them with the same.¹⁹⁷ The Court order led to a consent judgment in which the State of New York undertook to provide shelter to the needy who apply for it provided they met two criteria, that is: (a) they were in need of temporary shelter due to physical, mental or social dysfunction, or, (b) they met the need standard to qualify for the New York home relief programme.¹⁹⁸ The consent judgment further provided extensive standards which shelters for the homeless must meet, which included a bed of a minimum width of 30 inches together with required bedding, storage space and a laundry



¹⁹³ See Habitat Agenda, para. 61 for the full list of strategies.

¹⁹⁴ SERI (n 94 above) 15. In many instances, the duty to promote is often taken as an independent duty on its own. This is the case in the Kenyan Constitution which, in article 21(1), recognises the obligations of the State as encompassing the duty to observe, respect, protect, promote and fulfil. In this thesis, the duty to observe is subsumed under the duty to respect and the duty to promote is taken as a part of the duty to fulfil, thus dovetailing with the tripartite typology which has been used to analyse States' SER duties at the international level.

¹⁹⁵ UNHRP Report (n 16 above) 23. This is one of the special circumstances in which the State is expected to actually provide housing for people, in accordance with the analysis in the UNHRP Report at pages 17-19

¹⁹⁶ *Callahan v Carey*, No. 79-42582 (Sup. Ct. N.Y. County, Cot. 18, 1979), available at <http://www.escri-net.org/docs/i/399028> (accessed on 14 November 2012).

¹⁹⁷ As above.

¹⁹⁸ The Callahan consent decree, para. 1, available at http://www.escri-net.org/sites/default/files/callahanconsentdecree_0.pdf (accessed on 14 November 2012).

unit.¹⁹⁹ It has been documented that the Callahan Degree has had an extensive progressive influence in the provision of shelter to the homeless in New York City and the courts have over the years used the consent judgment to enhance the protection of the shelter rights of the homeless.²⁰⁰

The obligations of States in relation to housing, as discussed above, were neatly summarised by the United Nations Housing Rights Programme in table 1 below.



¹⁹⁹ Callahan consent decree, paras. 2-6. For a more elaborate discussion of the Callahan case, see Nolan (n 165 above) 6.

²⁰⁰ For an extensive account of this, see Coalition for the Homeless 'The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter' available at <http://www.coalitionforthehomeless.org/pages/the-callahan-legacy-callahan-v.-carey-and-the-legal-right-to-shelter> (accessed on 14 November 2012).

Box1: Housing Rights Obligations²⁰¹

<i>To Respect</i>	<i>To Protect</i>	<i>To Promote</i>	<i>To Fulfil</i>
Prevention of Illegal Evictions	Preventing Violations of Housing Rights	Develop National Housing Rights Strategies	Combatting, Reducing and Eradicating Homelessness
Prevention of All Forms of Discrimination	Ensuring Domestic Legal and Other Remedies and the Domestic Application of Int. Law	Develop Benchmarks of Full Realization	Increase and Properly Target Public Expenditure on Housing
Prevention of any Measures of Retrogressivity	Ensuring Equality Rights for All Groups	Legislative Review and Recognition of Housing Rights	Adequate and Habitable Housing for All
Housing-Based Freedoms	Access for All to Affordable Housing and the Development of an Affordability Benchmark	Security of Tenure	Develop Minimum Physical Housing Standards
Right to Privacy and Respect for the Home	Accessibility of Housing to Disadvantaged Groups Requiring Special Measures	Focus on the Rights of Vulnerable Groups	Provision of All Necessary Services and Infrastructure
Popular Participation in Housing	Democratic Residential Control of Housing	Access to Housing Information	Popular Housing Finance and Saving Schemes
Respecting the Cultural Attributes of Housing	Safeguarding Residential Stability	Ensuring a Sufficient Supply of Affordable Land	Social Housing Construction

²⁰¹ Commission on Human Rights, 'Activities of the United Nations Centre for Human Settlements (Habitat): Progress report of the Executive Director, HS/C/17/INF/6' (May 1999), para. 77, available at http://www.unhabitat.org/downloads/docs/1986_44675_inf6.htm (accessed on 27 September 2012).

7.5.3 The four-A's scheme

The obligations arising from the right to accessible and adequate housing can also be understood using the four-A's scheme framework, which is availability, accessibility, acceptability and adaptability. This framework recognises that the right to housing encompasses more than just a roof over one's head, and also relates to questions of dignity, personal safety as well as security.

i) Availability

Availability entails the requirement that for the right to adequate housing to be fully realised, there is a need for an adequate stock of housing to cover all the categories of people, especially low cost housing for middle and low income households.²⁰² It follows therefore that if sufficient stock of social or low cost housing is unavailable, the State will not be in a position to fully realise the right to adequate housing, thus engendering the obligation of the State to put in place sufficient measures to enhance the level of availability of housing stock for all segments of society.²⁰³ Much is required of the Kenyan government if it is to meet this obligation, as currently, of the 150, 000 housing units required in the urban areas annually to meet the population's housing needs, only 35, 000 units annually are being made available.²⁰⁴ Further to this huge backlog, it is estimated that only 20 per cent of these houses cater for low income earners, leaving low and middle income households bereft of accessible housing stocks and further fuelling the expansion of informal settlements.²⁰⁵ Despite plans by the Government to build over 200, 000 housing units annually by 2012 through construction incentives to the private sector, the establishment of a mortgage finance corporation, and the provision of

²⁰² See Council of Europe 'Recommendation of the Commissioner for Human Rights on the implementation of the right to housing' (June 2009), para. 3.1.2, available at <https://wcd.coe.int/ViewDoc.jsp?id=1463737&Site=CM> (accessed on 24 September 2012).

²⁰³ As above.

²⁰⁴ Government of Kenya 'Second Annual Progress Report on the Implementation of the First Medium Term Plan (2008-2012) of Kenya Vision 2030' (May 2011) 121, available at https://opendata.go.ke/api/file_data/zF8ojyoGLyfgA97OZZnZuRojLqC-FUCnDJgVVJOFD-4?filename=Vision%25202030%2520progress%2520report.pdf (accessed on 24 September 2012).

²⁰⁵ As above.

serviced land for low-cost housing,²⁰⁶ not much progress can be seen on the ground, especially with regard to the increase in stock of social and low-cost housing for the low and middle income earners, who form the majority of the population.²⁰⁷

Availability also entails the presence of requisite sanitation and other attendant services, infrastructure and facilities such as water, refuse disposal, electricity as well as adequate personal security.

ii) Accessibility

Accessibility can be viewed in terms of physical accessibility and economic accessibility. Physical accessibility takes into account the location of the shelter in relation to people's sources of income, schools, healthcare facilities and other basic necessities.²⁰⁸ It also requires improved accessibility to housing for special groups, especially people with disabilities, the elderly, persons living with HIV/AIDS, the terminally ill, among other special groups through the requisite modification of housing facilities and practices.²⁰⁹

²⁰⁶ Vision 2030 Second Annual Report (n 204 above) 122. According to Kenya's Housing Bill, 2011, low-cost housing is understood as a housing unit:

(a) comprising a minimum of two habitable rooms, cooking area and sanitary facilities and covering a gross floor area of between thirty to sixty square metres for each household with basic infrastructure and services of standards stipulated by law;

(b) of a cost of not more than two hundred times the prevailing statutory minimum wage.

²⁰⁷ The Government contends that the reasons for this difficulty are: lack of a comprehensive housing sector policy; inadequate human resource capacity; inadequate private-public partnerships due to lack of a comprehensive PPP framework; inadequate funding coupled with slow implementation of housing incentives; high cost of building materials; the effects of the 2007 post-election violence that led to massive destruction of houses as well as dampening investor confidence, see Vision 2030 Second Annual Report (n 204 above) 124.

²⁰⁸ See McLean - Housing (n 49 above) 55-16 -55-17, who contends that one of the four major points of criticism of the realisation of the right to housing in South Africa is the poor location of low-cost housing which are located far away from main economic centres and social services resulting in "mono-functional settlements". She argues that this reality in effect replicates, reinforces and perpetuates the distorted apartheid geography of the past.

²⁰⁹ UNHRP Report (n 16 above) 51-52.

Economic accessibility, on the other hand, touches on the affordability of shelter, and whether it is possible for people to access shelter while at the same time being able to acquire other relevant basic needs.²¹⁰ It entails the duty of the State to ensure that the percentage of housing-related costs is commensurate with income levels of the majority of citizens.²¹¹ Achieving this requires that the State put in place sufficient rent control measures to ensure that ordinary people are not priced out of available housing.²¹² Such a measure is severely lacking in Kenya at the moment as the Rent Restriction Act, the mechanism that was put in place to undertake the above responsibility, is too archaic and out of touch with the current realities in the housing sector.²¹³

Affordability also requires that the State puts in place a plan for the building of sufficient low-cost housing in strategic parts of the city to ensure that the housing needs of the poor are met as well as developing affordable housing finance schemes or housing subsidies to enable the poor and middle income populations to access adequate housing.²¹⁴ This is in line with the recommendations of the former Special Rapporteur on the Right to Housing, Miloon Kothari, urging States to expand budgetary allocations to housing, increase availability of social housing, adopt policies aimed at increasing housing subsidies for low-income groups, and to adopt

²¹⁰ See General Comment No. 4, para. 8(c) which provides that ‘personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised’ and that the State should put in place measures ‘to ensure that the percentage of housing-related costs is, in general, commensurate with income levels’. See also Final Report of the Special Rapporteur on the Right to Adequate Housing (n 95 above) paras. 14 & 30-35, who states that the lack of affordability, caused by land and housing speculation, rising rental and home prices, corruption as well as land grabbing and other illegal activities, is the main factor leading to homelessness; C Hartman ‘The case for a right to housing’ (1998) 9 *Housing Policy Debate* 223, at 225 & 231, who acknowledges the painful choice poor people have to make between food and housing, contending that excessive housing costs affects one’s ability to secure other basic essential goods and services.

²¹¹ Leckie – Where it matters most (n 17 above) 10, FN 14.

²¹² Craven (n 125 above) 338; UNHRP Report (n 16 above) 51.

²¹³ See section 3.2 above for a discussion of the limitations of the Rent Restriction Act.

²¹⁴ Craven (n 125 above) 338. See also Istanbul Declaration, para. 9, which entails the commitment of States to expand the supply of affordable housing by enabling socially and environmentally responsible markets, enhancing access to land and credit, as well as the provision of housing to those who are unable to participate in the housing markets; Habitat Agenda, para. 40(e)-(i).

policies regulating public and private rental markets as well as mortgage markets to ensure households do not pay more than 30 per cent of their income on housing.²¹⁵ Affordability has been a major concern raised by residents of informal settlements that have been earmarked for upgrading under the Kenya Slum Upgrading Programme (KENSUP) run by the Government in conjunction with UN-Habitat.²¹⁶ These concerns were recognised by the CESCR in its consideration of Kenya's Initial Report leading to a recommendation that Kenya:²¹⁷

Ensures that slum upgrading projects give priority to the construction of social housing which is affordable for disadvantaged and marginalized individuals and families and that affected communities are effectively consulted and involved in the planning and implementation of such projects.

As discussed above, affordability of the upgraded housing units should require that they are not priced at such a level as to make it impossible for the poor to afford their other basic essential goods and services.

iii) Acceptability

Acceptability entails the cultural adequacy or suitability of housing which requires that houses are constructed in a manner that takes into account the diversity of cultural identities.²¹⁸ Acceptability also entails the habitability of both the house itself and its surrounding areas, that is, it must comply with the requirements of safety, health and hygiene as well as offer the requisite basic amenities such as water, electricity and refuse disposal.²¹⁹ The quality of the housing structure must also be acceptable, as structurally deficient or inadequate housing often

²¹⁵ Final Report of the Special Rapporteur on the Right to Adequate Housing (n 95 above) para. 103.

²¹⁶ COHRE Report (n 6 above) 6 & chapter five.

²¹⁷ CESCR 40th & 41st Sessions Report (n 8 above) para. 383.

²¹⁸ See COHRE Report (n 6 above) 44, which acknowledges that in some Kenyan communities, it is a taboo for a male child to sleep in the same room as their mother and sisters, a concern that must be factored in if housing is to be adequate. An illustration is provided by the Australian case of *Balaiya v Northern Territory Government* (Decided in May 2004), brought by an indigenous man who complained that the allocation to him of a one bedroomed housing unit amounted to unreasonable direct discrimination based on his race as it failed to provide for his special accommodation needs as it would prevent him from engaging in cultural practices essential to his race as an indigenous person, see Nolan (n 162 above) 8-9.

²¹⁹ Council of Europe Recommendations (n 202 above) paras. 3.2.2 & 3.2.3.

leads to higher mortality and morbidity rates.²²⁰ This has been a challenge in Kenya due to the lack of sufficient monitoring of the available housing standards and building protocols, leading to the collapse of several housing units with adverse consequences to the health and property of inhabitants. There is therefore a need for legislative reforms that engender stricter building protocols, scrupulous and effective enforcement mechanisms, as well as harsher penalties to reign in unscrupulous private contractors who are driven by profits at the expense of public safety and security.

iv) Adaptability

Adaptability requires that the shelter is habitable in all weather conditions and that it adequately protects its inhabitants from the elements such as rain, cold, heat and other threats to health.

7.6 Dialogical constitutionalism and the role of courts in the realisation of the right to housing

The theory of dialogical constitutionalism, as discussed in chapters three and four above, acknowledges that the primary responsibility for the design and implementation of strategies for the realisation of the right to adequate housing belongs to the political institutions.²²¹ This duty was recognised, in the context of South Africa, by the SACC in the *Grootboom* case, where the Court held that courts should defer to the political institutions in this regard as it is not the province of the Court to second-guess the design of public policy by enquiring whether the measures adopted for the realisation of the right to housing are the most favourable or desirable.²²²

7.6.1 The requirement of dialogue in the realisation of the right to housing

The theory of dialogical constitutionalism envisages an active role for the citizen in the cooperative enterprise of the design, development, implementation and monitoring of the legislative, policy and programmatic framework for the realisation of the right to adequate housing by the political institutions. According to this theory, public participation in the design of

²²⁰ Craven (n 125 above) 346. A practical example of a subsidy system is exemplified by the practice in South Africa where low-income housing development has been financed primarily through subsidies. For a discussion, see McLean Housing (n 49 above) 55-6- 55-7.

²²¹ See the 2010 Kenyan Constitution, article 21(1).

²²² *Grootboom*, para. 41.

this implementation framework is a necessity, and failure to undertake societal consultation as well as to provide opportunities for genuine dialogue necessarily calls for the intervention of the courts as discussed below.

One of the major challenges to the realisation of the right to adequate housing in Kenya has been the lack of public participation as well as the insufficient relay of relevant information to the population affected by the government's legislative, policy and programmatic framework on housing.²²³ According to international best practices on the realisation of the right to adequate housing, public participation in the design of national housing strategies and their corresponding implementation framework is crucial as it secures trust, promotes collaboration and cooperation between all the relevant players within the housing sector, as well as cultivates a sense of ownership which ensures long-term sustainable commitment to the realisation of set housing objectives.²²⁴

The role of dialogue in the realisation of the right to housing is acknowledged by the CESCR which states that the design and development of the national housing strategy must engender public participation as well as genuine consultation with all members of the affected population, especially the homeless and inadequately housed populations as well as their representatives.²²⁵ The Committee contends that this is important as it enhances the relevance and the effectiveness of the resultant strategy as well as ensures a holistic approach to the protection of all the other attendant human rights.²²⁶ CESCR has further emphasised the importance of public dialogue and consultation in relation to protection against forced evictions, calling on State Parties to ensure that prior to eviction, especially of large groups, consultations with the affected persons are undertaken so as to explore feasible alternatives and to reduce

²²³ See for example COHRE Report (n 6 above) 26, which contends that people, especially those in informal settlements who were interviewed, want to be treated as partners in the design of the housing implementation framework on issues such as evictions, slum upgrading, land allocation, as well as the management and access to essential services. See also the *Endorois* case, paras. 17-20, 129-135, & 225-228.

²²⁴ COHRE Report (n 6 above) 28.

²²⁵ General Comment No. 4, para. 12.

²²⁶ As above. For a long list of rights and other social goods attendant to the right to adequate housing, see SERI (n 94 above) 12.

the necessity for the use of force.²²⁷ This reasoning has also been adopted by the SACC through the concept of “meaningful engagement” which the Court elaborated on in the cases of *PE Municipality*,²²⁸ *Olivia Road*,²²⁹ *Joe Slovo*,²³⁰ and *Abahlali*.²³¹ In their analysis of the jurisprudence of the SACC on “meaningful engagement” in the above cases, SERI summarises the requirements of the concept as follows:²³²

- The State is under an obligation to ‘meaningfully engage’ with those facing eviction to ascertain if they will be rendered homeless by an eviction and to determine what alternative accommodation can be provided. State institutions are obliged to engage meaningfully prior to taking a decision to institute eviction proceedings – *Olivia Road*;
- If engagement takes place after there has been a decision to institute eviction proceedings, it cannot be genuine or meaningful and proper engagement unless it includes taking into consideration the needs of those who will be affected, the possibility of upgrading the area *in situ* and the provision of alternative accommodation where necessary – *Abahlali*.
- No evictions should occur until the results of the proper engagement process are known – *Olivia Road*, *Abahlali*.

This requirement of public participation is one of the key objectives of Kenya’s National Housing Policy which provides that one of the aims of the policy is:²³³

²²⁷ General Comment No. 7, para. 13.

²²⁸ *Port Elizabeth Municipality*, paras. 36-39.

²²⁹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) 2008 (3) SA 208 (CC), Order paras. 1-4.

²³⁰ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2011] ZACC 8, order paras. 5 & 11.

²³¹ *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* (CCT12/09) [2009] ZACC 31, paras. 69 & 79. For a more in-depth analysis of these cases, see SERI (n 94 above) 17-27.

²³² SERI (n 94 above) 26-27. For a more elaborate discussion of the concept of “meaningful engagement” in the context of the theory of dialogical constitutionalism, see chapter three, section 3.5 above.

²³³ National Housing Policy (n 72 above) para. 13(p). See also para. 19 which provides as follows:

The poor people’s pragmatic approach to housing will be harnessed and put to maximum utility by community based organisations through effective and well defined popular participatory approaches. Community involvement as a planning tool will be advocated in all housing programmes targeting the poor.

To promote inclusive participation of the private sector, public sector, community-based organisations, non-governmental organisations, co-operatives, communities and other development partners in planning, development and management of housing programmes.

When governmental and non-governmental actors fail to provide adequate space for dialogue, or if they arbitrarily fail to consider the recommendations and views of the people in relation to the realisation of the right to adequate housing, the courts should play an important role of enforcing the public participation requirements in the Constitution and order appropriate remedies to ensure that the voices of people, including the poor, marginalised and vulnerable are included in housing processes.²³⁴

7.6.2 Role of the courts in the realisation of the right to housing

As a facilitator of dialogue, the court can play an important role in the realisation of the right to adequate housing, especially on the enhancing of the realisation of the State's duty to respect and protect the right to housing; the development of a conducive framework aimed at the progressive realisation of the right to adequate housing; the realisation of the minimum core content of housing rights for the most vulnerable and marginalised groups such as the homeless; and the protection of people from forced evictions that are contrary to international law, and which do not comply with the procedural requirements as is envisaged in the national eviction guidelines and the proposed Evictions and Resettlement Procedures Bill 2012.²³⁵ The role of the courts in this regard is envisaged by the CESCR which delineates the components of the right that are consistent with the provision of domestic legal remedies such as:²³⁶

- (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;
- (b) legal procedures seeking compensation following an illegal eviction;
- (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of

²³⁴ For a brief discussion of some of the remedial choices that engender dialogue and public participation in judicial decision-making, see chapter four, section 4.4.1 above.

²³⁵ For a brief elaboration of the provisions of this Bill, see section 7.3.2 above.

²³⁶ General Comment No. 4, para. 17. For a further delineation of these elements, see Commission on Human Rights, 'The Right to Adequate Housing: Final report submitted by Mr. Rajindar Sachar, Special Rapporteur' UN Doc. E/CN.4/Sub.2/1995/12, para. 95, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G95/129/50/PDF/G9512950.pdf?OpenElement> (accessed on 27 September 2012).

discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; (e) complaints against landlords concerning unhealthy or inadequate housing conditions, [as well as (d)] class action suits in situations involving significantly increased levels of homelessness.

The above delineation by the CESCR is in line with the work of the Special Rapporteur on the Right to Adequate Housing who outlined instances of State action or omissions that violate the right to housing to include the following: undertaking or condoning forced evictions; demolishing housing as a punitive measure; non-provision of essential services despite available resources; discrimination; adoption of legislation or policies inconsistent with the realisation of housing rights; repeal of legislation aimed at the realisation of housing rights; unreasonable housing budget reduction; overt prioritisation of high-income housing without concomitant focus on low-cost housing; allowing housing construction in unsafe sites; restricting freedom of organisation and expression for NGOs, CBOs and rent associations; failure to take steps for the realisation of housing rights in accordance with the ICESCR; failure to regulate housing markets; and the failure to integrate housing rights concerns in the development of macro-economic policies.²³⁷

It is clear from the above exposition that the violation of the right to adequate housing, just like the violations of the more traditionally court enforced civil and political rights is possible, and that the courts can thus undertake adjudication and provide effective remedies to ensure their respect, protection and fulfilment.²³⁸ Scott Leckie concurs, stating that an effective remedy in instances of violations is a central component of international human rights law

²³⁷ Commission on Human Rights, The right to adequate housing: progress report submitted by Rajindar Sachar, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/15, paras. 144-145, available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.1993.15.En?Opendocument> (accessed on 27 September 2012). For further guidelines as to violations of SERs of which the right to housing forms an integral part, see Maastricht Guidelines, Guidelines 14 & 15.

²³⁸ UNHRP Report (n 16 above) 68. They further affirm that judicial remedies can be made available for housing rights violations, at 72. See also Maastricht Guidelines, Guideline 22; Limburg Principles on the Implementation of Economic Social and Cultural Rights, para 7, UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987) 122–135, principle 19.

encompassing the entire corpus of human rights law, and forms an indispensable component of any effective strategy aimed at the realisation of housing rights.²³⁹

Further, the courts can play an especially significant role in the protection of people against forced evictions, which is widely acknowledged nationally and internationally as a *prima facie* violation of the right to adequate housing.²⁴⁰ The requisite safeguards to guide the courts in the protection of people from forced eviction are especially clear, having been extensively developed at the international and comparative domestic levels. Such safeguards can be found in the CESCR General Comment Number 7 which provides that evictions must be undertaken in strict compliance with international human rights law as well as in accordance with general principles of reasonableness and proportionality.²⁴¹ The Committee further delineates the requisite due process and procedural protection guidelines that should be followed when undertaking evictions, and which may help the courts when undertaking adjudication in eviction cases, as follows:²⁴²

(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

²³⁹ Leckie – Where it matters most (n 17 above) 26, footnote 47. He argues that judicial adjudication of housing rights is an important component of effective remedies, and that courts of law can be a driving force in the realisation of housing rights, at 27.

²⁴⁰ COHRE Report (n 6 above) 75; UNHRP Report (n 16 above) 74.

²⁴¹ General Comment No. 7, para. 14. See also COHRE Report (n 6 above) 67-68 and OHCHR & UN-Habitat (n 64 above) 9, which expound on some of the other human rights violations resulting from the violation of the right to adequate housing, and especially from forced evictions.

²⁴² General Comment No. 7, para. 15. See also OHCHR & UN-Habitat (n 64 above) 5-6. Similar provisions are encompassed in the Evictions and Resettlement Procedures Bill, 2012 as discussed in section 7.3.2 above.

These guidelines can further be complemented by other principles of adequate resettlement developed by other international organisations such as the *UN Comprehensive Human Rights Guidelines on Development-Based Evictions and Displacements*.²⁴³

Precedents exist where the courts have come to the aid of persons facing evictions, with positive results. A case in point is *Maina Ngare Njeru and 87 Others v Kenya Railways Corporation*,²⁴⁴ which was filed by 88 people threatened with eviction by the Railway Company. The Court issued an injunction stopping the Railway Company from conducting the evictions, an order which led to dialogue and negotiations between the parties resulting in the resolution of the conflict.²⁴⁵ Similarly, in the case of *John Samoei Kirwa & 9 Others v Kenya Railways Corporation*,²⁴⁶ the Court granted a temporary injunction and required that due process, including consultation with the Plaintiffs and all the other people to be affected by the demolitions be conducted by the Respondents. The judgment of the Court was especially sensitive to the plight of the Plaintiffs with the order stating the following:²⁴⁷

The Managing Director of the defendant should have heard the plaintiffs before issuing the notice. It should be noted that human compassion must soften the rough edges of justice in all situations. The eviction of squatters not only means their removal from their houses but the destruction of the houses themselves. The humbler the dwelling, the greater the suffering and more intense the

²⁴³ *UN Comprehensive Human Rights Guidelines on Development-Based Displacements*, A/HRC/4/18 available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf (accessed on 27 September 2012). It requires States to provide a legal framework prohibiting forced evictions; undertake a holistic and comprehensive prior assessment of any project that might lead to evictions and explore less harmful alternatives; engender participation of all sectors, especially those to be directly affected by the project; ensure that evicted persons have access to adequate food, potable water and sanitation, basic shelter and housing; livelihood sources, essential medical services, education and childcare facilities, among other things.

²⁴⁴ *Maina Ngare Njeru and 87 Others v Kenya Railways Corporation* (High Court of Kenya, Nairobi) HCCC No. 189 of 2004. See also *Gusii Mwalimu Investment Co. Ltd and Two Others v Ms Mwalimu Hotel Kisii Ltd*, Civil Appeal No. 180 of 1995, where the Court held that an eviction without a court order was illegal.

²⁴⁵ COHRE Report (n 6 above) 59.

²⁴⁶ *John Samoei Kirwa & 9 Others v Kenya Railways Corporation* (High Court of Kenya, Bungoma) HCCC No. 65 of 2004 (unreported).

²⁴⁷ See COHRE (n 6 above) 59.

sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done.

The Court further went on to say that where people have lived on a piece of land for a considerable period of time and made improvements to the land, they should be provided with alternative accommodation before they are evicted.²⁴⁸ The Court based its reasoning on section 16(3) of the Kenya Railway Corporation Act which provides the procedure for evictions, holding that the Railway Company had failed to abide by the legal requirements in accordance with that section.²⁴⁹ This injunction, granted without a constitutionally entrenched right to adequate housing mirrors the judgment of the SACC in the *PE Municipality* case where the Court held that:²⁵⁰

[a] court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.

It is also in line with CESCR General Comment Number 7 which provides that evictions should not lead to homelessness or precipitate the violations of other human rights, and that States must provide, to the maximum of their available resources, adequate alternative housing, resettlement or access to productive land to those affected by evictions.²⁵¹

Though the courts can play an important role in the realisation of the right to adequate housing, the task is by no means free of challenges. One of the most enduring challenges in the adjudication of housing rights is that adjudication will, of necessity, engender conflict between the right to adequate housing and the right to property, a conflict that must be resolved by the judges espousing a holistic understanding of the entire Bill of Rights and the Constitution in general. In international and comparative law, this balance has steadily shifted towards the protection of the right to adequate housing when there is a conflict with traditional rights

²⁴⁸ As above.

²⁴⁹ As above.

²⁵⁰ *Port Elizabeth Municipality*, para. 28. For further analysis of this aspects of the case, see Nolan (n 162 above) 4-5.

²⁵¹ General Comment No. 7, para. 16.

protecting private property.²⁵² The UNHRP contends that in these instances, the public interest of securing housing rights trumps property rights.²⁵³ The UNHRP Report quotes the UN Special Rapporteur on the Right to Housing who similarly states as follows:²⁵⁴

Under international treaties where the right to property is protected, and in countries in which it is a fundamental right, it has never been doubted that the right to property must yield to the greater social good of the community.

This has been the balancing jurisprudence emanating also in Europe where the former European Commission on Human rights found in *Z. and E. v Austria*, that the restriction of a landlord's right to give notice to a tenant was a justifiable regulation of property within article 1 of Protocol 1 of the European Convention on Human Rights as it pursued a legitimate social policy, that is, the protection of the interest of tenants in a situation of shortage of affordable housing.²⁵⁵

A more nuanced approach has been developed by the SACC in the context of forced evictions in South Africa, especially in relation to section 26(3) of the SAC and the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act, 1998 (PIE).²⁵⁶ In the *PE Municipality* case, the Court developed a 'constitutional matrix' aimed at balancing the conflict between property rights and housing rights, stating the non-absolute nature of property rights and its

²⁵² See the African Charter, article 14 which recognises that the right to property can be encroached upon in the interest of public need or in the general interest of the community so long as this is done in accordance with laid down law. As has been discussed above, the integral human interests protected by the right to accessible and adequate housing meets the standard of public need and general communal interest provided for by the African Charter, and so communal housing needs can legitimately require the encroachment on property rights.

²⁵³ UNHRP Report (n 16 above) 16.

²⁵⁴ Second progress report by Rajindar Sachar (n 126 above), paras. 67-76.

²⁵⁵ *Case of Z. and E. v Austria*, App. No. 10153/82, quoted in UNHRP Report (n 16 above) 86.

²⁵⁶ For an extensive analysis of this jurisprudence, see Liebenberg - Adjudication under transformative constitution (n 13 above) 268ff; van der Walt – Transformative constitutionalism (n 178 above) 674ff; van der Walt – Thoughts on *Modderklip* (n 178 above) 144-161; T Roux 'Continuity and change in a transforming legal order: The impact of section 26(3) of the constitution on South African law' (2004) *South African Law Journal* 466-492; and S Wilson 'Breaking the tie: Evictions from private land, homelessness and a new normality' (2009) 126(2) *South African Law Journal* 270-290.

limitation in relation to the promotion of the public interest.²⁵⁷ With the entrenchment of housing rights in the Constitution, the Court acknowledged the change in the judicial role from the traditional common law approach, holding as follows:²⁵⁸

The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

The Court further held that its new role required it 'to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern'.²⁵⁹ In her analysis of the *PE Municipality* case, Sandra Liebenberg contends that justice and equity should be the guiding lights of the courts in dealing with the conflict between property rights and housing rights.²⁶⁰

²⁵⁷ *Port Elizabeth Municipality*, para. 16.

²⁵⁸ *Port Elizabeth Municipality*, para. 23. The Court further held that in the resolution of this conflict between property and housing rights, the procedural and substantive aspects of justice and equity must be taken into account, and thus a requirement that people facing evictions be genuinely consulted and allowed to participate in the decision-making process as to the most just resolution of the conflict, at paras. 39-41.

²⁵⁹ *Port Elizabeth Municipality*, para. 37, as per Justice Sachs who further relied on the principle of 'ubuntu' which combines individual rights with a communitarian philosophy envisioning the need for human interdependence, respect and concern. The Kenyan Courts, in the case of *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition No. 15 of 2011, available at http://kenyalaw.org/Downloads_FreeCases/83548.pdf (accessed on 2 April 2013), have also shown, in the context of the right to education, that it can adopt a progressive balancing of competing rights. In this case, the High Court held that a government policy which accorded more opportunities to students from public primary schools as opposed to those in private primary schools in joining national secondary schools was legitimate as it was affirmative action aimed at enhancing equity and the achievement of social justice, as reliance on merit alone had previously occasioned unfairness and prejudice to students from public primary schools, at 11.

²⁶⁰ Liebenberg - Adjudication under transformative constitution (n 13 above) 277-79. She contends that these principles apply even in the context of eviction applications brought by private landowners as against unlawful occupiers. To elaborate she extensively discusses the *Modderklip* case, among other

Henk Botha contends that this balance between the right to housing and right to property is based on a relational and dialogical conception of rights, which is contrary to a conception of rights as rooted in abstract individualism, and which entails an expression of connectedness between the self and others, acknowledging that the self is forged within a network of social relationships situated within a concrete context.²⁶¹ The dialogical aspect of the relational conception of rights is an acknowledgment that rights must not be understood as fixed boundaries, but that their content and limits must be subject to debate through political and legal discourse.²⁶² He contends that this understanding of rights is better suited to the democratic-transformative aspirations of the Constitution, and is better capable of transforming the legal, social and political power relations with the aim of achieving social justice.²⁶³

The Kenyan courts have already been faced with the apparent conflict between the right to accessible and adequate housing in article 43(1)(b) and the right to property in article 40, with two judges adopting divergent interpretations, Justice JB Ojwang' (now of the Supreme Court of Kenya), in the *Charo* case, taking a restrictive and conservative interpretation of the right to housing,²⁶⁴ and Justice Daniel Musinga, in the *Muthurwa*²⁶⁵ and *Waithera*²⁶⁶ cases, taking a progressive and purposive interpretation of the right to housing. The *Charo* case concerned an application by about 270 households for an interim injunctive order restraining the Respondents from forcefully evicting them without the provision of alternative land or accommodation in contravention of the right to housing as is enshrined in article 43(1)(b) of the Constitution as well as a conservatory order to maintain the *status quo ante* pending the hearing and determination

cases, calling the resultant jurisprudence a 'transformative approach' to the resolution of the conflict between housing rights and property rights, see 281-292.

²⁶¹ H Botha 'Metaphoric reasoning and transformative constitutionalism (Part 2)' (2003) *Journal of South African Law* 20, at 23-25.

²⁶² As above.

²⁶³ Botha (n 261 above) 25.

²⁶⁴ *Charo Wa Yaa v Jama Abdi Noor & 5 others*, High Court of Kenya at Mombassa Misc. Civil Application No. 8 of 2011 (*Charo* case)(unreported – on file with author).

²⁶⁵ *Satrose Ayuma and others (on behalf of Muthurwa residents) v Kenya Railways Staff Benefit Scheme and others*, High Court of Kenya at Nairobi, Petition No. 65 of 2010 (*Muthurwa* case) (unreported – on file with author).

²⁶⁶ *Susan Waithera Kariuki and others v The Town Clerk, Nairobi City Council and others*, High Court of Kenya at Nairobi, Petition case No. 66 of 2010 (*Waithera* case)(unreported – on file with author).

of the main case.²⁶⁷ The Petitioner specifically urged the Court to take into account the judicial paradigm shift in the interpretation and application of the law of trespass and evictions required by the adoption of the transformative Constitution and as is envisaged in article 20(3) of the Constitution as follows:²⁶⁸

[The Court should adopt] a novel, progressive judicial task [and thus] consider and grant the prayers sought [as] these rights are of a provenance...heretofore not known to the [law] of Kenya, and it is incumbent on this Honourable Court to interpret the new parameters under which these newly-acquired rights may be enjoyed, enforced and protected...[The] Court and its officers [have to] recognise [a] paradigm-shift that the Constitution [...] seeks to bring about, rather than...seek to interpret new rights on the basis of old law.

Further, the Petitioners, through a subsequent application, requested the Court to allow them to construct makeshift shelters on the property so as to protect themselves and their families from the impending long rains which would have adverse consequences to their health and well-being.²⁶⁹ The Respondents, on the other hand, argued that the land in question was private land

²⁶⁷ See *Charo* case, at pages 2-4 which details the case of the Petitioner. The Petitioner asked the Court to order that due process, taking into account the constitutional values of human dignity and social justice, be followed in the eviction of the households, taking into account their constitutionally entrenched fundamental right to housing, at 3-4.

²⁶⁸ *Charo* case, pages 4 & 12. The Counsel for the Petitioner urged the Court to balance the competing right to housing and property on a scale of the constitutional values that underlie the Constitution, contending that the enjoyment of the right to property must be for the greater good of the entire community, at 11-12. For similar arguments in the context of SA, see Van der Walt – Thoughts on *Modderklip* (n 181 above) 149-150, who advocates a nuanced interpretation that recognises and accommodates both property and housing rights. He argues that since eviction is a strong private-law remedy, it entails tension between the transformative aspirations of the Constitution, on the one hand, and private law with its propensity to restrict change and thus preserve the *status quo ante*, on the other hand. He thus advocates a paradigm shift which views evictions as a fundamental constitutional law matter and which requires that courts develop private law so as to conform to the dictates of the constitutional rights, values and principles entrenched in the Constitution. These arguments are applicable to the Kenyan situation due to the similarity of constitutional provisions on housing and property rights in the two jurisdictions.

²⁶⁹ *Charo* case, pages 8-10. The negative and condescending judicial attitude to SERs in this particular instance is indicated by the judge's reference to this application as being 'based on expediency and on transient ecological conditions', at 8. This attitude is further reflected later in the ruling when the Court

subject only to private law,²⁷⁰ and that the State was not responsible for the applicants' lack of shelter and was thus under no obligation to provide alternative accommodation or shelter to the applicants.²⁷¹

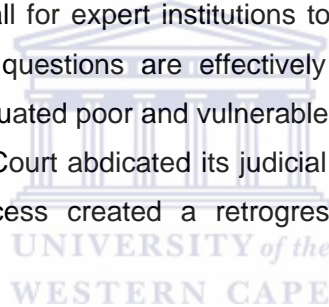
The *Charo* Court declined to espouse a progressive and purposive interpretation of the right to adequate housing, calling it an *aspirational right*, and also failed to adopt a transformative concept of adjudication which reflected the paradigm shift as was advocated by

dismisses the Petitioner's application, with costs, contending that it has no jurisdiction to entertain the same as it is not related to the main suit, and that its adjudication 'would be inconsistent with the constitutional obligation of the Court, to resolve disputes justly, in accordance with the law, including the existing law of jurisdiction', at 19-21. This reasoning is not only reflective of a lack of appreciation of the meaning, content and extent of the right to housing as discussed in section 7.4 above, but is also reflective of a lack of understanding of the continuum of obligations that the right to housing entails, which are discussed more substantively in sections 7.5 of this chapter. A proper understanding of the content of the right to housing would have enabled the judge to appreciate that emergency temporary shelter or accommodation for people in crisis situations was an intrinsic component of the right to housing and was thus intricately related to the main suit, which was against the forced eviction of the applicants. This particular understanding would have mandated the Court to adjudicate the relevant application and to flesh out the responsibility of the State to provide temporary accommodation to the applicants so as to protect them from the elements pending the final determination of the main case. Failure to adjudicate the application, taking into account the fact that the untenable position of a lack of proper shelters for the applicants was due to the actions of the 1st Respondent to demolish their houses, was an abdication, by the Court, of its judicial responsibility.

²⁷⁰ This argument was the basis of the Court's judgment, as the Court basically asserted that private property rights trumped housing rights, and there was thus no violation of the right to housing, see *Charo* case, pages 19-20.

²⁷¹ *Charo* case, pages 6-8 & 15-17. See Van der Walt – Thoughts on *Modderklip* (n 181 above) 150-151, who, in analysing the *Modderklip* judgments of both the High Court and Supreme Court of Appeal, avers that the fundamental interpretive move which informed the judgments was the recognition of the duty of the State to provide alternative land or accommodation for the occupiers taking into account their fundamental constitutional right to housing once they had been evicted from the property. This was reflective of the new constitutional paradigm which reconciled the private property rights of landowners *vis-à-vis* the State's constitutional duty towards people in crisis situations or threatened with homelessness. The Kenyan State thus cannot escape this obligation to provide alternative accommodation.

the Petitioners.²⁷² In the end, the court failed to adopt a balanced normative framework recognising the important human interests underlying both property rights and housing rights, instead simply reaffirming the privileged position of property rights under common law. This, in effect watered down the transformative potential of the entrenched housing rights in providing the requisite protection to the poor, marginalised and vulnerable groups faced with real threats of homelessness.²⁷³ The Court's reasoning for this was that the adoption of such a paradigm shift required an extensive and substantial body of sociological and comparative legal research material, which had not been laid before the Court.²⁷⁴ This reasoning flies in the face of the mandate of the Court as the guardian of the Constitution and as the protector of fundamental rights. According to the theory of dialogical constitutionalism advocated in this thesis, the courts must play an active role as facilitators of dialogue in the development, interpretation and elaboration of the meaning of normative constitutional provisions. The Court in this instance had the responsibility, as well as requisite judicial tools, to either call for further evidence from the Petitioner or on its own motion call for expert institutions to make submissions in the case so that the important constitutional questions are effectively dealt with for the benefit of the Petitioner and all other similarly situated poor and vulnerable people in crisis situations. In failing to do so, it is submitted that, the Court abdicated its judicial responsibilities, to the detriment of the Petitioners, and in the process created a retrogressive jurisprudence lacking in the



²⁷² *Charo* case, page 12. This failure of the Court to adopt a transformative and progressive approach to SER interpretation and adjudication is due to the influence of the classical liberal legal culture subsisting in Kenya prior to the enactment of the 2010 Constitution. If the courts are to facilitate the realisation of the transformative potential of the Constitution, there is need for judges, practitioners and other participants in SER adjudication to revisit and refashion this formalistic liberal legal culture and adopt creative as well as innovative responses to SER claims, see Liebenberg - Adjudication under transformative constitution (n 13 above) 43-44.

²⁷³ In this particular context, the Court should have had regard to the comparative SACC case of *Port Elizabeth Municipality*, paras. 17-23 & 30-38, where that court warned against the abstract and mechanical privileging of either property or housing rights, and instead called for courts to strive for a principled and just solution which balances and reconciles the competing constitutional interests in the context of the specific case.

²⁷⁴ *Charo* case, page 12.

protection of the right to housing for people in crisis situation who face forced evictions, and subsequently, homelessness.²⁷⁵

The Court further proceeded to hold that the applicants had already been evicted by an earlier lawful court order without analysing the lawful nature of the previous order of eviction.²⁷⁶ On this particular issue, the *Charo* Court failed to take into account international and comparative law requirements for a lawful eviction. It was open to the Court to assess the previous eviction order taking into account the persuasive international and comparative law jurisprudence such as the General Comments Number 4 and 7 of the CESCR as well as the UN Guidelines on Evictions, which provided specific procedural requirements for an eviction to be considered legal and procedural. It should also have undertaken a comparative analysis of similarly situated national jurisdictions such as South Africa where the courts have now consistently held that ‘a court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative accommodation is available, even if only as an interim measure’.²⁷⁷ If the Court had undertaken this analysis, it would have had no trouble adopting a paradigm shift in relation to forced evictions in accordance with the prayers of the Petitioner’s counsel, and would have set aside the previous eviction order, which had not met the constitutional requirements needed for a just and humane eviction.

Lastly, the *Charo* Court asserted that the right to housing was an aspirational right, subject to the standard of progressive realisation,²⁷⁸ and further failed to discuss the obligations

²⁷⁵ See Liebenberg - Adjudication under transformative constitution (n 13 above) 46, who contends that courts have the responsibility to affirm the fundamental nature of SERs because judges are:

[t]rained to interpret the nature and scope of rights, to systematically analyse evidence, to listen carefully to all parties to the litigation, to explore the implications of their arguments with them, to research relevant precedent, academic literature, international and comparative foreign law, and ultimately to write a judgment which provides transparent [and] comprehensive reasons for the conclusions reached.

²⁷⁶ *Charo* case, page 17-18

²⁷⁷ See for example: *Port Elizabeth Municipality*, para. 28. See also Wilson (n 256 above) 280, who summarises this jurisprudence to indicate that ‘unless there are special circumstances justifying a departure from the general rule, eviction orders should not be granted if they would lead to homelessness’.

²⁷⁸ *Charo* case, page 18-19. In terming the right to housing as an aspirational right, the court failed to transcend the negative/positive rights dichotomy to embrace an understanding of all rights, civil, political,

of the State arising from the right to housing in relation to the applicants and similarly situated individuals and groups.²⁷⁹ In making this argument, the Court relied on the *Grootboom* case, paragraph 41, which dealt with the analysis required to ascertain the reasonableness of a government plan for the realisation of the right to housing. The choice of the paragraph is indicative of either the Judge's hastiness in trying to dispose of the case or is a sign of selective reading to justify an already preconceived judgment.²⁸⁰ The Court should have read and relied instead on paragraph 45 of the *Grootboom* judgment, which was more relevant to the issues in question and which specifically dealt with the meaning of progressive realisation, espousing the meaning of the standard of progressive realisation as elaborated on by the CESCR in its General Comment Number 3, paragraph 9.²⁸¹ Two important components of the standard of

economic, social and cultural as containing a continuum of obligations, all of which require resources, albeit at varying degrees, to realise. Terming the right to housing as "aspirational" is, therefore, contrary to the Constitution which entrenches the entire corpus of human rights as justiciable and obliges the State to observe, respect, protect, promote and fulfil all rights entrenched in the Constitution (article 21(1)). For a discussion on the archaic nature of the separation of rights into the negative/positive dichotomy, see Liebenberg - Adjudication under transformative constitution (n 13 above) 54-59.

²⁷⁹ In this particular instant, the court failed to properly heed the voices of the poor and vulnerable litigants who were before it as it failed to adequately engage with the normative content of the right to housing. See Liebenberg - Adjudication under transformative constitution (n 13 above) 46, who, in acknowledging the difficulty faced by poor litigants in bringing cases to the courts, avers as follows:

If disadvantaged litigants do succeed, against the odds, in marshalling the substantial resources of money, time, energy and emotional commitment entailed in bringing a case to the courts, the least they can expect is a judgment which engages seriously with the normative commitments underlying the particular rights invoked.

²⁸⁰ See Liebenberg - Adjudication under transformative constitution (n 13 above) 341, who contends the following:

If the rights and values associated with SERs and substantive equality are marginalised in the adjudication of legal disputes between private parties, the law will be skewed in favour of those already able to wield the power that access to property and economic resources provides. The ultimate consequence is will be to undermine the Constitution's commitment to eradicating entrenched patterns of socio-economic disadvantage.

The court thus made an ideological choice to disregard the values and purposes that were intended to be promoted by the entrenchment of justiciable SERs in the 2010 Kenyan Constitution.

²⁸¹ For an elaborate discussion of the standard of progressive realisation, see chapter two, section 2.3 above. In relation to housing rights, see section 7.5.1 above.

progressive realisation, and which are to be undertaken immediately, deserve to be mentioned here. First, the State must put in place measures, including legislative, policy and programmatic measures to enhance the realisation of the right to housing.²⁸² Secondly, the minimum core content forms an intrinsic component of the standard of progressive realisation, and the CESCR stated that the reading of the obligations arising from the ICESCR without the minimum core deprives the Covenant of its *raison d'être*.²⁸³ As has been discussed in chapter five above,²⁸⁴ even though the SACC did not expressly adopt the minimum core in the *Grootboom* case, it still held that a government plan for the realisation of rights which did not take into account the urgent needs of those in crisis situations were unreasonable, thus espousing the basic ideals of the minimum core approach.²⁸⁵ It is submitted that the Court should have demanded that the State take the requisite steps to implement the National Housing Policy as well move with haste to enact the relevant housing Bills into legislation to enhance the protection of the housing rights of the applicants and other similarly placed individuals. The Court should have further demanded that the programmatic frameworks to be developed by the State for the implementation of the National Housing Policy and related legislation, must contain a minimum core content component realisable immediately so as to ameliorate the shelter needs of the applicants, in line with the integrated interpretive approach proposed in this thesis.²⁸⁶ The espousal of this transformative approach to adjudication would have ensured that progressive frameworks are put in place to enhance the realisation of the transformative potential of the Constitution.

A more progressive understanding of the right to adequate housing, especially its component of forced evictions is exhibited by the *Muthurwa* and *Waithera* Courts, rulings of Justice Musinga. The *Muthurwa* case was an application brought under the Kenyan Constitution and international law, being articles 2(5), 43(1)(b) and 53(1)(c) of the Constitution, article 25 of the UDHR, article 11 of the ICESCR, article 27 of the CRC and article 26 of the CRPD, and it sought a conservatory order to protect the Applicants from the demolition of their homes and

²⁸² See Wilson (n 256 above) 272 & 275.

²⁸³ CESCR General Comment No. 3, para. 10.

²⁸⁴ Chapter five, section 5.3.1.

²⁸⁵ *Grootboom*, paras. 64-69.

²⁸⁶ For an elaboration of the approach, see chapter five, section 5.3.3.

their forced eviction by the Respondents.²⁸⁷ Like in the *Charo* case discussed above, the Respondents' defence was that the property in question was private and not public land and they were thus not under any obligation with regard to the housing rights of the Applicants.²⁸⁸

The Court acknowledged that the First Respondent was the legally registered owner of the property in question, and thus had property rights in accordance with article 40 of the Constitution.²⁸⁹ It held that there was a conflict between the Respondents' property rights and the Applicants' housing rights, and that this conflict called for judicial balancing on the part of the Court so as to realise the transformative aspirations of the Constitution.²⁹⁰ The Court contended that the Constitution provided a guide to the courts when balancing competing rights; and the guidelines were the need to preserve the dignity of individuals, promote equality and social justice and to enhance the realisation of the potential of all human beings in accordance with article 19(2) as well as the provisions of articles 20(3)-(4) and 259(1).²⁹¹ Further, the Court noted the dearth of appropriate legal guidelines to guide courts in relation to housing rights and forced evictions, Kenya not having adopted an evictions guideline.²⁹² To fill this legal lacuna, the Court resorted to international and comparative law for standards to enable it to effect the requisite

²⁸⁷ *Muthurwa* case, pages 1-15. The application by the Applicants and their advocates is extensive, bringing to the Court's attention very useful tools to help the Court in determining the case, including General Comments 4 and 7 of the CESCR as well as the UN Eviction Guidelines. The case is illustrative of the structural litigation proposed in chapter four, section 4.3 of this thesis, involving a collaboration between victims of threatened eviction as well as PIL institutions such as *Kituo cha Sheria* and SER experts such as Professor Yash Pal Ghai with the aim of not only responding to the plight of the present victims, but also engendering structural changes in government to enhance the realisation of the right to housing, and to also set a proper precedent to guide Courts in the adjudication of similar cases.

²⁸⁸ *Muthurwa* case, pages 15-18.

²⁸⁹ *Muthurwa* case, pages 18-19. The aim of the property owner was to evict the Applicants, demolish the houses in the suit property and to construct modern residential and commercial buildings thereon.

²⁹⁰ *Muthurwa* case, pages 19-20 & 24-25.

²⁹¹ *Muthurwa* case, page 20-22. For a more elaborate discussion of these provisions in the context of transformative adjudication, see chapter five, section 5.2.2 (viii).

²⁹² *Muthurwa* case, page 28. The Court noted the need for the State to comprehensively put in place measures to address forced evictions, especially through the adoption of clear policy and legal guidelines, at 32.

balance.²⁹³ It relied extensively on CESCR General Comments Number 4 and 7 to understand the content as well as obligations of the State in relation to the right to housing, acknowledging that even though the Applicants had to move from the property at some point, their eviction must be undertaken in a humane manner.²⁹⁴

Further, the Muthurwa Court acknowledged the paradigm shift in adjudication that was intended by the promulgation of the 2010 Constitution, holding that courts were expected to go beyond the previously applied test in the granting of temporary injunction, as was set out in the case of *Giella v Cassman Brown Co Ltd* (1973) E.A. 358, in restraining the breach of fundamental rights.²⁹⁵ It held that:²⁹⁶

[t]he court has a duty to consider whether grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights. The court is enjoined to give an interpretation that promotes the values of a democratic society based on human dignity, equality, equity and freedom. Dignity of the people ought to be a core value in our constitutional interpretation.

The Court thus granted the interim injunction prayed for by the Applicants, not only because they had demonstrated a prima facie case with likelihood of success, but also because their fundamental rights and freedoms had been violated or were likely to be violated.²⁹⁷

The transformative judicial thinking exhibited by Justice Musinga in the *Muthurwa* case is further enhanced in his ruling in the *Waithera* case. The case concerned the demolition of houses and threatened eviction of the Applicants from their homes, which were in informal settlements, on the ground that the houses were built on road reserves.²⁹⁸ The First Respondent's defence was that it had no mandate and capacity to allocate land to, or to resettle, the homeless.²⁹⁹ The court relied on international law to define "adequate housing" as it

²⁹³ As above.

²⁹⁴ *Muthurwa* case, pages 29-32.

²⁹⁵ *Muthurwa* case, pages 23 & 27.

²⁹⁶ *Muthurwa* case, page 27.

²⁹⁷ *Muthurwa* case, page 32-33. The sensitivity of the Court to the importance of the constitutional issues raised is illustrated by it not burdening the Respondents with the costs of the application, at 34.

²⁹⁸ *Waithera* case, pages 1-5.

²⁹⁹ *Waithera* case, page 5. Jurisprudence abound, in the SA context, as to the duty of municipalities and local governments to provide emergency temporary housing to people in crisis situation. An extensive

had not been defined by the Constitution, and in this regard used CESCR General Comment Number 7, paragraphs 15-16 to define the parameters that had to be met for an eviction to be legal.³⁰⁰ To further enhance its balance of the competing right to housing and property rights, the Court affirmed the importance of reliance on the constitutional principles enshrined in article 10, human dignity as enshrined in article 28, the values underlying an open and democratic society based on human dignity, equality, equity and freedom as is enshrined in article 20(3)-(4), as well as the requirement that the Constitution is interpreted in a manner that promotes its purposes, values and principles as well as advance the rule of law, human rights and fundamental freedoms as is enshrined in article 259(1) of the Constitution.³⁰¹

The Court thus held that Applicants' right to housing overrode the First Respondent's duty to plan the City, and that it was unconstitutional to forcefully evict the Applicants from the houses they had occupied for over forty years with the consequence that they are rendered homeless.³⁰² The Court held that the government had an obligation to provide alternative accommodation if eviction was to be undertaken humanely, relying on the *Modderklip* case by the Supreme Court of South Africa to support its finding.³⁰³ The Court thus granted the conservatory order which was sought by the Applicants and also ordered the Respondents to bear the costs of the application.³⁰⁴ The Waithe Court further called on the State to expeditiously put in place the requisite legislative, policy and programmatic framework which sufficiently catered for the short-, medium- and long-term housing needs of everyone, but that responded to the special needs of the most vulnerable and marginalised people living in crisis

discussion of this duty is, however, beyond the scope of this chapter. For a brief discussion, see Wilson (n 256) 282-288.

³⁰⁰ *Waithe* case, pages 8-9

³⁰¹ *Waithe* case, page 9-10. See also van der Walt – Thoughts on *Modderklip* (n 181 above) 157, who calls this type of constitutionally-inspired interpretation aimed at the development of the common law the “radiation effect of the Constitution” or “indirect horizontal application”.

³⁰² *Waithe* case, pages 10-11.

³⁰³ *Waithe* case, pages 11-14. See also *Modderklip*, para. 26 for similar affirmations in the South African context.

³⁰⁴ *Waithe* case, page 16-17.

situations, such as the applicants.³⁰⁵ Further, the Court called on the State to develop and adopt appropriate eviction guidelines, in line with the UN Basic principles and guidelines on development-based evictions and displacement, so as to enhance the realisation of the right to adequate housing as well as to enhance the protection of people threatened with evictions.³⁰⁶

In the adjudication of housing rights cases, it will thus be imperative that the Kenyan Courts borrow from the jurisprudence set at the international and comparative national jurisdictions so as to breathe life into the constitutionally entrenched right to accessible and adequate housing to enhance social justice for the Kenyan people. The jurisprudence of the Kenyan courts, as is exhibited by the *Muthurwa* and *Waithera* Courts, are geared in this direction. This is exemplified by cases such as the *Ibrahim Songor Osman* case which entailed an application by a group of 1,122 people who had been forcefully evicted from unalienated public land that they had been occupying since the 1940s.³⁰⁷ The Petitioners approached the Court citing a violation of both CPRs and SERs contained in the 2010 Kenyan Constitution, especially the right to life under article 26(1) and (3), the right to human dignity under article 28 and 29, the right to information under article 35(1), the right to property under article 40, the right to housing, food, water and health as contained in article 43(1) as well as the right to fair administrative action under article 47.³⁰⁸ They sought a permanent injunction restraining the Respondents from evicting the Petitioners in future, a mandatory injunction ordering the Respondents to provide the Petitioners

³⁰⁵ *Waithera* case, pages 14-16. The Court quoted the *Grootboom* judgment of the SACC as to the requirement that the government develops a policy that responds to the long, medium and short-term needs of the people.

³⁰⁶ As above. It should be noted that even though efforts have been made to draft the Evictions and Resettlement Guidelines, 2011 and the Evictions and Resettlement Procedures Bill, 2012, as discussed in section 7.3.2 above, the same have not been adopted by cabinet or enacted by parliament respectively, and so have not yet filled the lacunae created by the lack of a proper domestic legal regime protecting people from forced evictions.

³⁰⁷ *Ibrahim Songor Osman v Attorney General & 3 Others*, High Court Constitutional Petition No. 2 of 2011. Similarly, see the case of *Musa Mohammed Dagane & Others v Attorney General*, High Court Constitutional Petition No. 56 of 2009, which although filed under the previous Constitution was able to find that the eviction of the Petitioners were unlawful for failing to fulfil requirements similar to those enumerated under the UN Guidelines on Evictions. The Court thus held that the Petitioners were entitled to compensation from the State.

³⁰⁸ *Ibrahim Songor* case (n 307 above) 4-6.

with suitable and permanent alternative land, shelter or accommodation, and an order for general, aggravated and exemplary damages.³⁰⁹ Even though the petition was undefended, the Court proceeded to undertake a substantive analysis of international law, especially the provisions of the ICESCR, the ICCPR, and the African Charter on Human and Peoples' Rights on evictions, and relied on the jurisprudence emanating from both the CESCR and the Human Rights Committee in determining that the Respondents had violated all the rights as per the Petitioners' petition.³¹⁰ The Court then provided substantive remedies as requested by the Petitioners, ordering the Respondents by a mandatory injunction to return the Petitioners to the land from which they were evicted, to reconstruct for them reasonable residences or houses with all the requisite social amenities to be mutually agreed upon by all the parties, a permanent injunction restraining the respondents from forcefully evicting the Petitioners in future as well as damages of Kshs. 200, 000 for each of the 1, 122 Petitioners.³¹¹

The requirement that other judges dealing with housing rights in general, and evictions in particular, adopt this progressive thinking cannot be overstated.

7.7 Conclusion

Housing plays a crucial role in ensuring that people are able to have a holistic, dignified and valuable existence. Despite this importance, access to adequate and affordable housing remains an endemic challenge for Kenyans, especially for the poor, vulnerable and marginalised individuals and communities. This challenge, which is prevalent both in the rural and urban areas, has seen the mushrooming of informal settlements in the urban areas as well as the prevalence of squatters in rural and urban areas. These are the challenges which the entrenchment of the right to accessible and adequate housing in the Constitution was meant to ameliorate. This chapter undertook an extensive analysis of the housing situation in Kenya, delving into a discussion of the right to adequate housing in national and international law and the State obligations which this right entail. The chapter then discussed the role of the courts in the realisation of the right to housing and how the courts can use their constitutional mandate, taking into account the theory of dialogical constitutionalism discussed in chapters three and

³⁰⁹ *Ibrahim Songor* case (n 307 above) 6-7.

³¹⁰ *Ibrahim Songor* case (n 307 above) 8-11.

³¹¹ *Ibrahim Songor* case (n 307 above) 11-12.

four, as well as the integrated approach to SER interpretation discussed in chapter five, in undertaking transformative adjudication to enhance the realisation of the egalitarian objectives which informed the entrenchment of the right to housing in the Constitution.

Though the right to housing is one of the most recognised rights at the international and domestic levels, many States, Kenya inclusive, have not been proactive in its realisation. The right has been extensively entrenched in several binding and non-binding international legal instruments such as the UDHR, ICESCR, ICCPR, CRC, CEDAW, ICRPD, and the African Charter and its Optional Protocol on the Rights of Women in Africa, as discussed in section 7.2 above. These binding international instruments, having been signed and ratified by Kenya, have direct application in Kenya's domestic legal system and can be effectively relied on by the courts taking into account article 2(5) and (6) of the Constitution as discussed more elaborately in chapter two, section 2.2 of this thesis. Several other non-binding legal instruments developed at the international and regional level have further expounded on the legal nature of the right to housing, providing clear standards and guidelines to help States in realising the right. Though these non-binding instruments have no legal force, it is submitted that they have persuasive force and must be taken into account by both the political institutions and the courts in the implementation and enforcement of the right to housing taking into account the international law principle that voluntarily accepted international obligations must be implemented in good faith.

On the domestic front, the Kenyan legal system had at first not explicitly recognised the right to adequate housing as an intrinsic component of human rights, with the only legislation providing any form of protection being the Rent Restriction Act of 1982 and the Kenya Railways Corporation Act.³¹² The paucity of the rights language in national legislation dealing with housing continued through the early 1990s, with the Housing Act of 1990 not recognising housing as a fundamental right. However, with the advent of legal reforms in the 1990s which coincided with the agitation for a new constitutional dispensation, housing has gradually been recognised as a right, with the Kenya National Housing Policy of 2004 providing the background for the reform of the housing sector. Subsequent to the policy, several legislative developments have been initiated, being the drafting of the Landlord and Tenant Bill 2007 aimed at amending the Rent Restriction Act to enhance its protection in the changing rental sector; the Housing Bill 2011, intended to replace the 1990 Housing Act, which espouse the language of housing rights; the

³¹² Though the 1963 Kenyan Constitution had a Bill of Rights, the Bill provided only for CPRs, with the exception of the right to property.

Evictions and Resettlement Guidelines and the Evictions and Resettlement Procedures Bill, 2012, which prohibit forced evictions, provide clear guidelines and procedures when undertaking evictions and enhancing the protection of people threatened with evictions. The above reforms are premised on the entrenchment of the right to accessible and adequate housing, and the shelter rights of children, in the Constitution as discussed in section 7.3 above. The legal reform in the housing sector has been further buttressed by land reforms which have led to the adoption of the National Land Policy of 2009 and its attendant Land Act 2012 as well as the Land Registration Act 2012. It is believed that the above reforms have the potential to respond to most of the housing challenges being experienced in Kenya today. The challenge, however, will be to translate precepts into practice.

The international and national legal provisions discussed above create a plethora of obligations for the State in the realisation of the right to adequate housing. These obligations are analysed using three different tools: the progressive realisation standard; the tripartite typology; and the 4-A's scheme, an analysis which is extensively undertaken in section 7.5. These obligations require the State to undertake a country-wide situational analysis to ascertain the housing needs of the differently situated individuals and groups and to adopt a national housing strategy aimed at the realisation of the short-, intermediate- and long-term needs of the entire populace. It is submitted that for the national strategy to be effective in the realisation of the right to housing, it must be entrenched in an extensive legislative, policy and programmatic framework aimed at the realisation of the right to housing.³¹³ The strategy must create a cooperative and collaborative framework that enables all the institutions of the State, together with all societal actors, to work together in an environment of mutual support to enhance the realisation of the right to adequate housing, as the government on its own cannot realise the right to adequate housing for all. The strategy must thus clearly delineate the role of the different State organs in the realisation of the right; provide a clear framework for the role of the private sector as well as the possibilities of reliance on the international mechanism of cooperation and

³¹³ A lot of effort has been expended in drafting legislative Bills aimed at developing a comprehensive national strategy and framework for the realisation of the right to housing as is discussed more elaborately in section 7.3 above. However, the Bills have so far not been enacted into law by Parliament, and so the desired legal framework is not operational. The proposal here is that the courts can enhance the process of enactment by requiring the State to expedite the Bills and enact them into law so as to provide the requisite protection to the many people who are facing housing challenges.

assistance to acquire resources for the implementation of the right to housing; put in place clear time-lines and benchmarks to enhance the implementation of the strategy; and put in place a monitoring and evaluation mechanism to ensure scrupulous implementation. Taking into account the requirement of public participation as expounded in the theory of dialogical constitutionalism, the preparation, design, implementation, monitoring and evaluation of the national housing strategy must be undertaken with the active and substantive participation of all sectors of society.

In discussing the role of the courts in the realisation of the right to adequate housing, this chapter, taking into account the theory of dialogical constitutionalism and the integrated interpretive approach, commences from the understanding that the primary responsibility for the realisation of the right to housing belongs to the political institutions. It thus envisages the courts espousing the requisite deference when assessing the viability of the national housing strategy or other implementation framework aimed at the realisation of the right to housing. The chapter, in section 7.6, delineates the opportunities available to the courts to undertake their facilitative role of enhancing dialogue and deliberation in the design, development and implementation of a national housing strategy, akin to the concept of “meaningful engagement” that was developed by the SACC. Further in assessing State obligations, especially using the progressive realisation standard and the tripartite typology tool, it is submitted that the courts are, of necessity, required to develop an expansive understanding of the meaning, scope and content of the right to housing. This requires that the courts adopt the expansive integrated approach developed in chapter five which envisions the courts adopting a strong rights approach, including requiring that the implementation framework on the right to housing espouse the minimum core content of the right to housing. It further envisages the courts adopting moderate remedies that inspire societal deliberation in the realisation of the right to housing and establishing monitoring mechanisms to ensure that its decisions are implemented. The courts, in undertaking their role, must further espouse a holistic understanding of the Bill of Rights in particular, and the Constitution in general, so as to ensure that the right to housing is interpreted and enforced taking into account, and balancing, other societal interests protected by other rights such as the right to property.

Chapter eight: Conclusion and recommendations

8.1 Introduction

The major objectives of entrenching justiciable socio-economic rights (SERs) in a constitution is to enhance the building of a just, free, equal, democratic and stable society.¹ Kenya, in its 2010 Constitution, has entrenched, for the first time, justiciable SERs with the major aim of realising the above-mentioned goals generally. The context of this study is Kenya, with its basis being the entrenched SERs in the 2010 Kenyan Constitution. The main purpose of the study is to set out and develop the possible interpretive strategy as well as approaches that could be adopted in Kenya to enhance the interpretation, implementation and enforcement of the entrenched SERs. The study is mainly based on a literature survey, with primary and secondary literature being analysed, and findings from them applied towards answering the research questions. The study sets out to inquire into five main areas, guided by the research questions contained in chapter one, and these are: an analysis of the political and socio-economic context of Kenya leading to the entrenchment of justiciable SERs; the nature, scope and content of the entrenched SERs; the nature, scope, content and extent of Kenya's national and international SER obligations; the ability of the entrenched SERs to achieve their constitutional purpose, that is, substantive equality, social justice, dignity and the improvement of the living conditions of all people; the approaches to SER interpretation, implementation and enforcement that are capable of achieving the above-mentioned constitutional purposes for the entrenchment of justiciable SERs; and the probable challenges in the interpretation and implementation of SERs that may detract from the achievement of the transformative aspirations of the 2010 Kenyan Constitution. This chapter provides a summary of the major findings of the study in section 8.2, and provides some recommendations based on the findings of the study in section 8.3. Section 8.4 then consists of a few concluding remarks.

¹ See DA Desierto 'Justiciability of socio-economic rights: Comparative powers, roles, and practices in the Philippines and South Africa' (2009) 23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485555 (accessed on 3 March 2011).

8.2. Synopsis of findings

8.2.1 Poverty, inequality and the endemic socio-economic deprivation in Kenya

The study found that poverty and inequality are rampant and endemic in Kenya, with the country ranking as one of the most unequal countries in the world. Statistical data, as is extensively discussed in chapter one, section 1.2, indicates that a high number of people in Kenya, between 46-56 per cent,² are living below the poverty line. Data further indicates that the level of poverty is increasing despite registered economic growth, and that since the post-election crisis of 2008, the poverty headcount has increased by 22 per cent, the measure of severe poverty has gone up by a startling 38 per cent, and that in the period between 2009-2010, inequality had increased in Kenya by 20 per cent.³ This rise in the levels of poverty and inequality has been attributed to factors such as politically instigated ethnic violence, rampant and runaway corruption in all sectors of society, global warming and the resultant climate change, the spike in prices of oil and other basic commodities, globalisation and skewed international trade practices. Chapter one further found that poverty and inequality in Kenya have a political and regional tilt, with regions that have previously benefitted from ruling elite practices having better poverty and inequality ratios than regions that have not previously featured in the top echelons of leadership in the State.

Poverty and inequality are intricately linked to socio-economic deprivation due to the skewed distribution of production resources, and access to basic social goods and services such as education, health, water, food, access to employment as well as political decision-making power to determine the distribution or redistribution of national wealth. This socio-economic deprivation leads to an unfair constriction of the life choices of poor people, leading to a vicious cycle of exclusion, marginalisation and powerlessness. The analysis of poverty and inequality in Kenya thus provides the contextual background for understanding and analysing the entrenched SERs in the 2010 Kenyan Constitution, as the major aim of their entrenchment is the elimination of poverty and inequality, emancipation and empowerment of the poor, vulnerable and marginalised individuals and groups, improvement of the living standards of the Kenyan people as well as the overall achievement of social justice and democratic governance.

² Alternative data from non-governmental organisations indicates that this figure is an underestimation of the situation by the government and that in reality, about 56-65 per cent of Kenyans are living below the poverty line and the number is increasing. See chapter one, section 1.2.

³ Chapter one, section 1.2.

The choices of theoretical and substantive interpretive approaches discussed in the study are thus premised on the need for the interpretation, implementation and enforcement of the entrenched SERs so as to meet the above-mentioned transformative aspirations of the 2010 Kenyan Constitution.

8.2.2 The nature, scope, content and extent of the entrenched socio-economic rights

i) Nature

The SERs entrenched in the 2010 Kenyan Constitution are justiciable in nature, meaning that they can be enforced through litigation in courts in the same manner as civil and political rights (CPRs). In entrenching SERs as justiciable rights, the 2010 Kenyan Constitution has adopted the principle of indivisibility, interdependence and interrelatedness of rights, affirming that all rights are mutually self-supporting and that the realisation of CPRs depends on the scrupulous implementation of SERs and *vice-versa*. The importance of the entire corpus of human rights entrenched in the Bill of Rights, of which SERs forms a crucial part, is that they are intended to form an integral part of the Kenyan State and provide the framework for the State's economic, social and policies.⁴ This affirms the integral nature of the entrenched SERs in Kenya's government structures, as they are intended to influence policy and political decision-making at all the levels of the State, that is, the national and county levels, as well as in each organ of the State.

However, even though SERs are justiciable and are contained in the same Bill of Rights as the CPRs, the obligations arising from the entrenched SERs vary slightly as the 2010 Kenyan Constitution has primarily adopted the standard of "progressive realisation" in the implementation of the rights,⁵ a standard first entrenched in article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶ The adoption of the standard was basically due to the perception that the implementation of SERs was highly resource-

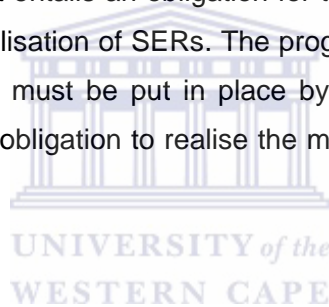
⁴ The 2010 Kenyan Constitution, article 19(1).

⁵ The 2010 Kenyan Constitution, article 21(2) as read with article 20(5).

⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. The other international treaties that have adopted the "progressive realisation" standard in the implementation of SERs include, the Convention on the Rights of the Child (CRC), article 4; and The United Nations Convention on the Rights of Persons with Disabilities (CRPD), article 4(1) & (2). An example of a national constitution that has adopted the standard in a domestic legal system is the 1996 South African Constitution, sections 25(5), 26 & 27.

dependant, a perception that has been discredited with research that indicates that CPRs and SERs both contain positive and negative obligations; both require resources to implement; and both contain immediate and progressive obligations.⁷ Due the vagueness of the progressive realisation standard and the difficulties in designing indicators to monitor its use in the realisation of SERs, the standard has come under serious criticism, with several commentators arguing that it is the major reason for the endemic neglect in the realisation of SERs nationally and internationally.⁸

To help enhance the understanding of the nature of SER obligations arising from the standard of “progressive realisation”, the study undertook an analysis of the four interrelated components of the standard, which are, progressive realisation, obligation to take steps, maximum of the available resources, and international cooperation and assistance. First, the progressive realisation component is a recognition that due to resource constraints all the SERs cannot be realised immediately.⁹ It entails an obligation for the State to put in place immediate, time-bound steps aimed at the realisation of SERs. The progressive realisation component also entails immediate obligations that must be put in place by the State, and they include: non-discrimination in access to SERs; obligation to realise the minimum core content of substantive



⁷ For this discussion, see chapter two, section 2.3.

⁸ M Dowell-Jones *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the economic deficit* (2004) 39; RE Robertson ‘Measuring state compliance with the obligation to devote the “maximum available resources” to realising economic, social and cultural rights’ (1994) 16 *Human Rights Quarterly* 693, at 694; M Craven, *The International Covenant on Economic, Social and Cultural Rights: a perspective on its development*, revised edition (1998) 151; AR Chapman ‘A “violations approach” for monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18 *Human Rights Quarterly* 23; D Harris ‘Comments’ in F Coomans and F Van Hoof (eds.) *The right to complain about economic, social and cultural rights* (1995) 103-06; and, S Leckie ‘Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights’ (1998) 20 *Human Rights Quarterly* 81, at 94.

⁹ The study, however, found that in the African Human Rights System, a similar standard, that of immediate realisation of rights, applies equally to both CPRs and SERs. For an extensive discussion of the SER obligations under the African system, see chapter two, section 2.4.

SERs; trade union rights; and, obligation to ensure fair wages and equal remuneration for equal work.¹⁰

Secondly, the obligation-to-take-steps component is an immediate obligation, requiring ICESCR State Parties to take concrete and targeted steps immediately after ratifying the Covenant with the aim of realising their SER obligations. It requires the State to design and adopt a comprehensive, time-based as well as financially-backed national strategy encompassing legislative, policy and programmatic measures for the realisation of SERs, with clear and sufficient objectives, benchmarks and indicators to enhance monitoring and evaluation of the same. This component also requires the State to adopt judicial and other effective administrative enforcement measures that are practical, accessible, affordable, timely and effective in addressing SER violations.¹¹

Thirdly, the maximum available resources component is a recognition that States are differently situated in terms of the amount of resources available for the realisation of SERs. It demands prioritisation in the allocation of available resources as well as the efficient and accountable use of those resources.¹² It not only refers to the budgetary resources available to the State, but also requires the State to put measures in place to harness private resources, and resources available through the facility of international cooperation and assistance, for the realisation of SERs. Resources not only include financial resources, but also include human resources, natural resources, technological and informational resources, as well as organisational resources. Some commentators, adopting the fiscal space diamond,¹³ have

¹⁰ For a general discussion of the progressive realisation component, see chapter two, section 2.3.1, as well as chapter six, section 6.6.1 in relation to the right to food, and chapter seven, section 7.5.1 in relation to the right to housing.

¹¹ For a more complete discussion of obligation to take steps component, see chapter two, section 2.3.2, as well as chapter six, section 6.6.1 in relation to the right to food, and chapter seven, section 7.5.1 in relation to the right to housing.

¹² The 2010 Kenyan Constitution, article 20(5)(b).

¹³ The four points of the diamond are: expenditure reprioritisation and efficiency; domestic resource mobilisation through taxation and other revenue raising measures; foreign aid grants (Official Development Assistance); and deficit financing. See R Balakrishnan *et al* (Centre for Women's Global Leadership) 'Maximum available resources and human rights: Analytical report' (June 2011) 2-4, available at <http://www.cwgl.rutgers.edu/globalcenter/publications/marreport.pdf> (accessed on 7 February 2012).

called for an expansion of the interpretation of this component to incorporate important sources of revenue for the realisation of SERs such as the State's monetary policies, financial sector policy and deficit financing.¹⁴

Lastly, the component of international assistance and cooperation is also an acknowledgment that the realisation of SERs may need resources which may not be available in some States, and it thus employs the principle of human solidarity in the realisation of SERs. It encompasses the extraterritorial obligation of developed States, as individual States and as members of international organisations, including the international financial institutions (IFIs) and the World Trade Organisation (WTO), to provide the requisite development assistance in terms of official development assistance (ODA) as well as through technology transfer to developing and least developed States to enable them meet their internal SER obligations.¹⁵

ii) Scope

In analysing the scope of the entrenched SERs, the study, in chapter two, commences with an analysis of the place of international law in the Kenyan domestic legal system. This analysis is prompted by the provisions of article 2(5) and (6) which incorporates international law into the Kenyan domestic legal system as being directly applicable in the Kenyan courts as sources of law. The Constitution thus incorporates a form of monism in a Commonwealth system that has previously adopted a dualist inclination when dealing with international law, requiring that enabling legislation be enacted by parliament before a ratified international treaty attains the force of law in the Kenyan domestic legal system. The study, however, found that the incorporation of international law as a source of law directly applicable by the domestic courts is not a strangely Kenyan experience, and has been the practice in the Latin American and Eastern European countries emerging from periods of dictatorship and going through the processes of democratization, a situation similar to the process of democratisation taking place in Kenya presently.

¹⁴ For a more complete discussion of the maximum available resources component, see chapter two, section 2.3.3, as well as chapter six, section 6.6.1 in relation to the right to food, and chapter seven, section 7.5.1 in relation to the right to housing.

¹⁵ The extra-territorial obligations encompass all the three components of the tripartite typology of rights, that is the duty to respect, protect and fulfil (promote, facilitate and provide). See generally SI Skogly 'Extraterritoriality: universal human rights without universal obligations?' in S Joseph & A McBeth (eds.) *Research handbook on international human rights law* (2010) 71, at 77ff.

The incorporation of international law directly into the Kenyan domestic legal system however raises questions as to the hierarchy of the sources of law in Kenya. The study undertook a comparative analysis of the practice in two countries with similar provisions incorporating international law in domestic legal systems, the United States of America and Colombia. The study found that earlier in its development, the jurisprudence of the American Supreme Court leaned towards international law, with the then Chief Justice Marshall holding that where possible, national law should not be interpreted to contravene international law.¹⁶ However, with the passage of time, there has been a shift towards a nationalistic leaning in relation to international law, with the adoption of the system of self-executing and non-self-executing treaty typologies, with self-executing treaties having direct application in the domestic legal system while non-self-executing ones need domesticating legislation for them to have the force of law in the domestic jurisdiction. In relation to the hierarchy of sources of law in the United States, the Constitution is the supreme law of the land, while self-executing treaties and federal statutes have equal status as sources of domestic law. In the instances of conflict between the self-executing international law and a federal statute, the courts have used the “last-in-time” doctrine, which means that the subsequent legal instrument overrides the previous legal instrument.

In contrast to the United States, Colombia has adopted monism in relation to international law, giving it prominence in Colombia's domestic legal system. In this system, international law is at the same level as the Constitution and enjoys prominence over conflicting domestic law. The important place international law occupies in the Colombian legal system is exemplified by its extensive use in the courts in Colombia when deciding cases within the domestic jurisdiction, as is discussed more elaborately in chapter two, section 2.2.2.

The study proposes that Kenya adopts an expansive interpretation of article 2(5) and (6) of the Constitution so as to give international law a prominent role in the domestic legal system, with the aim of enhancing the achievement of the transformative aspirations of the Constitution. This expansive interpretation is in accordance with articles 20(2) and 20(3)(b) of the 2010 Kenyan Constitution which calls for an adoption of an interpretation of rights that provides for the enjoyment of rights to the greatest extent consistent with their nature. In this vein, the study proposes that international law should be at the same level as the Constitution as a source of

¹⁶ *Murray v The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

international law, and should be higher in hierarchy than domestic legislation. This is due to the horizontal and vertical constitutional cross-pollination which means that human rights in national constitutions have a similar nature, scope and content as those in international law (treaty and customary) thus making it nonsensical for them to be hierarchically different.¹⁷ Further, to enable international law to exert an influence in the interpretation and enforcement of human rights at the national level, they must be at the same level or higher than the relevant national legal instrument containing rights (be it the constitution or legislation), due to the legal positivistic and schematic perspective that a hierarchically inferior norm cannot have an impact on the reading of a higher norm.¹⁸

The study thus found that taking into account the direct incorporation of international law into the Kenyan domestic legal system, the scope of the obligations of the State arising from SERs are not only those contained in the 2010 Constitution or other domestic legislation, but must also incorporate those obligations arising from international customary law and international treaties ratified by Kenya which contain SERs.

iii) Content

The study found that for the interpretation, implementation and enforcement of the entrenched SERs to enhance the achievement of the transformative potential of the 2010 Constitution, both the courts and the political institutions of the State must espouse a substantive, dialogical and interrelational conception of SERs. This can be better achieved by developing the substantive normative content of SERs, taking into account the constitutional values, objectives and purposes for which SERs were entrenched in the Constitution; as well as Kenya's historical and contextual situation, especially the endemic poverty and inequality that have resulted in political as well as socio-economic vulnerability, exclusion and marginalisation of certain individuals, groups and communities.¹⁹ The development of the normative content of SERs thus ensures that the entrenched SERs have practical effects on the lives of the poor, vulnerable and

¹⁷ A Peters 'Supremacy lost: International law meets domestic constitutional law' (2009) 3 *International Constitutional Law Journal* 170, at 197.

¹⁸ Peters (n 17 above) 177-181.

¹⁹ This enables the political institutions and the courts to appreciate the lived experiences of people, especially in relation to historical injustices, endemic poverty, gross inequality and marginalisation, and to design an implementation framework capable of responding to these historical and contextual challenges.

marginalised individuals as well as groups in society.²⁰ It also enables the courts to develop proper standards of review to scrutinise the State's SER implementation frameworks.

It was also found that for the entrenched SERs to achieve their transformative potential and ameliorate the conditions of the poor, vulnerable and marginalised individuals and groups, both the political institutions and the courts must espouse and develop the minimum core content of SERs. The study undertook an extensive analysis of the minimum core approach and its applicability in the Kenyan context, submitting that since Kenya is a State Party to the ICESCR and the other international and regional legal instruments that have explicitly adopted the minimum core approach,²¹ it should be bound to adopt and develop the minimum core content of the entrenched SERs in good faith taking into account the international law principle of *pacta sunt servanda*.²² Further support for the development of the minimum core content of SERs can be gleaned from article 20(2) of the 2010 Kenyan Constitution which provides for the enjoyment of rights in the Constitution to the greatest extent consistent with the nature of the rights, and article 20(3)(b) which calls for the adoption of an interpretation that most favours the enforcement of rights. The adoption of the minimum core approach has the potential to lead to the creation of an egalitarian society that provides for everyone's basic needs, and that protects everyone against deprivation. It also enables the State to develop better standards to monitor and evaluate programmes aimed at the realisation of SERs, and thus influence political decision-making on social programmes and budgetary allocations.

iv) Extent

This study proceeded from the premises that SERs, like all the other rights, are not absolute and can be legitimately limited by the State in specific circumstances so as to accommodate the democratic conflict between entrenched rights and competing social interests. In recognition of this non-absolute nature of SERs, the study undertook a limitations analysis in the Kenyan domestic legal context, expounding on the general limitations clause contained in article 24 of

²⁰ One of the major criticisms of the reasonableness approach developed by the Constitutional Court of South Africa is that it fails to develop the content of SERs. For an extensive discussion of this criticisms, see chapter five, section 5.3.1.

²¹ This proposal is in line with the direct incorporation of international law into the Kenyan legal system in accordance with articles 2(5) & (6) of the 2010 Constitution.

²² For an extensive discussion of the minimum core approach and its applicability to the Kenyan situation, see chapter two, section 2.5 and chapter five, section 5.3.2.

the 2010 Kenyan Constitution. The study found that limitations entail the exercise of public power and for it to be legitimate, it must accord with the provisions of article 24 of the Constitution, with the underpinning principle being that rights can only be limited in accordance with the law, and only to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality,²³ and freedom; and that limitations should not render the rights ineffective or illusory.²⁴ The study proposes that Kenya adopts a two-stage approach to the limitations analysis, with the first stage entailing an interpretation and development of the meaning, scope and content of the entrenched SERs, and an assessment of whether the impugned legislative or executive action impairs or limits the SER in question. It is at this stage that an analysis of the internal demarcations/limitations of rights in relation to the available resources is undertaken, and the scope and content of the SER in question determined. The second stage entails a proportionality test, with an analysis of the reasonableness and justification of the limitation being undertaken taking into account the factors enumerated in article 24 of the Constitution.²⁵

8.2.3 The proposed theoretical framework for the interpretation of the entrenched socio-economic rights

The theoretical framework proposed in the thesis encompasses the theory of dialogical constitutionalism as well as the transformative and integrated approach for the interpretation of the entrenched SERs.

i) The theory of dialogical constitutionalism

The study proposes the theory of dialogical constitutionalism, a theory that acknowledges the close link between law and politics as well as democracy and human rights. The theory espouses an understanding of constitutional interpretation as a value-laden and dialogical exercise that inculcates societal values and principles into the normative content of constitutional provisions. It acknowledges that legitimate disagreements on rights are inherent in society. It envisions that the resolution of these disagreements should be the responsibility of the people as a whole, engaging in a collaborative and cooperative project on the development of constitutional meaning undertaken in carefully structured deliberative institutions that enhance public participation based on equality and mutual respect, and thus engender a sense

²³ 2010 Kenyan Constitution, article 24(1).

²⁴ Limburg Principles, principle 56.

²⁵ For a more comprehensive discussion, see chapter two, section 2.6.3.

of collective self-governance. The study traced the historical and philosophical development of the theory of dialogue from the writings on dialogic imagination by Mikhail Bakhtin, a Russian philosopher and literary scholar, to the writings on conscientisation (critical consciousness) by Paulo Freire, a Brazilian educator and philosopher. The theory is, however, primarily based on the writings of two renowned contemporary scholars, Jürgen Habermas and Frank Michelman.

Habermas's writings on dialogue are based on his reconstructive theory of communicative action, from which he develops a theory of discourse based on the capacity of societal actors to reach common understanding and to coordinate their actions through reasoned argument, consensus as well as cooperation. In this theory, for participants to achieve rational consensus, there must be sincerity, truth, normative legitimacy, discursive equality, freedom, impartiality and fairness in the dialogical process. Habermas develops a proceduralist paradigm of law, which stresses the critical interdependence between private and public autonomy, and which acknowledges the importance of socio-economic well-being in the realisation of other rights, especially political and democratic rights which entail participation in collective self-government as well as public decision-making. The endpoint of Habermas's discourse theory is the emancipation or empowerment of the populace, leading to socio-economic transformation and the enhancement of social justice, the very objective of the entrenchment of justiciable SERs in the 2010 Kenyan Constitution.²⁶

Michelman, on the other hand, expounds on a conception of dialogic politics which demands the unmediated responsibility of the people, through on-going transformative dialogue, to undertake public decision-making about the governance of the polity. Michelman envisions dialogic politics as a normative activity entailing a contestation over concerns of public value, carried out in a deliberative process where reason and persuasion are aimed at achieving the common good in the ordering of societal life. This conception of politics is pragmatic and context respecting, acknowledging the historical as well as cultural situation of a particular society, and espousing these peculiarities to undertake a critical re-examination of the particular society with the objective of achieving transformation through interpretation (critical self-revision), internal development and re-collective imagination. He emphasises the importance of dialogue in this societal transformation, contending that it is only through this inclusive normative dialogue that total freedom and political liberty – the achievement of both a government of the people by the

²⁶ For an extensive discussion of Habermas, see chapter three, section 3.2.1.

people (democracy and self-rule), and a government of laws and not of men (rule of law and the judicial protection of human rights) can be realised.²⁷

The study, in chapter three, also undertakes an analysis of the practical use of dialogue in three comparative national jurisdictions, that is, the “dialogic metaphor” in Canada, “coordinate construction” in the United States, and “meaningful engagement” in South Africa. First, dialogic constitutionalism in Canada is based on the understanding of the interaction between the courts and the legislature in the context of the judicial review of legislative acts as a dialogue. The basis of this conception of dialogue is sections 1 and 33 of the Canadian Charter of Rights and Freedoms, which empower the legislature to reverse, modify or avoid the decisions of courts which have invalidated legislative or executive action. In this way, it is argued that judicial review by the courts is not the final word on constitutional interpretation, making it a weak form of review that does not have denigrating effects on the democratic aspirations of the majority as espoused by the political institutions.²⁸ Secondly, coordinate construction, developed more elaborately in the United States, is based on the reasoning that the courts do not have the sole and exclusive responsibility of interpreting the Constitution, and that other organs of the State similarly have equal coordinate responsibility to undertake constitutional interpretation in the discharging of their constitutional duties. Coordinate construction forms an important component of the theory of dialogical constitutionalism fashioned in chapter four which affirms that the primary responsibility for the design, development and implementation of a framework for the realisation of the entrenched SERs, a task which of necessity involves the interpretation of these rights, belongs properly with the political institutions of the State to be accomplished with the requisite participation of all sectors of society. Thirdly, meaningful engagement, as a component of constitutional dialogue, has been developed and used by the Constitutional Court of South Africa in the enforcement of entrenched SERs in the 1996 South African Constitution. It is an order of the Court requiring parties to litigation to substantively and meaningfully dialogue with each other with the aim of reaching amicable and mutually acceptable solutions. These orders always envision the Court retaining jurisdiction and scrutinising any agreement emanating from the parties before adopting

²⁷ F Michelman ‘Law’s republic’ (1988) 97 *Yale Law Journal* 1493, at 1493-1494. For a more comprehensive analysis of Michelman’s dialogic politics, see chapter three, section 3.2.2.

²⁸ This conception of dialogue has been criticised by several commentators, see chapter three, section 3.3.2 for an analysis of these criticisms.

the same as the judgment of the Court.²⁹ The practice in this three jurisdictions forms the basis of the theory of dialogical constitutionalism formulated for application in Kenya, as is elaborated in chapter four of the study, and is summarised below.

The theory of dialogical constitutionalism developed in chapter four envisages the development of the meaning of the entrenched SERs at three levels, first, at the political level in the development of the legislative, policy and programmatic framework for the implementation of the entrenched SERs; secondly, at the level of constitutional litigation in the courts; and thirdly, in the fashioning of judicial remedies subsequent to constitutional litigation. The first level of dialogue is an affirmation of the principle that the primary responsibility for the implementation of entrenched SERs rests on the political institutions of the State, especially the executive and the legislature. In undertaking their role, these institutions are expected to design, adopt and implement appropriate, effective as well as comprehensive national strategic frameworks, especially in the form of relevant legislation, policy and programmes for the realisation of SERs.³⁰ Dialogic deliberation, which encompasses the active and equal participation of all the sectors of society, especially the poor, vulnerable and marginalised groups, must take root at this stage to ensure that the resultant frameworks are reflective of the concerns of all sectors of society and are aimed at the achievement of the societal common good.

This first level of dialogue is supported by the 2010 Kenyan Constitution, which entrenches the requirement for public participation in decision-making at all levels and in all the organs of the State.³¹ The study proposes that to enhance deliberation in the context of the large number of societal actors and the little time within which decisions have to be made, there is a need for the design of responsive institutional frameworks, especially within parliament and its committees as well as the executive and its ministries, to open up these institutions and make them more accessible to the people. It further proposes that to enhance societal dialogue in the context of SERs, the Kenyan National Human Rights and Equality Commission can be mandated to supplement the deliberative efforts of the executive and the legislature in relation to the design, development and implementation of SER implementation frameworks. In this role,

²⁹ For a more substantive discussion of meaningful engagement, see chapter three, section 3.5.

³⁰ This is in line with the concept of coordinate construction as discussed more broadly in chapter three, section 3.4.

³¹ For a complete discussion of the provisions of the 2010 Constitution entrenching the requirement of public participation in decision-making, see chapter four, section 4.2.1.

it is proposed that the duty of the Commission will be to receive draft bills and policy documents from the relevant political institutions of the State, meaningfully engage the public on those documents through public hearings and submissions, prepare a report with proposed amendments to the draft bills or policy documents in accordance with the views resulting from the societal dialogue, and then submit the report to the relevant political institution for action. The choice of the Commission is due to its comparative advantage as a permanent constitutional commission with a human rights mandate, and with the relevant human resources capable of undertaking the required duties.³²

The second level of dialogue envisages constitutional litigation as a dialogue, and the courts as playing two important roles both as a forum, and as facilitators, of societal dialogue. It is based on the reasoning of Peter Häberle that 'he who has the power of pleading, has the power of interpretation', which basically means that pleadings in constitutional litigation are based on particular competing understandings or interpretations of the constitutional provision in issue. This understanding of litigation is envisioned by the 2010 Constitution which entitles a wide range of parties to institute judicial review proceedings as well as other forms of litigation for the vindication of entrenched SERs.³³ This enhances the level of societal dialogue as it allows societal actors and the courts to participate in the development of a more inclusive understanding of the entrenched SERs. The study proposes that at this level, the courts adopt a "strong rights approach" which entails a principled, substantive and expansive interpretation of the entrenched SERs through the development of their content, including the minimum core content. This approach further envisages a restricted application of the limitations to SERs, be it through internal limitations or through the article 24 general limitations clause. In the context of this "strong rights approach" the study proposes that the courts adopt a two-stage litigational approach, where the courts will expound on the nature, scope and content of the rights as well as scrutinise the impugned executive or legislative act to determine if it infringes on the right as expounded in the first stage. If the courts determine that the impugned act infringes the relevant SER, the court then proceeds to the second stage to undertake an analysis of whether the infringement is justified in an open and democratic society based on human dignity, equality and

³² For a comprehensive comparative analysis of the institutional structure best-placed to enhance deliberation in the design and implementation of SER implementation framework, see chapter four, section 4.2.2.

³³ The 2010 Constitution of Kenya, articles 22 & 258.

freedom in accordance with article 24 of the Constitution.³⁴ The study further proposes that Kenya adopts a mixed strategy of litigation in SER cases, a strategy that balances the need for structural reforms, but which also takes into account the peculiar situation and needs of the particular litigants.³⁵

The third level of dialogue looks at the dialogical remedies and monitoring mechanisms that the courts can adopt to enhance the enforcement of orders resulting from litigation. It calls on the Kenyan courts to adopt “moderate remedies” which are respectful of the separation of powers doctrine and the specific competencies of the political institutions of the State. Some of the remedies proposed here include the declaration of rights, declaration of invalidity, especially the suspended declaration of invalidity, as well as injunctions such as mandatory and structural interdicts. To enhance the effectiveness of remedies, the courts should also retain jurisdiction and exercise supervisory powers, especially in structural SER cases, to ensure that court orders are implemented by the political institutions. The exercise of supervisory jurisdiction may be undertaken either through the issuing of reporting orders, or may involve the courts requiring the parties to the litigation and other relevant societal actors to dialogue and meaningfully engage with each other with a view of coming up with a mutually satisfactory plan on how to vindicate the rights in question, the plan of which is adopted by the courts as the judgment of the court, and whose implementation is supervised by the courts to enhance its implementation.³⁶

In adopting moderate remedies, retaining jurisdiction and undertaking a supervisory function, the theory of dialogical constitutionalism fashioned here has effectively responded to the inherent challenges to judicial adjudication of SERs, that is, the separation of powers concerns as well as the concerns of polycentricity. In advocating the participation of a wide section of society in the design of an SER implementation framework as well as in the design of judicial remedies, the theory of dialogical constitutionalism ensures that varying societal expertise and lived experiences are brought to bear in the processes, with the result that any adverse polycentric impact of a judicial remedy is anticipated and dealt with. Further, in retaining jurisdiction and exercising supervision, the court retains its mandate to review its judgment during its implementation, and in this way it has the capacity to respond to any previously

³⁴ For a more expansive discussion of the two-stage approach, see chapter four, section 4.3.1.

³⁵ For a more comprehensive discussion of this proposal, see chapter four, section 4.3.2.

³⁶ For a more expansive discussion of the third level of dialogue, see chapter four, sections 4.4-4.5.

unforeseen polycentric challenges.³⁷ On the separation of powers concern with its attendant counter-majoritarian dilemma, the theory of dialogical constitutionalism does not envisage the courts as the sole, exclusive and ultimate interpreters of the Constitution, but as a forum as well as facilitator of societal dialogue and deliberation of constitutional meaning that encompasses the combined societal vision and values as expounded by the people as a collective. In this way, the theory of dialogical constitutionalism envisages a shared project of constitutional design and development that entail the role of all government institutions and societal actors in the interpretation, implementation and enforcement of the entrenched SERs.³⁸

ii) The transformative and integrated approach

The study found that the 2010 Kenyan Constitution can be termed a transformative Constitution as it contains all the essential elements required of such a constitution. These elements include: the entrenchment of justiciable SERs; the adoption of a substantive and redistributive conception of equality; the espousal of positive State duties to combat poverty and inequality as well as promote social welfare; the horizontal and vertical application of the Constitution as well as the Bill of Rights in both public and private spheres of society; the entrenchment of a requirement that the government be based on a democratic and participatory ethos; the envisioning of multi-culturalism; the entrenchment of historical self-consciousness; as well as the envisioning of transformative adjudication, that is, the creation of a new role and responsibilities for the judiciary through the transformation of adjudicative processes and methods.³⁹ In order to achieve the transformative aspirations of the 2010 Kenyan Constitution, the study proposes that Kenya adopts a transformative and integrated approach to SER adjudication, an approach that is principled, purposive as well as progressive, and which is aimed at developing the substantive content of the entrenched SERs.

The transformative and integrated approach proposed in the study finds its basis in the 2010 Kenyan Constitution, especially article 20 which provides that any approach adopted in interpreting the Bill of Rights must not only promote the values underlying an open and democratic society based on human dignity, equality, equity and freedom; but must also

³⁷ For a more substantive elaboration, see chapter four, section 4.6.1.

³⁸ For a more substantive elaboration, see chapter four, section 4.6.2.

³⁹ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, at 154-156. For a more comprehensive analysis of the 2010 Kenyan Constitution as a transformative constitution, see chapter five, section 5.2.

promote the spirit,⁴⁰ purport⁴¹ and objects of the Bill of Rights. Further, article 20(3)(b) of the Constitution requires the courts to adopt an interpretation that most favours the implementation and enforcement of rights.

The transformative and integrated approach proposed here is two-tiered, and it is not only aimed at giving content to SERs, but also the promotion of societal dialogue and public participation in the design, development, interpretation as well as enforcement of SERs in accordance with the theory of dialogical constitutionalism proposed in this study. The first-tier of the approach calls for the development of the substantive content of the entrenched SERs, including the basic minimum essentials for a dignified life, through the adoption of the progressive aspects of the minimum core approach developed by the Committee on Economic, Social and Cultural Rights (CESCR). This development of the content of SERs must be undertaken by the political institutions of the State, with the mandatory and active participation of all sectors of society, in the design, development and implementation of the State's legislative, policy and programmatic frameworks for the realisation of SERs. The content, as developed by the political institutions, will then be subject to improvements by the courts during adjudication as SER cases are litigated. The study avers that the advantage of an elaboration of the minimum core by the political institutions with the substantive participation of the people in a deliberative process is that it ensures that the meaning, content and scope of the rights are not permanent, but remain contingent and incomplete so as to allow for their evolution to meet emerging societal contexts as well as new forms of injustices.

The second tier of the transformative and integrated approach envisages the courts adopting an expansive reasonableness approach during SER adjudication to scrutinise and assess the State's legislative, policy and programmatic frameworks developed by the political

⁴⁰ The spirit of the Bill of Rights can be gleaned from article 20(2) which provides that "every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the rights or fundamental freedoms". This calls for an expansive and generous interpretation of rights, and with regard to SERs, that they are given content as far as possible to enable them to achieve their desired goals and objectives.

⁴¹ The purpose of the Bill of Rights is provided for in article 19(2) of the Constitution and it provides that "the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings".

institutions as stated above. The first level of analysis using the expansive reasonableness approach entails an inquiry as to whether the State's SER implementation framework has made provision for the basic minimum essentials for a dignified life (minimum core content) to cater for the socio-economic needs of the most vulnerable in society. If the implementation framework fails to provide for the minimum essentials in the first instance, then the courts should, in the absence of any substantive countervailing reasons, hold it as being *per se* unreasonable. However, if the courts are satisfied that the implementation framework has sufficiently provided for the minimum core content of the entrenched SERs, they should then proceed to the second level of analysis which entails assessing the implementation framework using the reasonableness benchmarks set by the Constitutional Court of South Africa as is enumerated in chapter five, section 5.3.1.

The transformative and integrated approach is, therefore, a strong rights-based approach adopting the best of the minimum core and the reasonableness approaches to SER interpretation and implementation with the purpose of ensuring that the constitutionally entrenched SERs achieve their true potential in alleviating human suffering, eradicating poverty as well as reducing the gap between the rich and the poor. It is also sensitive to democratic legitimacy requirements as it inculcates a collaborative cooperation between the judiciary and the other levels of government, acknowledges the limits of judicial competence, and is thus responsive to the separation of powers concerns.

8.2.4 The right to food

The study found that Kenya is a food insecure country and that hunger and malnutrition are endemic concerns that have straddled the country for a long time. This was affirmed by the President of the Republic, Mwai Kibaki, who, in January 2009 declared food insecurity a national emergency. To respond to the situation, the study proposes that Kenya should adopt a comprehensive and holistic rights-based livelihoods approach to food security, which takes into account the interrelatedness of rights as well as varying household entitlements of different sectors of society. This proposal is based on the provisions of the 2010 Kenyan Constitution which entrenches the right to food and other related rights as justiciable rights, and also incorporates international law, which provides extensively for the right to food, into the Kenyan domestic legal system. Taking into account this rights-based livelihoods approach, the study develops the content of the right to food, stating that the right two components, the maximal component requiring that food be of such quantity and quality to facilitate a normal, active

existence, be free from adverse substances, be acceptable within a given culture, and also be accessible in a sustainable way. The minimalist component, which is the minimum core content of the right to food, is the right to be free from hunger.

In an effort to enhance the realisation of the right to food, Kenya has developed a Draft National Food and Nutrition Security Policy 2011, which encompasses a life-cycle approach to food security with the aim of enhancing availability and access to adequate food of nutritional quality to all Kenyans. The policy aims to improve nutritional education for all sectors of society, establish early warning systems to detect threats to food security, and advocates the establishment of innovative response mechanisms such as transfer-based entitlements, cash transfers, public works programmes, input support, livelihood restoration as well as livestock management programmes. It envisages the development of a comprehensive and coordinated legal framework for the enhancement of food security as well as the establishment of an adequate structural framework for the coordination of all efforts geared towards the realisation of food security. It further espouses the commitment of the State to avail resources through its Medium Term Expenditure Framework to enhance the realisation of the goals contained in the Policy.

Despite its progressive nature, the Policy has several shortcomings. First, it does not adopt the right to food language, and thus detracts from an understanding of food as an entitlement and not a charity, the premise on which the rights-based livelihoods approach is based. Secondly, the Policy has failed to adopt the minimum core approach to the right to food. Thirdly, the Policy was developed using the top-down approach to policy formulation and development, and thus did not sufficiently incorporate the voices of the most vulnerable and marginalised individuals and groups. Fourthly, the Policy failed to provide a clear time-frame within which the programmes incorporated therein are to be developed and operationalised. Finally, the Policy fails to set clear and verifiable indicators and benchmarks for the monitoring and evaluation of its implementation. Since the Policy has not yet been adopted by the Cabinet, the study proposes that the Policy be amended to adopt a holistic rights-based livelihoods approach taking into account people's varying food entitlements as well as the interrelation between the realisation of the right to food to the other rights, both CPRs and SERs as is discussed more comprehensively in chapter six, section 6.4.3.

The study found that the courts have a prominent role to play in the realisation of the right to food, as it has been entrenched in the 2010 Constitution as a justiciable right. The courts

thus have a role, both as a forum and as facilitators of dialogue in accordance with the second and third levels of the theory of dialogical constitutionalism, to guide the political institutions of the State and other sectors of society in the interpretation, implementation and enforcement of the right to food. In doing this, it is proposed that the courts should adopt the transformative and integrated approach developed in the study so as to enhance the realisation of the transformative aspirations of the Constitution in relation to food security, which are, eliminating hunger, improving the living standard of the Kenyan people, achieving social justice, and ultimately ensuring sustainable development.

8.2.5 The right to housing

In relation to housing rights, the study found that housing plays a prominent role in enhancing human dignity and the realisation of other human rights, both CPRs and SERs. Access to adequate housing and proper sanitation, however, remains a daunting challenge for the majority of Kenyans in both rural and urban areas. The Kenyan government has attributed the housing challenge, especially in urban informal settlements, to the following challenges: the deficit in housing supply due to poverty, rural urban migration and population growth; the inability of the market economy to cater for low-cost housing to respond to the housing needs of the majority low income groups; failure to prioritise the housing sector in the general economic development plans; prohibitive building standards and regulatory requirements making housing construction unaffordable to the low income sectors of society; lack of adequate land policy leading to insecure tenure, land grabbing, forced evictions as well as land holding for speculative purposes; poor urban governance leading to non-provision of essential services; and the politicisation of development.⁴²

In reaction to these challenges, Kenya has, for the first time, entrenched the right to housing in the 2010 Constitution and has undertaken several efforts to reform old laws, as well as enact new ones, so as to enhance the realisation of the transformative aspirations of the 2010 Constitution. The legislative efforts commenced with the adoption in 2004 of the National Housing Policy, which was aimed at responding to the housing challenges by bridging the shortfall in housing stock resulting from increased demand caused by population explosion, rapid urbanisation, widespread poverty, and escalating costs of housing. The policy forms the

⁴² See Government of Kenya and the United Nations Habitat 'Kibera-Soweto Slum Upgrading Project – 2004' available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021262.pdf> (accessed on 19 September 2012).

basis of the Tenant and Landlord Bill 2007, the Housing Bill 2011 and the Evictions and Resettlement Procedure Bill 2012. The Tenant and Landlord Bill is set to replace the archaic Rent Restriction Act of 1982, which has failed to protect tenants from arbitrary rent increases, with the aim of simplifying and modernising laws relating to the renting of residential premises, the regulation of landlord and tenant relationships so as to enhance stability in the rental housing sector, and to protect tenants from unlawful rent increases as well as unlawful forced evictions.⁴³

The Housing Bill 2011, on the other hand is set to replace the Housing Act 1990, which had not adopted a rights-based approach to the realisation of housing needs. The Housing Bill adopts the language of rights, proposes the establishment of a National Housing Authority, the appointment of a Commissioner of Housing, and the Establishment of a National Housing Development Fund for the provision of the right to accessible and adequate housing as entrenched in the 2010 Constitution.⁴⁴ The guiding principles of the Bill includes an affirmation of housing as key to economic and social development; an adoption of the language of progressive realisation of housing rights; facilitation as well as provision of adequate housing, including social housing; the recognition of the private sector as the engine in housing development and the government as a facilitator, enabler and catalyst in housing development; and the facilitation of access to land and security of tenure for housing.⁴⁵ To complement the extensive provisions in the Housing Bill, efforts are being made to put in place an evictions regulation regime, starting with the development of the Evictions and Resettlement Guidelines⁴⁶ as well as the drafting of the Evictions and Resettlement Procedures Bill, 2012, with the aim of providing protection, prevention and redress in instances of forced evictions for all persons including unlawful occupiers and squatters.⁴⁷ If enacted and effectively implemented, the Tenant and Landlord Bill, the Housing Bill and the Evictions Bill have the potential to respond to most of the housing challenges being experienced in Kenya today. The challenge, however, will be to translate precepts into practice.

⁴³ The Landlord and Tenant Bill 2007, preamble & part III.

⁴⁴ The Housing Bill, November 2011, preamble and sections 4-10, 14-16 & 49.

⁴⁵ Housing Bill, section 3.

⁴⁶ Ministry of Lands, Evictions and Resettlement Guidelines, Final Edited Version, March 2011 (on file with author).

⁴⁷ Evictions Bill 2012, preamble.

As has been discussed in section 8.2.5 above in relation to the right to food, the courts also have a prominent role to play in the realisation of the right to housing. The study found that one of the major challenges to the realisation of housing needs is a lack of public participation as well as the insufficient relay of relevant information to the population affected by the government's legislative, policy and programmatic framework on housing. In its role as a facilitator of dialogue, and in accordance with the theory of dialogical constitutionalism developed in this thesis, the courts can ensure accountability of the political institutions of the State in the development and implementation of a national housing strategy and legal framework for the realisation of their obligation to respect, protect and fulfil SERs through the adoption of innovative, effective and progressive remedies.⁴⁸ The courts can also undertake a more active role in protecting people from forced eviction using the eviction guidelines that have been developed both at the international level (CESCR General Comment Number 7 and the UN Basic principles and guidelines on development-based evictions and displacement) and that are still being developed at the national level (Evictions and Resettlement Guidelines, Final Edited Version, March 2011 and the Evictions and Resettlement Procedures Bill, 2012).

Though adjudication plays an important role in the realisation of the right to housing, the study found that it is faced with the challenge of the need to reconcile the right to housing and the right to property, two apparently conflicting constitutional provisions. International and comparative law indicates that there has been a progressive shift towards the protection of housing rights at the expense of the protection of property rights, with the argument being that in instances of conflict between the two rights, the public interest of securing housing rights trumps property rights.⁴⁹ The South African Constitutional Court has, however, taken a more nuanced approach to this conflict, developing a 'constitutional matrix' which states the non-absolute

⁴⁸ For a discussion of some of the innovative and dialogical remedies that can be adopted by the courts, see chapter four, section 4.4.

⁴⁹ UN Housing Rights Programme (UNHRP) Report No. 1 'Housing rights legislation: Review of international and national legal instruments' (2002) 16, available at <http://www.ohchr.org/Documents/Publications/HousingRightsen.pdf> (accessed on 19 September 2012); Commission on Human Rights, The Right to Adequate Housing: Second progress report submitted by Mr. Rajindar Sachar, Special Rapporteur, E/CN.4/Sub.2/1994/20 (June 1994) paras. 67-76, available at <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.1994.20> (accessed on 26 September 2012); former European Commission on Human Rights case of *Case of Z. and E. v Austria*, App. No. 10153/82.

nature of property rights and envisages its limitation to enhance the public interest.⁵⁰ The SACC held that in this context:⁵¹

The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

The role of the court in the context of this conflict is thus 'to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern'.⁵² This nuanced approach is in line with the relational and dialogic conception of rights expounded in this thesis and should be adopted by the courts to surmount any challenges to the realisation of housing rights due to its apparent conflict with property rights.

8.3 Recommendations

Several recommendations to different sectors of society follow from the findings and discussion in this study. First, it is recommended that Kenya as a nation adopts the theory of dialogical constitutionalism proposed in this thesis for the interpretation, implementation and enforcement of the entrenched SERs. As has been discussed above, this theory has the potential to enhance the development of an inclusive and comprehensive legislative, policy and programmatic framework for the realisation of SERs as it entails the participation of all sectors of society, with the result that all sectors of society will work in collaboration and cooperation to ensure that the transformative aspirations of the Constitution envisaged by the entrenchment of SERs is achieved. In conjunction with the theory of dialogical constitutionalism, this study further recommends that the Kenyan courts also adopt the transformative and integrated approach to SER interpretation and enforcement as discussed in section 8.2.4 above.

Secondly, and in line with the first recommendation above, it is recommended that in undertaking a limitations analysis in accordance with article 24(1) of the 2010 Constitution, the

⁵⁰ *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) 2005 (1) SA 217 (CC), para. 16.

⁵¹ *Port Elizabeth Municipality*, para. 23.

⁵² *Port Elizabeth Municipality*, para. 37.

courts should adopt a two-stage approach as is discussed more broadly in chapter two, section 2.6.3 of this thesis. This will ensure that the courts are able to undertake stricter scrutiny and review of all legislative and executive action limiting rights, with the results that SERs are better protected and more widely enjoyed by the Kenyan people. They should refrain from adopting the contrary practice of the South African Constitutional Court which has failed to develop the content of rights, leading to the collapse of the limitations analysis of SERs into a one-stage test, with the consequence that the underlying constitutional values, objectives and purposes underpinning the SERs, as well as the historical and contextual situation of poor, vulnerable and marginalised groups are not brought to bear on the limitations analysis.

Lastly, the study recommends that Kenya embraces a fundamental shift in the legal culture from the prevailing conservative and formalistic culture to a more substantive and progressive culture to enhance the realisation of the transformative aspirations of the 2010 Constitution. This can be achieved through the transformation of legal education and advocates training curriculae so as to accord with and espouse the transformative underpinnings of the Constitution. In this context, it is proposed that Kenyan Law Faculties, the Kenya School of Law and the Law Society of Kenya through its Continuous Legal Education Programme adopt what was termed by Geo Quinot as “transformative legal education” the components of which include: adjustment of law curricula to reflect the new paradigm of constitutional supremacy; increased emphasis on fundamental rights and judicial review in law curricula; infusion of constitutional values into established areas of law, especially the private law subjects of property, torts and contracts so as to develop the common law; inculcation of substantive reasoning (innovation and creativity) among students and lawyers with increased engagement with both legal and extra-legal materials such as context, values, morality, policy and politics; development of an interdisciplinary, integrated and holistic approach to legal education; and the transformation of teaching methodology from the pedagogy of authority to the pedagogy of dialogue and justification.⁵³ This has the potential of improving substantive legal reasoning and transforming the legal culture in Kenya from formalistic and conservative to substantive and

⁵³ G Quinot ‘Transformative legal education’ (September 2011) 5ff, available at <http://blogs.sun.ac.za/teaching/files/2011/10/G-Quinot-Inaugural-Final2.pdf> (accessed on 7 October 2012).

progressive, and in this way enhance transformative adjudication capable of achieving the transformative as well as egalitarian aspirations of the Constitution.⁵⁴

8.4 Concluding Remarks

As has been elaborated in this thesis, challenges to the realisation of SERs abound both at the national and international level. In the Kenyan context, these challenges are exacerbated by the high poverty and inequality that is subsisting in Kenya today, as well as the general apathy towards the protection of human rights by both the political and the judicial institutions of the State.⁵⁵ Judicial apathy has further been exacerbated by the conservative and formalistic legal culture subsisting in Kenya presently both among the judges, litigating advocates and even legal commentators. However, with the promulgation of the 2010 Constitution and the reforms that are being undertaken in the judiciary, the judicial attitude towards the protection of human rights is slowly improving, and this is clearly illustrated in some of the cases, especially in relation to SERs, that have been discussed in the thesis.⁵⁶ It is in this context that the thesis elaborates a modest theoretical and interpretive approach to enhance the realisation of the entrenched SERs in the Kenyan context by both the political and the judicial institutions of the State. Though not a perfect solution to all the challenges that bedevil the realisation of SERs, it is hoped that this thesis will go a long way in alleviating some of the challenges facing the adjudication of SERs, and in that vein, help enhance human dignity, the standards of living of the Kenyan people as well as ensuring social transformation with the aim of achieving social justice for all Kenyans.

⁵⁴ For a more comprehensive discussion of this aspects, see chapter five, section 5.2.2.

⁵⁵ For an elaboration of judicial apathy in the protection of human rights, see J Arwa 'Litigating socio-economic rights in domestic courts: The Kenyan experience' A paper presented at The Colloquium on the African Charter on Human and Peoples Rights held in Cape Town South Africa from 7 – 10 November 2012, 10ff, available at <http://kelinkenya.org/wp-content/uploads/2010/10/LITIGATING-SOCIO-ECONOMIC-RIGHTS-3.pdf> (accessed on 2 April 2013).

⁵⁶ Some of these cases include: *Satrose Ayuma and others (on behalf of Muthurwa residents) v Kenya Railways Staff Benefit Scheme and others*, High Court of Kenya at Nairobi, Petition No. 65 of 2010 (*Muthurwa case*); *Susan Waithera Kariuki and others v The Town Clerk, Nairobi City Council and others*, High Court of Kenya at Nairobi, Petition case No. 66 of 2010 (*Waithera case*); and, *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition No. 15 of 2011, available at http://kenyalaw.org/Downloads_FreeCases/83548.pdf (accessed on 2 April 2013).

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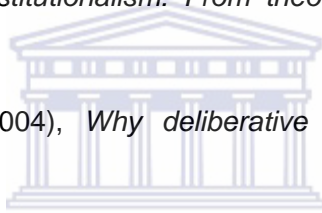
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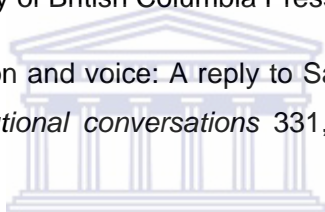
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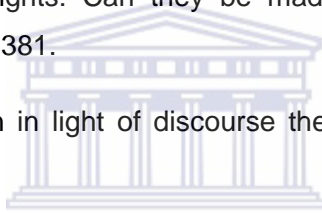
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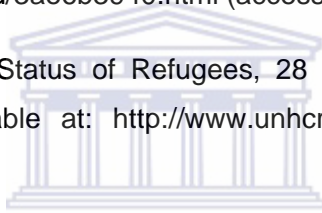
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